"OUT OF LEFT FIELD"

THE LITIGATION PRIVILEGE DEFENSE TO ADVERSE PARTY SUITS AGAINST LAWYERS

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INTRODUCTION

Imagine yourself playing for the Chicago Cubs in Wrigley Field for the National League Championship. You are standing on second base in the bottom of the ninth. If you can make it to home plate you will send the Cubs to the World Series and will be a hometown hero.

You see the batter hit a solid line drive down toward the left field line. As you start for third you see the ball land in fair play. You think it's headed for the left field corner so you set your eyes on home plate. As you approach home, you feel the ball whiz past your head and are shocked by the left fielder's throw. It lands safely in the catcher's mitt and you are tagged out. The Cubs lose again, and instead of being the hero, Cubs fans lament your decision to try for home over another pasta dinner at Harry Caray's.

Lawyers can also be caught by surprise from "out of left field" when they get sued by former *adverse parties* and other non-clients. Such cases are particularly surprising because the classical mindset is that a lawyer cannot be sued absent an attorney-client relationship. Indeed, the United States Supreme Court held over 100 years ago that a third party not in privity of contract with the lawyer cannot maintain a legal malpractice suit except in cases of fraud or collusion. *Nation Savings Bank v. Ward*, 100 U.S. 195 (1879).

Those words, "except for fraud or collusion" and expansions of those exceptions are an ever-increasing problem for lawyers. In this writer's recent experience, claims from adverse parties and other non-clients seem to be getting more and more prevalent.

TYPES OF ADVERSE PARTY CLAIMS

Claims from adverse parties and other non-clients have taken many forms. The general rule is that "an attorney is not responsible for an injury to a third person arising out of the representation." 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 6.1 (2013 ed.) [hereinafter "*Legal Malpractice*"). This is only a general rule, however. And, even if the attorney is not liable, hundreds of cases prove that non-parties can still file lawsuits, which must be defended.

Here is a non-exclusive list of some of the more common types of adverse party claims against lawyers:

Abuse of process
Aiding and abetting (breach of fiduciary duty, etc.)
Anti-SLAPP (strategic lawsuit against public participation) statutes
Civil conspiracy
Civil rights
Consumer protection statutes
Conversion
Defamation
Employee Retirement Income Security Act (ERISA)
False arrest or imprisonment
Fair Credit Reporting Act
Fair Debt Collection Practices Act
Fraud
Fraudulent transfers
Indemnity or contribution
Intentional infliction of emotional distress
Intentional interference with economic advantage
Invasion of privacy
Knowing participation in breach of fiduciary duty
Malicious prosecution
Misrepresentation
Multiplicity of proceedings or vexatious conduct (28 U.S.C. 1927)
Negligence/malpractice (intended beneficiary or harm reasonably foreseeable)
Racketeer Influenced and Corrupt Organizations (RICO)
Securities statutes
Trespass

This paper does not attempt to provide detailed analyses of each of these claims, but does address one of the most important defenses—the judicial proceedings privilege.

THE LITIGATION PRIVILEGE

The "litigation privilege" (also referred to as the "judicial proceedings privilege") is one of the most important defenses to claims against former adverse parties. Stated in its traditional form, "[t]he litigation privilege generally protects an attorney from civil liability arising from words he has uttered in the course of judicial proceedings." *Loigman v. Township Committee*, 889 A.2d 426, 433 (N.J. 2006).

The litigation privilege is of ancient origin, and developed primarily in the context of defamation and slander. *See id*. It has been statutorily adopted in some states, such as California. *See* Cal. Civ. Code § 47 (2012).

The privilege has been described as "the backbone to an effective and smoothly operating judicial system." *Loigman*, 889 A.2d at 436. It is broadly recognized, liberally applied, and "based upon a public policy of security to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients." Restatement (Second) of Torts § 586 cmt. a (1977). The privilege encourages loyalty and zealous representation on behalf of clients. As the Texas Court of Appeals has recognized:

> [I]f an attorney could be held liable to an opposing party for statements made or actions taken in the course of representing his client, he would be forced constantly to balance his own potential exposure against his client's best interest.

Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 405 (Tex. Ct. App. 2005).

The judicial proceedings privilege embraces the notion that "an attorney acting within the law, in a legitimate effort to zealously advance the interests of his client, shall be protected from civil claims arising due to that zealous representation." *Taylor v. McNichols*, 243 P.3d 642, 656 (Idaho 2010). When an attorney is speaking or acting on behalf of his client and for that client's interests, the privilege is presumed to apply. *Moss v. Parr Waddoups Brown Gee & Loveless*, 285 P.3d 1157, 1166 (Utah 2012).

The litigation privilege may apply to any statement made in the course of and with reference to a judicial proceeding by any judge, juror, party, witness, or advocate. An attorney's privilege to publish defamatory matter preliminary to or in the course of a judicial proceeding has been described as "absolute," at least so long as the publication has some relation to the proceeding. *See* Restatement (Second) of Torts § 586 (1977).

In contrast, it has also been stated that:

> "The [litigation] privilege is not absolute, but applies only where: (1) the statements involved were made during the course of judicial proceedings; and (2) they were relevant to the subject of inquiry. . .

