Quarterly Review

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Ohio Association *of* Civil Trial Attorneys

A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...

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The Source for Defense Success

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President's Note

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As the calendar flips to May, we all still find ourselves in the midst of the COVID-19 pandemic. We remain under a Stay at Home Order from our Governor, and while businesses are slowly starting to reopen to the public, uncertainty remains as to when our lives will return to normal. OACTA remains committed to its members during this time, and this issue of the Quarterly provides valuable information relating to COVID-19 issues we are all encountering. Three of our articles directly address important aspects of COVID-19 issues relevant to our members and their clients. Rema A. Ina's article on the Coronavirus Aid, Relief, and Economic Security ("CARES") Act provides timely information on the Act and its benefits. Rafael McLaughlin and Leslie Kissiar's article on the Americans with Disabilities Act in the context of COVID-19 issues is also timely information to consider as some of us prepare to reopen our offices and firms. Gretchen Mote, one of OACTA's distinguished Past Presidents, provides a timely article on cyber risks while working from home during this COVID-19 pandemic.

The other two articles in this issue of our Quarterly are from OACTA's Professional Liability Committee, which is one of our substantive law committees. Kurt Anderson, another of OACTA's distinguished Past Presidents, provides an informative article on the Attorney Litigation Privilege. David Oberly's article on cyber-related legal liability contains tips for attorneys and firms to protect confidential information in our cyber age.

These are indeed challenging times for all of us. As you continue to deal with the myriad of personal and professional issues during this time of crisis, please know that OACTA will be here for you. While in person events are not taking place at least during the first half of 2020, OACTA has been providing members with valuable resources on our website, and OACTA continues to provide members with free webinars relating to COVID-19 issues. OACTA is now continually adding content to its On Demand library, which will soon include webinars from the Personal Injury Defense Committee's seminar, in lieu of holding an in person seminar in June. Also look for upcoming webinars hosted by some of OACTA's valued sponsors.

Walter Payton is commonly remembered as a great running back for the Chicago Bears, who retired with the most rushing yards in the NFL until he was surpassed by one of my favorite players, Emmitt Smith. But Walter Payton also is remembered for some great inspirational locker room quotes, many of which seem applicable to our current circumstances. His autobiography is titled "Never Die Easy," which could apply to all of us during these COVID-19 times. We should not give up without a fight, as this expression implies, and we need to remember that as we face the challenges of today. (Side note – the full quote from Payton where the book title was taken is "Never die easy. Why run out of bounds and die easy? Make that linebacker pay. It carries into all facets of your life. It's okay to lose, to die, but don't die without trying, without giving it your best.")

Payton also is known for his quotes about teamwork. One of his famous quotes was "We are stronger together than we are alone." This has never been more true than it is today. OACTA is here for you, and our defense community is indeed much stronger together than we are alone. Now more than ever, I encourage you to renew your memberships if you have not already, and encourage others in our defense community to join OACTA. We all need each other, and now is the time for us to come together.

Stay healthy and safe.

Introduction

Professional Liability Committee.

Ian D. Mitchell, Esq., Committee Chair
Reminger Co., L.P.A.

Members and Friends,

Greetings. Hopefully this issue of the OACTA Quarterly Review finds you healthy and safe. Over the past two months, most if not all of us have endured significant changes in the day-to-day practice of law as a consequence of measures taken at both the public and private level to halt the spread of the coronavirus. At present, many of us find ourselves in strange circumstances, working from a home office and conducting meetings (as well as depositions) via videoconference. For trial attorneys and judges, the familiar environment of the courthouse is even limited to us and the frequent interaction with members of the bar, to which we've become accustomed for years, now seems entirely upside-down.

Our plan for the spring edition of the OACTA Quarterly Review was similarly upended by current events and we were forced to adjust in light of the circumstances associated with the COVID-19 outbreak. Specifically, this season's issue of the Quarterly was expected to focus primarily on new developments in Ohio law on professional liability matters. However, due to the needs of our members, fellow practitioners, and judges during this time of great upheaval, as well as those of the many clients we serve, the professional liability committee elected to also incorporate several articles pertaining to coronavirus-related issues.

In rising to the challenge, our slate of OACTA professional liability committee attorneys has produced some truly outstanding material for you in this issue. From cyber risks during the time of COVID-19 to an analysis of the attorney litigation privilege, from coronavirus-related ADA concerns in the workplace to advice for minimizing cyber-related legal liability, the spring issue of the OACTA Quarterly Review has you covered. On behalf of the entire OACTA professional liability subcommittee, I sincerely wish continued health and safety to each of you, your families, and co-workers. If the OACTA leadership can be of any assistance to you or your practice during this critical time, please reach out so that we can be a resource.

New Paycheck Protection Program Offers Forgivable Loans To Small Businesses

Rema A. Ina, Esq.
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Due to the national crisis caused by the Coronavirus pandemic, Congress passed a giant stimulus package and on March 27, 2020, President Trump signed it into law. The Coronavirus Aid, Relief, and Economic Security ("CARES") Act is a $2 trillion dollar aid package that will provide grants and loans to consumers, businesses, and state and local governments.

In an effort to keep businesses afloat and allow employees to continue to receive paychecks, the CARES Act provides a new Paycheck Protection Program ("PPP"). This program was enacted to help small businesses maintain payrolls and cover mortgage, rent and utility costs during this emergency. Below are FAQs regarding the PPP.

What is the Paycheck Protection Program?

The Paycheck Protection Program allows small businesses to obtain forgivable loans from the U.S. Small Business Administration ("SBA") to provide cash-flow to maintain their payroll for an 8-week period between February 15, 2020 and June 30, 2020.

Who is eligible?

Small businesses are eligible. Small businesses are generally considered businesses with fewer than 500[1] employees and include sole proprietors, independent contractors and gig economy workers. The SBA Administrator may permit a business with over 500 employees in certain industries to apply for the loan. Click here for the SBA's table of size standards: https://www.sba.gov/document/support-table-size-standards.

How much is the loan?

Businesses are eligible to borrow up to 2.5 times their average total monthly payroll costs, up to $10 million. Payroll costs are defined as the sum of payments for compensation, including salary, wage, cash tips, paid time off, severance, healthcare benefits, and state and local taxes.

What does the loan cover?

The loan covers two things: (1) payroll costs including employee salaries (including cash tips) up to an annual rate of pay of $100,000, sick and medical leave, and insurance premiums; and (2) operation costs such as mortgage, rent, and utility payments.

The loan does not cover the payroll costs associated with the Families First Coronavirus Response Act as employers will receive a refundable tax credit for that paid leave.

What are the conditions of the loan forgiveness?

Loans spent on the payroll and operation costs described above may be forgiven completely if the employer maintains its payroll during the covered period (February 15, 2020 – June 30, 2020), retains its employees, and maintains its wages relative to the previous year. The forgiveness amount is reduced if the borrower has certain reductions in employees or salaries.

What if I do not meet the conditions of loan forgiveness?

The portions of the loan that are not forgiven will be paid pack at an interest of no more than 4% and can be paid over a period as long as ten years.

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What is the covered period of the loan?

The covered period during which expenses can be forgiven extends from February 15, 2020 to June 30, 2020. Borrowers can choose which 8 weeks within that time period they want to count towards the covered period.

What if I already took out an Economic Injury Disaster Loan (EIDL) related to the Coronavirus?

Businesses who already received an EIDL loan related to the Coranavirus may refinance that loan into the PPP for loan forgiveness. Portions of the EIDL used for business purposes other than those costs permitted under the PPP will remain an EIDL loan.

How do businesses apply?

Eligible businesses may apply for the loan from any SBA-certified lender including banks, credit unions, and other financial institutions. If you already have a relationship with a bank, reach out to them first.

You may also utilize the SBA's lender match program here: https://www.sba.gov/funding-programs/loans/lender-match

What do I need to apply?

You will submit an application to your lender that includes:

1. Documentation verifying the number of full-time employees you have on your payroll and their rates of pay; payroll tax fillings you reported to the IRS; and state income, payroll, and unemployment insurance filings
2. Documents verifying payments on mortgage or rent obligations and utility payments
3. A certification from an authorized representative that the documents are true and correct and the loan forgiveness request reflects retaining employees and making the necessary operational payments.

If you have any questions concerning the PPP or any other employment issue affected by the Coronavirus, do not hesitate to give us a call: Rema A. Ina, Esq., Gallagher Sharp LLP, (216) 522-1074, rina@gallaghersharp.com, www.gallaghersharp.com

Endnotes

1 Businesses with more than one physical location qualify so long as total combined employees are below 500 employees (unless the businesses operated under NAICS code beginning with 72).

Rema Ina, Esq. is a Partner at Gallagher Sharp LLC. She devotes a large amount of her time to defending employers in cases involving employment law, including FMLA, ADA, FLSA, discrimination, and harassment claims. In addition, she counsels employers on employee issues and provides training on topics such as sexual harassment and ADA compliance.

