

IMMUNITY FROM CIVIL LIABILITY FOR THE EXPERT WITNESS: DON'T COUNT ON IT

D. Larry Crumbley and W. Eugene Seago*

A doctrine emerged under the common law of England that participants in court proceedings should enjoy special protections. One rationale for immunity from prosecution relates to the need for finality of decisions, as expressed by Justice O'Connor:

The judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict.¹

Another rationale for special treatment for witnesses relates to the need for open and balanced testimony that might otherwise be compromised

if the threat of a lawsuit existed. "Communications made in judicial or quasi-judicial proceeding carry an absolute privilege so that witnesses, bound by their oath to tell the truth, may speak freely without fear of civil suits for damages."² Thus, police officers have enjoyed immunity even from prosecution for false testimony.³ The underlying premise for any immunity is that "though the defendant might be a wrongdoer, social values of great importance require that the defendant escape liability."⁴

In *Murphy v. Mathews*⁵ the Missouri Supreme Court traced the development of witness immunity to defamation under common law. The mere filing of a lawsuit could harm the defendant's reputation. Even "those who have just cause for complaint, would not dare to complain for fear of infinite vexation,"⁶ without some immunity.

From plaintiffs the immunity was extended to witnesses,⁷ lawyers, and judges.⁸ But as many

¹ *Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985). The courts have recognized two types of immunity: (1) limited, and (2) absolute. Under limited immunity the participant who acts in bad faith can be prosecuted, but no liability attaches to mere negligence. Absolute immunity, as enjoyed by the police officer, protects even against "bad faith." See, e.g., *Levine v. Wiss & Co.* 478 A.2d 397 (S.Ct., N.J., 1984). As will be seen below, no cases have afforded expert witnesses absolute immunity against suits by their contracting party.

² *Briscoe v. Lahue*, 460 U.S. 332 (1983).

³ *Briscoe v. Lahue*, 460 U.S. 325 (1983).

⁴ Prosser and Keaton on Torts, at 1032 (5th ed., 1984).

⁵ 841 S.W. 2d 671 (Mo. 1992)

⁶ 76 Eng.Rep. 888 (Q.B. 1585), cited in *Briscoe v. Lahue*, 460 U.S. 331 (S.Ct., 1983).

⁷ See, e.g., *Morley v. Gory* 814 A.2d 762 Pa.Super., 2002.

⁸ See, e.g., *Forrester v. White*, 484 U.S. 219 (USSC 1988).

Dr. Crumbley, CPA, is KPMG Endowed Professor at Louisiana State University, and W. Eugene Seago, JD, is the R.B. Pamplin Professor of Accounting at Virginia Tech.