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# DEFAMATION LIABILITY FOR ATTORNEY SPEECH: A POLICY-BASED AND CIVILITY-ORIENTED RECONSIDERATION OF THE ABSOLUTE PRIVILEGE FOR ATTORNEYS

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## INTRODUCTION

> Ninety years ago, distinguished legal scholar Van Vechten Veeder noted that the difficulty with a bundle of legal rules like those of the tort of defamation is that "the longer they have existed the greater is the presumption that they have some utility."[1] The time has come to reevaluate the utility of the absolute privilege from defamation liability courts have granted, historically, to lawyers.

Defamation as a tort or crime has existed since before the Norman conquest.[2] During much of that expanse of time attorneys have enjoyed an absolute privilege from defamation liability. Attorneys in the United States and in England have represented clients and engaged in such speech as required for the representation of clients relatively unfettered by defamation claims against them. Courts have shielded attorneys from such actions by applying an absolute privilege to a broadly defined category of attorney speech, regardless of the motivation or truth of the attorney speech or the reputational or other injury to the subjects of that speech. Courts have justified the protection of

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1. Van Vechten Veeder, *The History and Theory of the Law of Defamation (I)*, 3 COLUM. L. REV. 546 (1903).

2. Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1052 (1962); *see* discussion *infra* part I.A.

attorneys with the rationale that attorneys need immunity to fulfill their role in the judicial process. Courts have reasoned that without this protection the threat of defamation liability would chill attorney speech and, as a result, clients would receive less effective representation. Consequently, the potential for attorney liability would thwart the ultimate quest for justice.[3]

While this rationale could justify applying the privilege to all representational speech, the courts have not acted so expansively. Rather, courts have restricted the absolute privilege for attorney speech in two manners. First, courts have allowed the privilege to apply only to attorney speech within the procedural penumbra of a judicial or quasi-judicial proceeding. Thus, courts protect attorney speech that occurs in the courtroom or hearing room or elsewhere if it is a part of, in anticipation of, or preliminary to a judicial proceeding or related to the proceeding in a procedural sense. This requirement sometimes appears to be no more than a rule that the speech be temporally tangent to a proceeding—that at the time of the speech a judicial proceeding is in progress or is anticipated.[4]

Second, the attorney speech must fall within a substantive penumbra to enjoy the privilege. In the United States, courts uniformly state that attorney speech must relate to the subject matter of the proceeding in some loose sense. Yet, courts so liberally define the parameters of the penumbra of substantive relevance that the penumbra can encompass any possible comment by an attorney.[5]

While a broad absolute privilege for attorneys may have been appropriate historically, the legal community must reconsider the privilege and its application by the courts in light of the reality of the environment in which attorneys practice law on the verge of the twenty-first century. A careful review of the hypotheses supporting the broadly interpreted absolute privilege yields the conclusion that though attorneys require protection of some sort,

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3. *See* Munster v. Lamb, 11 Q.B.D. 588 (C.A. 1883); *see also* Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463 (1909); discussion *infra* part III.

4. *See* discussion *infra* part IV.A.

5. *See* discussion *infra* part IV.B. "[A]s a practical matter the American Rule is so broadly applied that it may be stated that in effect American courts have all but adopted the English Rule." RODNEY A. SMOLLA, THE LAW OF DEFAMATION § 8.03[2][b] (1992). The "American Rule" is the substantive relevance requirement. *Id.* The "English Rule" requires no relevance whatsoever. *Id.; see* discussion *infra* part IV.B.1.

the quest for the truth and ultimately for justice may not require a broad privilege. Indeed, a secondary benefit of a more civil Bar may result from a more circumscribed privilege for attorney speech. In addition, a more limited privilege should avoid needless reputational injury to others, an interest that perhaps has received less than appropriate consideration in the past. The cost-benefit calculus outcome for a restricted attorney speech privilege perhaps exceeds the cost-benefit calculus result for a broadly interpreted and applied privilege for attorney speech.

Several facets of the practice of law today counsel in favor of a narrower privilege for attorneys. The ethos regarding attorney speech has changed drastically over the years. Whereas in the past attorneys rarely spoke publicly or advertised, they now speak in a variety of settings not used in the past. Lawyers advertise and hold press conferences, for example. The legal and ethical standards governing attorney speech have become more liberal as has the general acceptance by the legal profession of attorney speech in various contexts. As a consequence, a greater quantity and a broader variety of speech presents itself to courts and perhaps tempts those courts to apply absolute privilege protection on the basis that the speech is somehow representational and therefore the threat of defamation liability must not chill it. This analysis could apply to a press conference in which a defense attorney sets out the basic defense the client will pursue.[6]

In addition, commentators have lamented that attorneys have become more loose-lipped and less deferential in their dealings with others even within the traditional representational confines of accepted attorney speech. Many commentators have written about a decline of civility among attorneys and in the courts and have lamented that attorneys have lost a sense of decorum sometimes described as professionalism.[7]

Courts can prune the privilege for attorney speech in several ways. First, courts can retain an absolute privilege, but apply that privilege in a narrower manner than courts have applied it

6. *See* Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2617 (1993) (discussing in the context of a 42 U.S.C. § 1983 action, the absence, historically, of a privilege for press conferences by attorneys). See also *infra* notes 52-63 and accompanying text for a discussion of the change in incidence of speech for attorneys.

7. *See infra* notes 64-86 and accompanying text (discussing the loss of civility).

in the past. Both the procedural and substantive penumbras must have a narrower scope.

Attorney speech should enjoy the privilege only when connected procedurally to a true judicial proceeding. The proceeding should be one historically recognized by courts as a judicial proceeding with the elements traditionally appearing in a judicial proceeding. Also, the speech must be a regular and recognized part of the judicial proceeding process. The speech should tie functionally to the judicial proceeding, not simply exist tangent to the proceeding. A stricter requirement such as this would discourage overbroad use of the privilege in settings not accompanied by other speech safeguards.

Attorney speech should enjoy an absolute privilege only if it indeed relates in a meaningful sense to the subject matter of the representation. It must be representational speech—speech made in a historically recognized advocate's role. Such a standard would eliminate protection from defamation liability, for example, for *ad hominem* attacks on opposing counsel. Erasing the impenetrable privilege for such comments may assist in combatting the emerging lack of civility among attorneys. A relevance standard with some meaning should deny the absolute protection for much of the attorney speech that seems uncivil. The possibility of defamation liability may encourage more carefully managed attorney tongues. Such a standard does no real violence to the privilege's historical rationale of assisting the attorney in representing the client so as to obtain justice. Rather, the rationale supports a meaningful relevance requirement and the narrow substantive penumbra the relevance requirement creates. Verbal attacks on opposing counsel, the type of speech exemplary of speech outside the protection of the newly defined privilege, assists in representing a client only in an oblique, posturing manner. Perhaps courts should not legitimize that sort of representation tactic.

As an alternative method of limiting the privilege, courts can allow attorneys to enjoy a qualified privilege for their speech. An attorney would forfeit the privilege, as is true with other qualified privileges, if the attorney spoke knowing that the statement was false or if the attorney acted recklessly with regard to the falsity of the statement. The qualified privilege approach may be less useful, however, because it may prevent

dismissal of defamation claims against attorneys short of trial.[8]

Part I of this article discusses the cause of action for defamation. Part II discusses the context of attorney speech in the 1990s. Part III explains the privilege and examines the assumptions underlying it. Part IV reviews the application of the privilege by the courts and suggests improvements. Part V discusses the alternative of a qualified privilege. The conclusion proposes that a stricter view of the existing privilege or a reformulation of the privilege as qualified may optimize the benefit to society.

## I. A CAUSE OF ACTION FOR DEFAMATION

### A. *The Common Law*

An attorney has potential liability for defamation when the attorney injures the reputation of another by false[9] written or spoken words heard by a third party.[10] Written defamation has been termed libel; spoken defamation is slander.[11]

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8. *See* discussion *infra* part V.

9. Historically, truth has been an affirmative defense which the defendant must prove. LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION § 6, at 26 (1978); Roy Robert Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 51 (1931); *see, e.g.*, Atwater v. Morning News Co., 34 A. 865 (Conn. 1896). The burden regarding truth or falsity has shifted in recent times as a result of constitutional imperatives. *See* Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353 (1975); Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 851 (1984); Linda Kalm, Note, *The Burden of Proving Truth or Falsity in Defamation: Setting a Standard for Cases Involving Nonmedia Defendants*, 62 N.Y.U. L. REV. 812 (1987). In certain circumstances the United States Constitution requires the plaintiff to prove falsity. *See* Milkovich v. Lorain Journal Co., 491 U.S. 1, 19-20 n.6 (1990) (noting under *Hepps* public figure plaintiff has burden regarding falsity under the *New York Times v. Sullivan* standard); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986) (holding private figure plaintiffs like public figure plaintiffs have the burden of proof regarding falsity of claim against media defendant).

10. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 111, at 771, § 113, at 797 (5th ed. 1984) [hereinafter PROSSER & KEETON]. For discussions of the historical background of defamation actions, see Frank Carr, *The English Law of Defamation* (pts. 1-2), 18 LAW Q. REV. 255, 388 (1902); Eaton, *supra* note 9; W.S. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries* (pt. I), 40 LAW Q. REV. 302 (1924); Lovell, *supra* note 2; Van Vechten Veeder, *The History and Theory of the Law of Defamation* (I & II), 3 COLUM. L. REV. 546 (1903) [hereinafter Veeder I], 4 COLUM. L. REV. 33 (1904) [hereinafter Veeder II]. Courts did not always embrace the tort lovingly. *See* Stanley Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 791 (1979).

11. ELDREDGE, *supra* note 9, § 12, at 77-81. Historically, libel was the more serious

Many courts have attempted to explain the notion of an injury to reputation, each using slightly different language. Generally all agree that speech which tends to "diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against" an individual can support a defamation action.[12] The *Restatement (Second) of Torts* section 559 provides that any statement which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" defames that person.[13] An action for defamation exists, in large part, to

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tort because courts presumed that written statements could reach larger audiences, exhibited a greater degree of thought and planning by the defendant, and inflicted greater injury on the plaintiff's reputation. SMOLLA, *supra* note 5, at § 1.04[3]. Because other forms of speech now present substantial dangers to reputation even when no writing exists, the RESTATEMENT (SECOND) OF TORTS § 568(1) (1977) defines libel as any "form of communication that has the potentially harmful qualities characteristic of written or printed words." RESTATEMENT (SECOND) OF TORTS § 568(1) (1977). Section 568(2) of the *Restatement* defines slander as "publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those [within the category of libel]." *Id.* § 568(2). Section 568(3) states that "the area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation" are factors to consider when categorizing libel. *Id.* § 568(3). See Note, *Developments in the Law—Defamation*, 69 HARV. L. REV. 875 (1956) [hereinafter *Developments*], for a general but succinct discussion of common-law defamation principles.

12. PROSSER & KEETON, *supra* note 10, § 111, at 773. The right to protect reputation "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); *see also* Kimmerle v. New York Evening Journal, Inc., 186 N.E. 217, 218 (N.Y. 1933). Defamatory speech "tend[s] to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." *Id.* For a good discussion of the value of reputation, see David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 776 (1984) ("Reputation is something we have all been taught to cherish, like honor and patriotism. Respect for its value is passed down to each generation by oracles of our culture.").

13. RESTATEMENT (SECOND) OF TORTS § 559 (1977). Defamation protects relational interests. *See* Leon Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936).

14. As Laurence Eldredge has stated: "One who believes that he appears to be ridiculous in the eyes of his fellow men can suffer an agony of emotional distress which may be more painful, and far more lasting, than the pain from the severed nerves of a torn-off arm." ELDREDGE, *supra* note 9, § 4, at 11; *see also* Hayes v. Todd, 15 So. 752, 755 (Fla. 1894) (Defamation "destroy[s] [one's name] which money cannot buy, and that which, when lost, the powers of earth cannot restore."). Other purposes include compensation for harm and deterrence. ELDREDGE, *supra* note 9, § 3, at 5-6; *see* RESTATEMENT (SECOND) OF TORTS § 623 Special Note (1977) (purposes of

vindicate the blemish on the maligned individual's reputation.[14] Courts have found all manner of comments actionable.[15]

Because plaintiffs find proving pecuniary injury from reputational attack difficult, if not impossible, courts have presumed the injury and therefore the damages with certain types of defamation.[16] The majority of courts hold that the plaintiff need not prove pecuniary damages, sometimes called special damages, with what the law refers to as libel per se and slander per se.[17] Slander per se includes spoken words that accuse the individual of a crime involving moral turpitude, loathsome disease, unchastity, or incompetency or improper conduct of business or trade.[18] Originally, all libel actions required no proof of special damages; however, gradually only libel per se, libel defamatory on its face, escaped the special damage requirement.[19]

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the tort include compensation, vindication, and punishment); Ingber, *supra* note 10, at 791-92 (discussing purposes of torts in general and defamation in particular). One commentator has analyzed defamation cases and determined that courts have attempted to protect reputation as property, as honor, and as dignity. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693-719 (1986); *see also* Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743 (1986). Early in the twentieth century, Van Vechten Veeder distinguished reputation, protected from defamation, from character, which society cannot protect. *See* Veeder II, *supra* note 10, at 33-34.

15. *See, e.g.*, Sheppard v. Dun & Bradstreet, Inc., 71 F. Supp. 942 (S.D.N.Y. 1947) (nonpayment of debt); Gersten v. Newark Morning Ledger Co., 145 A.2d 56 (N.J. Super. Law Div. 1958) (divorce eminent); see also cases discussed and cited in PROSSER & KEETON, *supra* note 10, § 111, at 775-76. *See generally* SMOLLA, *supra* note 5, ch. 4.

16. *See* Anderson, *supra* note 12; Eaton, *supra* note 9, at 1357; Veeder, *supra* note 14. "[E]xperience teaches . . . damage to reputation is recurringly difficult to prove and that requiring actual proof would repeatedly destroy any chance for adequate compensation." Gertz v. Robert Welch, Inc., 418 U.S. 323, 394 (1974) (White, J., dissenting).

17. SMOLLA, *supra* note 5, § 1.04[5], ch. 7; *see* RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977) ("Special harm . . . is the loss of something having economic or pecuniary value."). Sections 569 and 570 clarify that the *Restatement* requires no proof of special damage for libel or slander per se. RESTATEMENT (SECOND) OF TORTS §§ 569, 570 (1977).

18. PROSSER & KEETON, *supra* note 10, § 112, at 788-93; *see, e.g.*, Brown & Williamson Tobacco Corp. v. Jacobson & CBS, Inc., 713 F.2d 262 (7th Cir. 1983) (discredit in business: advertising to induce children to smoke); Sweeney v. Sengstacke Enter., Inc., 536 N.E.2d 823, 825 (Ill. App. Ct. 1989) (crime: conspiracy to kill); Agnew v. Hiatt, 466 N.E.2d 781 (Ind. Ct. App. 1984) (crime: stealing); Gnapinsky v. Goldyn, 128 A.2d 697 (N.J. 1957) (unchastity: has child by man not her husband); Dietrich v. Hauser, 257 N.Y.S.2d 716 (Sup. Ct. 1965) (competency in occupation: cheat and fraud); *see also* RESTATEMENT (SECOND) OF TORTS §§ 571 (crime), 572 (disease), 573 (business), 574 (unchastity) (1977).

19. SMOLLA, *supra* note 5, §§ 1.04[5], 7.06; Eaton, *supra* note 9, at 1354-55; *see*

Traditionally, courts treated defamation as a strict liability tort.[20] To temper the harsh nature of such an application of the tort, the common law recognized both absolute and qualified privileges. Courts recognized absolute privileges for participants in judicial proceedings,[21] for participants in legislative proceedings,[22] and for executive and administrative officials,[23] for example. Conditional or qualified privileges have existed in a variety of settings and evaporate upon a showing of malice.[24]

### *B. Constitutional Limitations*

The First Amendment to the United States Constitution has protected freedom of speech and the press always,[25] but until 1964 and the case of *New York Times Co. v. Sullivan*,[26] the First Amendment did not impinge in any way on the constraint on speech imposed by the tort of defamation.[27] Beginning with

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*also* RESTATEMENT (SECOND) OF TORTS § 569 cmt. b (1977) ("Some courts have taken the position that a libelous publication is actionable per se only if its defamatory meaning is apparent on its face and without reference to extrinsic facts.").