Rema is the Vice Chair of the OACTA Employment Law Committee. In addition, she serves as an officer in her firm's Diversity and Inclusion Committee and was a member of the inaugural Cleveland 2019 FDCC Ladder Down class for female leaders in the legal community.

Balancing COVID-19 Concerns and the ADA in the Workplace

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The Americans with Disabilities Act of 1990 ("ADA") prohibits covered employers, both public and private, that have at least fifteen employees from discriminating against a qualified employee with a disability. In light of the World Health Organization's recent classification of COVID-19 as an international pandemic, employers should undertake measures to maintain the safety of their employees while also complying with the ADA. The Equal Employment Opportunity Commission ("EEOC") recently released an article entitled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" which clarified how employers can respond to an international pandemic like COVID-19 without violating the ADA. What follows is a summary of the EEOC's directive:

(1) The Center for Disease Control ("CDC") recommends that individuals experiencing COVID-19 symptoms stay home and not return to work until they are free of fever and any other symptoms associated with COVID-19 for at least 24 hours. In light of the CDC's recommendation, employers may **confidentially** ask employees if they are experiencing COVID-19-specific symptoms and require symptomatic employees to leave work or stay home without violating the ADA. Employers may also rely on the CDC or other public health authorities to identify the symptoms associated with COVID-19. Employers must protect the privacy of their employees and maintain the confidentiality of employee health information.

(2) Because fever is a symptom associated with COVID-19, employers may **confidentially** take an employees' body temperature before allowing admission into the workplace. Under the ADA, measuring an employee's body temperature is generally considered a "medical examination." The EEOC defines medical examination as a test or procedure that seeks information about an individual's health. Typically, an employer cannot require that all employees submit to a temperature reading. However, in the event of an international pandemic, a temperature reading can be justified as a business necessity. Temperature readings should be conducted in a private setting and the results must be kept confidential. Additionally, employers who choose to administer temperature readings must do so in a uniform and non-discriminatory manner.

(3) Employers may measure the body temperatures of new applicants as a condition of employment. Employers must uniformly administer this practice for all applicants for the same or similar position. Additionally, an employer can postpone a newly hired applicant or, if an employer requires an immediate start date, withdraw an offer of employment from applicants who are positive for COVID-19 or who have COVID-19 symptoms. However, employers may not postpone or withdraw an employment offer of a newly hired applicant solely because the applicant is considered at high risk of contracting COVID-19 by virtue of age or pregnancy.

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(4) Employers may require a doctor's note to authenticate an employee's absence from work, or fitness to return to work. However, the CDC cautions against this practice, as health care providers are busy during a pandemic and may be unable to timely provide the documentation. Employers are encouraged to develop flexible policies responsive to the time constraints posed by an international pandemic on healthcare providers and consider accepting alternative forms of validating an employee's health.

(5) Employees with pre-existing mental conditions that have been exacerbated by the COVID-19 pandemic, such as anxiety disorder, obsessive compulsive disorder, or post-traumatic stress disorder, may be entitled to reasonable accommodations from employers pursuant to the ADA. An employer may inquire as to the nature and extent of an employee's pre-existing condition and request medical documentation to determine whether the condition is a disability, as well as to explore reasonable accommodations for the exacerbated disability. Additionally, employees already receiving a reasonable accommodation for a disability prior to the pandemic may be entitled to an additional and/or altered accommodation, absent undue hardship, induced by COVID-19. Employers may inquire as to which disability serves as the basis for the new or altered accommodation and the reasons for same.

The COVID-19 pandemic is fluid and rapidly evolving. Moving forward, employers should be aware of CDC and EEOC guidelines related to the pandemic, as well as state-specific safety measures, and maintain flexible policies. It is imperative that employers keep abreast of new information about COVID-19 and update their polices accordingly.

Rafael McLaughlin, Esq., who is the Managing Partner of Reminger's Fort Wayne, Indiana office, is a trial attorney who has defended jury trials involving allegations of medical malpractice, long term care liability, wrongful death, catastrophic personal injury, and professional liability. Rafael enjoys a highly varied practice that reflects the versatility he has developed during his more than 20 years as a litigator. Rafael has served as lead counsel in litigation disputes in the state and federal courts of Massachusetts, Rhode Island, Ohio, and Indiana. Rafael also represents companies and individuals in actions brought by professional licensing and oversight boards, departments of insurance, as well as clients facing employment and discrimination-related claims before the United States Department of Justice, the U.S. Department of Housing and Urban Development, the EEOC, and state civil rights commissions. Rafael is also experienced in resolving claims through ADR, including arbitration and mediation.

From 2006 to 2008, Rafael was recognized as a "Rising Star" by Massachusetts Super Lawyers Magazine. Since 2010, Rafael has been repeatedly recognized as a "Super Lawyer" by Ohio Super Lawyers Magazine, a recognition given to less than 3% of lawyers in Ohio.

Rafael is a graduate of the prestigious Boston Latin School, the oldest school in America. He earned a B.A. from Denison University in Granville, Ohio, after which he spent two years as a Sales Representative for UNUM Insurance. Rafael graduated, with honors, from New England Law/Boston, where he was a member of the International Law Journal, a recurring member of the Dean's List, and the recipient of multiple CALI Awards for Excellence.

Leslie Kizziar, Esq. is an Associate based in Reminger Co., LPA's Fort Wayne office. She focuses her practice on a wide range of areas, including general liability, employment practices liability, professional liability, insurance coverage defense, and medical malpractice defense. Leslie originally joined Reminger in 2018 as a law clerk, where she gained invaluable experience assisting with various stages of litigation.

Leslie earned her Juris Doctorate from Drexel University Thomas R. Kline School of Law, where she was involved in several pro bono clinics that partnered with her school. Leslie earned her undergraduate degree from Indiana University Bloomington.

Absolute Means Absolute: Understanding and Applying the Attorney Litigation Privilege

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For centuries, English and American courts have recognized that attorneys are protected from civil liability for actions in pursuit of the interests of their clients, both before and during litigation. Variously known as the "litigation privilege" or "judicial privilege", it is an absolute privilege or immunity that shields an attorney from liability for actions during or in anticipation of litigation or judicial proceedings. The purpose of this article is to discuss the history and scope of the privilege as it currently exists in Ohio, and to argue why this protection should broadly apply to all forms of civil liability and to all attorney actions in the course of litigation, not just statements.

I. The History of The Attorney Litigation Protection

Since the creation of the adversarial system in medieval England, courts have recognized the need to protect conduct that occurs in the course of litigation. Recognizing that litigation spawns accusations and arguments that may prove incorrect, the protection is rooted in the need to allow parties the unfettered liberty to assert claims and present evidence without fear that their adversary will seek vengeance in subsequent or collateral litigation challenging the validity or even the motives of the claims.

The first recorded mention of a litigation privilege may be in the 1640 English case of *Molton v. Clapham*, 82 Eng.Rep. 393 (1640). In denying Molton's claim for libel where Clapham had previously argued in open court that affidavits offered by Molton were not true, the court observed that litigation inherently involves competing accusations, stating: "I say, that J.S. hath no title to the land, if I claim or make title to the land: or if I say, that J.S. is a bastard, and entitle myself to be right heir, because in all such circumstances the words are not actionable, because that I pretending title, do it in defence thereof." This decision, however, is primarily grounded in a party's vested interest in disputing a fact, which is an essential characteristic of all libel privileges.

A clearer protection for statements specifically because they were made in litigation appears in *Beauchamps v. Croft,* 73 Eng.Rep. 639 (Q.B. 1569).[1] During the reign of King Henry VII, Lord Beauchamps sued Sir Richard Croft, alleging he had been defamed in a previous lawsuit in which Croft had accused Beauchamp of forgery. The court found for Croft, stating, "no punishment was ever appointed for a suit in law, however it be false, and for vexation."

Subsequent English court decisions relying on *Beuchamps* articulated even more clearly what has become a cornerstone in the litigation protection doctrine, i.e., that the conduct arose in the course of judicial proceedings. In the 1585 King's Bench decision in *Cutler v. Dixon,* the Court dismissed Cutler's claim that Dixon had defamed him in prior litigation accusing Cutler of "divers great abuses and misdemeanors", because the accusation was made in the "ordinary course of justice." Similarly, in 1591 the King's Bench dismissed an action brought by one Buckley, who claimed he had been previously defamed in a lawsuit by Wood accusing Buckley of being "a maintainer of pirates and murderers, and a procurer of murders and piracies." *Buckley v. Wood,* 76 Eng. Rep. 888 (K.B. 1591). Relying on *Beauchamp* and *Cutler*, the judges rejected Buckley's claim of defamation, stating that "for any matter contained in the bill that was examined in said court, no action lies, because it was in the course of justice."

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These cases formed the bedrock for what is now widely recognized as the absolute litigation privilege in the law of libel and slander. The decisions recognized that permitting claims of libel would have a profound chilling effect on those seeking redress. In *Cutler v. Dixon*, the court acknowledged that "if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation."

