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## Speaking Freely: The Litigation Privilege

By Mark J. Fucile  
Fucile & Reising LLP

In many settings, if we called someone a liar, a cheat, incompetent or worse, we might be on the receiving end of a defamation claim. If we need to do that during litigation, however, we're generally protected by the litigation privilege. In this column, we'll look at the privilege, the rationale behind it, its scope and the exceptions. Two comparatively recent Court of Appeals cases neatly summarize these areas and are ready resources if you need to explore the privilege further: *Brown v. Gatti*, 195 Or App 695, 99 P3d 299 (2004) (review pending on other issues), and *Mantia v. Hanson*, 190 Or App 412, 79 P3d 404 (2003).

**The Privilege.** The litigation privilege confers absolute immunity from defamation claims for statements made during both judicial and quasi-judicial administrative proceedings. The privilege applies to attorneys, parties, judges and witnesses. Therefore, if you plead a fraud or malpractice claim against someone or suggest they are a liar in cross-examination, the privilege generally bars a subsequent defamation claim against you. Oregon's version of the litigation privilege draws on both the Restatement (Second) of Torts § 586 and our own case law. Although the immunity for civil claims is absolute, it does not preempt the prohibitions against perjury and false swearing under, respectively,

ORS 162.065 and 162.075, or those requiring candor toward tribunals and lawyer honesty under, respectively, RPCs 3.3 and 8.4(a)(3).

**The Rationale.** The Court of Appeals in *Mantia* quoted comment a to Restatement § 586 in explaining the rationale for the privilege: “The privilege . . . is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege is absolute. It protects the attorney from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth, or even his knowledge of its facility.” 190 Or App at 418.

**The Scope.** To qualify for the privilege, a statement must meet two general tests. First, it must have “some reference to the subject matter of the pending litigation.” 194 Or App at 701, quoting comment c to Restatement § 586 and *Chard v. Galton*, 277 Or 109, 113, 559 P2d 1280 (1977). The idea behind this requirement as it relates to lawyers is that the privilege is designed to protect them in their role as advocates, and, therefore, must have some connection to that role. Second, the statement must be made “in connection with a judicial proceeding.” *Id.* This requirement clearly applies to statements in pleadings, briefs, correspondence between opposing lawyers and in the courtroom. But, it also extends to statements, such as settlement demands, that are made prior to formal proceedings being instituted. The Court of Appeals held in *Brown*, however, that post-trial statements to the media generally do not qualify.

***The Exceptions.*** *Mantia* deals at length with exceptions and recognizes two principal ones. First, the privilege does not immunize litigants against subsequent claims for wrongful initiation of civil proceedings. Wrongful initiation claims occur when the original case ends in the defendant’s favor and was “initiated without probable cause and for an improper purpose.” 190 Or App at 419, quoting comment a to Restatement § 587. Second, the privilege does not apply to tortious interference claims that involve unfounded litigation when: “(1) the plaintiff in the antecedent proceedings lacked probable cause to prosecute those proceedings; (2) the primary purpose of those proceedings was something other than to secure adjudication of the claims asserted there; and (3) the antecedent proceedings were terminated in favor of the party now asserting the tortious interference claim.” 190 Or App at 429.

***Summing Up.*** The litigation privilege doesn’t excuse lawyers from their duties of candor toward courts or honesty in general. But, if you genuinely need to call someone a liar, a cheat, incompetent or worse in the course of a case, the litigation privilege gives you the freedom to do that without fear of later facing a defamation claim.

## **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege

matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.