



## Alerts

### Massachusetts Court Applies Litigation Privilege to Dismiss Claims Against Attorney Accused of Fraudulent Activity During Trial

August 17, 2022

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*Bassichis v. Flores*, 189 N.E.3d 640 (2022)

#### Brief Summary

Plaintiffs in the case were creditors of William von Thaden, who was married to Kimberly von Thaden until their divorce in 2017. The defendant, Michael I. Flores (defendant), represented Kimberly in the underlying divorce proceedings. Plaintiffs accused defendant of making misrepresentations during the underlying divorce proceedings when representing the wife. The court, however, dismissed plaintiffs' claims and held that the litigation privilege applied to defendant's conduct and communications during the course of the underlying judicial proceedings.

#### Complete Summary

During their marriage, the husband owned and operated a successful construction business, which was his family's primary income source. However, by 2014, the business was no longer profitable. By 2017, the business owed thousands of dollars in business loans. Shortly thereafter, the husband and the wife contemplated divorce. The husband promised the wife that she would receive all of the marital property. She then hired the defendant to represent her in the divorce. The husband appeared *pro se*.

Defendant filed a complaint for divorce on the wife's behalf. Prior to trial, defendant submitted proposed findings of fact, supporting documentation and a proposed judgment that awarded all marital assets to the wife. Defendant informed the judge in his opening statement that the husband was in agreement with all of the proposed findings of fact and the proposed judgment. Defendant explained that he had submitted the case as an "adversarial matter" because the husband intended to file for bankruptcy after the divorce became final.

After the judgment for dissolution finalized, the husband filed a petition for bankruptcy, naming the plaintiffs as creditors. The bankruptcy case was closed in May 2019 without any distribution to the husband's creditors. In July 2020, the creditors commenced an action against defendant based on his representation of the wife in the divorce. Plaintiffs alleged that defendant

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participated in a fraudulent transfer, civil conspiracy, and violations of the Uniform Fraudulent Transfer Act.

Defendant moved to dismiss the complaint on the basis that plaintiffs' claims were barred by the litigation privilege. In their opposition, plaintiffs maintained that the litigation privilege protected only communications made in the course of litigation and did not protect defendant's conduct in carrying out a scheme to defraud the plaintiff creditors by transferring all marital assets to the wife through collusive divorce proceedings. According to plaintiffs, their claims were based on defendant's "conduct in effectuating the unlawful transfer of [the husband's] assets to his wife." The trial court granted defendant's motion to dismiss. The Massachusetts Supreme Court granted review.

The court explained that the application of the privilege extends to communications preliminary to a proposed judicial proceeding or during the course of a judicial proceeding. The privilege also protects defamatory statements "even if uttered maliciously or in bad faith" because a privilege that protects an individual from liability for defamation would be of little value if the individual were subject to liability under a different theory of tort.

The court noted that the policies of the litigation privilege promote zealous advocacy by allowing attorneys "complete freedom of expression and candor in communications in their efforts to secure justice for their clients." It is in the public interest to allow counsel full freedom of speech, in conducting the causes, and advocating and sustaining the rights of their constituents, and this freedom of discussion ought not to be impaired by numerous and refined distinctions. However, the court noted that the privilege will not always shield attorneys from their own wrongdoing. For example, a court has the inherent authority to sanction an attorney for his or her misconduct.

The litigation privilege applies to an attorney's actions during the course of a judicial proceeding, as well as communications. To find otherwise would invite attorneys to divide their interests between advocating for their client and protecting themselves from a retributive suit.

## Significance of Decision

This decision affirms that the attorney litigation privilege is applied broadly. This case demonstrates that attorneys are given great latitude in their litigation conduct and arguments during the course of representing clients.