While these early decisions involved suits between prior litigants, later cases addressed claims directly against opposing counsel. In *Brook v. Montague*, the plaintiff sued an attorney who had attempted to impeach the plaintiff's testimony in prior litigation by calling the plaintiff a convicted felon. The court said that "a counsellor in law retained hath a privilege to enforce anything which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false." Similarly, in *Hugh's Case* 80 Eng.Rep. 470 (1621), the plaintiff sued Sir Thomas Hughs, who while acting as a lawyer had sought to impeach the plaintiff by accusing him of murdering three children. The court ruled that Hughes could not be sued for libel because the statement "was in his profession, and pertinent to the good and safety of his client, though it were not directly to the issue…." And in *Wood v. Gunston*, 82 Eng.Rep. 863 (1655), the court held that "if a counceller speak scandalous words against one in defending his clyent's cause, an action doth not lie against him for so doing, for it is his duty to speak for his clyent, and it shall be intended to be spoken according to his clyent's instructions."

Notably, these decisions focused on the attorney's role in representing the client and his duty to zealously pursue the client's interests. In 1772, Lord Mansfield encapsulated the broad protection afforded to each of the essential roles in the adversary system, stating: "[N] either party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office." *Rex v. Skinner*, 98 Engl.Rep. 529, 530 (1772).

From these early roots, the absolute litigation privilege (i.e., the privilege applies regardless of malice or bad faith) was followed by early American courts and has now been incorporated into the jurisprudence of all but two states in the Union[2], and is enshrined in §586, Restatement (2nd) of Torts, which states:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

The Ohio Supreme Court has long recognized the absolute protection for communications made in the course of litigation. *Liles v. Gaster,* 42 Ohio St. 631 (1885)("The general rule is, that language used in the ordinary course of judicial proceedings, whether by the judge, a party, counsel, jurors or witnesses, is protected if it be relevant to the matter under consideration, and the court have jurisdiction."). Ohio's modern formulation of the doctrine is rooted in *Erie Cty. Farmers' Ins. Co. v. Crecelius*, 122 Ohio St. 210, 171 N.E. 97 (1930) in which the Court held that "[n]o action will lie for any defamatory statement made by a party to a court proceeding, in a pleading filed in such proceeding, where the defamatory statement is material and relevant to the issue." *Id.*, at syllabus. Echoing Lord Mansfield, the Ohio Supreme Court has more recently stated, "It is a well-established rule that judges, counsel, parties, and witnesses are absolutely immune from civil suits for defamatory remarks made during and relevant to judicial proceedings." *Willitzer v. McCloud*, 6 Ohio St. 3d 447, 448–49, 453 N.E.2d 693, 695 (1983). And specifically addressing attorney liability, the Court has held:

> As a matter of public policy, under the doctrine of absolute privilege in a judicial proceeding, a claim alleging that a defamatory statement was made in a written pleading does not state a cause of action where the allegedly defamatory statement bears some reasonable relation to the judicial proceeding in which it appears.

Surace v. Wuliger, 25 Ohio St.3d 229, 495 N.E.2d 939 (1986), at syllabus.

Notably, *Surace* involved a claim of libel by a third party who was not involved in the original litigation. The Ohio Supreme Court found that the protection nevertheless applied. *Accord, Krakora v. Gold*, 7th Dist. No. 98-CA-141, 1999 WL 782758, at *2 (Sept. 28, 1999)(dismissing defamation action against lawyer who impugned the qualifications of a proposed expert witness in correspondence to opposing counsel, because "[a]n absolute privilege applies to allegations referring to parties and non-parties alike.")

The privilege is not limited to pending litigation, but also applies to statements where litigation may be anticipated. In *Simmons v. Climaco*, 30 Ohio App.3d 225, 507 N.E.2d 465 (1986), the 8th District applied the privilege to preclude defamation claims by Department of Labor investigators after a lawyer wrote to their supervisors accusing them of misconduct in investigating the lawyer's client. In *Krakora v. Gold, supra,* the 7th District held that pre-suit settlement correspondence was sufficiently related to litigation to immunize statements about proposed experts.

> The policy behind the absolute privilege for an attorney's letters written prior to the filing of seriously contemplated litigation is that attorneys should be free to zealously advocate the rights of their clients in all stages of a case. *Buschel v. Metrocorp* (E.D.Pa.1996), 957 F.Supp. 595, 598. Furthermore, individuals should be encouraged to privately resolve their disputes without resort to judicial process. *Conservative Club of Washington v. Finklestein* (D.D.C.1990), 738 F.Supp. 6, 14. This requires the ability to discuss matters with opposing counsel that are reasonably related to an anticipated lawsuit.

Krakora, 1999 WL 782758, at *3.

The Ohio Supreme Court adopted this rationale in *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 1994-Ohio-316, 634 N.E.2d 203, to protect correspondence from a lawyer to a prosecuting attorney that reported alleged criminal conduct. Although no proceedings or investigation had commenced, the Court agreed that it would be anomalous to shield witness statements during a prosecution but not the allegations that trigger the initial investigation. The Court stated:

> The absolute privilege or "immunity" for statements made in a judicial proceeding extends to every step in the proceeding, from beginning to end. See Prosser & Keeton, *Law of Torts* (5 Ed.1984) 819, Section 114. In this regard, Dean Prosser has noted that, "[a]lthough there is some authority to the contrary, the better view seems to be that an informal complaint to a prosecuting attorney or a magistrate is to be regarded as an initial step in a judicial proceeding, and so entitled to an absolute, rather than a qualified immunity." (Footnotes omitted.) *Id.* at 819–820. We agree with this assessment of the issue.

M.J. DiCorpo, 69 Ohio St.3d at 506.

The Ohio Supreme Court has also applied the litigation privilege to quasi-judicial proceedings such as the character investigation of a bar applicant, *Wilson v. Whitacre*, 20 C.D. 392, 4 Ohio C.C.R. 15 (1889), and complaints to the grievance committee of a local bar association. *Hecht v. Levin*, 66 Ohio St.3d 458, 613 N.E.2d 585 (1993), paragraphs one and two of the syllabus. *See also Michaels v. Berliner,* 119 Ohio App.3d 82, 694 N.E.2d 519 (9th Dist., 1997)(privilege applied to an attorney's "courtesy letter" notifying opposing counsel and the presiding judge of perceived conflicts of interest, although finding the privilege may have been exceeded by copying the letter to persons with no interest in the litigation); *Barilla v. Patella*, 144 Ohio App.3d 524, 534, 760 N.E.2d 898 (8th Dist., 2001) ("[c]ommunications made during unemployment proceedings, which are quasi-judicial in nature, are subject to an absolute privilege"); *Baldwin v. Adidas America, Inc.*, Case No. C-2-02-265, 2002 U.S. Dist. LEXIS 19626 (S.D.Ohio 2002), at *8 (finding the United States Patent and Trademark Office, Trademark Trial and Appeals Board a quasi-judicial tribunal

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and statements made in a petition thereto are "clothed with an absolute privilege").

II. Policy Considerations Supporting the Absolute Privilege.

In its decisions, the Ohio Supreme Court has acknowledged numerous public policy reasons for the absolute privilege, stating:

> [T]he rule found its origin in the feeling that great mischief would result if witnesses in courts of justice were not at liberty to speak freely, and if they could not feel an assurance that they would not be subject to suits for slander and libel as a result of testimony freely given. It is of course equally necessary that attorneys should be fully protected in counseling testimony, pleadings, and other proceedings in the usual and regular course of the trial of litigated cases, and for the same reasons that other court officials, including the judge who hears and decides causes, may be unfettered in the discharge of official duties, and may not be deterred from a fearless performance of official duties by a fear of actions for defamation. …By the great weight of authority, therefore, the courts have stood firm in declaring that no suit for defamation can be based upon defamatory matter published in judicial proceedings, where such matter is material and relevant to the issue. A contrary rule would manifestly result in a multitude of slander and libel suits, which would not only bring the administration of justice into disrepute, but would, in many instances, deter an honest suitor from pursuing his legal remedy in a court of justice.

Erie, 122 Ohio St. at 214–15.

In *Willitzer*, the Court stated:

> This immunity is based on the policy of protecting the integrity of the judicial process. The function of a judicial proceeding is to ascertain the truth. To achieve this noble goal, participants in judicial proceedings should be afforded every opportunity to make a full disclosure of all pertinent information within their knowledge. For a witness, this means he must be permitted to testify without fear of consequences. Freedom of speech in a judicial proceeding is essential to the ends of justice. 1 Harper & James, Law of Torts (1956) 423–426, Section 5.22.

Willitzer, 6 Ohio St.3d at 448–49.

