WASPLC

By Tanya Goodman
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Litigation Privilege in Washington: From Limited Protection to Functional Immunity

Executive Summary

Washington's litigation privilege originated as a narrow common-law doctrine to safeguard candid participation in judicial proceedings. It was justified by the assumption that courts would actively supervise and discipline misconduct. Over decades, appellate decisions have expanded its scope, particularly for attorneys, while practical accountability mechanisms (sanctions, bar discipline) have proven limited in high-discretion contexts like family court. The result is a doctrine that increasingly functions as de facto immunity, insulating not only legitimate advocacy but also potential abuses such as knowing falsehoods or process weaponization.

This paper traces the 'de facto immunity' doctrine's evolution, identifies the resulting accountability gap, and proposes targeted statutory guardrails to restore the original conditional bargain without undermining zealous representation.

I. Historical Purpose

The privilege protects the truth-seeking function of courts by shielding parties, witnesses, and attorneys from collateral civil liability for statements made in the course of litigation. It rests on two premises: (1) candid advocacy requires breathing room, and (2) judicial oversight—through striking improper matter, sanctions, contempt, or discipline, provides the necessary check.
It was never designed to shield fraud on the court, fabricated evidence, or use of process for extrinsic purposes.

II. Washington's Early Framework: Privilege Conditioned on Accountability

A. Twelker v. Shannon & Wilson, Inc., 88 Wn.2d 473, 564 P.2d 1131 (1977)
The Court distinguished absolute from qualified privilege and emphasized that protection depends on the availability of disciplinary authority. Statements outside the immediate judicial context received only qualified protection.

B. McNeal v. Allen, 95 Wn.2d 265, 621 P.2d 1285 (1980)
The Court extended absolute privilege to pertinent statements by attorneys and parties in pleadings, stressing policy goals of zealous advocacy and avoiding derivative suits. Yet it reiterated that the privilege does not grant attorneys impunity for abuse.

C. Deatherage v. Examining Bd. of Psychology, 134 Wn.2d 131, 948 P.2d 828 (1997)
The Supreme Court reaffirmed that the privilege's rationale depends on the existence of some disciplinary power. Absolute witness immunity from civil suit does not necessarily extend to professional licensing board proceedings.

These cases preserved a conditional logic: broad speech protection justified only by meaningful judicial and disciplinary oversight.

III. Modern Expansion: Toward Absolute Framing

A. Jeckle v. Crotty, 120 Wn. App. 374, 85 P.3d 931 (2004)
The Court applied broad protection to attorneys for acts arising out of client representation, using language that approached functional immunity in civil claims.

B. Young v. Rayan, 27 Wn. App. 2d 500, 533 P.3d 123 (2023)
Division I affirmed dismissal of claims (including defamation and false light) based on allegedly perjured declarations in litigation. The court emphasized reliance on trial court sanctions and professional discipline as sufficient safeguards, even for serious allegations of misconduct.

C. Valve Corp. v. Bucher Law PLLC, No. 86585-4-I (Wash. Ct. App. Div. I, June 30, 2025) (published)
The court again invoked absolute immunity language for attorneys and firms for acts in client representation, dismissing tortious interference and abuse of process claims in a complex arbitration context. It reiterated deference to internal checks.

These decisions illustrate incremental broadening, often in published opinions that reinforce the 'de facto' doctrine's reach.

IV. The Accountability Gap

Washington courts continue to justify expansive privilege by pointing to alternative remedies: trial court sanctions, contempt, and WSBA discipline under Supreme Court-delegated authority (APR and ELC rules). In practice, these mechanisms operate within a closed institutional loop. The WSBA administers grievances and prosecutions; discipline remains relatively infrequent relative to complaint volume. Recent annual reports show thousands of grievances but only dozens of formal disciplinary actions annually (e.g., ~50 lawyers disciplined in 2024 out of over 40,000 licensees).
In family court, characterized by high discretion, heavy reliance on declarations, and limited evidentiary hearings, the gap is pronounced. Theoretical remedies rarely translate into meaningful redress for harmed litigants.

V. Interaction with Discretionary Narrative Tools

Expansive privilege interacts problematically with broad, subjective label standards such as "abusive use of conflict" under RCW 26.09.191 (5). The statute now includes a specific definition (bad-faith order violations, threats, use of the child in conflict, abusive litigation per RCW 26.51.020), yet application still involves significant judicial discretion(6).

Once embedded in findings, such labels can reframe protected advocacy as pathology, influence future proceedings, and chill legitimate petitions, all while the underlying statements enjoy near-absolute civil protection. Similar dynamics appear across systems relying on discretionary labeling (dependency, employment, mental health evaluations).

This is not to question the validity of protective concepts in appropriate cases, but to examine how privilege + discretion + weak external oversight can produce self reinforcing institutional narratives.

VI. Family Court as Systems Case Study

Family court exemplifies the risks: irreversible relational harm, procedural asymmetry, and heavy dependence on third-party reports and affidavits. Privilege here can shield narrative construction that becomes "fact" for downstream actors (evaluators, schools, agencies) with limited correction mechanisms.

VII. Mason v. Mason, 19 Wn. App. 2d 803, 497 P.3d 431 (2021)

This decision recognizes a narrow exception: litigation privilege does not categorically bar abuse-of-process claims where process is used for an extrinsic, improper purpose. It confirms the

doctrine is not absolute in every circumstance, yet remains fact-specific and underutilized without clearer statutory guidance.

VIII. Policy Recommendations for Governance Accountability:

Restore the conditional nature of the privilege through structural adjustments:

1. **Statutory Clarification of Limits**
   Codify that the privilege does not shield: knowing material falsehoods, fabricated evidence, fraud on the court, or abuse of process for extrinsic ends. Tie explicitly to existing exceptions (e.g., Mason).
2. **Constraints on Discretionary Findings**
   For standards like RCW 26.09.191, require detailed findings linking evidence to statutory criteria, with heightened scrutiny on appeal for subjective labels. Written findings alone are insufficient without external boundaries on interpretation.
3. **Independent Oversight Mechanisms**
   Consider an external review body for litigation conduct complaints (modeled on independent disciplinary or ombuds structures) to reduce closed-loop dynamics.
4. **Transparency and Reporting**
   Mandate annual public reporting on: sanctions requested/granted in civil cases, bar referrals from litigation conduct, and outcomes. Leverage WSBA data more systematically.
5. **Narrow Civil Safety Valve**
   Create a limited cause of action (clear and convincing evidence of bad-faith abuse + exhaustion of internal remedies) with fee-shifting protections to deter frivolous claims.

IX. Conclusion

Litigation privilege serves a vital function but drifts when its justifying accountability structures become theoretical. Washington's doctrine has evolved from conditional protection—tied to judicial supervision—toward functional immunity in practice. Realigning incentives and restoring meaningful checks is a governance imperative, not an attack on the bar or bench. The public deserves systems where freedom of advocacy coexists with accessible correction mechanisms, preserving both judicial integrity and citizen trust.

Citations

(1) APR; ELC Rules; WSBA Discipline System Annual Reports (2023–2024).
(2) Young v. Rayan, supra; Valve Corp., supra.
(3) WSBA reports (low formal action rates vs. grievance volume).
(4) Twelker, Deatherage, McNeal, supra.
(5) RCW 26.09.191 (abusive use of conflict definition and limitations).
(6) RCW 26.51.020 (abusive litigation).