

Featured Editorial

From time to time, Legal Mutual Liability Insurance Society of Maryland requests editorial from local counsel concerning the legal landscape of Maryland. In this issue, it is our pleasure to feature an article written by J. Wyndal Gordon, Esq.



About J. Wyndal Gordon

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The Infamous Judicial Privilege

Consider this scenario, a composite of several cases in which I have recently been involved: a litigation attorney is retained to represent a small service provider who is being sued as a co-defendant in a class action matter involving several other service providers in Washington D.C. and the surrounding areas. During the course of the litigation, counsel finds himself dealing with an additional set of facts that seem to have little to do with the complaint, and even less to do with the overall case. The additional facts are comprised of a stack of approximately 60 letters received from opposing counsel addressed to a multitude of other businesses. Innocent enough, right? Wrong. The content of those letters is quite defaming to the counsel's client. And what is more uncomfortable is the fact that they are addressed to some of the client's direct business relationships as well as potential customers. The letters further expressly identify the client and strongly infer that he was engaged in violating certain state and federal minimum wage laws — a false assertion, and opposing counsel knows it.

Being a subscriber to the old adage that 'no good deed goes unpunished,' the client's attorney sends the opposing counsel a well-intentioned and reasonably toned letter. In that letter, he advises that his client disapproved of their firm's mass mailing and demands a retraction of the letters as well as a 'cease & desist' of future communications of the like. He further advises that his client would consider taking legal action against counsel and their D.C.-based mega-firm if the requests are not honored. He gives them ten days to respond and uses that

time to research the propriety of their conduct, determine the client's causes of action, and to draft and file suit.

As the research ensues, he pulls cases, and reads opinions, journals and legal treatises to determine the viability of a defamation suit. What he discovers is actually more disturbing than receiving the fusillade of copied letters courtesy of opposing counsel. It appears that the letters may have been fair game. Every case states that an attorney who publishes defamatory statements about an opposing party is protected by the judicial privilege, especially when a judicial proceeding is

pending. After several hours of research, frantically looking for a meaningful exception to this apparent axiom in the law, he discovers there are no exceptions applicable to this particular case. His letter to counsel was just an empty threat. So, how far does judicial privilege go?

Absolute Judicial Privilege

In Maryland, statements uttered in the course of a trial or contained in pleadings, affidavits, or other documents related to a case fall within an absolute privilege, and therefore cannot serve as the basis for an action in defamation. *Woodruff v. Trepel*, 125 Md. App. 381, 391 (1999), *Keys v. Chrysler Credit Corp.*, 303 Md. 397, 403-04 (1985). The absolute privilege protects from liability those who publish defamatory statements, even if they knew the statements were false, published them with malice or acted in an otherwise

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unreasonable manner. *See, Adams v. Peck*, 288 Md. 1, 3 (1980). “The privilege remains absolute whether the defamatory statements be relevant or irrelevant to the subject matter of the proceedings.” *Rosenberg v. Hellinski*, 328 Md. 664, 676 (1992). Its protections extend to judges, attorneys, parties, and witnesses who publish defamatory matters during the course of a proceeding. *Korb v. Kowalewicz*, 285 Md. 699, 701-04 (1979).

The rationale behind the privilege is more than a century old. *See, Hunckel v. Voneiff*, 69 Md. 179, 198, 14 A. 500 (1888). Simply stated, the right of an individual to seek redress for defamatory statements made during the course of a judicial proceeding has been curtailed to encourage witnesses to speak freely in court without fear of possible civil liability. *See, Woodruff*, 125 Md. App. at 392 citing *Rosenberg*, 328 Md. 664, 677 (1992), *AGC v. Manger*, 396 Md. 134, 143 (2006) (“*Maryland law provides for a broad privilege for allegedly defamatory statements in a judicial proceeding, and that bringing such a suit [defamation] would erode public confidence in the legal profession*”). An attorney at law is absolutely privileged to publish defamatory matter concerning another in the course of a judicial proceeding in which he participates as counsel, so long as the matter published has some reference or relation to the proceeding. *Dixon v. DeLancey*, 84 Md.App. 441, 448 (1990), cert. denied, 321 Md. 501 (1991).