And in *Surace*, the Court noted:

> The rationale, of course, is that public policy necessitates free and unencumbered exchange of statements in judicial proceedings in order to assist courts in the truth-seeking process. …Although the result may be harsh in some instances and a party to a lawsuit may possibly be harmed without legal recourse, on balance, a liberal rule of absolute immunity is the better policy, as it prevents endless lawsuits because of alleged defamatory statements in prior proceedings. Sufficient protection from gross abuse of the privilege is provided by the fact that an objective judge conducts the judicial proceedings and that the judge may hold an attorney in contempt if his conduct exceeds the bound of legal propriety or may strike irrelevant, slanderous or libelous matter.

Surace, 25 Ohio St.3d at 234 (internal citations omitted).

Additional policy reasons apply to statements in pre-litigation negotiations and other quasi-judicial proceedings.

> The policy behind the absolute privilege for an attorney's letters written prior to the filing of seriously contemplated litigation is that attorneys should be free to zealously advocate the rights of their clients in all stages of a case. *Buschel v. Metrocorp* (E.D.Pa.1996), 957 F.Supp. 595, 598. Furthermore, individuals should be encouraged to privately resolve their disputes without resort to judicial process. *Conservative Club of Washington v. Finklestein* (D.D.C.1990), 738 F.Supp. 6, 14.

> This requires the ability to discuss matters with opposing counsel that are reasonably related to an anticipated lawsuit.

Krakora v. Gold, 1999 WL 782758, at *3.

Other scholars have noted additional public policy reasons for the rule, including the advent of the rules of procedure and the availability of sanctions (e.g., Civ.R. 11, Fed.R.Civ. Pro. 11 and 26); that the threat of attorney liability would also have a chilling effect on the availability of willing lawyers, thereby impairing a client's right to counsel of his choice; that collateral litigation would be abused to intentionally create conflicts of interest disrupting ongoing attorney-client relationships, particularly if the original litigation is still pending; and that the threat of litigation and conflicts would impair the attorney's ethical duty of undivided loyalty to the client.[3]

All the above reasons support insulating an attorney from civil liability for his actions taken in pursuit of his client's interest.

Moreover, while *Erie* and its predecessors required statements to be "material and relevant" to a proceeding, the foregoing public policy concerns (and the developing majority rule nationwide) led the Ohio Supreme Court to relax the test in *Surace*, holding that a statement will be protected if it "bears some reasonable relation to the judicial proceeding in which it appears." *Surace*, 25 Ohio St.3d at 233.

And in all forms of the test, court have consistently applied a liberal interpretation of whether a communication was "relevant" or (under the current test) is "reasonably related" to litigation:

> In determining whether the words and writings are relevant to the subject of inquiry, great liberality is to be used, as otherwise a party or his attorney may be deterred from prosecuting an action vigorously by fear of personal liability for libel and slander.

Justice v. Mowery, 69 Ohio App.2d 75, 77, 430 N.E.2d 960 (1980). In *Surace*, the Ohio Supreme Court found the rule to be "cogently stated" in *Justice* and quoted it at length.

But as it stands today,[4] all the Ohio Supreme Court decisions have addressed an attorney's statements, and not other actions an attorney may take in the course of litigation. It is this author's belief that the absolute privilege ought to extend more broadly and more strongly than just an affirmative defense of privilege against a claim of libel.

III. The Privilege Should Apply To Both Statements And Actions Of Attorneys.

Given the nature of litigation and the adversary system, it is not surprising that the earliest collateral attacks upon litigators asserted claims of libel and slander. But jurisdictions around the country, including several Ohio appellate districts, now recognize that despite its origins and its current appearance in the Restatement of Torts as a libel defense, the litigation privilege should apply with equal weight to other types of civil claims against attorneys, including claims of fraud, malicious prosecution and/or abuse of process, intentional infliction of emotional distress, invasion of privacy, tortious interference with contractual and/or business relationships, and civil conspiracy. *See* Anenson, 31 Pepp. L. Rev. at 927 and fns. 64-77 (2004), *citing Mem'l Drive Consultants, Inc. v. Ony, Inc.,* No. 96-CV-0702E(F), 1997 U.S. Dist. LEXIS 14413, at *8 (W.D.N.Y. Sept. 3, 1997) (applying Massachusetts law) ("While the privilege is most often used as a defense to defamation claims that have been brought against an attorney, the privilege has been interpreted to be an absolute privilege that insulates attorneys from all forms of civil liability."); *Buckhannon v. U.S. West Communications, Inc.*, 928 P.2d 1331, 1334-35 (Colo. Ct. App. 1996) (stating that the lawyer's litigation privilege barred suit based on an in-house attorney's statements to a disability insurance carrier "regardless of the tort theory"); *Brown v. Del. Valley Transplant Program*, 539 A.2d 1372, 1374 (Pa. Super. Ct. 1988) (noting that absolute immunity "bars actions for tortious behavior by an attorney other than defamation...."). These authorities recognize that plaintiffs should not be allowed to undercut the public policy

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concerns merely by using creative pleading. *See Thornton v. Rhoden*, 53 Cal. Rptr. 706, 719 (Ct. App. 1966) ("The salutary purpose of the privilege should not be frustrated by putting a new label on the complaint."); *Doe v. Nutter, McClennen & Fish*, 668 N.E.2d 1329, 1333 (Mass. App. Ct. 1996) (stating that the litigation privilege would be futile if an attorney could be liable under an alternative theory). The Ohio Supreme Court has not yet had an opportunity to apply the protection to lawyers beyond libel claims. In *Erie*, the Court noted that while statements in litigation were immune from claims of libel, an aggrieved victim may have other recourse including claims of malicious prosecution. *Erie*, 122 Ohio St. at 215, 171 N.E. at 98 ("The right to sue for damages for malicious prosecution applies to both civil and criminal causes in this state, and this is of itself an additional safeguard.") However, *Erie* did not involve claims against an attorney. *Surace* is the Ohio Supreme Court's most recent decision applying the protection to claims against an attorney, and that decision was limited to claims for libel.

However, in *Taplin-Rice-Clerkin Co. v. Hower*, 124 Ohio St. 123, 177 N.E. 203 (1931) the Ohio Supreme Court applied *Erie* to preclude claims of malicious prosecution against a corporation and its officers, whose testimony to a grand jury resulted in an indictment an indictment of a former employer, John Hower, for embezzlement. When the prosecutor declined to pursue the charges, Hower filed suit for malicious prosecution. The trial court permitted admission of the grand jury testimony at trial, and the corporation then appealed the jury verdict and award in favor of Hower. The Supreme Court reversed on the grounds of the absolute privilege as stated in *Erie*, holding that "testimony given before the grand jury is privileged, and, in a case for malicious prosecution, such as the case at bar, is therefore inadmissible."

And while the Ohio Supreme Court has not yet ruled on the issue, Ohio appellate districts have applied the litigation privilege to other types of claims against attorneys. In *Bales v. Hack*, 31 Ohio App.3d 111, 111, 509 N.E.2d 95 (2nd Dist., 1986), Plaintiff Michael Bales brought claims of both libel and intentional infliction of emotional distress against his ex-wife and her attorney, Bertram Hack, based on their allegations of Bale's homosexuality in a prior divorce proceeding. The court dismissed Bale's suit, finding the statements shielded by absolute immunity as made in the course of litigation, and without distinguishing between the causes of action. (The court also noted, "parenthetically", that the Plaintiff's alternative theory of liability for violation of Civ.R. 11 was invalid because Civ.R. 11 affords no private cause of action). In *Seminatore v. Redmond*, 8th Dist. No. 54806, 1988 WL 136056, (Dec. 15, 1988), the 8th District applied the immunity to preclude claims of malicious prosecution, slander of title, intentional interference with use of property, and intentional infliction of emotional distress. *See also Pincus v. Pincus,* 2018-Ohio-5231, ¶ 43, 127 N.E.3d 393, 402, appeal not allowed, 2019-Ohio-1421, ¶ 43, 155 Ohio St.3d 1422 (privilege precluded claims of malicious prosecution and abuse of process); *Seminatore v. Dukes*, 8th Dist. No. No. 84032, 2004-Ohio-6417 (precluding claims of libel and conspiracy); *Lopinski v. State Farm Mut. Ins. Co.*, 6th Dist. No. L-96-078, 1996 WL 748179 (Dec. 20, 1996) (privilege precluded claims of "invasion of privacy and breach of confidentiality" asserted against an insurance company's attorneys who disclosed the plaintiff's medical records and expert reports to counsel for other parties and a mediator); *Wallace v. Feador*, 8th Dist. No. 46662, 1983 WL 2752 (Nov. 3, 1983)("The same rule precludes suits for invasion of privacy by statements made in the course of judicial proceedings."); *Battig v. Forshey*, 7 Ohio App.3d 72, 73, 454 N.E.2d 168 (4th Dist., 1982)(invasion of privacy); *Brawley v. Plough*, 75 Ohio Misc.2d 36, 662 N.E.2d 905, 906 (Portage Com. Pl. 1995)(privilege barred claims of malicious prosecution).