20. ELDREDGE, *supra* note 9, § 5, at 15; *see* Peck v. Tribune Co., 214 U.S. 185, 189 (1909) (quoting Lord Mansfield in Rex v. Woodfall, 98 Eng. Rep. 914, 916 (1774) ("Whatever a man publishes, he publishes at his peril.")). Keeton suggests that the fact that courts applied strict liability illustrates the value society has placed on reputation in England and America. W. Page Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1222 (1976).

21. *See* discussion *infra* part III. and IV.; *see also* RESTATEMENT (SECOND) OF TORTS §§ 585 (judicial officers), 586 (attorneys), 587 (parties to judicial proceedings), 588 (witnesses), 589 (jurors) (1977); PROSSER & KEETON, *supra* note 10, § 114, at 816-20; SMOLLA, *supra* note 5, § 8.03.

22. *See* PROSSER & KEETON, *supra* note 10, § 114, at 820-21; Oliver P. Field, *The Constitutional Privileges of Legislators*, 9 MINN. L. REV. 442 (1925); Leon R. Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960 (1951); *see also* RESTATEMENT (SECOND) OF TORTS §§ 590, (legislators), 590A (witnesses) (1977).

23. *See* PROSSER & KEETON, *supra* note 10, § 114, at 821-23; Arno C. Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127 (1962); Joel F. Handler & William A. Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44 (1960); *see also* RESTATEMENT (SECOND) OF TORTS § 591 (1977).

24. *See* SMOLLA, *supra* note 5, §§ 8.07-.10; RESTATEMENT (SECOND) OF TORTS §§ 593-612 (1977). One of the often invoked privileges is that for communication when a common interest exists between the parties. Section 596 of the *Restatement* contains an exposition of this privilege. *Id.* § 596; *see also* discussion *infra* part V.

25. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

26. 376 U.S. 254 (1964).

27. The following statement from Chaplinsky v. New Hampshire, 315 U.S. 568

*New York Times*, the Supreme Court has recognized that the Constitution mandates some control on defamation actions to protect the free exchange of ideas and information requisite to democratic self-governance and intellectual development, even though the controls mean less protection for individual reputations.[28]

The Supreme Court in the *New York Times* case limited the tort of defamation by stating that public official plaintiffs[29] must prove that the allegedly defamatory statement was made with actual malice. The Court defined actual malice as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not."[30] The Court stated that the freedom of expression needed "breathing space" regarding the truth of a statement or else self-censorship contrary to the interests of the community would occur.[31] The Court focused on the fact that the right to criticize government officials was a basic precept of the First Amendment and the American form of government.[32] In several later cases, the

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(1942), presents the historical view that the First Amendment and the tort of defamation do not interact:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, *the libelous*, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

*Id.* at 571-72 (emphasis added); *see also* Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946).

28. *See* Ingber, *supra* note 10, at 792-94 (discussing rationales for the First Amendment). Ingber refers to the balancing of First Amendment interests and defamation interests as the balancing of reason and individual decency respectively. *Id.* at 788-89. *See generally* Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 S. CT. REV. 191; Paul A. LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 NEB. L. REV. 249 (1987); Joan E. Schaffner, Note, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 S. CAL. L. REV. 433 (1990).

29. In *New York Times*, the plaintiff, an elected city commissioner with the title of Commissioner of Public Affairs, sued the Times and others on the basis of an allegedly defamatory advertisement setting forth facts about civil rights demonstrations in Alabama. New York Times Co. v. Sullivan, 376 U.S. 254, 258-59 (1964).

30. *Id.* at 279-80.

31. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

32. 376 U.S. at 269-79. For a critical discussion of *New York Times*, see Kalven, *supra* note 28; Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603

Supreme Court expanded the actual malice standard to apply to public figure plaintiffs as well as to public official plaintiffs.[33]

While affirming the actual malice standard for public figure and public official plaintiffs, the Supreme Court in *Gertz v. Robert Welch, Inc.*[34] stated that any standard of liability for private figures would satisfy the Constitution as long as that standard did not impose liability without fault. Thus, the states, in fashioning the tort of defamation and applying it, must require at least proof of negligence before a court can impose liability constitutionally.[35] The Court justified the difference in treatment of public and private figures by noting that public figures have access to the media themselves and thus can fight the untruths with truth.[36] Also, public figures assume the risk of defamatory statements to an extent.[37]

The Court stated that even in a private plaintiff situation actual malice must accompany any sort of presumed or punitive damages.[38] If a plaintiff does not prove actual malice, that plaintiff can only recover damages for provable actual injury.[39] Actual injury includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[40]

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(1983).

33. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) (affirming the actual malice standard regarding public figures); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (public figure); *see also* Gerald G. Ashdown, *Of Public Figures and Public Interest—The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937 (1984); Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984).

34. 418 U.S. 323 (1974). *Gertz* involved a private citizen mentioned in connection with communist activities in a magazine article. *Id.* at 325-26. For a discussion of *Gertz*, see Eaton, *supra* note 9, at 1408-48; *see also* LeBel, *supra* note 28, at 264-76; Douglas R. Matthews, Comment, *American Defamation Law: From* Sullivan *Through* Greenmoss *and Beyond*, 48 OHIO ST. L.J. 513, 518-19 (1987).

35. 418 U.S. at 347.

36. *Id.* at 344.

37. *Id.* at 344-45; *see* Wolston v. Readers' Digest Ass'n, 443 U.S. 157, 164 (1979). *But see* Schaffner, *supra* note 28, at 464-65 (attacking these justifications as insubstantial).

38. 418 U.S. at 348-49.

39. *Id.*

40. *Id.* at 350; *see also* Michael T. Mather, *Experience with* Gertz: *"Actual Injury" in Defamation Cases*, 38 BAYLOR L. REV. 917 (1987).

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[41] Justice Powell, in a plurality opinion, explained that the actual malice and other proof requirements for damages set out by *Gertz* apply only to statements which involve "matters of public concern."[42] Justice Powell surmised that when the issue is not one of public concern, the First Amendment issues do not compel restraint of defamation and the state interest in protecting reputations and compensating for injury to reputations looms larger.[43] A credit report issued to only five subscribers was "solely in the individual interest of the speaker and its specific business audience" and so did not concern the public.[44]

In *Dun & Bradstreet*, the Court reviewed instructions to the trial jury regarding proof of damages. The Court did not clarify whether the statement in *Gertz* that states must require at least a showing of negligence to impose liability was a requirement for all speech or only for speech involving public concerns. Even if a constitutional negligence requirement applies only to speech which is of public concern,[45] states may require a negligence standard of liability and many do.[46]

In *Philadelphia Newspapers, Inc. v. Hepps*,[47] the Court again

41. 472 U.S. 749 (1985). Dun & Bradstreet sent a credit report to five subscribers which stated that the plaintiff business had filed for voluntary bankruptcy. *Id.* The plaintiff had not so filed. *Id.* at 751-52.

42. *Id.* at 760-61.

43. *Id.* at 757-61.

44. *Id.* at 762.

45. Justice Powell, in an opinion joined by Justices Rehnquist and O'Connor, did not address the negligence requirement. *Id.* at 749-63. Justice White, concurring in the judgment, believed that the fault rules applied only to public affairs. *Id.* at 770. Chief Justice Burger, concurring in the judgment, espoused overruling *Gertz* entirely. *Id.* at 763-64. The dissenters supported a negligence threshold. *Id.* at 775-76 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens). *See generally* LeBel, *supra* note 28, at 267 n.87; Rodney A. Smolla, Dun & Bradstreet, Hepps *and* Liberty Lobby*: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1545-48 (1987); Matthews, *supra* note 34, at 523-24.

46. SMOLLA, *supra* note 5, at § 3.10 (noting that thirty-seven states and the District of Columbia require negligence). Many courts apply a traditional ordinary reasonable person analysis. *See, e.g.*, McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978). *But see* RESTATEMENT (SECOND) OF TORTS § 580B cmt. g (1977) (adopting a professional malpractice approach to negligence). Many commentators argue in favor of a fault requirement as the appropriate means to striking a balance. *See* Smolla, *supra* note 45, at 1548-61; Schaffner, *supra* note 28, at 465-78.

47. 475 U.S. 767 (1986). In *Hepps*, the newspaper indicated that the plaintiffs had links to organized crime and had exploited those links to influence the legislative and

significantly altered the common-law approach to defamation by holding that public figure plaintiffs and private plaintiffs complaining of speech involving public concerns must bear the burden of proving that the allegedly offending statements are false.[48] Also, the Court indicated that it had not concluded decisively that the same rules applied to both nonmedia defendants and media defendants.[49] Language in earlier cases had seemed to indicate that the status of the defendant was immaterial.[50] No new standard based on the identity of the

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governmental processes. *Id.* at 769-71. The Court recognized the plaintiffs as private figures, the defendants as media, and the matter as public. *Id.* at 769-70.

48. *Id.* at 776-77; *see also* Milkovich v. Lorain Journal Co., 491 U.S. 1, 20 n.6 (1990) (clarifying and affirming that public official and public figure plaintiffs have the burden of proof regarding falsity under the *New York Times* rule).

49. 475 U.S. at 779 n.4; *see also Milkovich*, 497 U.S. at 19-20 n.6 ("In *Hepps* the Court reserved judgment on cases involving nonmedia defendants . . . and accordingly we do the same."). *See generally* Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order From Confusion in Defamation Law*, 49 U. PITT. L. REV. 91 (1987); LeBel, *supra* note 28, at 280-82; Smolla, *supra* note 45, at 1564; Kalm, *supra* note 9; Katherine W. Pownell, Comment, *Defamation and the Nonmedia Speaker*, 4 FED. COMM. L.J. 195 (1989); Note, Philadelphia Newspapers, Inc. v. Hepps *Revisited: A Critical Approach to Different Standards of Protection for Media and Nonmedia Defendants in Private Plaintiff Defamation Cases*, 58 GEO. WASH. L. REV. 1268 (1990).

50. In *Dun & Bradstreet*, Justice Powell, in an opinion joined by two other justices, noted that the *Gertz* constitutional speech protections "were not 'justified solely by reference to the interest of the press and broadcast media in immunity from liability.' " Dun & Bradstreet Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974)). Justice White in a concurrence in *Dun & Bradstreet* stated:

> Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants. On that issue, I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech.

472 U.S. at 773. Justice Brennan, joined by three other justices in *Dun & Bradstreet*, explicitly rejected such a dichotomy, stating "the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Id.* at 784. These statements by the Justices are especially compelling in light of the Vermont Supreme Court opinion then under consideration. *See* Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 461 A.2d 414 (Vt. 1983). The Vermont court drew a clear distinction between treatment of media and nonmedia defendants. *Id.* at 417; *see also* Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359 (Or. 1977). In distinguishing speech by nonmedia defendants, the Oregon Supreme Court stated: "There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Id.* at 1363.

defendant developed, however, because in *Hepps* the defendant was clearly a media defendant.[51]

Absent an absolute privilege, these constitutional parameters might constrain the tort of defamation in many cases of attorney speech. The common-law absolute privilege, however, steps in and goes even farther than the Constitution requires to protect speech at the expense of individual reputation. The generally loose application of the privilege by modern day courts may very well go too far in protecting attorney speech.

## II. THE CONTEXT OF ATTORNEY SPEECH TODAY

Before analyzing the common-law absolute privilege for attorneys, a consideration of the context of the speech to which the privilege applies is imperative. Attorney speech of today probably differs greatly from the attorney speech that courts of England and the United States considered when those courts thought about how, when, and why attorneys speak and whether attorney speech deserved the protection of an absolute privilege.[52] Attorneys, by definition, have spoken in courtrooms and in hearings and in documents filed with the courts. Perhaps now more than ever, however, attorneys speak in other settings. Within the last twenty years, the United States Supreme Court has opened the door for lawyer advertising and lawyers of all pedigrees have rushed through that door.[53] Advertising is now ethical as well as legal.[54]

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51. *Hepps*, 475 U.S. at 777. *See generally* Smolla, *supra* note 45, at 1525-31.

52. *See* SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR (1993); LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985); *see also* JOHN H. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982). *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 1.3 (1986) (discussing briefly the history of the legal profession and citing to numerous sources discussing the history of law practice). For a discussion of some of the changes within the Bar, see Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 408 (1992).

53. *See* Peel v. Attorney Registration & Discipline Comm'n, 495 U.S. 91 (1990); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Couns., 471 U.S. 626 (1985); *In re* R.M.J., 455 U.S. 191 (1982); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); *see also* Linda Sorenson Ewald, *Content Regulation of Lawyer Advertising: An Era of Change*, 3 GEO. J. LEGAL ETHICS 429 (1990); John. G. Balzer, Note, *Attorney Advertising: Who's Really Afraid of the Big Bad Lawyer?*, 22 NEW ENG. L. REV. 727 (1988).

54. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.1-7.5 (1992).

Accompanying the change in the perception and practice of attorney advertising, attorneys are apparently more comfortable talking to the press and seem to be becoming more adept and willing to use publicity to their own or their clients' advantage. The case of *Gentile v. State Bar of Nevada*[55] presents an example of one of the new forms attorney speech takes. Gentile, an attorney, represented a defendant indicted for theft of cocaine and traveler's checks.[56] Gentile's client owned the storage facility where the police had secured the cocaine and traveler's checks as part of a police undercover operation.[57] During the investigation of the theft, a series of press reports detailed that the investigators suspected Gentile's client but not the police officers who had access to the vault.[58] Immediately after the indictment of his client, attorney Gentile held a press conference to point out weaknesses in the case against his client.[59]

Unfortunately, the Nevada State Bar reprimanded Gentile for making statements violative of the state regulation on pretrial publicity.[60] The United States Supreme Court reviewed the matter, holding that the Nevada ethics rule regarding pretrial publicity by an attorney was void for vagueness.[61] The Court held, however, that states may constitutionally regulate attorney speech by a test that punishes speech that an attorney knew or should have known would have "substantial likelihood of materially prejudicing" an adjudicative proceeding.[62] Though the

55. 111 S. Ct. 2720 (1991).
56. *Id.* at 2723, 2727.
57. *Id.* at 2727.
58. *Id.* at 2727-28.
59. *Id.* at 2728-29.
60. *Id.* at 2723.
61. *Id.* at 2731.
62. *Id.* at 2738. Nevada patterned the rule in question after Rule 3.6 of the Model Rules of Professional Conduct. For a pre-*Gentile* discussion of the rule, see Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003 (1984); Patricia A. Sallen, Comment, *Gag Me with a Rule—Arizona Rules of Professional Conduct Rule 3.6*, 19 ARIZ. ST. L.J. 115 (1986). For discussions of the *Gentile* opinion and its implications, see Joel H. Swift, *Discriminatory Regulation of Trial Publicity: A Caveat for the Bar*, 12 N. ILL. L. REV. 399 (1992); Kelly Ann Hardy, Comment, *Order in the Courtroom, Silence on the Courthouse Steps: Attorneys Muzzled by Ethical Disciplinary Rules*, 22 SETON HALL L. REV. 1401 (1992); Michael W. McTigue, Jr., Comment, *Court Got Your Tongue? Limitations on Attorney Speech in the Name of Federalism:* Gentile v. State Bar, 72 B.U. L. REV. 657 (1992); Lester Porter, Jr., Comment, *Leaving Your Speech Rights at the Bar*—Gentile v. State Bar, 111 S. Ct. 2720 (1991), 67 WASH. L. REV. 733 (1992). Rule 3.6 is in the process of being revised.

