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From Advocate to Party - Defenses for Lawyers Who Find Themselves in Litigation

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FROM ADVOCATE TO PARTY— DEFENSES FOR LAWYERS WHO FIND THEMSELVES IN LITIGATION

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Attorneys, like all professionals, face civil liability when their action or inaction causes harm to a client. When an attorney fails the client, the claim most often asserted, and the claim that is typically most appropriate, is a legal malpractice claim. A legal malpractice claim is based on negligence.¹ Thus, the elements of a legal malpractice claim are (1) a duty, (2) a breach of that duty, (3) the breach proximately caused injury to the plaintiff, and (4) damages occurred.²

Still, attorneys find themselves in a different circumstance than the average litigant. An attorney is not responsible for the client’s underlying

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1. *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989).

2. *Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 117 (Tex. 2004).

harm. The attorney represents the client who is opposite another party in litigation or negotiation, and it is often the other person in the lawsuit, arbitration, or negotiation who causes the underlying harm. Maybe the other side caused an auto accident³ or took advantage of the client in a business deal.⁴ When the client turns on the attorney for a harm caused by another, which the attorney allegedly could have prevented, the attorney has a form of derived responsibility for not protecting the client or obtaining for the client the best recovery.

Sometimes the attorney, as a zealous advocate for the client in transactional work and litigation, may offend the other side—leading to hard feelings and the occasional lawsuit by someone the attorney never represented.⁵

This paper examines a few defenses that, for the most part, are specific to attorneys when they find themselves as a defendant instead of an advocate.

I. THIRD PARTY LITIGATION, “THIS GUY ISN’T MY CLIENT!”

An attorney is protected from actions filed by a non-client when those actions are based on the attorney’s work in connection with representing a client.⁶ This protection has existed for over 100 years.⁷ Historically, the concept of attorney immunity covered several different defenses available to attorneys; and on occasion others as well.

A. *The Litigation Privilege.*

For quite some time, Texas courts have held,

Any communication, oral or written, uttered or published in the due course of a judicial proceeding is absolutely privileged and cannot constitute the basis of a civil action in damages for slander or libel. The falsity of the statement or the malice of the

3. Kelley & Witherspoon, LLP v. Hooper, 401 S.W.3d 841, 845 (Tex. App.—Dallas 2013, no pet.).

4. Hamlin v. Gutermuth, 909 S.W.2d 114, 115–17 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

5. See Kelly v. Nichamoff, 868 F.3d 371, 373 (5th Cir. 2017) (transactional); see also Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 402, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (litigation).

6. Campbell v. Mortg. Elec. Registration Sys., No. 03-11-00429-CV, 2012 WL 1839357, at *5 (Tex. App.—Austin May 18, 2012, pet. denied) (mcm. op.); Alpert, 178 S.W.3d at 405; Renfroe v. Jones & Assocs., 947 S.W.2d 285, 288 (Tex. App.—Fort Worth 1997, writ denied); Bradt v. West, 892 S.W.2d 56, 71–72 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

7. Kruegel v. Murphy, 126 S.W. 343, 345 (Tex. App.—Dallas 1910, writ ref’d).

utterer is immaterial, and the rule of nonliability prevails even though the statement was not relevant, pertinent and material to the issues involved in the case.⁸

In Texas, “any statement made in the trial of any case, by anyone, cannot constitute the basis for a defamation action, or any other action.”⁹ “‘Anyone’ includes judges, jurors, counsel, parties, [and] witnesses.”¹⁰ When the claim asserted against the lawyer was based on acts that can be characterized as defamation—slander or libel—the protection has been characterized as the judicial proceeding privilege.¹¹

Over time claimants have sought to avoid the judicial proceedings privilege by bringing claims not for libel, but for fraud, negligent misrepresentation, DTPA violations, or other common law or statutory claims.¹² As claims expanded beyond libel and slander, the same defense or privilege began being called the litigation privilege or litigation immunity in addition to the judicial proceedings privilege.¹³ Texas courts have held the privilege also extends to all claims pleaded by a claimant and is not limited to defamation claims.¹⁴ Over time, Texas courts have come to use the two terms—the litigation privilege and the judicial proceedings privilege—interchangeably.¹⁵ Recently, the Texas Supreme Court opined that litigation privilege was the same as attorney immunity—even though the litigation privilege is available to anyone.¹⁶ “The judicial proceedings privilege is ‘tantamount to immunity,’ where there is an absolute privilege, no civil action in damages for oral or

8. *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942) (citing *Hott v. Yarbrough*, 245 S.W. 676 (Tex. 1922, judgment adopted)).