Most recently, the 12th District Court of Appeals has acknowledged the broader application of the privilege to torts beyond defamation.

> While the privilege historically was raised to defeat defamation claims, the modern version has broadened in most states to include multiple tort claims. *See Nationstar Mtge., L.L.C. v. Ritter*, 10th Dist. Franklin Nos. 14AP-1000 and 14AP-1002, 2015-Ohio-3900, 2015 WL 5638100, ¶ 15 (privilege applied to claims of fraud, slander, and intentional

infliction of emotional distress). The federal 11th Circuit stated that " '[a]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior * * * so long as the act has some relation to the proceeding.' " *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1274 (11th Cir. 2004), quoting *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So.2d 606, 608 (Fla.1994). This is consistent with Ohio law, which provides that litigation privilege operates to protect both actions and statements made in the course of a judicial proceeding that "bears some reasonable relation to the judicial proceeding in which it appears." See *Surace* at 233, 495 N.E.2d 939; *Mootispaw v. Kiger*, 12th Dist. Fayette Case No. CA96-11-025, 1997 WL 176273, at *1 (Apr. 14, 1997) ("There is an absolute privilege or immunity for statements made in a judicial proceeding that extends to every step in the proceeding, from beginning to end.")

Reister v. Gardner, 12th Dist. Nos. CA2019-01-010, CA2019-01-011, and CA2019-01-020, 2019-Ohio-4720, appeal allowed, 2020-Ohio-877, 158 Ohio St.3d 1434.[5]

Some might argue that attorneys have such close access to and influence upon judicial proceedings that there ought to be a remedy for abusive conduct such as malicious prosecution, abuse of process, or spoliation of evidence. But as noted above, Ohio courts have consistently applied the absolute privilege to preclude claims of malicious prosecution and abuse of process. And while this author has not found any case discussing the application of the privilege to claims of spoliation of evidence, the Ohio Supreme Court has previously questioned the need for the tort of spoliation in the first place. In *Elliott-Thomas v. Smith*, 154 Ohio St.3d 11, 2018-Ohio-1783, 110 N.E.3d 1231, the Court considered claims that two attorneys had engaged in "spoliation" of evidence by intentionally hiding or concealing it, although not physically destroying it. The Court declined to expand the tort of spoliation beyond physical destruction. Noting that most jurisdictions have abolished the tort of intentional spoliation altogether (including California, where it originated), the Court stated:

> As the viability of the tort is not an issue currently before us, we do not go that far today. Nevertheless, the reasons and principles discussed by these courts guide our decision to reject an expansion of the tort of intentional spoliation of evidence to encompass allegations of intentional concealment of or interference with evidence.
>
> One consideration that supports our decision is the existence of other adequate remedies to deter and punish interference with and concealment of evidence by parties and counsel. Civ.R. 37 provides trial courts with broad discretion to impose sanctions upon a party who violates the rules governing the discovery process. *See Toney v. Berkemer*, 6 Ohio St.3d 455, 458, 453 N.E.2d 700 (1983). Abuse of the discovery process is also deterred by the ethical obligations placed upon legal counsel, *see Prof.Cond.R. 3.3 and 3.4*, and attorney-disciplinary sanctions, *see Gov.Bar R. V.*
>
> Another consideration contributing to our decision to reject an expansion of the spoliation tort is the speculative nature of the harm arising from interference with or concealment of evidence and the speculative nature of any alleged resulting damages. And a jury would find assessing damages problematic "because evidence spoliation tips the balance in a lawsuit; it does not create damages amenable to monetary compensation."

Elliott-Thomas v. Smith, 154 Ohio St.3d 11, 2018-Ohio-1783, 110 N.E.3d 1231, at ¶¶ 15-17.

Thus, while *Elliott-Thomas* chose not to "go that far today", it signals a skepticism that spoliation is necessary in Ohio tort jurisprudence. It is instructive that *Elliott-Smith* pointed to the abandonment of the tort by other jurisdictions, and that it expressed confidence that judicial and disciplinary supervision and sanctions are "adequate remedies to deter and punish interference with and concealment of

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evidence by parties and counsel." This latter rationale closely tracks some of the public policy reasons for the absolute litigation privilege.

Because the privilege already precludes intentional torts such as malicious prosecution and abuse of process, and because the Supreme Court's discussion in *Elliott-Thomas* expresses a preference for remedies available under the rules of procedure and rules of professional conduct over an intentional tort claim such as spoliation, the argument for tort remedies does not appear compelling enough to supersede the policy reasons for the absolute litigation privilege. Such a rule already applies in other jurisdictions. *See, e.g., Auriemma v. Montgomery*, 860 F.2d 273, 275-76 (7th Cir. 1988) (listing cases where attorneys were granted immunity based upon their conduct); *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978) (holding that prosecutor was absolutely immune from suit that claimed that he destroyed and falsified evidence).

Some may question whether the absolute litigation privilege, as a creature of common law, can overcome a statutory cause of action, as statutory actions are generally considered to supersede common law principles. But federal courts have consistently protected government litigators against federal statutory claims by the application of absolute immunity. *See Imbler v. Pachtman*, 424 U.S. 409 (1976); *see also Briscoe v. LaHue*, 460 U.S. 325 (1983) (protecting witnesses); Stump v. Sparkman, 435 U.S. 349 (1978) (protecting judges). In fact, in applying the immunity, the federal courts have looked to state common law principles of attorney immunity and supporting policy concerns. *See, e.g., Auriemma v. Montgomery*, 860 F.2d 273, 277 (7th Cir. 1988); *Barrett v. United States*, 798 F.2d 565, 572-73 (2d Cir. 1986) (collecting state immunity cases). The courts have explained that "the judicial process require[s] that advocates be able to vigorously present their clients' cases without having to fear being sued...." *Barnett*, 798 F.2d at 572-73; *see also Auriemma*, 860 F.2d at 273. As such, the immunity is applied more as a procedural rule than as an element of a substantive claim or defense. While a statute may create a cause of action, it will not of its own supersede an otherwise applicable immunity.

There are, of course, outer limits to conduct that can be plausibly "related" to advancing the judicial process. The immunity would not apply to the attorney's malpractice and breach of duties owed in the attorney-client relationship. The immunity exists to protect the attorney's undivided loyalty and zealous representation of the client...not to shield the attorney from negligence in doing so. And certainly criminal conduct cannot be afforded immunity, as intentional acts of theft or violence have no plausible role in advancing the judicial process. See *Panzella v. Burns*, 169 A.D.2d 824 (N.Y. App. Div. 1991) (privilege applied to verbal altercation between attorneys but not claim for battery where one attorney punched the other in the face in the judge's chambers); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) (judge was properly liable for assault and battery when he "forced Gregory out the [courtroom] door, threw him to the floor in the process, jumped on him, and began to beat him"). But so long as the attorney's actions were plausibly related to advancing his client's interests in the litigation, they should be shielded—whether in word or in deed.

IV. The Privilege Is "Absolute" And Acts As An Immunity.

Although often called a "privilege", the litigation privilege is actually an immunity and should not be confused with the affirmative defense of privilege in libel law. There are several practical reasons for making the distinction.

First, the privilege is universally considered "absolute", i.e., it applies regardless of fraudulent or malicious intent. "The distinction...is that the absolute privilege protects the publisher of a false, defamatory statement even though it is made with actual malice, in bad faith and with knowledge of its falsity; whereas the presence of such circumstances will defeat the assertion of a qualified privilege." *Bigelow v. Brumley*, 138 Ohio St. 574, 579, 37 N.E.2d 584, 588 (1941).

Thus, an "absolute privilege" constitutes an immunity, and the Ohio Supreme Court has acknowledged as much.

> And what is this fundamental philosophy underlying the whole doctrine of absolute privilege? It is expressed in 3 Restatement of Torts, 224, Section 584, as follows:
>
> 'Privileges of the first class [absolute privileges] are based chiefly upon a recognition of the necessity that certain officials and others charged with the performance of important public functions shall be as free as possible from fear that their actions may have an adverse effect upon their own personal interests. ***To accomplish this, it is necessary for them to be protected not only from liability but from the danger of even an unsuccessful civil action. This being so, it is necessary that the propriety of their conduct shall not be indirectly inquired into either by court or jury in civil proceedings brought against them for misconduct in office***. ***Therefore, the privilege is absolute and the protection which it affords is complete.*** It is not conditioned upon the honest and reasonable belief that the defamatory matter is true or upon the absence of ill will on the part of the publisher. The absolute privilege of such officials to publish defamatory matter is a part of a general privilege which extends to all acts done by them in their official capacity which invade the interests of others.'

Bigelow v. Brumley, 138 Ohio St. 574, 583–84, 37 N.E.2d 584 (1941)(***emphasis*** added).