*Gentile* opinion clarifies that states can constrain attorney speech in the pretrial publicity setting, the opinion also makes clear that the legal profession and society in general accept the type of speech occurring in *Gentile* as appropriate if the speech stays within the appropriate regulatory constraints. As Gentile did, many attorneys now use the media to assist the representation of the client.[63]

Not only the occasion for attorney speech has changed. On the whole, what attorneys say and how they say it has become decidedly less civil. Numerous commentators have lamented the lack of lawyer civility and the swell of "Rambo" lawyering.[64] Many link the incidence of "Rambo" lawyering to a decline of professionalism.[65] For example, in *Chevron Chemical Co. v. DeLoitte & Touche*,[66] the Supreme Court of Wisconsin, in affirming a lower court exercise of inherent authority to punish outrageous attorney behavior, stated: "There is a perception both inside and outside the legal community that civility, candor, and professionalism are on the decline in the legal profession and

63. See, for example, Barto v. Felix, 378 A.2d 927 (Pa. Super. Ct. 1977), in which a public defender held a press conference and discussed the brief he had filed on behalf of his client. The brief, and therefore the press conference, contained defamatory statements about the investigating police officers. *Id.* at 928; *see also* Green Acres Trust v. London, 688 P.2d 617 (Ariz. 1984) (member of the press present when complaint presented to client); Andrews v. Elliot, 426 S.E.2d 430 (N.C. Ct. App. 1993) (allegations sent to newspaper). *See generally* Andrew Blum, *Left Speechless*, NAT'L L.J., Jan. 18, 1993, at 1 (discussing criminal defense bar use of media).

64. *See* Brian M. Barkey, *Civility in Defense Practice*, 69 MICH. BAR J. 912 (1990); Chief Justice Harry L. Carrico, *Adhering to a Different Honor: The Necessity for a Return to Professionalism in the Practice of Law*, 39 FED. BAR NEWS & J. 321 (1992); Michael H. Dettmer, *Observations on Professionalism*, 68 MICH. BAR J. 842 (1989); Lawrence A. Dubin, *Civility Among Lawyers: A Video Self-Examination*, 69 MICH. BAR J. 884 (1990); Michael Franck, *We Have Met the Enemy and He is Us*, 69 MICH. BAR J. 880 (1990); Douglas W. Hillman, *Professionalism—A Plea for Action!*, 69 MICH. BAR J. 894 (1990); Steven Lubet, *Civility: A Tale of Deconstruction and Constraint*, 1992 WISC. L. REV. 157 (short story); Judge Helen Wilson Nies, *Rambo Lawyering: The Need for Civility in Civil Litigation*, IDEA J.L. & TECH. 1 (1991); Judge Roland L. Olzark, *If it Please the Court*, 69 MICH. BAR J. 834 (1989); Judge Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990); Joseph F. Regnier, *Bench/Bar Tension Brings Complaints*, 68 MICH. BAR J. 838 (1989); Robert N. Salyer, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J. 78 (Mar. 1, 1988); Judge Gene Schnelz, *"If the Shoe Fits . . ."*, 68 MICH. BAR J. 830 (1989) (spoof); *see also* Steven Lubet, *"Professionalism" Revisited*, 42 EMORY L.J. 198-99 (1993) (discussing briefly the civility crisis).

65. *See* Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX. TECH L. REV. 955, 957 (1992) ("To me, professionalism is synonymous with common courtesy, civility and the Golden Rule.").

66. 501 N.W.2d 15 (Wis. 1993).

that unethical, win-at-all-costs, scorched-earth tactics are on the rise."[67] The trial court granted a judgment notwithstanding the verdict against the offending attorney's client.[68] Commentators, many of whom are practitioners or judges, suggest that the pressure of the marketplace[69] and the fear of malpractice suits[70] have contributed to a legal environment in which attorneys do not trust each other; harass each other by being difficult on every point, including scheduling; use excessive discovery;[71] and attack opposing counsel's character or a witness' character if winning, in the attorney's view, may be more likely with such action.

Examples of the opprobrious manner in which attorneys deal with each other abound. In *Sussman v. Damian*,[72] the Florida Court of Appeals tells an appalling tale. Two attorneys representing opposing parties in a lawsuit argued at a deposition about whether one of the attorneys had produced certain documents requested by the other attorney. One of the attorneys allegedly called the other a "damned liar."[73] At a subsequent hearing, the presiding judge chastised the lawyers and told them to behave.[74] As the attorneys left the hearing and the courthouse, they argued, with the earlier-maligned attorney attacking the professional integrity of the other attorney by making statements about the attorney's dealings with client money and trust accounts.[75] Finally the attorneys sued each other for defamation. The court reviewing the matter referred to the attorneys' conduct as "inexcusable, intemperate and unprofessional."[76]

In *Arneja v. Gildar*,[77] an attorney sued another attorney for comments made just prior to a hearing on a matter in which both attorneys represented clients. The offending attorney allegedly stated: "You're unnecessarily pursuing this case. You don't

67. *Id.* at 19-20.
68. *Id.* at 18-19.
69. Cook, *supra* note 65, at 961-69; Dettmer, *supra* note 64, at 843; Franck, *supra* note 64, at 880; Nies, *supra* note 64, at 2-3.
70. *See* Dettmer, *supra* note 64, at 843; Franck, *supra* note 64, at 880-81.
71. *See* Cook, *supra* note 65, at 972 n.76 ("Rambos" excel at excessive discovery).
72. 355 So. 2d 809 (Fla. Dist. Ct. App. 1977).
73. *Id.* at 810.
74. *Id.*
75. *Id.*
76. *Id.* at 812.
77. 541 A.2d 621 (D.C. 1988).

understand the law. Where did you go to law school; you should go back to law school before you practice law. You don't understand. You better learn your English, go to elementary school."[78]

Attorneys do not limit this unsavory behavior to dealings with other lawyers. For example, in *Bull v. McCuskey*,[79] counsel referred to the opposing party, a physician, as a "fumble-fingered fellow, a liar, a scoundrel, a damned idiot."[80] He further stated: "[H]e will lie under oath, steel [sic] an elderly woman's redress, cheat if he can get away with it, and all that is left for him is to make a pact with the devil and murder those who would oppose him."[81] These comments exemplify the unsavory and unnecessary speech undesirable in a respectable, economical, efficient, and stress-minimizing legal practice environment.

The frequency with which attorneys sue each other on the basis of something said in the course of other legal matters also indicates the extent to which the practice of law has become a battle to the death with no consideration of courtesy to the other participants in the process.[82] Ironically, the attorney's goal of victory may not be obtainable in such an environment. Former Chief Justice Warren E. Burger has stated:

> [W]ithout civility no private discussion, no public debate, no legislative process, no political campaign, no trial of any case, can serve its purpose or achieve its objective. When men shout and shriek or call names, we witness the end of rational thought processes, if not the beginning of blows and combat.[83]

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78. *Id.* at 622; *see also* Milo Geyelin, *Lawyers Object to Colleagues' Rudeness*, WALL ST. J., June 24, 1991, at B1.

79. 615 P.2d 957 (Nev. 1980).

80. *Id.* at 959.

81. *Id.* at 959-60. The physician was being sued for medical malpractice. *Id.* at 957.

82. *See, e.g.*, Pinkston v. Lovell, 759 S.W.2d 20 (Ark. 1988); Izzi v. Rellas, 163 Cal. Rptr. 689 (Ct. App. 1980); Arneja v. Gildar, 541 A.2d 621 (D.C. 1988); Sussman v. Damian, 355 So. 2d 809 (Fla. Dist. Ct. App. 1977); Dineen v. Daughan, 381 A.2d 663 (Me. 1978); Richards v. Conklin, 575 P.2d 588 (Nev. 1978); Feldman v. Bernham, 163 N.E.2d 145 (N.Y. 1959); Panzella v. Burns, 565 N.Y.S.2d 194 (App. Div. 1991); Baratta v. Hubbard, 523 N.Y.S.2d 107 (App. Div. 1988); Rosen v. Brandes, 432 N.Y.S.2d 597 (Sup. Ct. 1980); Post v. Mendel, 507 A.2d 351 (Pa. 1986). For a discussion of the flaw in analogizing the practice of law to battle, see Dettmer, *supra* note 64, at 842-43.

83. Chief Justice Warren E. Burger, Supreme Court of the United States, Remarks Before the American Law Institute, *in* WARREN E. BURGER, DELIVERY OF JUSTICE 173

Thus, civility may be necessary for the achievement of justice. Indeed, civility is necessary for attorneys to perform their social function as the "gatekeepers" of the system of law. As Professor Timothy Terrell and Mr. James Wildman have discussed, attorneys must act respectfully not only to interfere less with the process of law, but also to promote respect for all the other actors within the legal system and respect for the system itself.[84] Without respect for the system of law, no system can exist.[85]

Having recognized the problem, some jurisdictions and entities within the profession are attempting to take steps to regain the ethic of civility necessary for our legal system to work. Task forces have been developed, codes of conduct have been promulgated, and Inns of Court are being formed to heighten lawyers' awareness and understanding of proper conduct.[86]

## III. THE ABSOLUTE PRIVILEGE FOR SPEECH RELATING TO JUDICIAL PROCEEDINGS

Long before the United States Supreme Court began balancing First Amendment interests of free speech with individual interests in reputation traditionally protected by the tort of defamation, and long before the Court began protecting speech in the context of defamation actions for the benefit of the First Amendment, the courts of the United States and England performed a similar balancing and concluded that certain limited categories of speech deserved absolute protection for reasons unrelated to the relatively new doctrine of the First Amendment. The courts determined that in narrow contexts the value of the free flow of information that results from free and fearless speech

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(1990) (emphasis omitted); *see also* Salyer, *supra* note 64.

84. *See* Terrell & Wildman, *supra* note 52, at 423-28.

85. *Id.* Not everyone agrees that civility is so important. *See, e.g.,* Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467 (1992); Robert E. Rodes, Jr., *Professionalism and Community: A Response to Terrell and Wildman*, 41 EMORY L.J. 485 (1992); Jack L. Sammons, Jr. & Linda H. Edwards, *Honoring the Law in Communities of Force: Terrell and Wildman's Teleology of Practice*, 41 EMORY L.J. 489 (1992).

86. *See* Cook, *supra* note 65, at 982-1000; Dubin, *supra* note 64, at 884 (noting that at least 36 states are studying the lack of professionalism); Joryn Jenkins, *The Quiet Crusade: The American Inns of Court's Battle to Return Professionalism to the Practice of Law*, 39 FED. BAR NEWS & J. 318 (1992); John R. Lane, *Civility in the Practice of Law: An Anglo-American View*, 39 FED. BAR NEWS & J. 310 (1992); *Standards for Professional Conduct within the Seventh Federal Judicial Circuit*, 39 FED. BAR NEWS & J. 307 (1992) (draft).

exceeds the value of the damage caused by the defamatory statements and felt by unfortunate individuals.[87] Society has grappled with the question of whether and when to sacrifice the individual for the interest of the society in many areas of the law. With regard to free speech and reputational damage, the individual has often lost the battle.

In a small category of situations, courts have recognized an absolute privilege on behalf of the speaker so that the speaker has no liability even if the speaker spoke with perfect knowledge of the falsity of the statement.[88] In other situations, courts have used conditional or qualified privileges that prevent liability unless the injured party proves malice.[89]

An accepted absolute common-law exemption from liability attaches to statements relating to a judicial proceeding. All participants in the proceeding share the immunity. Lord Mansfield stated in *The King v. Skinner*,[90] "[N]either party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office."[91] As is true with all absolute privileges, the protection attaches even if the speaker knows that the statements are false and speaks with a malicious motive.[92]

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87. *See* ELDREDGE, *supra* note 9, §§ 72-94; PROSSER & KEETON, *supra* note 10, §§ 114-15; Orrin B. Evans, *Legal Immunity for Defamation*, 24 MINN. L. REV. 607 (1940); Fowler V. Harper, *Privileged Defamation*, 22 VA. L. REV. 642 (1936); Veeder, *supra* note 3, at 465; *Developments*, *supra* note 11, at 917-33. For a general discussion of the balance, see Van Vechten Veeder, *Freedom of Public Discussion,* 23 HARV. L. REV. 413, 413-15 (1910). *See also* Zander v. Jones, 680 F. Supp. 1236, 1238 (N.D. Ill. 1988), *aff'd,* 872 F.2d 424 (7th Cir. 1989) ("[T]he ends to be served by permitting the statements in the course of a legal proceeding outweigh the harm that may be done to the reputation of others.").

88. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 583-592A (1977); ELDREDGE, *supra* note 9, §§ 72-77; PROSSER & KEETON, *supra* note 10, § 114; SMOLLA, *supra* note 5, §§ 8.01-.06.

89. *See* RESTATEMENT (SECOND) OF TORTS §§ 593-612 (1977); ELDREDGE, *supra* note 9, §§ 78-94; PROSSER & KEETON, *supra* note 10, § 115; SMOLLA, *supra* note 5, §§ 8.01-.10; Evans, *supra* note 87; *Developments, supra* note 11, at 924-31.

90. 98 Eng. Rep. 530 (1772). There, the plaintiff complained that the judge in another proceeding told the jury that the statement was "sedious, scandalous, corrupt, and perjured." *Id.*

91. *Id. See generally* RESTATEMENT (SECOND) OF TORTS §§ 585 (judges), 586 (attorneys), 587 (parties), 588 (witnesses), and 589 (jurors) (1977); ELDREDGE, *supra* note 9, § 73; SMOLLA, *supra* note 5, § 8.03; *Developments, supra* note 11, at 920-24. In Petty v. General Acc. Fire & Life Assur. Corp., 365 F.2d 419, 421 (3d Cir. 1966), the Third Circuit Court of Appeals stretched to apply the privilege to an interested nonparty, the liability insurer of the defendant.

92. "[T]he interest in encouraging a litigant's unqualified candor as it facilitates the

The rationale for the privilege has involved three assumptions. First, courts have assumed that people, including participants in the judicial process, do not speak freely if someone might sue them for defamation relating to their speech. Second, courts have assumed that in order for the proper administration of justice and the law, participants in the judicial proceeding must speak freely. Finally, courts have assumed that these participants require an absolute privilege to insure free speech and therefore the goal of the proper administration of justice. Critical analysis of these assumptions can inform consideration of privileges that apply to judicial proceedings, especially with regard to the privilege for attorneys.

### *A. The Assumption that the Possibility of Defamation Liability or Litigation Chills Speech*

The assumption that the possibility of defamation litigation chills speech, indeed, deserves respect and acceptance. The supposition correlates with a recognized purpose of the tort of defamation, deterrence of certain injuring speech. The tort, however, imperfectly deters. Because litigation is expensive, unpleasant, and emotionally damaging even to the eventual victor, the possibility of a defamation lawsuit not only deters speech that may not actually be defamatory but is confusingly close to the amorphous definition of actionable speech. The possibility of a defamation lawsuit also deters speech that clearly cannot form the basis of an action. The assumption that even the possibility of a victorious lawsuit deters speech lies at the heart of much of the First Amendment constraints on defamation actions. The Supreme Court has assumed that the threat of defamation actions would unduly chill the speech of the press, and therefore has sought to avoid self-censorship of the press and others to protect First Amendment concerns by increasing the burden a defamation plaintiff must carry in certain settings.[93]

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search for truth is deemed so compelling that the privilege attaches even where the statements are offered maliciously or with knowledge of their falsity." Nix v. Sawyer, 466 A.2d 407, 411 (Del. Super. Ct. 1983). See also Barker v. Huang, 610 A.2d 1341 (Del. Super. Ct. 1992), involving an action against a doctor and insurance company defending the doctor for statements in a deposition and in a newspaper. The court refused to accept even a "sham litigation exception" to the absolute privilege because of the chilling effect a proceeding to develop sham proof might have. *Id.* at 1344. For a historical view of the privilege for judicial proceedings, see Kemper v. Fort, 67 A. 991 (Pa. 1907).