Expansion of the Judicial Privilege

Over the last 27 years, the judicial privilege has been expanded for attorneys far beyond the courtroom, the traditional arena designated for exchanging verbal wallops and ‘doozies.’ The privilege was first expanded to

include extra judicial statements made by an attorney while a judicial proceeding was pending. *Adams v. Peck*, 288 Md. 1, (1980). Then it was expanded to include extra judicial statements made by an attorney in contemplation of a judicial proceeding, but not yet filed. *See, Arundel Corp. v. Green*, 75 Md.App. 77 (1988). The judicial privilege also has been expanded to include statements made during administrative and other quasi-judicial proceedings, *Woodruff*, 125 Md.App. 381, 396-97 (1999); to post-judgment proceedings, *Keys v. Chrysler Corp.*, 303 Md. 397 (1985); to letters written to the Governor and a member of Congress requesting an investigation, *Imperial v. Drapeau*, 351 Md. 38 (1998); and even to settlement documents not made a part of a court record, e.g., letters of apology. *Sodergren v. Johns Hopkins Univ. Applied Phys.*, 138 Md. App. 686, 694 (2001).

Adams v. Peck, and Arundel Corp., v. Green Analysis

In the instant matter, *Adams v. Peck*, 288 Md. 1, (1980) and *Arundel Corp., v. Green*, 75 Md.App. 77 (1988) cited above were primarily responsible for the arrested development of the embryonic defamation case. The legion of other cases documenting the evolution of the privilege did not offer any assistance to the cause either. In light of this, counsel took the liberty of providing a brief analysis of the *Adams and Arundel* opinions to provide a substantive explanation for the ultimate decision not to sue. One must suspect that a growing trend in corporate litigation against small businesses will be to attack them vicariously through their clientele. The return of the mob is on the horizon, except this time, limbs are not being broken, businesses are being destroyed. When leveraged effectively, a defamation campaign can

embarrass, overwhelm, and ultimately force some disadvantaged businesses to forego their day in court. Upon review of the treatments below, it will be easy to understand why I maintain this position. I consider the abuse of the judicial privilege a ‘code red’ issue for the legal profession that needs to be closely monitored, and ‘checked’ when appropriate.

In *Adams v. Peck*, 288 Md. 1 (1980), two parents entered into an agreement under which the mother would have custody of a child and the father would have visitation rights. Several months after the agreement, the mother sought to modify the visitation schedule and the mother’s attorney requested that she and the child seek evaluations from a psychiatrist. The psychiatrist completed an evaluation that accused the father of sexually abusing at least one of the children. *See, Adams v. Peck*, 43 Md. App. 168 (1979). The psychiatrist’s evaluation was alleged to have been prepared for, and circulated to independent third parties. *Id.* at 170. Although the mother used the report as a basis for the modification, the report was never filed with the court. The father filed a defamation suit against the psychiatrist for creating the false report for passage to third parties. Upon completion of discovery, the psychiatrist filed a motion for summary judgment and it was granted. The father appealed to the Court of Special Appeals; the Court of Special Appeals affirmed the

trial court’s judgment. *See, generally, Id.* The father filed a petition for certiorari, and the same was granted by the Court of Appeals. The Court of Appeals affirmed the judgment and held that the report fell under the absolute privilege because it “was published during the course of [a] judicial proceeding,” even though it was never filed as a document in the case. *Adams*, 288 Md. at 8.

