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Complex Litigation

Litigators' Immunity From Non-Client Lawsuits

By Michael Hoenig
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It is generally understood that lawyers have some form of immunity from civil liability to non-clients for their statements or actions taken in connection with representing a client in litigation. Often referred to as "the litigation privilege," whether that immunity from third-party suit is "absolute" or "qualified" depends on the facts and circumstances of the case, the relevance or connection of the lawyer's conduct to the litigation at hand, and the breadth of the immunity doctrine applied in a particular state. See M. L. Steinberg & L. J. Weissler, "The Litigation Privilege as a Shelter for Miscreant Counsel," 97 Ore. L. Rev. 1 (2018); L. L. Hill, The Litigation Privilege: Its Place in Contemporary Jurisprudence," 44 Hofstra L. Rev. 401 (2015); T. L. Anenson, "Absolute Immunity From Civil Liability: Lessons for Litigation Lawyers," 31 Pepperdine L. Rev. 915 (2004).

Policy considerations undergird the evolution of an effective immunity doctrine. Advocates litigating on behalf of their clients should be able to represent their clients zealously without the threat of lawsuits by disgruntled non-clients or offended third parties. The goal of finding the truth in the battle between the parties requires the candid, objective and undistorted disclosure of evidence, the ability to pursue zealous advocacy, and the adversaries' realistic evaluation of the case to promote settlement.

Litigators would be chilled by the threat of subsequent litigation and that could reduce access to the courts. The finality of judgments would be affected by retaliatory collateral litigation commenced against the prevailing party and its counsel. An "open season" for "sore loser" lawsuits claiming malicious statements were made could multiply abusive litigation practices. As one writer puts it, "the integrity of the adversary system outweighs any monetary interest of a party injured by her adversary." Hill, supra, at 401.

Traditionally, later lawsuits by disgruntled parties centered around defamation claims, whether slander or libel. Thus, immunity focused on attorney statements.

Indeed, the vaunted American Law Institute (ALI) Restatements of the Law provided an absolute litigation privilege as a defense to claims that defamatory matter was stated or published in the original litigation. See Restatement (Third) of Law Governing Lawyers §57 (ALI 2000); Restatement (Second) of Torts §586 (ALI 1977). Courts across the country, however, recognized that all forms of advocates' conduct and actions related to the litigation might need immunity as well.

Dangerous Lawsuits

A fine post by attorney Daniel L. Abrams ("Non-Client Lawsuits Against Attorneys" (Sept. 26, 2005)), warns that non-client lawsuits against attorneys rendering legal services "are even more dangerous than ordinary malpractice claims," for two principal reasons. First, those lawsuits typically allege intentional misconduct, not negligence. Intentional misconduct is "far more likely to raise the interest of a disciplinary committee, and far less likely to be covered by a malpractice insurance policy."

Second, says Abrams, although lawyers should practice law with a healthy fear of malpractice liability, "they cannot practice law like they are scared of third parties." Many third-party lawsuits are brought by individuals on the other side of a litigation or transaction. Lawyers are "often placed in a position where they are knowingly inflicting some kind of misfortune on others." Thus, it is critical to understand where the line is drawn between zealous advocacy and potential third-party liability. The writer then surveys quite a number of scenarios where enhanced vigilance is called for. (E.g., aiding or participating in client's breach of fiduciary duty or contract; common law fraud/conversion; malicious prosecution/abuse of process; etc.).

New York courts apply a so-called "absolute" immunity from liability for defamation when oral or written statements are made by attorneys in connection with a proceeding in court "when such words and writings are material and pertinent to the questions involved." But needless defamation showing "express malice" causes the protection to be "withdrawn." Similarly, relevant statements made in judicial or quasi-judicial proceedings, irrespective of the attorney's motive for making them, are also afforded absolute protection. See *Front v. Khalil*, 24 N.Y.3d 713 (2015) (reviewing New York law). In *Front*, the court recognized a "qualified" privilege for attorney statements made prior to litigation when they were pertinent to the commencement of a good faith, anticipated litigation. See E. M. Spiro & J. L. Mogul, "Attorneys Beware—Limited Immunity From Defamation Suits," New York Law Journal (Dec. 22, 2016).