More recently, the Ohio Supreme Court has noted that the same policies supporting absolute immunity for witnesses and judges also apply to attorneys, stating:

> It is a well-established rule that judges, counsel, parties, and witnesses are absolutely immune from civil suits for defamatory remarks made during and relevant to judicial proceedings. *See Erie County Farmers' Ins. Co. v. Crecelius* (1930), 122 Ohio St. 210, 171 N.E. 97; *McChesney v. Firedoor Corp.* (1976), 50 Ohio App.2d 49, 51, 361 N.E.2d 552 [4 O.O.3d 28]. This immunity is based on the policy of protecting the integrity of the judicial process. The function of a judicial proceeding is to ascertain the truth. To achieve this noble goal, participants in judicial proceedings should be afforded every opportunity to make a full disclosure of all pertinent information within their knowledge. ***For a witness, this means he must be permitted to testify without fear of consequences.*** Freedom of speech in a judicial proceeding is essential to the ends of justice. 1 Harper & James, Law of Torts (1956) 423–426, Section 5.22.
>
> Moreover, independence in decision-making is essential to preserving the integrity of the judicial process. ***Hence, judges are absolutely immune from civil liability for acts made within their jurisdiction.*** *Bradley v. Fisher* (1871), 80 U.S. (13 Wall.) 335, 20 L.Ed. 646.
>
> ***The same considerations underlying the immunity of judges provided the basis for immunity of prosecutors.*** Thus, prosecutors are considered "quasi-judicial officers" entitled to absolute immunity granted judges, when their activities are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman* (1976), 424 U.S. 409, 430, 96 S.Ct. 984, 995, 47 L.Ed.2d 128. *Imbler* held that a prosecutor has absolute immunity "…in initiating a prosecution and in presenting the State's case…." *Id.* at 431, 96 S.Ct. at 995.

Willitzer v. McCloud, 6 Ohio St. 3d 447, 448–49, 453 N.E.2d 693 (1983)(***emphasis*** added).

As noted in *Willitzer*, treating the absolute litigation privilege as an immunity for attorneys is consistent with the immunities afforded to witnesses and judges in carrying out their respective roles in the judicial process.

Ohio law immunizes witnesses from civil liability for their testimony. "A witness in a judicial proceeding, such as defendant in this case, is immune to civil liability for injuries

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resulting from his giving of alleged false testimony—even where he knew his statements were false." *Brawley v. Plough*, 75 Ohio Misc. 2d 36, 39, 662 N.E.2d 905, 907 (Portage Com. Pl. 1995) *citing Elling v. Graves,* 94 Ohio App.3d 382, 640 N.E.2d 1156 (6th Dist. 1994). In *Brawley,* the court applied the witness immunity doctrine to preclude claims for malicious prosecution, false arrest, negligence, and emotional distress, after the plaintiff was acquitted of charges of menacing based on the plaintiff's criminal complaint.

In *Elling*, the court dismissed defamation and fraud claims against a psychological expert witness who had testified in a prior divorce action. The 6th District stated:

> Ohio courts have long recognized that freedom of speech is essential in a judicial proceeding in order to ascertain the truth and to achieve justice. To assure that all participants in a judicial proceeding feel free to testify, question and act, Ohio courts prohibit civil actions based on statements made by parties and witnesses during the course of and relevant to judicial proceedings. *Willitzer v. McCloud* (1983), 6 Ohio St.3d 447, 448–449, 6 OBR 489, 490–491, 453 N.E.2d 693, 694–695. Thus, as a matter of public policy, claims alleging that defamatory remarks or statements were made during the course of and relevant to judicial proceedings are barred by the doctrine of absolute immunity. *Id.; Erie Cty. Farmers' Ins. Co. v. Crecelius* (1930), 122 Ohio St. 210, 171 N.E. 97. Furthermore, a witness is immune from civil liability for giving false testimony. *Schmidt v. Statistics, Inc.* (1978), 62 Ohio App.2d 48, 16 O.O.3d 85, 403 N.E.2d 1026; *Patterson v. Patterson* (Apr. 14, 1989), Greene App. No. 88–CA–75, unreported, 1989 WL 35881. This ban on civil liability for false statements applies even in cases where the party testifying knew his statements were false. *Stoll v. Kennedy* (1987), 38 Ohio App.3d 102, 526 N.E.2d 821; *Schmidt, supra.*

Likewise, Ohio law recognizes that "no civil action can be maintained against a judge for the recovery of damages by one claiming to have been injured by judicial action within the scope of the judge's jurisdiction." *Evans v. Supreme Court of Ohio* (2002), 119 Ohio Misc.2d 34, 2002-Ohio-3518, at ¶ 20 (citations omitted.) *See also Fahrig v. Greer,* 2nd Dist. No. 6596, 1980 WL 352570, at *2 (May 1, 1980)(dismissing claims against a judge and two court reporters alleging slander, obstruction of justice, fraud, and civil rights violations because "[t]he principle of judicial immunity applies to acts of a judge and court reporters while acting in their official capacities", *citing U.S. ex rel Johnson v. Specter*, 262 F. Supp. 113; *Brown v. Charles*, 309 F. Supp. 817, 818; *Dieu v. Norton*, 411 Fed. 2d 761; *Morrow v. Igleburger*, 67 FRD 675).

The numerous public policy reasons supporting the absolute litigation privilege compel the conclusion that attorneys should not have to operate under the fear of retaliatory litigation of any kind, not simply claims of libel. As noted above, the Ohio Supreme Court recognized the need for witnesses and judges to be immune from suit, stating "is necessary for them to be protected not only from liability but from the danger of even an unsuccessful civil action. This being so, it is necessary that the propriety of their conduct shall not be indirectly inquired into either by court or jury in civil proceedings brought against them for misconduct in office." *Bigelow,* 138 Ohio St. at 583. The Court then applied that same rationale to prosecutors.

The same public policy reasons for immunizing witnesses and judges in performing their functions, and for immunizing attorneys from claims of libel, likewise support complete attorney immunity from all other forms of civil liability, regardless of the label or the type of underlying conduct. So long as an attorney is performing tasks that "may be related to" the representation of a client in existing or potential court proceedings, there should be no distinction between protections for statements and other actions. As the 12th District has noted in *Reister, supra:*

> The rationale for providing immunity to "actions" as opposed to merely "statements" is consistent with the purposes of the litigation privilege rule. "Just as participants in litigation must be free

to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct." *Jackson* at 1274, quoting Levin at 608. *See Opperman v. Klosterman Equip. L.L.C.,* 3d Dist. Mercer No. 10-14-09, 2015-Ohio-4621, 2015 WL 6848501, ¶ 75 ("privilege is necessary to protect litigants and potential litigants from the possibility of a flood of defamation suits").

Reister v. Gardner, 2019-Ohio-4720, ¶ 25, appeal allowed, 2020-Ohio-877.

V. Conclusion

Actions speak louder than words. If the so-called "absolute" litigation privilege is to truly be an immunity and an absolute protection from the specter of retaliatory litigation by a vindictive opponent or third party, the protection should apply to all conduct on behalf of the client, and it should preclude all forms of civil liability and not limited to libel and slander.

Endnotes

1 The date of the *Beauchamps* case is disputed. It appears to have been decided in 1497 and subsequently recorded or copied into an official record in 1569. See discussion in Hayden, *Reconsidering the Litigator's Absolute Privilege to Defame*, 54 Ohio State Law Journal 985, 1013, fn. 175.

2 Georgia provides an absolute privilege for attorney statements made in pleadings, but only a qualified (good faith) privilege for all other acts. Ga. Code Ann. §§ 51-5-7, 51-5-8; Louisiana recognizes only a qualified privilege for attorney statements in judicial proceedings. La. Stat. Ann. § 14:49(4).

3 T. Leigh Anenson, *Creating Conflicts of Interest: Litigation As Interference with the Attorney-Client Relationship*, 43 Am. Bus. L.J. 173 (2006); T. Leigh Anenson, J.D., LL.M., *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 Pepp. L. Rev. 915, 916 (2004); John B. Lewis & Lois J. Cole, *Defamation Actions Arising from Arbitration and Related Dispute Resolution Procedures - Preemption, Collateral Estoppel and Privilege: Why the Absolute Privilege Should be Expanded*, 45 DePaul L. Rev. 677, 678 (1996).

4 On March 17, 2020, the Ohio Supreme Court accepted jurisdiction in the appeal of *Reister v. Gardner*, S.Ct. Case No. 2019-1815 appeal allowed, 2020-Ohio-877, in which one of the propositions of law addresses whether the absolute litigation privilege extends only to statements or also to all other acts taken in litigation. However, *Reister* does not involve claims against any attorney, but rather claims by a receiver against the directors of a corporation, arising out of their decision not to settle which ultimately resulted in a multi-million dollar jury verdict against the corporation. Although the "statements versus acts" question is posed in *Reister*, the case may not be a proper vehicle for addressing the absolute litigation privilege.