93. *See* discussion *supra* part I.B. *See generally* Anderson, *supra* note 12; Keeton,

Likewise, the common-law courts have assumed that the possibility of defamation actions causes self-censorship of the speech of judges, juries, witnesses, parties, and counsel. These courts have sought to protect against self-censorship of these parties not because of the general value of the speech of these actors but for the value of the proper working of the judicial system. An early statement of this view occurs in *Munster v. Lamb*,[94] one of England's earliest reported attorney privilege cases. Lord Fry stated:

> It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty . . . . If such actions were allowed, persons performing their duty would be constantly in fear of actions.[95]

The case of *United States v. Hurt*[96] presents an example of the reality of this theoretical assumption. In *Hurt*, the chilling effect of the possibility of suit on an attorney's statements and, therefore, on the representation offered, manifested itself. A court appointed the attorney in *Hurt* to handle an appeal for a criminal defendant.[97] The attorney argued in his brief that the appellant had received ineffective assistance of counsel at the trial level.[98] The trial attorney then sued the appeal attorney for two million dollars on the basis of statements in the brief supporting the ineffectiveness claim that allegedly libelled the trial attorney.[99] The appellate court remanded the case for a development of the facts regarding the ineffective assistance claim.[100] At the hearing on remand, the appeal attorney stated that he feared that anything he said in the representation of his client might be further basis for the libel claim. He stated: "I . . . feel that I am inhibited from defending or representing [appellant] on this remand proceeding for the simple reason that I have a personal

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*supra* note 20.

94. 11 Q.B.D. 588 (C.A. 1883).
95. *Id.* at 607.
96. 543 F.2d 162 (D.C. Cir. 1976).
97. *Id.* at 163.
98. *Id.* at 163-64.
99. *Id.* at 163.
100. *Id.*

interest in this matter which may not be at all times and in every respect co-extensive and equal to his."[101] After reminding the attorney that anything he might say in the representation would enjoy a privilege, the lower court forced the attorney to continue the representation.[102] The second appellate court faced the question of whether the appeal attorney rendered the appellant ineffective assistance of counsel in the remand hearing because the attorney labored under the cloud of a libel suit. Judge Spottswood W. Robinson, writing for the United States Court of Appeals for the District of Columbia Circuit, stated: "The first essential element of effective assistance of counsel is counsel able and willing to advocate fearlessly and effectively, and the libel suit generated far too great a dilemma for appellate counsel to permit him that range of action."[103] With regard to actual prejudice that the defendant might have suffered, the court simply noted that "[t]he pressure under which appellate counsel labored may well have resulted in subtle restraints which not even he could pinpoint or define."[104] The court so held while also noting that "counsel actually had little or nothing to fear" regarding the defamation claim.[105] Thus, this case suggests that empirical data, if available, would support the notion that the slimmest possibility of defamation liability chills speech and that simply the possibility of a lawsuit chills speech, regardless of eventual liability.

### *B. The Assumption that Judicial Actors Must Speak Freely for the Proper Operation of the Judicial System*

The second assumption, that free speech of the actors in the judicial proceeding, including attorneys, must occur for the judicial system to operate properly, must be examined critically as well. Though courts have long held that participants in judicial proceedings ought to enjoy immunity from liability for speech in the proceeding because free speech is imperative to the accomplishment of the administration of justice, the specific rationales for the privileges for each category of actor seem to

101. *Id.* at 164.
102. The lower court threatened contempt if the attorney did not proceed. *Id.* at 165.
103. *Id.* at 167-68.
104. *Id.* at 168.
105. *Id.* at 167.

differ. Judges enjoy immunity so that they can administer the law and the proceedings in their courts in a truly independent, fair, and efficient fashion.[106] Obviously, the immunity extends to opinions and memoranda of the court.[107] Juror immunity has the same goal of insuring the independent and unbiased administration of justice by the rendering of unfettered decisions.[108] Courts have granted witnesses immunity to insure the full disclosure of information so that the fact finder, whether judge or jury, can determine the ultimate truth and insure the proper administration of justice.[109] Parties enjoy immunity to insure full disclosure and free access to the court system and justice.[110]

The link between unfettered attorney speech and the proper administration of justice is less direct and less obvious. Courts

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106. For discussions of the rationale for judges, see BRUCE W. SANFORD, LIBEL AND PRIVACY § 10.4.2, at 485-87 (2d ed. 1991). ELDREDGE, *supra* note 9, § 73, at 340-45; Veeder, *supra* note 3, at 474-75. Courts apply the immunity broadly to protect judges as long as the judges act as courts when the statements occur. *See* SANFORD, *supra*; *Developments, supra* note 11, at 918-19; *see also* Bradley v. Fisher, 80 U.S. 335, 347 (1871) ("Liability to answer to every one who might feel himself aggrieved by the action of a judge, would be inconsistent with the possession of this freedom, and would destroy the independence without which no judiciary can be either respectable or useful."). For a general statement of the privilege, see RESTATEMENT (SECOND) OF TORTS § 585 (1977).

107. ELDREDGE, *supra* note 9, § 73, at 342-44; PROSSER & KEETON, *supra* note 10, § 114, at 816. Publication of the opinions in reporters has been more problematic. *See* Lowenschuss v. West Publishing Co., 542 F.2d 180 (3d Cir. 1976) (privilege applied to publisher of opinion in semi-official reporter); Garfield v. Palmieri, 297 F.2d 526 (2d Cir.), *cert. denied*, 369 U.S. 871 (1962) (privilege applied to report to West federal reporters); Murray v. Brancato, 48 N.E.2d 257 (N.Y. 1943) (no privilege for report of opinion to unofficial reporter); Hanft v. Heller, 316 N.Y.S.2d 255 (Sup. Ct. 1970) (privilege applied to report to state official reporter).

108. Veeder, *supra* note 3, at 475; *see, e.g.*, Irwin v. Murphy, 19 P.2d 292 (Cal. Ct. App. 1933); Greenfield v. Courier-Journal & Louisville Times Co., 283 S.W.2d 839 (Ky. 1955). For a general statement of the privilege, see RESTATEMENT (SECOND) OF TORTS § 589 (1977).

109. Veeder, *supra* note 3, at 476-77; *see* Buschbaum v. Heriot, 63 S.E. 645 (Ga. Ct. App. 1909); Adams v. Peck, 415 A.2d 292 (Md. 1980); Harold Douglas Norton, *Torts—Defamation—Judicial Immunity—Absolute Immunity Afforded Potential Witnesses for Statements Published in Unfiled Documents Prepared for Possible Use in a Pending Judicial Proceeding*, 11 U. BALT. L. REV. 344 (1982) (discussing the witness privilege); *see also* ELDREDGE, *supra* note 9, § 73, at 369-71. For a general statement of the privilege, see RESTATEMENT (SECOND) OF TORTS § 588 (1977).

110. PROSSER & KEETON, *supra* note 10, § 114, at 817; SMOLLA, *supra* note 5, § 8.03; *Developments, supra* note 11, at 922; *see, e.g.*, Drummond v. Stahl, 618 P.2d 616 (Ariz. 1980), *cert. denied*, 450 U.S. 967 (1981); Sailboat Key, Inc. v. Gardner, 378 So. 2d 47 (Fla. Dist. Ct. App. 1979). For a general statement of the privilege, see RESTATEMENT (SECOND) OF TORTS § 587 (1977).

have described the rationale for the attorney privilege as the same as or derivative of that of a party—to assure the free flow of information so as to determine the truth and to assure free access to the courts.[111] In *Hoar v. Wood*,[112] the Massachusetts Supreme Court stated that "the privilege is extended to the counsel, for the interest and benefit of the party, and to allow him full scope and freedom, in the support or defence of the rights of the party."[113] In more recent times, the Illinois Court of Appeals, in *Libco Corp. v. Adams*,[114] stated that "[t]he purpose of the privilege is to secure to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients."[115] The *Restatement (Second) of Torts* states in the

111. Veeder, *supra* note 3, at 482. For example, in Mower v. Watson, 11 Vt. 536 (1839), the Vermont Supreme Court stated that "[t]he counsel is but the agent of the client, and in that capacity, only, could claim any protection." *Id.* at 540. See Maulsby v. Reifsnider, 14 A. 505, 505 (Md. 1888), in which the court stated:

> He is obliged in the discharge of a professional duty to prosecute and defend the most important rights and interests, the life it may be, or the liberty or the property of his client, and it is absolutely essential to the administration of justice that he should be allowed the widest latitude.

*Id.; see* Gelinas v. Gabriel, 741 P.2d 443, 444 (N.M. Ct. App. 1987) (freedom for justice for client); Baratta v. Hubbard, 523 N.Y.S.2d 107, 108 (App. Div. 1988) (privilege enhances the power of clients to enforce rights). See also Surace v. Wuliger, 495 N.E.2d 939, 944 (Ohio 1986), in which the court stated:

> [W]e wish to re-emphasize the public policy considerations underlying the doctrine of absolute privilege in judicial proceedings in the test we have formulated today. The most basic goal of our judicial system is to afford litigants the opportunity to freely and fully discuss all the various aspects of a case in order to assist the court in determining the truth, so that the decision it renders is both fair and just.

*Id.*

112. 44 Mass. 193 (1841).

113. *Id.* at 196; *see also* Matthis v. Kennedy, 67 N.W.2d 413, 417 (Minn. 1954).

114. 426 N.E.2d 1130 (Ill. App. Ct. 1981).

115. *Id.* at 1132. In Ball Corp. v. Xidex Corp., 967 F.2d 1440 (10th Cir. 1992), the United States Court of Appeals for the Tenth Circuit stated: "The integrity of our adversarial system would be compromised if advocates were forced to steer their course between zealousness on the one hand, and fear of liability for damages on the other." *Id.* at 1444. The Second Circuit in Bleeker v. Drury, 149 F.2d 770 (2d Cir. 1945), stated: "Fearless administration of justice requires . . . that an attorney have the privilege of representing his client's interests, without the constant menace of claims for libel." *Id.* at 771; *see* Scott v. Stansfield, [1868] 3 L.R.-Ex. 220 (involving a judge's statements with early references to the social interest in the unfettered administration of justice). Modern references abound. *See, e.g.*, Grasso v. Mathew, 564 N.Y.S.2d 576, 579 (App. Div. 1991) ("A contrary rule would be an impediment to the search for truth and prevent inquiries with the freedom and boldness required for the welfare of our society."). One commentator, writing early in this century, expressed the assumption as follows: "It is essential to the ends of justice that all persons participating in judicial proceedings . . . should enjoy freedom of speech in the

comments to section 586, which deals with attorney privilege, that the rationale for the privilege is the public policy of "securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients."[116]

The rationale of protecting attorney speech so that attorneys may assist clients could justify applying a privilege to all attorney statements made in a representational capacity. A few courts seem to emphasize this expansive approach. In *Smith v. Griffiths*,[117] the Pennsylvania Superior Court, in evaluating several statements by an attorney, stated: "The purpose for which the privilege exists cannot fully be achieved by limiting the privilege to structured or formal proceedings. To permit an attorney to best serve a client, the privilege must be broad enough to include occasions when a client's cause is being advocated under less formal circumstances."[118] In the criminal context, the Ohio Court of Appeals in *Simmons v. Climaco*[119] considered whether letters to government officials regarding improprieties in an investigation enjoyed the privilege. The attorney represented the subject of the investigation. The court applied the privilege, noting that "[a]n attorney retained during the pre-indictment period may not serve his [client's] interests as zealously were he concerned with personal liability in a later defamation proceeding."[120] The proposition that all representational attorney speech must be free from the threat of defamation liability for justice to obtain is tenuous at best given the injury to reputational interests which could occur.

The majority of courts have, however, at least in theory, used the representational rationale to justify unfettered attorney speech in only a limited circumstance.[121] The *Restatement*

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discharge of their public duties or in pursuing their rights, without fear of consequences." Veeder, *supra* note 3, at 469; *see also* Evans, *supra* note 87, at 607-08; Harper, *supra* note 87, at 644.

116. RESTATEMENT (SECOND) OF TORTS § 586 cmt. a (1977); *see also* SANFORD, *supra* note 106, § 10.4.2, at 488.

117. 476 A.2d 22 (Pa. Super. Ct. 1984).

118. *Id.* at 25.

119. 507 N.E.2d 465 (Ohio Ct. App. 1986).

120. *Id.* at 468. In determining whether to apply the privilege to a letter from an attorney to an attorney for an entity not a party to a litigation, the New Jersey Superior Court in DeVivo v. Ascher, 533 A.2d 412 (N.J. Super. Ct. Law Div. 1987), *aff'd*, 550 A.2d 163 (N.J. Super. Ct. App. Div. 1988), noted that to further the policy of securing justice for a client, a court must consider the freedom needed by the attorney to represent the client appropriately. *Id.* at 416-17.

121. *See, e.g.*, Pinkston v. Lovell, 759 S.W.2d 20 (Ark. 1988); Andrews v. Elliott, 426

*(Second) of Torts* section 586 provides a statement of the majority view of the privilege for attorneys:

> 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.[122]

Such a standard should protect attorney speech only when that speech closely connects to a judicial proceeding both procedurally and substantively.

The *Restatement* and many courts link the alternative control of the disciplinary power of the court to the privilege for attorney speech[123] and in that way attempt to restrict the reach of the privilege. In *Demopolis v. Peoples National Bank of Washington*,[124] the Washington Court of Appeals denied the privilege to an attorney's statement made in the hall outside the hearing room during a recess because "an absolute privilege is allowed only in 'situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct.' "[125] Because the attorney in *Demopolis* spoke in a setting in which applying the privilege would not further the ultimate goal of the administration of justice, and because the setting had no safeguards to protect the allegedly defamed party, the privilege did not protect the attorney's statements.[126]

The assumption that an attorney needs to speak freely in a narrow set of circumstances for the proper administration of justice appears sound and deserves respect. Parties must speak

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S.E.2d 430 (N.C. Ct. App. 1993).

122. RESTATEMENT (SECOND) OF TORTS § 586 (1977).

123. *See id.* § 586 cmt. a (1977); *see also* Petty v. General Acc. Fire & Life Assur. Corp., 365 F.2d 419, 420 (3d Cir. 1966) ("[T]he judicial controls and supervision which surround a judicial proceeding afford some protection against the risk of defamation there."). *See generally* Munster v. Lamb, 11 Q.B.D. 588, 608 (C.A. 1883) ("The Court can always check improper conduct."); Veeder, *supra* note 3, at 471, 486; *Developments, supra* note 11, at 922.

124. 796 P.2d 426 (Wash. Ct. App. 1990).

125. *Id.* at 430 (quoting Twelker v. Shannon & Wilson, Inc., 564 P.2d 1131, 1133 (Wash. 1977)).

126. *Id.* at 430; *see also* Izzi v. Rellas, 163 Cal. Rptr. 689, 694 (Ct. App. 1980) (sanctions and bar discipline are available); Pawlowski v. Smorto, 588 A.2d 36, 41 (Pa. Super. Ct. 1991) (contempt and perjury proceedings are available).

and present their positions largely through the words of their attorneys. If one accepts the basic tenet of the judicial system, that society obtains truth and justice by discourse, the judicial proceeding in the sense of the trial or hearing is the essential context for parties to present their cases to the fact-finder and the essential context for discourse. Attorneys need to speak, and the threat of defamation actions would chill that speech. The validity of the assumption that attorneys require protection at the cost of reputational injury to others becomes much less clear as one considers situations farther away from the trial context.

### C. *The Assumption that Attorneys Require a Broad Absolute Privilege to Achieve Societal Goals*

Lastly, courts have presumed that attorneys need an absolute privilege rather than a qualified one. Many courts have presumed that attorneys require a broadly applied absolute privilege. Many jurisdictions evaluating attorney speech in the defamation context use an absolute privilege for attorney speech that roughly fits within the *Restatement* definition of protected speech.[127] A few states such as Louisiana[128] and Georgia[129] have seriously analyzed the possibility of applying a conditional privilege to attorney speech and have in fact adopted such a privilege. Most states have not. Many of the courts applying the absolute privilege to attorney speech have done so with a broad stroke, interpreting "judicial proceeding" broadly,[130] interpreting the required procedural relationship broadly,[131] and interpreting the requirement of substantive relevance broadly.[132] This third assumption, the assumption that attorneys should benefit from a broadly applied absolute privilege, is particularly problematic in today's world.

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127. *See* RESTATEMENT (SECOND) OF TORTS § 586 (1977).
128. *See, e.g.*, Freeman v. Cooper, 414 So. 2d 355 (La. 1982) (discussing and applying the conditional privilege as Louisiana precedent dictated).
129. O.C.G.A. §§ 51-5-7 (qualified privilege for statements in other contexts), 51-5-8 (absolute privilege for statements in pleadings) (1982).
130. *See* discussion *infra* part IV.A.1.
131. *See* discussion *infra* part IV.A.2.
132. *See* discussion *infra* part IV.B.