New Yorkers have yet another consideration in the litigation immunity calculus—the potential influence of a statute. New York's Judiciary Law §487, titled "Misconduct by Attorneys," provides that an attorney "guilty of any deceit" with intent to deceive the court or any party is "guilty of a misdemeanor" and forfeits to the party injured treble damages, "to be recovered in a civil action." Could §487 be a portal

through which absolute or qualified immunity from retaliatory lawsuits by disgruntled non-parties is bypassed? Possibly. So lawyers must be careful not to engage in intentionally deceptive conduct. See Friedman Kaplan, "Liability Under N.Y. Judiciary Law §487—How Bad Does It Have To Be?" (ABA/BNA Lawyer's Manual on Professional Conduct Feb. 22, 2017).

Spoliating Evidence

An interesting application of absolute immunity for lawyers' actions in the conduct of litigation is found in a "hot-off-the-press" Texas Supreme Court decision. The case is *Bethel v. Quilling, Selander*, No. 18-0595 (Texas Sup. Ct. Feb. 21, 2020). Plaintiff Bethel's husband tragically died in a car accident while towing a trailer. Bethel sued the trailer manufacturer alleging faulty brakes as the accident cause. The manufacturer's defense was handled by the Quilling law firm which hired experts to examine the brakes.

Upon discovery that the trailer's brakes were disassembled and tested before plaintiff had an opportunity to either examine them or document their original condition, plaintiff filed a separate lawsuit against the defense law firm and the experts the firm had retained to check the brakes. Plaintiff claimed that key evidence in the case was destroyed during the disassembly and testing. The lawsuit, among other things, charged fraud, trespass to chattel and conversion.

Here are the law firm's actions plaintiff attacked in the new suit against the lawyers: (1) disassembling the trailer's brakes; (2) failing to establish any testing/inspection protocol at the time of the disassembly; (3) failing to document the disassembly on video; (4) changing the position of the brakes' adjuster screws to facilitate the disassembly; (5) activating some of the brakes to test them; and (6) spilling oil on the brakes during disassembly. Plaintiff alleged that the foregoing amounted to criminal destruction of personal property. As such, it was not the type of conduct that is part of client representation. Thus, no litigators' immunity should apply.

The Texas Supreme Court observed: "[A]s a general rule, attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation." The immunity inquiry focuses on the kind of conduct at issue rather than the alleged wrongfulness of the conduct. Thus, a lawyer is not susceptible to liability simply because the conduct is labeled fraudulent or wrongful. An exception to the immunity rule for general fraud would "significantly undercut" the lawyer's pursuit of legal rights he deemed necessary and proper. The lawyer would be forced, instead, to balance his own potential exposure against his client's best interest.

Rather, the court's focus should be on whether the attorney's complained-of-conduct fell within "the scope of an attorney's legal representation of his client." Similarly, labeling the conduct as "criminal" to avoid attorney immunity likewise

would undercut the policies immunity is intended to serve. The Texas court did say that the immunity rule is not "boundless." Actions for the purpose and with the intent to commit fraud that fall outside the scope of the representation of the client are not immune. The court provided examples. Id. at 9-10.

The court concluded that the complained-of conduct by the law firm was the kind of action that are "taken in connection with representing a client in litigation." At bottom, plaintiff took issue with the manner in which the firm examined and tested evidence during discovery in civil litigation. "These are paradigmatic functions of an attorney representing a client in litigation." Id. at 10. Had the destruction of a non-client's property been unrelated to litigation, or had the lawyers intentionally destroyed evidence by, say, simply taking a sledgehammer to the brakes, those acts would not involve the "provision of legal services" within the scope of client representation. But, here, acting in conjunction with experts to examine and test key evidence in the underlying suit, that conduct was protected by attorney immunity.

Conclusion

The foregoing discussion, no more than the tip of a huge iceberg, shows that "absolute" immunity is not necessarily so absolute. The "qualified" privilege doesn't protect lawyers all the time. But lawyer zealousness is given ample latitude to advocate for clients vigorously, sometimes aggressively. So long as lawyers act in good faith, don't intentionally deceive or commit fraud, and stay within ethical boundaries, the protective immunity doctrines do protect. Since some research suggests that non-party lawsuits amount to some 20 percent of lawsuits filed against lawyers, it seems vital for counsel to be aware of legal responses to such threats.

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