5 See footnote 4 above.

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Compliance Tips for Law Firms and Lawyers To Minimize Cyber-Related Legal Liability

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While no type of business is immune to hackers today, law firms in particular have found themselves to be especially vulnerable and susceptible to criminal cyber activity, with firms of all sizes experiencing more attempted—and many times successful—cyber attacks from malicious outsiders and data compromise events stemming from firm employees. At the same time, the scope of potential legal liability exposure faced by law firms in connection with data compromise events has also expanded rapidly as well. As such, firms must take proactive measures to shield client data from unauthorized access and acquisition, which can be accomplished through the implementation of several key data security measures as part of an overall cyber risk management program. Executed properly, effective law firm cybersecurity measures can protect law firms not only from experiencing a catastrophic data breach incident, but from substantial potential liability exposure as well.

The Noteworthy Cyber and Security Threat Faced by Law Firms

Cyber attacks on law firms have become so commonplace today that it is no longer a matter of *whether* a firm will fall victim to a cyber-attack, but a question of *when* and *to what extent* a cyber-attack will occur. There are several reasons why law firms are such magnets for cyber attacks.

First, law firms possess a treasure trove of sensitive client data—data which has significant value—rendering them a principal target of cyber attacks aimed at accessing that private firm data, which is then sold on the black market. Second, law firms have money, and lots of it, making them the ideal target for ransomware attacks, where cyber criminals can make easy money by locking down a firm's files until a ransom payment is made.

Third, law firms today are still generally ill-prepared to deal with the sophisticated cyber attacks that are being carried out by cyber criminals today. Broadly speaking, the operation of law firms is still not managed as closely or efficiently as other businesses. Despite the growing threat, many firms have failed to take note and implement the appropriate policies, procedures, and other safeguards that are required to mount an effective defense against today's sophisticated cyber attacks. For the malicious hacker, then, a law firm's computer network may be much easier to penetrate than that of its client.

Increased Scope of Cyber-Related Legal Liability Faced by Law Firms

To further complicate matters, law firms face significantly expanded potential cyber-related legal liability as compared to years past.

First, the threat of legal malpractice claims stemming from data breach incidents or other cybersecurity-related failures is no longer merely theoretical, but now constitutes an actual and significant threat to law firms. While relatively few malpractice claims have been pursued by clients against their attorneys to date, the increasing standards that are rapidly developing regarding the implementation of proper data security safeguards will inevitably lead to an increase in the number of cyber-related legal malpractice claims that are filed as time progresses.

In fact, that trend has already started, first in *Shore v. Johnson & Bell,* No. 16-cv-4363 (N.D. Ill. 2016), a class action lawsuit that was filed against a Chicago law firm for alleged cyber vulnerabilities and failing to protect the security and confidentiality of its thousands of clients

and former clients. Similarly, in *Millard v. Doran,* No. 153262/2016 (Sup. Ct. N.Y. Co. 2016), a legal malpractice action was filed against a New York attorney for allegedly lax data security measures that allowed cyber criminals to send fraudulent instructions to a client during a real estate transaction which, in turn, caused the client to erroneously wire $2 million in funds to the account of the hacker.

While both of these cases were resolved shortly after suit was filed and without an adjudication on the merits, *Shore* and *Millard* provide plaintiffs with a clear blueprint for pursuing legal malpractice claims against law firms and attorneys in the wake of a data security incident involving clients' sensitive or confidential personal information.

Furthermore, in addition to targeted legal malpractice claims, law firms and attorneys are also now vulnerable now to more general negligence claims arising from inadequate cybersecurity measures and data breach incidents. For example, in *Dittman v. UPMC,* 196 A.3d 1036 (Pa. 2018), the Pennsylvania Supreme Court held that employers have an affirmative duty to take reasonable care to safeguard sensitive personal information possessed by the company from cyberattacks. The *Dittman* ruling is a watershed event in cybersecurity and data breach litigation, as the decision establishes new rules of the road for negligence claims asserted in the wake of data breach incident. Importantly, the *Dittman* ruling is applicable well beyond only the employer-employee relationship, and likely applies with equal force in other contexts, including attorney-client relationships.

In addition, law firms and lawyers now also face liability in connection with new consumer privacy laws that are starting to be enacted across the country. For example, the California Consumer Privacy Act of 2018 ("CCPA")—which went into effect at the start of 2020—requires companies, including law firms, to comply with a range of requirements and limitations regarding the collection, use, and sharing of personal data of California residents. In addition, the CCPA provides consumers—including law firm clients—a private right of action to pursue class action litigation in connection with certain data breach events, with available statutory damages of $100 to $750 per incident. Other state legislatures across the nation have made a concerted effort to enact similar "CCPA copycat" laws of their own, and it is highly likely that other states will be successful in putting in place their own versions of the CCPA in the coming months and years.

Compliance Steps

Combined, law firms and lawyers face noteworthy potential legal liability in connection with data breaches and other types of data compromise events. Fortunately, there are several proactive measures that firms and attorneys can take to minimize the risk of cyber-related legal liability:

- **Cybersecurity/Data Security Policies & Procedures:** As a starting point, firms should develop and implement a stringent set of cybersecurity and data privacy policies and procedures addressing the use of technology by firm personnel. These policies should define expectations for employees, as well as anyone with access to firm data, regarding issues such as the use of personal email and devices, file-sharing programs, the copying of data to personal devices, and use of firm systems from remote locations. Important policies to have to reduce the risk of cyber-related legal liability include acceptable use, Internet use, mobile device and tablet, bring-your-own device ("BYOD"), and password policies.

- **Firm Personnel Education & Training:** Education and training is a second vital ingredient to any effective firm cybersecurity risk management program, as many data compromise incidents are either directly or indirectly caused by human error or carelessness. In particular, firm employees should be made aware of the vital importance of safeguarding firm data and the key role that firm personnel play in ensuring the security of the organization's networks and systems. Furthermore, firms should also educate personnel on effective cybersecurity practices, such as being suspicious of potential phishing emails, and the ability to spot social engineering schemes, which have become a go-to tactic for hackers attempting to infiltrate firm networks through human vulnerabilities.

- **Maintaining a Security-First Firm Culture:** Beyond mere education and training, firms should also strive to promote a cybersecurity-first culture throughout their organizations. This can be done in a variety of ways. Set achievable, firm-wide security goals. Connect the security of the firm to the personal privacy of employees

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themselves. Communicate clear rules and requirements regarding the use of technology at work. Educate employees about the business benefits, and potential severe negative consequences, that employees' cyber habits have on the firm. Post reminders around the office relating to cyber-attack prevention measures. Combined, with the proper amount of time and effort, firms can develop a mindset and culture throughout the organization that maximizes employees' commitment to making cybersecurity a top priority in their day-to-day activities, which in turn can play a significant role in preventing cyber attacks from wreaking havoc on a firm's systems and finances.

- **Vendor Management:** In addition to assessing the security of their own systems, firms also need to assess the security of their vendors as well, as law firms' support vendors can often serve as the weakest link in a firm's security chain due to inadequate security controls and the entry portal these entities possess to firm systems. As part of the vendor selection process, firms should conduct thorough due diligence and evaluate the vendor's data security practices and procedures. Once a vendor is retained, firms should ensure that vendor access to firm data, as well as the vendor's ability to make changes on the firm's system, is limited to the greatest extent possible. In addition, firms should also develop necessary contractual security requirements for all vendors that maintain access to the firm's client information or systems.

- **Cyber Insurance:** Finally, firms should obtain cyber-specific insurance coverage (if they have not already done so) to mitigate the risk of expenses and losses resulting from a data breach incident. Law firms cannot assume that their general firm insurance policies will cover all losses stemming from a cyber attack, as many firms have discovered the hard way that their professional errors and omissions insurance, general liability insurance, and property insurance do not cover all of the costs associated with a cyber attack. Cyber insurance coverage, on the other hand, is specifically designed to cover losses stemming from a data breach, both in terms of response costs for things like providing notice of a breach, as well as damages and expenses arising out of lawsuits stemming from the breach. Importantly, in addition to covering direct losses stemming from a breach, cyber-risk policies will also cover indirect costs and expenses associated with the breach, such as public relations firm costs, legal fees, and credit monitoring services fees.

Conclusion

Due to the massive volume of sensitive, highly valuable client information that is collected and maintained, as well as the noteworthy amount of revenue generated, law firms are particularly prime targets for cyber attacks. Recently, malicious hackers have stepped up the frequency and sophistication of their attacks against law firms large and small, with firms now facing far greater security threats than ever before. Cyber attacks on law firms are only likely to escalate and intensify moving forward, as cyber criminals develop new techniques to infiltrate firm systems and networks in more advanced ways. At the same time, firms and attorneys also face significantly expanded liability in connection with cybersecurity and data security incidents as well.