Eight years after *Adams*, the privilege was extended again, this time to include communications by an attorney made in anticipation of a judicial proceeding. In *Arundel Corp. v. Green*, 75 Md. App. 77 (1988), an attorney sent letters to the customers of Arundel on behalf of several aggrieved employees alleging that Arundel’s crushed stone products exposed them to asbestos related toxins. According to the letter, the toxins were believed to have caused the employees to suffer severe personal injuries. The letter additionally inquired whether the customers were made aware or warned of the potential hazards associated with the stone products. In closing, the letter requested the customer to assist the firm with its investigation. A courtesy copy of the letter was sent to counsel for Arundel. In response, Arundel’s counsel demanded that the offending attorney provide proof of its claims, or cease & desist all future letters of that sort. When the offending

attorney did not reply, Arundel filed suit alleging defamation. Upon conclusion of discovery, the offending attorney filed a motion for summary judgment. The motion was granted by the trial court. Arundel appealed. Upon consideration of the merits, the Court of Special Appeals held that the judicial privilege applied to communications by an attorney prior to the institution of a judicial proceeding. *See, Id.* The Court further held that the communication was made in preparation for litigation and was thus encompassed within the broad definition of a “judicial proceeding” for purposes of applying the privilege. *Id.* However, the court held that a genuine issue of fact existed as to whether the defamatory matters contained in the letter had any relationship to the suit. The trial court’s judgment was vacated, and the case remanded. *Id.* Unfortunately, the specific facts relied upon by the Court to remand that portion of the *Arundel* case bear no resemblance to the facts in the aforementioned client’s matter.

Rules of Professional Conduct 3.6

Despite an attorney’s protection from liability for virtually any statement made relating to a judicial proceeding, he/she is still bound by the Rules of Professional Conduct. *See, e.g., Arundel Corp.*, at 84 (*Whether an attorney intentionally published a defamatory statement is a matter of importance only in determining the*

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An attorney at law is absolutely privileged to publish defamatory matter concerning another in the course of a judicial proceeding in which he participates as counsel, so long as the matter published has some reference or relation to the proceeding.

amenability of the attorney to the disciplinary power of the court of which he is an officer). Particularly, Rule 3.6 “*Trial Publicity*”, has built-in controls to place at least some limitations on an attorney’s extra judicial statements. *See, MRPC 3.6, AGC v. Gansler, 377 Md. 656 (2003)*. However, in order to find a violation of this rule, it must be shown that the extra-judicial statement had a substantial likelihood of materially prejudicing the judicial proceeding.

If by chance an aggrieved party was able to establish a Rule 3.6 violation based upon an attorney’s defamatory statement, the Rule does not provide any significant relief to a person damaged thereby. *See, Gansler, (Reprimand was appropriate sanction for extra-judicial statements in violation of MRPC 3.6)* A reprimand or similar punishment is no consolation for a

tarnished or destroyed reputation directly and proximately caused by, at the very least, an attorney’s unethical conduct. *Id.* How is a business’s reputation restored if it is blacklisted and shunned by an entire business community as a result of a false publication? A civil judgment with damages is the only remedy. Without either one, the pursuit of relief is at best symbolic, and at worst, an act of futility.

Maryland is silent as to whether violations of the Rules of Professional Conduct provide a legitimate basis for a civil cause of action. Past writings on the subject tend to suggest that it does not, or that such a violation would merely constitute evidence of a cause of action rather than dispositive proof. *Hooper v. Gill, 79 Md. App. 437, 443-44 (1989)*. Without access to courts, or meaningful discipline with a restitution component, Rule 3.6 is a ‘toothless tiger.’

Conculsion

Once used as a shield to protect the impassioned advocate and others from vexatious litigation during the course of a proceeding, the judicial privilege has now become a sword in the arsenal of weapons available to the trial attorney. Given the broad expansion of the privilege’s ‘wet blanket’ of coverage for virtually every defamatory remark related to a case by counsel, the battlefield for resolving disputes is now being fought on two fronts — the courtroom and chamber of the commerce. As lawyers adjust to the growing trends in litigating cases on behalf of small businesses, corporate clients may also have to adjust to perhaps adding a public relations professional to their team of trial attorneys. Welcome to the future. •

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