. Statements made during the course of judicial proceedings which are irrelevant to the proceedings are entitled to only a "qualified privilege."

Stucchio v. Huffstetler, 720 So. 2d 288, 289 (Fla. Dist. Ct. App. 1998).

Extension Beyond Defamation

Although rooted in defamation, the litigation privilege has been asserted successfully in defense of a broad range of other claims. For example, it has been successfully asserted in defense of claims for bad faith and breach of fiduciary duty, interference with business relationships, civil conspiracy and racketeering. *See, e.g., Jackson v. BellSouth Telecomms*., 372 F.3d 1250, 1277 (11th Cir. 2004) (tortious interference and conspiracy to defraud); C*hristonson v. United States*, 415 F. Supp. 2d 1186, 1196 (D. Idaho 2006) (RICO); *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 440 F. Supp. 2d 1184 (D. Nev. 2006) (bad faith and breach of fiduciary duty); *Boca Investors Group, Inc. v. Potash*, 835 So.2d, 273, 274 (Fla. Dist. Ct. App. 2002) (interference with business relationships); *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 151 P.3d 732, 750-52 (Haw. 2007) (interference with prospective economic advantage); *Debry v. Godbe*, 992 P.2d 979, 986 (Utah 1999) (citations omitted) (infliction of emotional distress; "the judicial proceedings privilege extends not only to defamation, but to all claims arising from the same statements"); *see also generally* Robert W. Lucas, *The Lawyers' Litigation Privilege*, Riding the E&O Line (Newsletter of the Professional Liability Committee of the Defense Research Institute), http://clients.criticalimpact.com/newsletter/newslettercontentshow1.cfm?contentid=5027&id=708 (last accessed Feb. 21, 2013).

Extension to Lawyer Conduct

Recently, there has been a trend to extend the litigation privilege beyond mere statements to also immunize *conduct*. An excellent recent example appears in the Utah Supreme Court's decision in *Moss v. Parr Waddoups Brown Gee & Loveless*, 285 P.3d 1157 (Utah 2012). In that case, a company called Iomed hired the Parr law firm to sue its former employee, Yanaki, for allegedly violating a non-compete agreement and stealing Iomed's trade secrets. Immediately after filing suit, the Parr firm, acting zealously on behalf of Iomed, obtained and enforced *ex parte* orders that directed the local sheriff to use reasonable force to enter Yanaki's home without consent and to take custody of computers and other electronic data for preservation purposes.

Yanaki eventually settled with Iomed, but then he and his fiancé (Moss) in turn sued Iomed's law firm and three of its lawyers. Yanaki and Moss alleged claims for abuse of process, invasion of privacy, infliction of emotional distress, trespass, conversion and civil conspiracy. The Utah Supreme Court held that the litigation privilege extended to the attorneys' *conduct*, and dismissed all of

Yanaki's and Moss's claims. *See* 285 P.2d at 1165-67 (citing cases from several jurisdictions). The dismissal came, however only after *nine painful years* of litigation, including a trip to the Utah Court of Appeals and Utah Supreme Court.

Limitations on the Litigation Privilege

Despite some authority characterizing the litigation privilege as "absolute," it is certainly not without limits. There are some claims for which the litigation privilege is usually *not* a defense. Such claims may include malicious prosecution, fraud, criminal perjury, suborning perjury and professional discipline. *See, e.g., Hagberg v. Cal. Fed. Bank FSB*, 81 P.3d 244, 259 (Cal. 2004) (the litigation privilege "operates to bar civil liability for any tort claim based upon a privileged communication, with the exception of malicious prosecution"); *Bushell v. Caterpillar, Inc.*, 683 N.E.2d 1286, 1289 (Ill. Ct. App. 1997) (litigation privilege does not provide immunity from criminal perjury); *Hawkins v. Harris*, 661 A.2d 284, 288 (N.J. 1995) (litigation privilege is not bar to professional discipline or criminal perjury); *Dello Russo v. Nagel*, 817 A.2d 426, 433 (N.J. Super. Ct. App. Div. 2003) (litigation privilege does not insulate against malicious prosecution or professional discipline); *N.Y. Cooling Towers, Inc. v. Goidel*, 805 N.Y.S.2d 779, 783 (N.Y. Sup. Ct. 2005) (refusing to dismiss claims against adverse party's attorney based on fraud and collusion); *Clark v. Druckman*, 624 S.E.2d 864, 870-72 (W. Va. Ct. App. 2005) (litigation privilege does not immunize attorney from claims of fraud or malicious conduct).

The risks of liability also increase to the extent the lawyer engages in independent acts outside the scope of furthering his client's interests, when the lawyer acts to further his own self interest, or when the lawyer engages in other acts that are "foreign to his duties as an attorney." *Moss*, 285 P.3d at 1166. (citations omitted). This is a murky world indeed.

