
When Attorney Marketing Becomes Defamatory: How Far Does The Litigation Privilege Extend?

By Jesse L. Roth

In most jurisdictions, attorneys have an absolute privilege to make statements during the course of judicial proceedings without fear of being subject to defamation liability. This absolute privilege extends to every step in the proceeding and covers anything that may be said so long as the statement is relevant to the issue being tried. See, e.g., *Couch v. Schultz*, 193 Mich. App. 292, 294-95 (1992). However, what happens when an attorney makes those same statements outside the courtroom? For example, what if an attorney repeats those statements not for litigation purposes, but for other purposes?

The Fair Reporting Privilege

In Michigan, a defamation plaintiff may not recover any damages for the publication or broadcast of a “fair and true” report of matters of public record. MCL 600.2911(3). This constitutes a “fair reporting privilege” for public documents. *Kefgen v. Davidson*, 241 Mich. App. 611, 623, n 7 (2000). To be “fair and true,” a report must only be substantially accurate, rather than literally accurate. *Koniak v. Heritage Newspapers, Inc.*, 198 Mich. App. 577, 583 (1993). Recently, our office secured the dismissal of all claims against a law firm client on these grounds.

Our office represented a law firm which had filed a federal RICO action alleging corruption against a handful of public officials and private individuals. Our clients posted a copy of the complaint they filed on their website, gave a television interview during which they repeated some of the allegations contained in the complaint, and posted a link to the television interview on their website. Ultimately, the trial court held that all of these statements were protected speech.

Most jurisdictions recognize that there are persuasive policy reasons to have a judicial proceedings privilege, e.g., so that participants are free to express themselves without fear of retaliation. Michigan has recognized that there are just as persuasive policy reasons to have a fair reporting privilege, e.g., because the public has a legitimate interest in accessing and viewing this type of information,

and particularly where it helps protect whistleblowers who are engaged in policing public corruption.

Amidst the sanctity of the free speech rights provided under Michigan law, a word of caution. Plaintiff's counsel, in the case we defended, had recently won a one million dollar judgment in a similar defamation action against an attorney. The difference was that while the law protects relevant statements, it does not protect gratuitous allegations, even what made it a pleading. Michigan attorneys would do well to litigate – and market – with this distinction in mind.