## IV. THE COURTS' APPLICATION OF THE PRIVILEGE AND SUGGESTIONS FOR CHANGE

### *A. The Procedural Penumbra*

#### *1. The Judicial Proceeding*

##### *a. The Courts' Treatment of the Judicial Proceeding Requirement*

The early attorney privilege cases involved a traditional judicial proceeding—one complete with a judge, adversarial parties, and traditional rules of evidence and legal propriety.[133] Many modern cases also involve statements made in what society considers a traditional judicial proceeding.[134] The judicial proceeding setting presents a strong argument for the privilege. The client urgently needs the assistance of an attorney in presenting his or her case in a traditional proceeding. An attorney supposedly knows the rules of the game. An attorney knows how to work within the rules of evidence. An attorney knows the rules of court etiquette. An attorney has training in persuasion and legal reasoning. The party generally has none of that knowledge or training.

A traditional judicial proceeding minimizes the potential for damage from attorney speech. The rules of evidence constrain the attorney's speech in court. The judge's power to control conduct regarding the matter before him or her by sanctions and contempt and admissibility rulings makes unnecessary

133. *See, e.g.*, Hoar v. Wood, 44 Mass. 193 (1841); Munster v. Lamb, 11 Q.B.D. 588 (C.A. 1883).

134. *See, e.g.*, Johnson v. Stone, 268 F.2d 803, 803-04 (7th Cir. 1959) (rejecting claim that attorney "misappropriated exhibits; introduced perjured, improper, irrelevant and slanderous testimony of witnesses; and made improper, irrelevant, slanderous and untrue statements" because any such statements were privileged); Reed v. Baker, 430 F. Supp. 472 (D. Del. 1977) (applying absolute privilege to statements at trial regarding expert testimony about a mental disorder of a party); Wojinski v. Foley, 226 F. Supp. 157, 158 (N.D.N.Y. 1963), *aff'd*, 327 F.2d 665 (2d Cir. 1964) (reciting statement made while arguing motion that tax return filed by the plaintiff was "false and fraudulent and probably straight perjury"); Dixon v. DeLance, 579 A.2d 1213 (Md. Ct. Spec. App. 1990) (statement in court that nonparty was illegitimate); Fowler v. Conforti, 583 N.Y.S.2d 789 (Sup. Ct. 1992), *aff'd*, 598 N.Y.S.2d 782 (App. Div. 1993) (statement in open court that brief was "misleading"); Wall v. Blalock, 95 S.E.2d 450 (N.C. 1956) (dismissing, on the basis of privilege, claim that attorney allegedly stated to the jury that the witness was "degraded mentally"); Irwin v. Ashurst, 74 P.2d 1127 (Or. 1938) (affirming, on the basis of privilege, lower court holding for attorney who allegedly stated in court that witness was a "dope fiend").

defamatory comments less likely. Parties need unfettered attorney speech, and the setting minimizes the possible injury to individuals for the sake of the societal goal.

Gradually, courts have applied this privilege not only to judicial proceedings, but also to other proceedings that perform judicial functions.[135] The comments to the *Restatement (Second) of Torts* section 586 state that the privilege applies to all proceedings in which there is an "exercis[e] of a judicial function."[136] No clear explanation exists of exactly what might constitute such an exercise. The determination is a question of law.[137]

In deciding whether to recognize a proceeding and extend protection, courts have looked at whether attorneys need to speak unhindered in representing a client and whether the proceeding has in place other controls on the speech which protect against reputational injury caused by attorney speech.[138] In *Ball Corp. v. Xidex Corp.*,[139] the United States Court of Appeals for the Tenth Circuit focused on the need for

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135. *See, e.g.*, Meyers v. Amerada Hess Corp., 647 F. Supp. 62 (S.D.N.Y. 1986) (attorney's comments in investigatory conference of state human rights division); Ascherman v. Natanson, 100 Cal. Rptr. 656, 659-60 (Ct. App. 1972) (hearing on doctor's staff privileges before the board of directors of the hospital district); Arneja v. Gildar, 541 A.2d 621 (D.C. 1988) (attorney's comments in hearing room but prior to hearing with Rental Accommodation Office); Odyneic v. Schneider, 588 A.2d 786 (Md. 1991) (witness comments before health claims arbitration panel); Rainer's Dairies v. Raritan Valley Farms, 117 A.2d 889, 894 (N.J. 1955) (hearing before the state director of the milk industry); Kirschstein v. Haynes, 788 P.2d 941 (Okla. 1990) (state board of health birth certificate proceeding); Ramstead v. Morgan, 347 P.2d 594, 599 (Or. 1959) (attorney discipline proceedings); *see also* Annotation, *Libel and Slander: Privilege Applicable to Judicial Proceeding as Extending to Administrative Proceeding*, 45 A.L.R.2d 1296 (1956); *cf.* Preiser v. Rosenzweig, 614 A.2d 303, 307 (Pa. Super. Ct. 1992) (holding statements to a committee of a volunteer lawyer association mediating a fee dispute not statements in judicial proceeding).

136. RESTATEMENT (SECOND) OF TORTS § 586 cmt. d (1977). *See generally* PROSSER & KEETON, *supra* note 10, § 114, at 818-19; SMOLLA, *supra* note 5, § 8.03; *Developments, supra* note 11, at 920-21.

137. *See* Matthis v. Kennedy, 67 N.W.2d 413 (Minn. 1954).

138. In *Odyniec v. Schneider,* the Maryland Supreme Court was asked to decide whether the absolute privilege applied to statements made by a doctor examining a person who had a claim before the Health Claims Arbitration Office. Odyniec v. Schneider, 588 A.2d 786 (Md. 1991). The court noted that the societal value of the proceeding and the adequacy of procedural safeguards to minimize the occurrence of defamation called for the conclusion that the Health Claims Arbitration proceeding was similar to a judicial proceeding so that the absolute privilege for participants applied. *Id.* at 792.

139. 967 F.2d 1440 (10th Cir. 1992).

protection of attorney speech in the proceeding.[140] In *Ball*, the plaintiff corporation claimed that an attorney had made false statements about the corporation in a Patent and Trademark Office reexamination proceeding.[141] The Tenth Circuit noted that the privilege freeing an advocate from the fear of suit was necessary for "the integrity of our adversarial system."[142] The Patent and Trademark Office proceeding implicated those same concerns.[143]

In *Bleeker v. Drury*,[144] the United States Court of Appeals for the Second Circuit dealt with the question of whether the attorney privilege applied to an Industrial Board proceeding in which a seaman sought compensation for an injury. With regard to the value of the proceeding and the need for free speech for the attorney, the court stated that "[t]he adequate representation of a client and the full presentation of pertinent facts are just as important in this proceeding as in those before any other tribunal."[145] The court specifically noted the protections against defamation present in the proceeding.[146] The court examined whether the activities and duties of the Industrial Board replicated those of a traditional court proceeding.[147] With the Industrial Board, an individual presided over the hearings, and that individual made evidence admissibility rulings and otherwise applied rules of evidence and rules of court procedure akin to trials in state courts.[148] The individual made conclusive determinations of fact and law, and a party could appeal the decision to a true court of law.[149] Thus, the *Bleeker* court concluded that the Industrial Board proceeding sufficiently resembled a traditional judicial proceeding so that the privilege applied to attorney speech within it.[150]

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140. *Id.* at 1442.
141. *Id.*
142. *Id.* at 1444.
143. *Id.* at 1444-45.
144. 149 F.2d 770 (2d Cir. 1945).
145. *Id.* at 772.
146. *Id.* at 771.
147. *Id.*
148. *Id.*
149. *Id.* at 771-72.
150. *Id.; see* Kent v. Connecticut Bank & Trust Co., N.A., 386 So. 2d 902 (Fla. Dist. Ct. App. 1980) (incredibly strict application of a judicial proceeding). In *Kent*, an attorney for a bank told the plaintiff's employer that the plaintiff was a delinquent debtor. *Id.* There was a judicial proceeding in progress at the time, but it was

### *b. A Suggestion for Caution in Recognizing Judicial Proceedings Pretenders*

While most courts have justifiably and rationally applied the privilege to proceedings that are not technically courtroom proceedings before a judge, these decisions seem to place much emphasis on the necessity of unfettered attorney speech and very little emphasis on the expansive grant of power such holdings give to attorneys at the expense of individuals whom those attorneys might defame, purposefully or otherwise. The fact that courts tend to side with attorneys because they are attorneys themselves may blind courts to the damage produced by defamatory attorney speech. Perhaps, however, earlier courts have been so persuasive in their pro-privilege stances that later courts have not analyzed critically the underlying tenets supporting the privilege. Before any court expands the application of the absolute privilege to a particular proceeding, that court should consider whether the proceeding indeed replicates the traditional judicial proceeding such that attorney speech requires protection in that context to achieve societal goals at least as significant to or equal to the goal of the proper administration of the court system. In addition, the court should analyze carefully whether the proceeding uses procedures to minimize the likelihood of defamatory attorney remarks. Though many proceedings may have protections, those proceedings may not be of sufficient import to justify application of the privilege.

An example of a questionable application of the absolute privilege is the case of *Kirschstein v. Haynes*.[151] In that case, the Oklahoma Supreme Court made one of the most expansive interpretations of what might qualify as a judicial proceeding. The court considered a process to file a delayed birth certificate.[152] The Oklahoma Commissioner of Health or his delegate had the power to decide whether to file a delayed certificate for an individual on the basis of documentation submitted.[153] Even though in the matter before the court no hearing had occurred, and even though the relevant statute

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dismissed later for lack of subject matter jurisdiction. *Id.* The court refused to apply the privilege to the attorney speech because there was no *valid* judicial proceeding. *Id.* at 903.

151. 788 P.2d 941 (Okla. 1990).

152. *Id.* at 945.

153. *Id.* at 945 n.1.

provided no usual hearing procedure, the court speculated that if an individual requested a proceeding, the Commissioner of Health or his delegate would conduct one pursuant to the state administrative procedures act.[154] The court recognized, therefore, a proceeding to which the absolute privilege could apply.[155] Even if a court, such as the *Kirschstein* court, applies the privilege to a situation not presenting anything resembling a judicial proceeding in the sense of a hearing involving adversaries with evidence presented and admissibility ruled upon by an arbiter applying a set of rules, the court must consider whether a petition to file a delayed birth certificate carries such import that an attorney assisting in such activity should receive total immunity from defamation liability. When one considers that the United States Supreme Court has not given the press such a grant of immunity even when the press speaks on issues of national governmental importance, the logic of a grant of absolute privilege to an attorney's comments in a birth certificate process seems questionable.

### 2. *The Procedural Relation to a Judicial Proceeding*

#### a. *The Courts' Treatment of the Procedural Relation Requirement*

By requiring that the absolute privilege apply only to an attorney's statements procedurally related to a judicial proceeding or procedurally related to something a court determines replicates a judicial proceeding, courts attempt in another manner to tailor the privilege to situations in which attorneys need unfettered speech and in which alternative means constrain defamatory comments. The *Restatement (Second) of Torts* section 586 provides the privilege to speech "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 [the attorney] participates as counsel."[156]

Courts uniformly refuse to hold an attorney responsible in a defamation action for speech occurring while the attorney appears in a representational capacity if the statements occur within a courtroom or hearing in the presence of an arbiter,

154. *Id.* at 948-50.
155. *Id.* at 950.
156. RESTATEMENT (SECOND) OF TORTS § 586 (1977).

assuming substantive relevance.[157] The English court in *Munster v. Lamb*[158] evaluated an in-court statement of counsel when the court acknowledged that attorneys deserve absolute immunity from defamation liability.[159] The formal setting argues forcefully for protection because in court the client most evidently needs the attorney's assistance in presenting the client's story. Furthermore, the judge can exercise control over the attorney's speech. The same concerns and justifications apply to statements during hearings of all sorts as long as the judicial officer presides.[160]

Courts agree that attorneys enjoy an absolute privilege with regard to documents filed with a judicial body in the regular course of a judicial proceeding. If a judicial or quasi-judicial

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157. *See, e.g.*, Johnson v. Stone, 268 F.2d 803, 803-04 (7th Cir. 1959) (rejecting claim that the attorney "misappropriated exhibits; introduced perjured, improper, irrelevant and slanderous testimony of witnesses; and made improper, irrelevant, slanderous and untrue statements" because any such statements were privileged); Reed v. Baker, 430 F. Supp. 472 (D. Del. 1977) (applying absolute privilege to statements at trial regarding expert testimony about a mental disorder of a party); Wojinski v. Foley, 226 F. Supp. 157, 158 (N.D.N.Y. 1963), *aff'd*, 327 F.2d 665 (2d Cir. 1964) (reciting statement made while arguing motion that tax return filed by the plaintiff was " 'false and fraudulent and probably straight perjury' "); Friedman v. Knecht, 56 Cal. Rptr. 540 (Dist. Ct. App. 1967) (citing comments about other attorney on hearing on motion for continuance regarding violation of confidence, threats, and affair); Dixon v. DeLance, 579 A.2d 1213 (Md. Ct. Spec. App. 1990) (statement in court that nonparty was illegitimate); Panzella v. Burns, 565 N.Y.S.2d 194 (App. Div. 1991) (statement in judge's chambers in course of domestic relations matter); Fowler v. Conforti, 583 N.Y.S.2d 789 (Sup. Ct. 1992), *aff'd*, 598 N.Y.S.2d 782 (App. Div. 1993) (statement in hearing to court that brief was "misleading"); Klein v. Walston & Co., 245 N.Y.S.2d 660, 662 (Sup. Ct. 1963), *aff'd*, 280 N.Y.S.2d 911 (App. Div. 1967) (remarks in opening statement privileged); Bull v, McCuskey, 615 P.2d 957 (Nev. 1980) (statements during trial privileged); Wall v. Blalock, 95 S.E.2d 450 (N.C. 1956) (dismissing on the basis of privilege claim that attorney allegedly stated to the jury that the witness was "degraded mentally"); Irwin v. Ashurst, 74 P.2d 1127 (Or. 1938) (affirming, on the basis of privilege, lower court holding for attorney who allegedly stated in court that witness was a "dope fiend").

158. 11 Q.B.D. 588 (C.A. 1883).

159. *Id.; see also* Hoar v. Wood, 44 Mass. 193 (1841).

160. *See, e.g.*, Panzella v. Burns, 565 N.Y.S.2d 194 (App. Div. 1991) (applying privilege to statements made in judge's chambers in hearing on domestic relations matter); O'Brien v. Stein, 547 N.E.2d 1213 (Ohio Ct. App. 1988), *cert. denied*, 493 U.S. 809 (1989) (applying privilege to statement by an attorney made during hearing in judge's chambers on promissory note matter in which statement was response to judge's inquiry). But see Bell v. Anderson, 389 S.E.2d 762 (Ga. Ct. App. 1989), in which an attorney's statement in a judge's chambers in a mid-trial conference was privileged because it was a summary of evidence to be presented, but no recognition of a general absolute privilege in the setting was afforded because the statement was not in a pleading as required by the state privilege statute.

action is in progress, any documents such as complaints, answers, briefs, motions, and memoranda in support of motions filed with the court as a part of that action benefit from the privilege, even though a court proceeding in the sense of a hearing may not have occurred.[161] For example, in *Mohler v. Houston*,[162] the plaintiff complained that his wife's attorney defamed him in a brief filed in an appeal in a domestic relations action. Without hesitation, the court applied the absolute privilege.[163]

Courts also apply the privilege to other documents, such as affidavits, filed with the court in support of various motions or issues otherwise before the court.[164] In *Joplin v. Southwestern Bell Telephone Co.*,[165] the plaintiff's attorney filed an affidavit with the trial court explaining the attorney's attempts to contact

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161. *See., e.g.,* Bleeker v. Drury, 149 F.2d 770, 772 (2d Cir. 1945) (concluding statements by defendant that plaintiff was guilty of delay and unfair practice were relevant in a memorandum of the defendant filed with the Industrial Board after the Board granted plaintiff's motion for reconsideration); Ponzoli & Wassenberg, P.A. v. Zuckerman, 545 So. 2d 309 (Fla. Dist. Ct. App. 1989); Wolf v. Musnick, 443 N.Y.S.2d 230, 230-31 (App. Div. 1981) (applying privilege to answer in child support arrears matter claiming that plaintiff raised children in immoral environment); Justice v. Mowery, 430 N.E.2d 960, 961 (Ohio Ct. App. 1980) (briefs, pleadings, oral arguments privileged); Passon v. Spritzer, 419 A.2d 1258, 1261 (Pa. Super. Ct. 1980) (statement in petition for writ of habeas corpus and supporting brief privileged); McNeal v. Allen, 621 P.2d 1285, 1286 (Wash. 1980) (statement of damages in complaint privileged). In Georgia, where attorney privileges are statutory, attorneys enjoy an absolute privilege with regard to written statements while spoken words are only qualifiedly privileged. *See* O.C.G.A. §§ 51-5-7 to -8 (1982); *see also* Howard v. DeKalb County Jail Staff, 421 S.E.2d 309 (Ga. Ct. App. 1992) (applying privilege to statements in a brief). *See generally* ELDREDGE, *supra* note 9, § 73, at 357-58 (pleadings and briefs); SANFORD, *supra* note 106, § 10.4.2, at 489.