The gray boundaries of the privilege are described somewhat in several cases. For example, in *Fraidin v. Weitzman*, 611 A.2d 1046, 1080 (Md. Ct. Spec. App. 1992), the court stated:

> The law does require that while an attorney is acting within the scope of his employment, he may not commit fraud or collusion, or a malicious or tortious act, even if doing so is for the benefit of the client. Such actions are beyond the qualified privilege and an attorney is personally liable for them. . . . To remove the qualified privilege, the attorney must possess a desire to harm which is independent of the desire to protect his client. This would constitute actual malice and therefore substantiate a tortious interference with contract claim.

But "fraud" or "collusion," as used in this context, should not be considered all encompassing. Lawyers necessarily "conspire" or "collude" with

their clients in almost every representation. Indeed, "lawyers necessarily 'conspire' with clients in providing advice or undertaking activities to achieve their clients' objectives," but nonetheless their actions, "*as the client's agent*, cannot support a conspiracy." *Legal Malpractice* § 6.6 (emphasis added). If the *dictum* in *Fraidin* is taken too far, then every lawyer would become a co-conspirator with his or her client in every representation.

In *Southern Union Co. v. Southwest Gas Corp.*, 165 F. Supp. 2d 1010, 1016 (D. Ariz. 2001), the court explained that an attorney may be liable if the attorney "acts out of self-interest which goes beyond the agency relationship." For example, a lawyer *might* be exposed to liability if, for example, he induced a breach of contract on the hope that he would personally fill the resulting economic void, as by obtaining a new client who wrongfully breached its contract with a prior law firm. *See Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321, 327 (9th Cir. 1982) (*dictum*). Thus, a lawyer faces increased risk of liability from non-clients when he commits acts that do not further his client's interests but seek to create separate economic advantage for the lawyer.

Creative plaintiffs have seized upon this concept to argue that a former adverse attorney had a self-interest in obtaining legal fees and future work from his client. However, such a narrow "self-interest" does not go beyond the attorney-client relationship, exists in almost every lawyer representation, and has been flatly rejected as a basis for imposing liability on lawyers in numerous cases. *See, e.g., Shenandoah Assocs. v Tirana*, 322 F. Supp. 2d 6, 11 (D.C.D.C 2004) ("[s]o long as he acts or advises with the purpose of promoting the client's welfare, it is immaterial that the lawyer hopes the action will increase the lawyer's fees or reputation as a lawyer or takes satisfaction on the consequences to a nonclient."), *quoting* Restatement (Third) of the Law Governing Lawyers, § 57, cmt. g; *Los Angeles Airways*, 687 F.2d at 328 (rejecting argument that lawyer could be exposed to liability for inducing breach of contract based on desire to gain further trust and confidence of client).

Needless to say, the lines can be very murky, and navigating the waters in this part of the law can be treacherous.

Practice Pointers – How to Avoid Liability

So, given the duties of undivided loyalty and zealous advocacy owed to clients, how can lawyers avoid stepping across the line into foul territory? There is no bright-test, but some practical considerations will help.

First, abide by the ethical rules of your jurisdiction. While lawyers usually think of ethical rules as a means to protect clients, the public and the profession, in this context the ethical rules provide great protection for the lawyer. Ethical rules provide safe boundaries in which the lawyer can be a zealous and loyal advocate, but also avoid unfair and over-reaching tactics that can lead to trouble.

See, e.g., Clark, 624 S.E.2d at 871 (noting that Rules of Professional Conduct provide safeguards to prevent against abusive and frivolous litigation tactics).

For example, a key rule contained in Model Rule of Professional Conduct 4.1 prohibits lawyers from making false statements to others. Model R. Prof. Cond. 4.1 (2012). Many claims by former adversaries involve allegations of untrue statements that give rise to alleged claims for fraud, collusion and conspiracy. And often such claims are based on alleged statements by lawyers that are, at worst, misconstrued and thereby painted as gray, when in fact the statement might have been technically true. Adhering to principles of "Abe Lincoln honesty" will help avoid accusations of fraud on the part of the attorney.

Strictly following rules related to conflicts of interest is also imperative. This includes the prohibition against engaging in a representation that may be infected by lawyer's own personal interests. *See* Model R. Prof. Cond. 1.7(a)(2). A huge red flag should arise whenever the lawyer is tempted to start thinking of ways he can personally benefit from any representation (other than the normal fee). A lawyer's duty is to represent his client, not his own interests. A lawyer must keep his eye on the ball, and not be distracted by opportunities for personal advantage.

Following applicable rules of civil procedure, such as Federal Rule of Civil Procedure 11, will also help shield against claims from adverse parties. *See, e.g., Clark,* 624 S.E.2d at 871 (also noting that Rules of Civil Procedure provide safeguards to prevent against abusive and frivolous litigation tactics). If claims and statements are made for proper purposes and are warranted by existing law or a good faith argument for modifying the law, chances are good the judicial proceedings shield will provide protection for such claims and statements.

Finally, do your homework and get a second opinion. Most of the time, lawyers can find precedent for or against a proposed course of action. Treat prior precedent as a safety net or the ultimate backstop. And never hesitate to seek the advice of a trusted advisor. As objective as a lawyer may try to be, there is no substitute for seeking the advice of another lawyer whose vision is not clouded by personal involvement.