

The Appellate Strategist

INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

Reach of Litigation Privilege To Be Tested By Florida Supreme Court

July 13, 2011 by [Robert C. Weill](#)

In a day and age when every other day there seems to be a sex scandal involving a politician's "indiscretions," the Florida Supreme Court has been asked to examine a legal issue arising out of an alleged sex scandal. In *DeMonico v. Traynor*, No. SC10-1397, the Court must determine whether an attorney is protected by the litigation privilege against claims for defamation and tortious interference when he related to another party's ex-spouses and former business associates during witness interviews that the party used prostitutes to entice business clients. The Court accepted the case for review based on conflict with the Court's prior decision in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell P.A. v. U.S. Fire Insurance Co.*, 639 So. 2d 606 (Fla. 1994). The district court's decision is reported at 47 So. 3d 1287 (Fla. 4th DCA 2010), and the slip opinion can be found [here](#). The Court heard [oral argument](#) on June 9, 2011.

The District Court's Decision.

The district court affirmed the application of the privilege to bar the claims against the attorney and his law firm. Over the dissent of one judge, the district court held that "[b]ecause the statements complained of were made by the [attorney] while he was acting as defense counsel in the underlying litigation, and the statements bore 'some relation' to the proceeding, they were absolutely privileged as a matter of law."

The dissent, on the other hand, questioned whether a qualified, rather than absolute, privilege applied since the attorney's defamatory statements targeted a person *outside* a "judicial proceeding." It then concluded that disposition by summary judgment was not appropriate because "there remain disputed issues of material facts as to whether the attorney made the statements and whether they were made with the intent to injure the appellant."

Review before the Florida Supreme Court.

The Florida Supreme Court accepted review of the case based on express and direct conflict with its decision in *Levin Middlebrooks* which held that "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior . . . so long as the act has some relation to the proceeding." Petitioners asserted that the district court's holding conflicted with *Levin Middlebrooks* "by applying an absolute privilege to statements defaming a party outside of a judicial proceeding, at a time when the defamed party and/or his lawyer are not present, not provided an opportunity to be heard, and not able to have any judicial recourse because the defamatory statements are not made in the 'course of the judicial proceeding.'"



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In sum, the issue before the Court turns on the meaning of the phrase “course of judicial proceeding.” Does the “course of judicial proceedings” requirement become non-issue once a lawsuit is filed? Does it sweep into its net comments made during potential witness interviews outside the presence of the defamed party or a judge? Does the term require that the statements be made during a formal discovery process (e.g., deposition, answer to interrogatories), a court filing, or in open court? In the end, the Court will have to balance “the chilling effect on free testimony” versus “the right of an individual to enjoy a reputation unimpaired by defamatory attacks” based on the facts of this case.