

WSBA NWSidebar
Posted: July 18, 2023

Court of Appeals Issues Rare Decision on Litigation Privilege

By Mark J. Fucile
Fucile & Reising LLP

In late June, Division I of the Washington Court of Appeals issued a comparatively rare decision on the “litigation privilege.” As the Court described it in *Young v. Rayan*, ___ Wn. App.2d ___, ___ P.3d ___, 2023 WL 4171003 (June 26, 2023):

The litigation privilege immunizes participants in legal proceedings from civil liability based on statements they make during litigation. Litigants often strongly and passionately express their position over the course of a case. The privilege exists to encourage frank and open testimony and argument despite this turbulent emotional atmosphere. It protects participants from retaliatory, derivative lawsuits—regardless of the merit of those suits—instead relying on checks by the trial court such as sanctions to address false testimony.

Young involved a lawsuit by an attorney against a law firm over allegedly defamatory statements made about the attorney by a law firm lawyer and a staff person in declarations provided in probate litigation in which they were witnesses. The trial court in *Young* dismissed the attorney’s claims on summary judgment based on the litigation privilege. The Court of Appeals affirmed.

The Court of Appeals’ decision provides a useful summary of Washington law in an area that, ironically, protects lawyers on daily basis in a wide variety of litigation but doesn’t typically get much notice.

Young is also noteworthy in two other respects.

First, in addition to discussing the litigation privilege in the context of defamation, the Court of Appeals also applied the doctrine to dispose of related claims of false light and civil conspiracy. The discussion of false light mirrored the Court's conclusions on defamation analytically. The Court found that the civil conspiracy claim in this instance was tethered conceptually to the defamation claim because it effectively alleged that the law firm employees had conspired through their allegedly defamatory testimony.

Second, the Court noted that Division II of the Court of Appeals had included a gloss on the privilege that it should only apply when public policy considerations support its use. The attorney in *Young* attempted to argue that this essentially created an exception to applying the privilege in his case. Division I, however, declined to read the privilege as including a public policy requirement.

Note: On July 24, the Court of Appeals issued a revised opinion correcting some of the underlying facts recounted in its original opinion. The revised opinion, however, did not alter either the outcome or the legal analysis. The July 24 revised opinion is available on the Washington Courts' website and is the version that will eventually be published.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.