162. 356 A.2d 646 (D.C. 1976).

163. *Id.* at 647. The comments related to a claim that the plaintiff had left his wife for another woman when his wife was pregnant with their fifth child and that the plaintiff had engaged in other irrational behavior. *Id.; see also* Scott v. Statesville Plywood & Veneer Co., 81 S.E.2d 146 (N.C. 1954) (statements in complaint and affidavit absolutely privileged); Johnson v. Schlarb, 110 P.2d 190 (Wash. 1941) (affirmative defense statements in the answer are privileged).

164. *See, e.g.,* Hinckley v. Resciniti, 552 N.Y.S.2d 278 (App. Div. 1990) (holding statements in affidavits supporting motions for sanctions privileged); Baratta v. Hubbard, 523 N.Y.S.2d 107 (App. Div. 1988) (holding statements in affidavit supporting motions regarding an opposing attorney's complicity in client's wrongful activities privileged); Holzberg v. Rothenberg, 281 N.Y.S.2d 931, 932 (App. Div. 1967) (holding statements in affidavit which accused other attorney of suborning perjury in context of family court matter representation privileged); Simon v. Stim, 176 N.Y.S.2d 475, 476 (Sup. Ct. 1958), *aff'd,* 199 N.Y.S.2d 405 (App. Div. 1959) (holding statements in affidavit filed with court privileged).

165. 753 F.2d 808 (10th Cir. 1983).

the plaintiff to develop a collaborative pretrial memorandum. The affidavit noted that the attorney had discovered that the plaintiff had recently sought habeas relief to obtain release from jail.[166] The Tenth Circuit affirmed the district court determination that an absolute privilege applied to the attorney's statement.[167]

Courts have applied the privilege likewise to documents which are officially a part of a judicial proceeding though not necessarily filed with a court. In *Zanders v. Jones*,[168] in the course of the pretrial aspects of a proceeding, the defense attorneys listed the plaintiff as a potential witness in a prehearing document which the attorneys sent to opposing counsel. The plaintiff claimed that listing her in this way defamed her and caused her resulting injury.[169] In holding the statement privileged, the court noted that "anything said or written in the course of a legal proceeding is protected by an absolute privilege."[170] The court did not concern itself with whether the defense attorneys had filed the document with the court. The commentary to the *Restatement* specifically states that the privilege should apply to affidavits and pleadings and written arguments.[171]

Some courts have applied the privilege to statements, written or oral, which occur prior to the initiation of a judicial proceeding.[172] These courts usually demand that the attorney

166. *Id.* at 810.
167. *Id.* (relying on a statutory formulation of the privilege).
168. 680 F. Supp. 1236 (N.D. Ill. 1988), *aff'd*, 872 F.2d 424 (7th Cir. 1989).
169. *Id.* at 1237.
170. *Id.* at 1238.
171. RESTATEMENT (SECOND) OF TORTS § 586 cmt. a (1977).
172. *See, e.g.*, Green Acres Trust v. London, 688 P.2d 617, 623 (Ariz. 1984) (agreeing with the standard); Selby v. Burgess, 712 S.W.2d 898 (Ark. 1986) (holding statements made in investigation of alienation of affections claim privileged); Izzi v. Rellas, 163 Cal. Rptr. 689, 692 (Ct. App. 1980) (applying privilege to letter to opposing counsel regarding default judgment and stating standard as "proceedings which have the real potential for becoming a court concern"); Lerette v. Dean Witter Org., Inc., 131 Cal. Rptr. 592 (Ct. App. 1976) (applying privilege to letter sent to investors seeking information relating to a prospective proceeding); Richards v. Conklin, 575 P.2d 588 (Nev. 1978) (holding letter to potential defendant in legal malpractice action privileged); Simmons v. Climaco, 507 N.E.2d 465 (Ohio Ct. App. 1986) (holding letters to supervisors of agents investigating client privileged); Pawlowski v. Smorto, 588 A.2d 36, 40 (Pa. Super. Ct. 1991) (holding statements to district attorney and state police that the plaintiff had perjured self at hearing in another matter privileged as preliminary to judicial proceeding privileged); Russell v. Clark, 620 S.W.2d 865, 868 (Tex. Civ. App. 1981) (applying privilege to letter to interested parties seeking evidence for use in pending litigation because privilege exists for statements

have a good faith expectation of the initiation of a proceeding when the attorney makes the statements.[173] In *Pinkston v. Lovell,*[174] the Arkansas Supreme Court determined that the privilege applied to an attorney's statements to a client or potential client as to another attorney's competence or admitted incompetence in a situation in which the client consulted the speaking attorney regarding filing a legal malpractice claim against the allegedly maligned attorney.[175]

An attorney can argue persuasively that he or she needs defamation protection in order to fully and zealously represent the client in the investigation stage of litigation. Unfortunately, this argument considers only the goal of zealous representation and not the accompanying damage to individual reputations that may result from such unfettered speech in an unrestrained context. Applying the privilege to this preliminary stage of litigation protects attorneys without the commensurate alternative controls on attorney speech. No court oversees the communication prior to suit being filed, and if the attorney files no suit, no court ever has the opportunity to review the speech. The case of *Arundel Corp. v. Green*[176] presents the problem. In *Arundel*, an attorney allegedly made offending statements about the plaintiff corporation and its product in a letter to its customers.[177] An action never occurred involving Arundel Corporation.[178] While the *Arundel* court was unwilling to decide whether the offending attorney in good faith anticipated filing suit against Arundel, the court clearly left open the possibility that the privilege could apply absent any subsequent court

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preliminary to proceedings); *see* RESTATEMENT (SECOND) OF TORTS § 586 (1977). The court in *Andrews v. Elliot* agreed that in principal the privilege could apply if relevant to anticipated litigation, but denied the privilege on the specific facts. Andrews v. Elliot, 426 S.E.2d 430 (N.C. Ct. App. 1993); *see also* Rosen v. Brandes, 432 N.Y.S.2d 597, 601 (Sup. Ct. 1980) (rejecting privilege to communication two months preliminary to proceeding).

173. *See, e.g., Green Acres Trust*, 688 P.2d at 623 ("applied only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration"); Smith v. Suburban Restaurants, Inc., 373 N.E.2d 215, 218 (Mass. 1978) (rejecting privilege because there was "no indication that the attorney seriously contemplated a judicial proceeding in good faith"); *see* RESTATEMENT (SECOND) OF TORTS § 586 cmt. e (1977).

174. 759 S.W.2d 20 (Ark. 1988).

175. *Id.* at 22-23.

176. 540 A.2d 815 (Md. Ct. Spec. App. 1988).

177. *Id.* at 816.

178. *Id.* at 817.

oversight.[179] Thus, an attorney enjoys an absolute privilege for statements subject to no immediate judicial control.

In similar fashion, courts have used the privilege with regard to speech surrounding a judicial proceeding. For example, courts have applied the privilege to letters and oral statements directed to opposing counsel, to judges, and to third parties. In *Arneja v. Gildar*,[180] the District of Columbia Court of Appeals applied the privilege to comments made by one attorney to another while the lawyers and their clients sat in a hearing room awaiting the arrival of the hearing officer.[181] In *Simon v. Stim*,[182] the court granted the privilege to an attorney's letter to a judge urging that the judge sign the enclosed order and calling attention to an affidavit the opposing party had previously filed in a voluntary bankruptcy proceeding. The court granted the privilege even though it recognized that the letter did not constitute a pleading, a filing, or an official document.[183] The court noted that a lawyer's statements made "in furtherance of the interests of his clients" do not create defamation liability.[184] In perhaps a further step away from the judicial proceeding, the New Jersey Superior Court, in *DeVivo v. Ascher*,[185] applied the privilege to a letter sent by an attorney for a party to a dispute, not to the opposing party or the presiding judge, but to a third interested party allegedly accusing the other party to the litigation of skimming funds.[186]

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179. *Id.* at 819-20.

180. 541 A.2d 621 (D.C. 1988).

181. *Id.* at 623; *see also* Cummings v. Kirby, 343 N.W.2d 747, 748-49 (Neb. 1984) (holding attorney's statements that the client's son was a crook made at a meeting with the client after a trial privileged).

182. 176 N.Y.S.2d 475 (Sup. Ct. 1958), *aff'd*, 199 N.Y.S.2d 405 (App. Div. 1959).

183. *Simon*, 176 N.Y.S.2d at 476. In Richeson v. Kessler, 255 P.2d 707 (Idaho 1953), the Idaho Supreme Court granted the privilege to a letter to a judge complaining that the brief filed by the opposing party was "misleading," "untrue," "improper," and "unethical." *Id.* at 707-08. The *Richeson* court stated that the statement need not be in a pleading, brief, or affidavit to be privileged and noted that letters are a recognized avenue for pursuing a legal issue with a judge. *Id.* at 708; *see also* McLaughlin v. Copeland, 455 F. Supp. 749, 751-52 (D. Del. 1978), *aff'd*, 595 F.2d 1213 (3d Cir. 1979) (affording privilege to memorandum, supporting documents, and letter sent to judge and counsel); Smith v. Griffiths, 476 A.2d 22 (Pa. Super. Ct. 1984) (holding letter to master appointed to hear alimony matter related to plaintiff's actions regarding money and statement in judge's chambers on unrelated matter all privileged).

184. *Simon*, 176 N.Y.S.2d at 476.

185. 533 A.2d 412 (N.J. Super. Ct. Law Div. 1987), *aff'd*, 550 A.2d 163 (N.J. Super. Ct. App. Div. 1988).

186. *Id.* at 416; *see also* Club Valencia Homeowners Ass'n, Inc. v. Valencia Assocs.,

Often attorneys argue that their statements must enjoy a privilege because the statements are essential to the settlement process. In *Chard v. Galton*,[187] the Oregon Supreme Court applied the privilege to a letter from an attorney to an opposing party's insurer on the basis that the letter was part of the settlement effort. The court stated that "[i]t is equally important that a lawyer enjoy the same degree of freedom in settlement of his client's case as that which he enjoys in its actual pleading or trial."[188]

Other courts have applied the privilege less leniently when dealing with situations farther afield from the judicial proceeding.[189] In *Schulman v. Anderson Russell Kill & Olick, P.C.*,[190] the firm representing a client in a matter against the plaintiff, an accountant, sent a letter to clients and telephoned clients of the plaintiff seeking information for the establishment of a punitive damage claim. The firm allegedly defamed the accountant in these communications.[191] The court refused to apply the privilege, stating: "Attorneys should be encouraged to pursue informal methods of discovery, in order both to minimize clients' costs and to conserve judicial time. Yet this court is mindful of the grave potential for abuse and bad faith in such informal quests for information."[192]

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712 P.2d 1024 (Colo. Ct. App. 1985) (holding letters from attorney for association to individual condo owners privileged); Irwin v. Cohen, 490 A.2d 552 (Conn. Super. Ct. 1985) (holding letter from one attorney in several pending matters to attorney for opposition in those matters privileged); Libco Corp. v. Adams, 426 N.E.2d 1130, 1130-32 (Ill. App. Ct. 1981) (holding letter from attorney opposing Libco to another attorney opposing Libco in another suit privileged); Gelinas v. Gabriel, 741 P.2d 443 (N.M. Ct. App. 1987) (holding statements of attorney to insurance representatives and social security representative that physician was incompetent privileged); Penny v. Sherman, 684 P.2d 1182, 1185-86 (N.M. Ct. App. 1984) (holding demand letter written during course of estate settlement sent to plaintiff's employer privileged); Simmons v. Climaco, 507 N.E.2d 465 (Ohio Ct. App. 1986) (holding letters to supervisors of investigators of client privileged).

187. 559 P.2d 1280 (Or. 1977).

188. *Id.* at 1282. The suit was filed shortly after the letter. *Id.* at 1281.

189. *See, e.g.*, Troutman v. Erlandson, 593 P.2d 793, 795 (Or. 1979) (rejecting privilege for allegedly defamatory letter to opposing counsel and potential investor); Petrus v. Smith, 459 N.Y.S.2d 173, 174 (App. Div. 1983) (statement outside courthouse after hearing not privileged); Schulman v. Anderson Russell Kill & Olick, P.C., 458 N.Y.S.2d 448, 453 (Sup. Ct. 1982).

190. 458 N.Y.S.2d 448 (Sup. Ct. 1982).

191. *Id.* at 451.

192. *Id.* at 453.

Fortunately, courts and commentators agree that letters and other communications to the media do not benefit from an absolute privilege.[193] In *Buckley v. Fitzsimmons*,[194] the United States Supreme Court confronted a 42 U.S.C. § 1983 claim based upon a prosecutor's allegedly defamatory statements to the press. The prosecutor claimed that his statements to the press enjoyed an absolute privilege.[195] In analyzing possible applicable privileges, the Court noted that the plaintiff "does not suggest that in 1871 there existed a common-law immunity for a prosecutor's, or attorney's, out-of-court statement to the press."[196] Rather, the Court stated that out-of-court statements received, at most, qualified immunity.[197] As the North Carolina Court of Appeals stated in *Andrews v. Elliot*,[198] " '[i]t is clear . . . that statements given to the newspapers concerning the case are no part of a judicial proceeding, and are not absolutely privileged.' "[199] These courts tend to note that granting attorneys freedom from defamation in such settings furthers no public purpose.[200] Though the statements may substantively relate in that they, for example, restate the complaint, and though the statements truly anticipate a judicial proceeding, the statements to the media do not further society's goal of the appropriate administration of justice.

### *b. A Suggestion for a Narrow Procedural Relation Standard*

While attorney comments in court, in hearings, and in written documents that are officially a part of a judicial proceeding may deserve an absolute privilege, many of the settings in which courts have granted the privilege simply do not compel its application. First, in many of the settings in which courts have granted an absolute privilege to attorney speech it is much less

193. *See, e.g.*, Asay v. Hallmark Cards, Inc., 594 F.2d 692 (8th Cir. 1979); Bradley v. Hartford Acc. & Indem. Co., 106 Cal. Rptr. 718 (Ct. App. 1973); Kennedy v. Cannon, 182 A.2d 54 (Md. 1962); Andrews v. Elliot, 426 S.E.2d 430 (N.C. Ct. App. 1993); Barto v. Felix, 378 A.2d 927 (Pa. Super. Ct. 1977). *But cf.* Johnston v. Cartwright, 355 F.2d 32 (8th Cir. 1966).

194. 113 S. Ct. 2606 (1993).

195. *Id.* at 2611.

196. *Id.* at 2617.

197. *Id.* at 2617-18.

198. 426 S.E.2d 430 (N.C. Ct. App. 1993).

199. *Id.* at 433 (quoting PROSSER & KEETON, *supra* note 10, § 114, at 820).

