

C O M M U N I C A T I O N S a n d M E D I A
A L E R TMAY
2012SPEAK FREELY AND BREATHE EASY: THE ABSOLUTE
PRIVILEGE IN JUDICIAL PROCEEDINGS

By Elizabeth Nicolas

From time to time in litigation, opposing sides exchange harsh and even arguably slanderous words. The good news is that in some circumstances, those exchanges are privileged and protected from defamation claims.

In *Richmond v. McHale*, 2012 Pa. Super. LEXIS 2 (January 4, 2012), the Pennsylvania Superior Court ruled that allegedly defamatory statements made during a discovery meeting were absolutely protected by judicial privilege. The court affirmed the trial court order sustaining the appellee's preliminary objections and dismissing the appellant's complaint.

Kenneth Richmond, Esq., was the attorney for plaintiffs in an underlying civil case involving the alleged sexual abuse of a minor. The defendant in the underlying action was represented by Joseph J. McHale, Esq. McHale and three other attorneys met at Richmond's office to attempt to resolve a potential discovery dispute relating to plaintiff's request for a physical examination of the defendant. McHale would not agree to the exam and accused Richmond of using the proposed examination "to extort money from his clients."

Richmond filed a complaint alleging that McHale made the comments to induce fear of criminal prosecution against Richmond. Richmond further alleged that the comments adversely affected his ability to practice law and damaged his professional reputation. McHale filed preliminary objections, arguing that the comments were not defamatory; and in any event, the comments were made in the course of litigation, and therefore, were absolutely privileged.

The trial court sustained the preliminary objections and dismissed the complaint, reasoning that, because the comments were made during a discovery conference, they were privileged. In addition, the comments were protected because they were made in connection with McHale's representation of his client in a judicial proceeding. On appeal, the Pennsylvania Superior Court agreed.

Richmond v. McHale confirms that statements made by attorneys during judicial proceedings are protected. But what

about parties to a litigation — are they protected under the privilege as well?

The answer is yes in Pennsylvania. Under the law of the Commonwealth, "statements made by judges, attorneys, witnesses and *parties* in the court of or pertinent to any stage of judicial proceedings are absolutely privileged and, therefore, cannot form the basis for liability for defamation." See *Pawlowski v. Smorto*, 588 A.2d 36, 41 (Pa. Super. 1991) (emphasis added). The absolute privilege extended to parties in a judicial proceeding has an important policy basis: namely, that "[a]ll persons involved in a judicial proceeding are encouraged by the privilege to speak frankly and argue freely without danger or concern that they may be required to defend their statements in a later defamation action." *Smith v. Griffiths*, 476 A.2d 22, 24 (Pa. 1984). A party is entitled to absolute immunity for "communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress and relief sought." *Bochetto v. Gibson*, 860 A.2d 67, 72 (Pa. 2004). A proceeding is judicial in nature if: (1) it is adversarial; (2) its decision resulted from an application of appropriate provisions of law to the facts; and (3) it is subject to appellate review. *Massi v. LaPorte*, 27 Pa. D. & C.3d 301 (1983), citing *New York Court of Claims in Kitchner v. State*, 371 N.Y.S. 2d 91 (1975).

Notably, the privilege can extend to "pertinent and material" statements made in separate proceedings. See *Post v. Mendel*, 507 A.2d 351, 355 (Pa. 1986). For example, in *Ortiz v. Del. River Port. Auth.*, 2010 U.S. Dist. LEXIS 48143 (E.D. Pa. May 17, 2010), the court determined that a privilege originating from a separate proceeding protected relevant statements from a defamation claim. In *Ortiz*, the plaintiffs brought a federal civil rights action for alleged constitutional and state law violations arising from an altercation. One of the defendants alleged in a counterclaim that plaintiffs defamed him by making knowingly false statements about him during an internal agency investigation of the altercation. The court found that the statements

(continued on page 2)

(continued from page 1)

plaintiffs made during the agency's investigation were privileged because, among other things, they were "pertinent and material" to a related, concurrent criminal proceeding. The court dismissed the defendant's counterclaim, concluding that plaintiffs' statements were shielded from claims of defamation by the absolute privilege.

Quasi-judicial proceedings are also encompassed in the privilege. In *Overall v. Univ. of Pa.*, 412 F.3d 492 (3d Cir. 2005), the Third Circuit recognized a quasi-judicial privilege but limited it to "proceedings before federal, state or local governmental bodies, or proceedings held pursuant to a statute or administrative regulation." The court did note, however, that Pennsylvania courts have declined to extend quasi-judicial status to entirely private hearings, such as institutional internal grievance proceedings, like the one at issue in *Overall*, with no binding judgments or requirements for sworn testimony. *Id.* at 497.

Of course, the privilege does not absolve attorneys from their obligation to behave in a civil manner and to encourage their clients to do the same. See *Pa. Code of Civility Art. II*. But those parties and their counsel who have exchanged words during the course of litigation may breathe

a little easier knowing that their hyperbole and verbal sparring may not be actionable. ♦

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.

For more information about Schnader's Communications and Media Practice Group or to speak with a member of the Firm at a particular Schnader office location, please contact:

*Carl A. Solano, Chair
215-751-2202
csolano@schnader.com*

*Elizabeth Nicolas
215-751-2574
enicolas@schnader.com*

www.schnader.com
©2012 Schnader Harrison Segal & Lewis LLP