As such, it is critical for law firms to implement effective measures to properly safeguard their networks and systems, as well as the data they possess. Through the implementation of the cybersecurity practices and safeguards discussed above—as part of a comprehensive cybersecurity risk management program—law firms can take proactive precautionary measures to effectively minimize the risk of falling victim to a cyber attack and, more importantly, avoid being on the receiving end of a potentially catastrophic cyber-related lawsuit arising from cybersecurity and data security shortcomings.

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Avoiding Heightened Cyber Risks During COVID-19

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Practicing law without electronic communications does not seem possible these days, especially with many lawyers working remotely due to COVID-19. While the duties of Ohio Rules of Professional Conduct **Rule 1.1 Competence**, requiring that lawyers keep aware of the benefits and risks associated with relevant technology, and **Rule 1.6 Confidentiality of Information**, requiring that lawyers protect confidential client data, have extended to electronic communications, the COVID-19 pandemic presents new challenges to lawyer cybersecurity.

The ABA recognized the importance of *Securing Communication of Protected Client Information* in Formal Opinion 477R. The Opinion stated that a lawyer generally may transmit information relating to the representation of a client over the internet without violating the (Model) Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. It then recommended seven steps lawyers should take to prevent disclosures. These steps are worth reviewing in the context of COVID-19:

1. **Understand the nature of the threat.** Consider the sensitivity of the client's information and whether it poses a greater risk of cyber theft. If there is a higher risk, greater protections may be warranted.

   COVID NOTE: If working remotely, all security precautions should be in place or client information could be at risk. This includes using a VPN and not using public Wi-Fi.

2. **Understand how client confidential information is transmitted and where it is stored.** Be aware of the multiple devices such as smartphones, laptops and tablets used to access client data.

   COVID NOTE: Each device is an access point and should be evaluated for security compliance. Strong passwords and two-factor authorization should be employed for all devices.

3. **Understand and use reasonable electronic security measures.** Know the security measures available to provide reasonable protections for client data.

   COVID NOTE: Be sure every lawyer and support person uses VPN with secure Wi-Fi connections. Keep all firewalls and anti-spyware/anti-virus software updated. Employ strong passwords for each device. Use encryption and two-factor authorization.

4. **Determine how electronic communications about clients' matters should be protected.** Discuss with the client the level of security that is appropriate when communicating electronically. Take into account the client's level of sophistication with electronic communications. If the client is unsophisticated or has limited access to appropriate technology protections, alternative nonelectronic communication may be warranted.

   COVID NOTE: It is especially important during this time that clients are aware of the need to protect confidential information. You may need to discuss security on the receiving end of the

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communication as well. If there are doubts that you can communicate securely, you may have to consider using paper communications and having documents delivered via FedEx or other courier service.

Be sure all electronic communications are regularly monitored and reviewed for timely reply. This will include all email accounts, firm inquiry responses, contact forms from websites and any other social media accounts the firm uses.

5. **Label client confidential information.** Mark communications as privileged and confidential to put any unintended lawyer recipient on notice that the information is privileged and confidential.

   COVID NOTE Most lawyers have confidentiality notices at the bottom of office email. Be sure if lawyers are working remotely or sending email from phones that they are using formatted office email for remote communications so this notice is still included in all electronic communications.

6. **Train lawyers and nonlawyer assistants in technology and information security.** Rules 5.1 and 5.3, require steps to ensure that lawyers and support personnel in the firm understand how to use reasonably secure methods of communication with clients.

   COVID NOTE: Review security procedures with law firm personnel to ensure security procedures are being followed. This is a good time to review procedures on avoiding scams and what to do in the event of a cyber attack.

7. **Conduct due diligence on vendors providing communication technology.** Take steps to ensure that any outside vendor's conduct comports with the professional obligations of the lawyer.

   COVID NOTE: All vendor accounts should be closely monitored during this time, especially if firm personnel are not in the office regularly. Pay careful attention to regularly scheduled supply deliveries and to invoices for products and services. Remind everyone to be sure emails are actually sent from the purported vendor before providing any information or clicking on anything in an email.

In addition to these usual considerations for lawyer cybersecurity, COVID-19 related schemes are increasingly being used by scammers. The U.S. Department of Homeland Security Cybersecurity and Infrastructure Security Agency (CISA) and the United Kingdom's National Cyber Security Centre (NCSC) recently issued joint Alert COVID-19 Exploited by Malicious Cyber Actors warning of the exploitation by cybercriminals of the global pandemic and providing mitigation strategies.

The Alert cautioned that the threats will often look like they come from trusted entities and include:

- Phishing, using the subject of coronavirus or COVID-19

  NOTE: While most phishing targets email, COVID phishing has also used text messages.
- Malware distribution, using coronavirus- or COVID-19-theme,
- Registration of new domain names containing wording related to coronavirus or COVID-19, and
- Attacks against newly deployed remote access and teleworking infrastructure, (such as a new VPN)

The cyber threats take advantage of concern about the virus to persuade victims to click on a link or download an app. To create an impression of authenticity, the cyber threats may spoof sender information to appear that it comes from a trustworthy source such as World Health Organization (WHO) or a "Dr."

The Alert warns that phishing threats are also being used to steal credentials. If the user clicks on the hyperlink in the phishing email, a spoofed login webpage (that looks like it may relate to email provided by Google or Microsoft or services accessed via government websites) appears with a password entry form. If the password is entered, it allows access to the victim's accounts to acquire personal information and use the victim's email address book. Further, phishing using COVID related themes is being used to deploy malware, such as "TrickBot."

The vulnerabilities of specific VPN's such as Citrix, Pulse Secure, Fortinet, and Palo Alto were noted in the Alert. Cyber scammers are also exploiting Zoom popularity by sending phishing emails with names such as "zoom-us-zoom."

After outlining the threats, the Alert provides CISA and NCSC **advice to help mitigate the risk to individuals and organizations from malicious cyber activity related to both COVID-19 and other themes:**

- CISA guidance for defending against COVID-19 cyber scams
- CISA Insights: Risk Management for Novel Coronavirus (COVID-19), which provides guidance for executives regarding physical, supply chain, and cybersecurity issues related to COVID-19
- CISA Alert: Enterprise VPN Security
- CISA webpage providing a repository of the agency's COVID-19 guidance
- NCSC guidance to help spot, understand, and deal with suspicious messages and emails
- NCSC phishing guidance for organizations and cyber security professionals
- NCSC guidance on mitigating malware and ransomware attacks
- NCSC guidance on home working
- NCSC guidance on end user device security

These tips in the Alert are also helpful:

Phishing Guidance for Individuals

The Alert lists the NCSC's Top Tips for Spotting a Phishing Email:

- **Authority** – Is the sender claiming to be from someone official (e.g., your bank or doctor, a lawyer, a government agency)? Criminals often pretend to be important people or organizations to trick you into doing what they want.
- **Urgency** – Are you told you have a limited time to respond (e.g., in 24 hours or immediately)? Criminals often threaten you with fines or other negative consequences.
- **Emotion** – Does the message make you panic, fearful, hopeful, or curious? Criminals often use threatening language, make false claims of support, or attempt to tease you into wanting to find out more.
- **Scarcity** – Is the message offering something in short supply (e.g., concert tickets, money, or a cure for medical conditions)? Fear of missing out on a good deal or opportunity can make you respond quickly.

  NOTE: In our current situation, it might refer to toilet paper, hand sanitizers or masks!

Phishing Guidance for Organizations and Cybersecurity Professionals

The Alert advises that:

- Organizations that widen their defenses to include more technical measures can improve resilience against phishing attacks.
- Organizations should consider NCSC's guidance that splits mitigations into four layers, on which to build defenses:
  1. Make it difficult for attackers to reach your users.
  2. Help users identify and report suspected phishing emails (see CISA Tips, Using Caution with Email Attachments and Avoiding Social Engineering and Phishing Scams).
  3. Protect your organization from the effects of undetected phishing emails.
  4. Respond quickly to incidents.
- Organizations should plan for a percentage of phishing attacks to be successful. Planning for these incidents will help minimize the damage caused.

Communications Platforms – Zoom and Microsoft Teams – Guidance for Individuals and Organizations

With the increased use of online meetings to conduct daily legal practice, cybercriminals have targeted these communication platforms. The Alert listed tips from the FBI to help defend against such attacks:

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Tips for defending against online meeting hijacking (Source: FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic, FBI press release, March 30, 2020):

- Do not make meetings public. Instead, require a meeting password or use the waiting room feature and control the admittance of guests.
- Do not share a link to a meeting on an unrestricted publicly available social media post. Provide the link directly to specific people.
- Manage screensharing options. Change screensharing to "Host Only."
- Ensure users are using the updated version of remote access/meeting applications.
- Ensure telework policies address requirements for physical and information security.

Hopefully the strategies outlined in this article in the COVID NOTES and in the Alert guidance will help lawyers avoid cyber risks during COVID-19. The views expressed are those of the author based on information that was current as of the writing of this article. However, this is a rapidly changing situation and readers should check for the latest updates to effectively use electronic communications to meet the challenges of practicing during COVID-19.

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