200. *See, e.g.*, Asay v. Hallmark Cards, Inc., 594 F.2d 692, 697 (8th Cir. 1979); Green Acres Trust v. London, 688 P.2d 617, 622 (Ariz. 1984).

certain that the interest of the client and the interest of society demand attorney speech unfettered by the threat of defamation actions. Second, these settings may lack other controls on attorney speech. Third, the potential damage to the reputation of individuals exceeds damage that might occur with statements in briefs or in court. Finally, other societal goals such as civility in legal activities may be furthered by a narrower procedural penumbra than that applied by the courts in the past.

Perhaps a more societally optimal approach would determine whether attorney speech falls within the procedural penumbra of a judicial proceeding by considering whether that speech is in the regular course of the judicial proceeding. The court would have to decide that the statement truly was a part of the judicial proceeding, not simply a statement incident to a proceeding. Assuming substantive relevance, any statement which occurred within the courtroom or hearing room or which occurred in the course of the proceeding as part of the proceeding would enjoy the privilege. Statements in briefs and other filings or documents required by the judicial process would enjoy the privilege. This standard would eliminate from protection most, if not all, communications that occur outside of the courtroom, hearing room, judge's chambers, or deposition room or which are not a written element of that proceeding.

The case of *Post v. Mendel*[201] illustrates how a court might apply this approach. The Pennsylvania Supreme Court in *Post* reviewed a letter from the defense attorney to a judge presiding over a case involving the defense attorney and the subject of the letter, the plaintiff's attorney. The defense attorney also sent the letter to the disciplinary authority for the state and to a witness in the judicial proceeding.[202] The court eloquently explained the standard it applied as follows:

> [T]he privilege exists because there is a realm of communication essential to the exploration of legal claims that would be hindered were there not the protection afforded by the privilege. The essential realm of protected communication is not, however, without bounds. Rather, the protected realm has traditionally been regarded as composed only of communications which are issued in the regular

201. 507 A.2d 351 (Pa. 1986).
202. *Id.* at 352-53.

> course of judicial proceedings and which are pertinent and material to the redress or relief sought.[203]

The court refused to apply the privilege to the letter at issue, stating:

> Accordingly, we do not believe issuance of the letter was within the sphere of activities which judicial immunity was designed to protect . . . . The letter was not addressed to [the judge, it] did not state or argue any legal position, and it did not request any ruling or action by the court. Nor did the communication request that anything contained in it should even be considered by the court. The letter was clearly not a part of the judicial proceedings to which it made reference . . . .[204]

Comments in the hearing room prior to the proceeding or statements in an elevator after a hearing would not enjoy a privilege because those statements would not occur in the regular course of a judicial proceeding as a part of the proceeding.[205] Such attorney speech which would not benefit from this new form of the absolute privilege may indeed further a client's interests. Clearly, letters investigating a claim do further a client's interest, especially if the letters garner fruitful information. Comments in the hearing room prior to a proceeding may further a client's interest. An attorney can defend his or her statements to the press with the same argument. Those statements, too, further a client's interests. Those statements, too, arguably assist the client.

The interest of providing zealous representation to the client is a valid consideration. Yet, other considerations present themselves. The interest in totally unfettered attorney speech is not as compelling given a situation with no alternative and no realistic control on the attorney's speech. Such a situation would not protect against potentially defamatory attorney speech. Applying the privilege broadly to tangential speech may actually

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203. *Id.* at 355 (emphasis omitted).

204. *Id.* at 356.

205. In Arneja v. Gildar, 541 A.2d 621 (D.C. 1988), the privilege was applied to statements made in a hearing room before the hearing officer entered. In Panzella v. Burns, 565 N.Y.S.2d 194 (App. Div. 1991), the privilege applied to comments after a hearing that occurred in an elevator and other locations with no judicial officer present. The suggested modification of the procedural penumbra would exclude these situations from protection from defamation liability.

encourage the lack of civility noted recently to plague the practice of law. A stricter standard such as the one suggested here may improve the situation. The standard probably accords with the original intent regarding the privilege and balances the interest in unfettered attorney speech, the reputational injury perhaps felt by others, and collateral effects on civility in the legal profession.

### *B. The Substantive Penumbra*

#### *1. Statements of the Standard*

Assuming that the court accepts that an attorney's statement falls within the procedural penumbra, the substantive relevance requirement also limits the privilege. In England, attorneys need not fear liability relating to statements made "in the course of the administration of the law."[206] The courts have imposed no substantive relevance limitation on this broad grant of privilege.[207] In the United States, the protection extends to attorney statements only if those statements have "some reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it."[208]

Courts have interpreted substantive relevance so broadly, however, that the requirement differs little from the English approach.[209] In discussing the substantive relevance requirement, courts have stressed that they must analyze substantive relevance with a liberal eye—a view that in effect creates a presumption of relevance that the defamation plaintiff

206. Munster v. Lamb, 11 Q.B.D. 588, 605 (C.A. 1883).

207. ELDREDGE, *supra* note 9, § 73, at 361-62. Interestingly, in Maryland the English rule requiring no substantive relevance showing applies to statements by parties but not to statements by attorneys. *See* Dixon v. DeLance, 579 A.2d 1213, 1217-18 (Md. Ct. Spec. App. 1990); *see also* Odyniec v. Schneider, 588 A.2d 786, 789 (Md. 1991) (confirming that the English rule applies to parties).

208. RESTATEMENT (SECOND) OF TORTS § 586 cmt. c (1977); *see* SMOLLA, *supra* note 5, § 8.03[2]; *see also* Maulsby v. Reifsnider, 14 A. 505 (1888) (rejecting the English unconditional privilege for attorneys). Though courts do not always refer to the *Restatement*, they do apply a substantive relevance requirement. *See, e.g.*, Fowler v. Conforti, 583 N.Y.S.2d 789, 792 (Sup. Ct. 1992), *aff'd*, 598 N.Y.S.2d 782 (App. Div. 1993); Pawlowski v. Smorto, 588 A.2d 36, 41 (Pa. Super. Ct. 1991).

209. On this point commentators tend to agree. *See, e.g.*, ELDREDGE, *supra* note 9, § 73, at 362-63; PROSSER & KEETON, *supra* note 10, § 114, at 817-18; SANFORD, *supra* note 106, § 10.4.2, at 491-92; SMOLLA, *supra* note 5, § 8.03[2].

must overcome. The early Massachusetts Supreme Court in *Hoar v. Wood*[210] stated:

> And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings, with which a party, or counsel who naturally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved.[211]

The North Carolina Supreme Court stated in *Scott v. Statesville Plywood & Veneer Co.*[212] that "the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety."[213]

The New York Court of Appeals in *Andrews v. Gardiner*[214] stated that "[t]he privilege embraces anything that may possibly be pertinent."[215] Courts often state that they must resolve all doubts regarding substantive relevance in favor of the attorney.[216] Some courts view the relevance standard as requiring a finding of "no relation to the cause or subject matter of inquiry" if the court denies application of the absolute privilege.[217] Substantive relevance is a question of law.[218]

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210. 44 Mass. 193 (1841).
211. *Id.* at 197.
212. 81 S.E.2d 146 (N.C. 1954).
213. *Id.* at 149.
214. 121 N.E. 341 (N.Y. 1918).
215. *Id.* at 343.
216. *See, e.g.*, Matthis v. Kennedy, 67 N.W.2d 413, 417 (Minn. 1954) ("[A]ll doubt should be, under the prevailing rule, resolved in favor of relevancy and pertinency."); Fowler v. Conforti, 583 N.Y.S.2d 789, 792 (Sup. Ct. 1992), *aff'd*, 598 N.Y.S.2d 782 (App. Div. 1993) ("[A]ll doubts as to pertinence are resolved in favor of the privilege."); Pawlowski v. Smorto, 588 A.2d 36, 41 (Pa. Super. Ct. 1991) ("[A]ll doubt as to whether the alleged defamatory communication was indeed pertinent and material to the relief or redress sought is to be resolved in favor of pertinency and materiality.").
217. Spoehr v. Mittelstadt, 150 N.W.2d 502, 505 (Wis. 1967) (quoting Jennings v. Paine, 4 Wis. 372 (1855)); *see also* Pinkston v. Lovell, 759 S.W.2d 20, 23 (Ark. 1988) ("[W]e cannot say that there was 'no connection whatever.' "). For other statements of liberal approaches to the substantive relevance requirement, see Brown v. Shimabukuro, 118 F.2d 17, 18 (D.C. Cir. 1941) ("[S]tatements in pleadings and affidavits are absolutely privileged if they have enough appearance of connection with the case in which they are filed so that a reasonable man might think them relevant.

### 2. *Application by the Courts of the Substantive Relevance Requirement*

Given these judicial statements of the requirement, the courts, not surprisingly, rarely deny the absolute privilege to attorneys on the basis of lack of substantive relevance. Often courts apply the privilege to statements that without doubt relate to the subject matter of the proceeding and that attorneys utter in furthering the client's position. This category of speech is representational speech made in a representational capacity. No one would disagree that a statement to the arbiter in an affidavit about the parentage of an applicant for a delayed birth certificate relates substantively to the birth certificate issuance process.[219] Likewise, statements in a motion to dismiss in a partnership dissolution suit which accuse the opposition of fraudulent and unethical action in obtaining funds that belonged to the partnership relate substantively and are representational.[220] The speech constitutes the claim of right of the client.

Another example of this clearly relevant and representational speech is an argument by an attorney that his or her criminal client received ineffective assistance of counsel at trial when represented by another attorney.[221] The statements about trial counsel do not laud the trial attorney by definition, yet the speech not only relates substantively to the client's claim, but is the client's claim. If the client is to succeed in proving ineffective assistance of counsel, negative statements must be made about the trial counsel. Such is the essence of an ineffective assistance of counsel claim. If a privilege exists, that privilege must apply,

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They need not be relevant in any strict sense."); Arneja v. Gildar, 541 A.2d 621, 624 (D.C. 1988) (noting relevance in the legal sense not required and propriety of liberal construction); Mohler v. Houston, 356 A.2d 646, 647 (D.C. 1976) ("The communication need not be relevant in the legal sense; the term is very liberally construed."); Star v. Simonelli, 428 N.Y.S.2d 617, 618 (App. Div. 1980) (possibly pertinent standard); Demopolis v. Peoples Nat'l Bank of Wash., 796 P.2d 426, 429 (Wash. Ct. App. 1990) ("A statement is pertinent if it has some relation to the judicial proceeding in which it was used, and has any bearing upon the subject matter of the litigation.").

218. *See, e.g.*, Arneja v. Gildar, 541 A.2d 621, 624 (D.C. 1988).

219. *See* Kirschstein v. Haynes, 788 P.2d 941, 950 (Okla. 1990).

220. *See* Ponzoli & Wassenberg, P.A. v. Zuckerman, 545 So. 2d 309, 310 n.4 (Fla. Dist. Ct. App. 1989) (noting statements that the attorneys acted fraudulently and unethically in an effort to delay and obtain money). Statements in support of a motion in a debt proceeding regarding the impropriety of the method of attachment are in this category. *See* Dineen v. Daughan, 381 A.2d 663, 664 (Me. 1978).

221. *See* United States v. Hurt, 543 F.2d 162 (D.C. Cir. 1976).

to some extent, to this type of attorney speech. The attorney speaks representationally in presenting the client's case and the speech furthers the client's case substantively.

As one moves on the spectrum of attorney speech away from speech which is the essence of the client's claim, courts have held speech privileged by viewing relevance as a common sense, layperson's relevance. Generally, such speech is representational and adds substantively to the client's claim. For example, in *Passon v. Spritzer*,[222] a Pennsylvania Superior Court applied the privilege to statements implicating an individual of murder in a writ for habeas corpus and in the brief supporting the writ. The state had incarcerated for the same offense the client for whom the attorney prepared the writ and brief.[223] The court found that the statements related substantively to the client's claim that the state should release her.[224] Likewise, in *McNeal v. Allen*,[225] the Washington Supreme Court held that a statement in the filed complaint as to the amount of damages related substantively to the plaintiff's civil claim though stating the amount of damages in the complaint contradicted a state rule of procedure.[226]

The case of *Dixon v. DeLance*[227] presents another example of the common sense relevance standard applied appropriately. In a hearing about child custody and visitation, an attorney for one parent indicated to the court that the other parent had an unmarried couple and illegitimate child living in the home. The Maryland Court of Appeals recognized that the statements related substantively to the proceeding.[228] Most reasonable people would agree that the moral environment surrounding a child while in the custody of a parent relates substantively to a proceeding to determine custody. Other examples abound.[229]

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222. 419 A.2d 1258 (Pa. Super. Ct. 1980).
223. *Id.* at 1259.
224. *Id.* at 1261.
225. 621 P.2d 1285 (Wash. 1980).
226. *Id.* at 1285.
227. 579 A.2d 1213 (Md. Ct. Spec. App. 1990).
228. *Id.* at 1217.
229. *See, e.g.*, Chard v. Galton, 559 P.2d 1280 (Or. 1977). In *Chard*, the Oregon Supreme Court held that statements in a letter to the opposing party's liability insurer about a prior automobile accident involving the opposing party in an inebriated state were privileged. *Id.* at 1283. The action to which the statements attached involved an automobile accident in which the opposing party allegedly drove while intoxicated. *Id.* at 1281. The court stated: "The test of 'some relation,' as used

In some cases, the courts find substantive relevance when the statements perhaps relate in a common sense way to the underlying action but the attorneys lacked judgment or a sense of decorum in choosing the words to express thoughts. For example, in *Star v. Simonelli*,[230] the plaintiff, a doctor, complained of statements made by the defense attorney, an opposing counsel in a medical malpractice action against the doctor. The attorney referred to the doctor as a "butcher," a "rodomontade who is universally disliked in the profession [and who] trades on allegations of influence and arrogates to himself hegemonic prerogatives."[231] The attorney commented that the doctor engaged in "mnemonic serendipity" and "gross fraud and misconduct" and that the doctor had lots of malpractice suits and had a history of assaulting the servers of process.[232] The court found these statements "possibly pertinent."[233] The attorney in

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here, is not whether the evidence of the occurrence would be admissible in the trial of the case but whether it would have sufficient tangential relevance to affect the value of a settlement. We believe it does have such relevance." *Id.* at 1283; *see also* Pinkston v. Lovell, 759 S.W.2d 20, 21 (Ark. 1988) (holding statements to legal malpractice client regarding potential defense attorney's competency and regarding defense attorney's testimony in a criminal trial regarding his competency or lack thereof substantively relevant); Selby v. Burgess, 712 S.W.2d 898, 899 (Ark. 1986) (holding statements about doctor having performed an abortion on wife of the defendant in an alienation of affections case substantively relevant); Club Valencia Homeowners Ass'n v. Valencia Assocs., 712 P.2d 1024, 1027 (Colo. Ct. App. 1985) (holding statements in letter to members of homeowners' association accusing the plaintiff of fraud substantively relevant to action against the plaintiff for wrongful acts); Matthis v. Kennedy, 67 N.W.2d 413 (Minn. 1954) (holding statement regarding adultery of guardian made at hearing regarding a final accounting by the guardian substantively relevant); DeVivo v. Ascher, 533 A.2d 412, 415 (N.J. Super. Ct. Law Div. 1987), *aff'd*, 550 A.2d 163 (N.J. Super. Ct. App. Div. 1988) (holding statement in letter to client or employer of plaintiff accusing plaintiff of skimming substantively relevant to action against the plaintiff of falsification of records); Wolf v. Musnick, 443 N.Y.S.2d 230, 230-31 (App. Div. 1981) (holding in an action for child support arrears, statements in the answer accusing the plaintiff of raising the children in an immoral environment substantively privileged); Russell v. Clark, 620 S.W.2d 865, 869-70 (Tex. Civ. App. 1981) (holding attorney statements to investors of plaintiff seeking evidence for use in pending litigation and which described the litigation and painted the plaintiff in a dubious light substantively relevant). *But see* Demopolis v. Peoples Nat'l Bank of Wash., 796 P.2d 426, 429-30 (Wash. Ct. App. 1990) (holding statement that opposing party was a perjurer not relevant even though attorney argued that party was testifying and credibility was at issue).

230. 428 N.Y.S.2d 617 (App. Div. 1980).

231. *Id.*

232. *Id.*

233. *Id.* at 618.

*Bull v. McCuskey*,[234] another medical malpractice action, called the doctor "a fumble-fingered fellow, a liar, a scoundrel, a damned idiot."[235] The attorney made several other comments of equal caliber.[236] *Bull* involved an action for abuse of process rather than defamation, but the court applied the same privilege and found substantive relevance.[237]

Finally, courts have applied the privilege to speech which does not seem to relate substantively to the judicial proceeding in any meaningful way. In *Andrews v. Gardiner*,[238] the court applied the privilege to an attorney's remarks that an opposing attorney in an underlying matter was "an unprincipled, blackmailing, depraved scoundrel."[239] A creative court in *Arneja v. Gildar*,[240] analyzed the following statement: "You're unnecessarily pursuing this case. You don't understand the law. Where did you go to law school; you should go back to law school before you practice law. You don't understand. You better learn English, go to elementary school."[241] The court noted that the matter at issue involved a statutory interpretation so the remarks about schooling and understanding related substantively to the matter at hand.[242] Likewise, in *Panzella v. Burns*,[243] an attorney sued another attorney for defamation arising from statements made in a conference in a judge's chambers. The conference involved a matrimonial matter.[244] Though the court never recited the offending statements, it did refer to the "verbal altercation" which culminated in one of the attorneys suffering a broken nose.[245] The court concluded that the statements were

234. 615 P.2d 957 (Nev. 1980).
235. *Id.* at 959.
236. *Id.* at 961-62.
237. *Id.* In *Spoehr v. Mittelstadt,* an attorney stated that the opposing attorney would have difficulty proving damages because his client was a "deadbeat." Spoehr v. Mittelstadt, 150 N.W.2d 503 (Wis. 1967). The court found the statement privileged because the court could not say that the statement bore no relation to the proceeding which was a proceeding to resolve liability and damages arising from an automobile collision. *Id.* at 505. When the issue of damages presents itself, the argument that none exists because the opposing party was a "deadbeat" seems relevant.
238. 121 N.E. 341 (N.Y. 1918).
239. *Id.* at 342.
240. 541 A.2d 621 (D.C. 1988).
241. *Id.* at 622.
242. *Id.* at 624.
243. 565 N.Y.S.2d 194 (App. Div. 1991).
244. *Id.* at 195.
245. *Id.*

pertinent and thus absolutely privileged, while stating: "the court properly determined that the obscenities uttered by the defendant would not be understood in a literal context by those who heard them."[246]

It is difficult to fathom how comments that escalate into an assault and that are obscene and relate to opposing counsel, substantively relate, even in a tangential sense, to the subject matter of the judicial proceeding involving a matrimonial matter. The speaking attorney may obtain a posturing advantage, but the speech lacks relevance to the subject matter.

A few courts have not applied the substantive relevance standard so leniently. For example, in *Post v. Mendel*,[247] the Pennsylvania Supreme Court reviewed a letter an attorney wrote about opposing counsel's performance in a recent proceeding. In the letter, the maligning attorney referred to opposing counsel as an unethical attorney, a liar, a user of "nefarious tactics," a deceiver of the court, and a "piranha."[248] Though the court seemed most swayed by the procedural context of the letter, the court also noted that the letter was not "directly relevant" to the original matter and would not be relevant to a proposed future matter.[249] In *Sussman v. Damian*,[250] the Florida Court of Appeals refused to apply the privilege to statements made after a hearing but did not deal with the subject matter of the lawsuit at hand. The remarks of one attorney to another dealt with allegations of improper conduct regarding client monies and trust funds which had no bearing on the particular matter the attorneys were involved with at the time.[251]

### 3. *A Suggestion for a More Stringent Substantive Relevance Requirement*

If courts afford attorneys an absolute privilege, the substantive relevance requirement should have effect. The substantive penumbra need not encompass anything and everything an

246. *Id.*
247. 507 A.2d 351 (Pa. 1986).
248. *Id.* at 352-53.
249. *Id.* at 356-57. The court stopped short of stating that the comments would be irrelevant to a disciplinary action against the plaintiff attorney, but noted that the defendant overpublicized the letter and thus robbed himself of the potential privilege in that context. *Id.* at 357.
250. 355 So. 2d 809 (Fla. Dist. Ct. App. 1977).
251. *Id.* at 811.

attorney might deign to utter. Courts must refocus attention on the purpose behind the absolute privilege and the result of applying the privilege in interpreting and applying the substantive relevance requirement, thereby delineating the substantive penumbra.

An improved approach to the absolute privilege for attorney speech would use the common sense relevance notion. The time has come, however, for a more conservative view of substantive relevance. First, perhaps society would benefit from courts seriously considering the possible relevance of a statement as opposed to being excused from such an analysis by the broad statements of presumptions in favor of relevance used by many courts in the past. This analysis should result in findings of substantive relevance for the vast majority of defamation cases based on attorney speech. Attorney speech which is the essence of a client's claim or which in fact relates to a client's claim should always be privileged. That speech is necessary for the proper administration of justice, regardless of the exact words used or the character of those words.

A different result should obtain in situations such as those presented by the *Andrews, Arneja, Panzella, Post* and *Sussman* cases. In these cases, the statements at issue maligned opposing counsel. Perhaps one can argue that this speech is substantively relevant and representational in that it provides a superior posture for the client's attorney and thus furthers the client's case. Short of this possible indirect effect on the outcome of the case, without doubt, the speech does not relate to the subject matter of the proceeding.

A court in deciding whether to apply the absolute privilege must consider whether this speech furthers the goal of the privilege, obtaining truth and justice for the client by eliminating any chill on the attorney's speech. While an attorney's comments may assist the attorney's client by belittling the character of opposing counsel in the eyes of the judge and jury, such speech does not directly assist the court in finding the truth, and therefore justice, in the matter before it because the speech has nothing to do with the dispute. If a court allowed no privilege for these comments, the threat of defamation liability would not chill speech regarding the matter in dispute. An attorney could fearlessly place before the court each and every fact or opinion necessary for a valid decision.

Not allowing a privilege for such speech would act as a disincentive for vitriolic personal attacks on judicial participants indicative of the decline of civility in the legal profession. The maligning attorney might carefully consider attacks on opposing counsel if he or she knew that a court might require that he or she pay damages or defend a suit. The District of Columbia Court of Appeals, in *Arneja v. Gildar*,[252] noted that "[a] separate public policy concern . . . is the integrity and civility of legal proceedings, especially as perceived by the public."[253] Because an attorney's speech maligning opposing counsel is so tenuously connected to the policy justifying the privilege in such a situation, perhaps a court should apply the substantive relevance requirement and thus the limit of the substantive penumbra so as to exclude personal attacks of this kind.

## V. A PROPOSAL FOR A QUALIFIED PRIVILEGE

As an alternative to a broad absolute privilege, courts might consider recognizing a qualified privilege. An attorney could enjoy freedom from defamation liability for any statement relevant procedurally and substantively to a judicial proceeding and not made with knowledge or reckless disregard for the falsity of the statement. Just as the Supreme Court grants the press such freedom in certain contexts in the interest of the First Amendment and one of its underlying rationales, appropriate self government, attorneys could enjoy such a privilege in the interest of the proper administration of justice. Such a standard would encourage attorneys to speak cautiously, but perhaps would not cause excessive speech censorship.

Louisiana long ago rejected an absolute privilege for attorneys in favor of a qualified privilege requiring that the attorney have spoken with probable cause and without malice.[254] The case of *Freeman v. Cooper*[255] presents an analysis of the privilege in a situation involving just the sort of attorney speech which, in the

252. 541 A.2d 621 (D.C. 1988).
253. *Id.* at 624.
254. *See* Sabine Tram Co. v. Jurgens, 79 So. 872, 873 (La. 1918) ("No one has a right to deem appropriate or pertinent to an issue presented for decision in a judicial proceeding a libelous allegation that he knows is false or that he has not just or probable cause to believe is true."); *see also* O.C.G.A. §§ 51-5-7 to -8 (1982) (applying a qualified privilege in most situations).
255. 414 So. 2d 355 (La. 1982).

interest of responsible and professional lawyering and civility, perhaps should not enjoy protection from defamation liability. The case makes a strong argument for the qualified privilege. While noting that attorneys need to have freedom to represent clients without fear of defamation litigation, the Louisiana Supreme Court stated: "Nevertheless, the privilege granted to an attorney is not a license to impugn the professional integrity of opposing counsel or the reputation of a litigant or witness."[256] In *Freeman,* the defense attorney made statements about opposing counsel in a brief in a domestic relations matter.[257] The attorney accused opposing counsel of lying, of trying to take advantage of a new judge, and of generally acting above and outside the law.[258] The court evaluated the statements in light of the qualified privilege and concluded that the description of opposing counsel's behavior was unrelated to and "added . . . nothing" to the merits of the matter before the court.[259] In addition, the defense attorney had no probable cause.[260] Thus, courts can use a qualified privilege to protect representational speech while allowing liability for substantively unrelated unprofessional speech.

An argument against a qualified privilege and in favor of an absolute privilege suggests that the threat of costly litigation chills all representational speech of attorneys, even if attorneys know that they will prevail ultimately by application of the qualified privilege. An absolute privilege allows for a speedy dismissal when someone wrongfully accuses an attorney. A judge decides the application of the privilege on a motion to dismiss for failure to state a claim or on a motion for summary judgment. Hearings and depositions are usually unnecessary. A qualified privilege, defeated upon a showing of knowledge of falsity or recklessness with regard to falsity, may require more hearings and depositions and even a trial.

The case of *Andrews v. Elliot*[261] exemplifies the effect of a lesser degree of protection to attorney speech which results from a qualified as opposed to an absolute privilege. In *Andrews*, an

256. *Id.* at 359.
257. *Id.* at 356.
258. *Id.* at 357-58.
259. *Id.* at 359.
260. *Id.*
261. 426 S.E.2d 430 (N.C. Ct. App. 1993).

attorney allegedly sent a letter to a newspaper defaming another attorney by claiming that the other attorney acted unethically and illegally.[262] The North Carolina Court of Appeals reviewed a dismissal pursuant to a grant of a motion to dismiss for failure to state a claim.[263] The absolute privilege could have supported dismissal of the complaint, if that privilege applied. Because the absolute privilege did not apply, only a qualified privilege was at issue. Thus, the plaintiff attorney's allegation in the complaint that the offending attorney made the statements with actual malice prevented dismissal at the preliminary stage of the litigation.[264]

Summary judgment may remain a viable avenue for attorney defendants, just as it has been an alternative for the press. In *Sussman v. Damian*,[265] the court bravely affirmed a grant of summary judgment in a qualified privilege setting. The plaintiff could defeat the privilege upon a showing of actual malice, but no indication of this existed. Rather, the evidence suggested that the statement was simply a "deplorable emotional outburst."[266]

Attorneys, however, must fight an uphill battle to succeed on a motion for summary judgment. In *Petrus v. Smith*,[267] an attorney for a party to an accounting proceeding relating to an executor's administration of an estate referred to the executor as a liar and a thief. The attorney stated this outside of the courthouse.[268] The *Petrus* court noted that a qualified privilege was available because the statement related to the accounting proceeding, a matter of interest to the attorney speaker and to the receivers of the communication, the executor and his attorney.[269] Yet, the court refused to grant summary judgment, stating "[a] qualified privilege requires plaintiff to establish

262. *Id.* at 431.
263. *Id.* at 432.
264. *Id.* at 433 (applying qualified privilege to statements about a subject in which the speaker had an interest or a duty). For other cases considering a qualified privilege for attorney speech, see Green Acres Trust v. London, 688 P.2d 617 (Ariz. 1984); Petrus v. Smith, 458 N.Y.S.2d 173 (App. Div. 1983); Schulman v. Anderson Russell Kill & Olick, P.C., 458 N.Y.S.2d 448 (Sup. Ct. 1982); Rosen v. Brandes, 432 N.Y.S.2d 597 (Sup. Ct. 1980).
265. 355 So. 2d 809 (Fla. Dist. Ct. App. 1977).
266. *Id.* at 812.
267. 459 N.Y.S.2d 173 (App. Div. 1983).
268. *Id.* at 174.
269. *Id.*

malice . . . a fact question hinging on defendant's state of mind which is not usually amenable to summary judgment."[270]

The press manages with a qualified privilege. Perhaps attorneys can manage as well. The attorneys of Louisiana do not appear to have suffered unreasonable speech constraint as a result of the application of only a qualified privilege. Nor has there been an outcry that the administration of justice in Louisiana is flawed because of flawed representation rendered by muzzled attorneys.[271] Perhaps a qualified privilege presents a more reasonable and realistic alternative than society thought appropriate in the past.

## CONCLUSION

Though a healthy respect for anything that has withstood the test of time is usually the best course, occasionally in the law a rule or standard of long standing must receive reevaluation in light of the changing world in which it exists and in light of the method of use the rule or standard has suffered. The time has come to reevaluate the absolute privilege for attorney speech.

Courts over the years have broadly applied the absolute privilege for attorney speech. The privilege has existed for speech related procedurally and substantively to a judicial proceeding. Many courts, however, have used an almost all-encompassing view of both the procedural and the substantive relation requirements—the procedural and the substantive penumbras. In this time of increased volume of and multiplied contexts for attorney speech and in this time of a perceived lack of attorney civility and therefore professionalism, perhaps society can achieve a greater good by the use of a narrower protection from defamation for attorney speech. Added responsibility for what an attorney says and how he or she says it should improve the quality of what the attorney says in terms of truth and in terms of choice of words to convey truth.

Less than zealous client representation may occur as a result of attorneys fearing defamation liability. Careful tailoring of the parameters of the privilege to encompass truly representational speech, however, should minimize any chill to representation

270. *Id.*

271. *See also* O.C.G.A. §§ 51-5-7 to -8 (1982) (qualified privilege if statement not in writing).

that does not already exist with the privilege as applied by the courts today. Ultimately, any arguable additional detrimental effect to representation may be justified in light of the gain to society in terms of reduced reputational injury, recompense for such, and enhanced civility.

Though a narrower privilege may create more or greater conflicts of interest for attorneys, the increase should be slight and again is justified by the overall value of a societally superior standard. Finally, perhaps a narrower protection of attorney speech will result in an increase of cases in the court system challenging statements of attorneys on the basis of defamation liability. An attorney whose statements have injured another might have escaped liability in the past as a result of the historical application of the privilege for attorney speech. With a narrower reformulation of the privilege, that same speech might be actionable. An increase in litigation could result. This sort of increase in litigation should not be viewed as a wholly negative occurrence, however. To the extent that the injuries are actionable under our standards of defamation liability, they are injuries that deserve to be righted. To the extent that people pursue meritless claims against attorneys on the basis of speech, such suits occur even now with a very broad absolute privilege. Perhaps a clear and rational standard of the privilege, even if that privilege is narrower in the protection given, can actually reduce litigation by providing certainty where fog may exist at present.

One means to narrow the present broad privilege is to continue the use of an absolute privilege but to narrow the procedural and substantive penumbras. First, the absolute privilege should apply only to true judicial proceedings and proceedings that are synonymous with judicial proceedings in terms of form, procedure, and import. Second, the absolute privilege should apply to statements that functionally relate to a judicial proceeding, not to statements that happen to occur contemporaneously with a proceeding. Third, to benefit from the privilege, statements should relate to the subject matter of the proceeding and not simply be, for example, an insult tossed at opposing counsel.

Another approach allows a qualified privilege for attorney speech. A showing that the attorney knew the statement to be false or acted recklessly as to the falsity of the statement would defeat the privilege. Why should society want attorneys to be

immune from defamation liability for making false statements knowingly in court or elsewhere? Though a qualified privilege may eliminate early disposition of attorney defamation cases because plaintiffs can allege recklessness, summary judgment may still be available in some cases. Even if the collective effect of a qualified privilege on early disposition is significant, the benefits to society in the added protection to individual reputations and the general benefit to society of a more civil and therefore professional atmosphere for the practice of law may outweigh any cost.