9. *Hernandez v. Hayes*, 931 S.W.2d 648, 650 (Tex. App.—San Antonio 1996, writ denied) (citing *James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982); *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942)); see also *Bird v. W.C.W.*, 868 S.W.2d 767, 771–72 (Tex. 1994).

10. *McCrary v. Hightower*, 513 S.W.3d 1, 6 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

11. *Butler v. Lilly*, 533 S.W.2d 130, 131–34 (Tex. App.—Houston [1st Dist.] 1976, writ dismissed).

12. See *Sacks v. Zimmerman*, 401 S.W.3d 336, 340 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (alleging the intentional tort of invasion of privacy).

13. *Id.*

14. *Hernandez*, 931 S.W.2d at 654 (citing *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 (1988); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939 (Tex. 1988)).

15. See *Jenevein v. Friedman*, 114 S.W.3d 743, 746 (Tex. App.—Dallas 2003, no pet.).

16. See *Youngkin v. Hines*, 546 S.W.3d 675, 679 n.2 (Tex. 2018) (“*Youngkin* referred in his briefs to litigation privilege rather than attorney immunity, but both labels describe the same doctrine.”); *But see, Landry’s, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 59 (Tex. App.—Houston [14th Dist.] 2018, pet. granted) (referring to *Youngkin* but applying the privilege to a party that was not an attorney).

written communications will lie, 'even though the language is false and uttered or published with express malice.'"¹⁷ The application of the privilege to a statement is a question of law.¹⁸

This privilege arose from a public policy consideration that every citizen should have the unqualified right to seek redress "without the fear of being called to answer in damages," and that the administration of justice will be better served if "witnesses are not deterred by fear of lawsuits."¹⁹ The privilege is intended to protect the integrity of the process itself and ensure that a factfinder gets the information it needs.²⁰ To protect the integrity of the process, the privilege extends even to wrongful conduct.²¹

In determining the application of the judicial proceedings privilege, a Court must extend the privilege to any statement that bears "some relation" to the proceeding and must resolve all doubt in favor of the privilege.²² The some relation test has been interpreted rather broadly to not require that the action in question meet "technical relevance, materiality, or admissibility standards."²³ The some relation test has even protected defendants from liability when the action or statement concerns a third party to the proceeding.²⁴ Courts have justified the breadth of the some relation standard as "necessarily minimal so as to occasion no fear, by any witness, of retaliatory damage suits for defamation and thereby hamper the original purpose of the privilege to encourage testimony."²⁵

The privilege also goes beyond utterances in court and filings with the court. For years, the Texas Supreme Court has held the privilege covers any of the pleadings or other papers filed in a case.²⁶ The privilege applies not just to statements in court, but "communications made in contemplation

17. *Wilkinson v. USAA Fed. Sav. Bank Tr. Servs.*, No. 14-13-00111-CV, 2014 WL 3002400, at *6 (Tex. App.—Houston [14th Dist.] July 1, 2014, pet. denied) (mem. op.) (quoting *Hernandez*, 931 S.W.2d at 650).

18. *Watson v. Kaminski*, 51 S.W.3d 825, 827 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

19. *Attaya v. Shoukfeh*, 962 S.W.2d 237, 239 (Tex. App.—Amarillo 1998, pet. denied) (citing *Parker v. Holbrook*, 647 S.W.2d 692, 695 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.c.)).

20. *Id.*

21. *See Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942) (explaining false statements uttered with express malice remain privileged).

22. *Fitzmaurice v. Jones*, 417 S.W.3d 627, 633 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

23. *Jenevein v. Friedman*, 114 S.W.3d 743, 748–49 (Tex. App.—Dallas 2003, no pet.) (citing RESTATEMENT (SECOND) OF TORTS § 586 cmt. c. (AM. L. INST. 1977)).

24. *Id.* at 749 (citing *Odeaneal v. Wofford*, 668 S.W.2d 819, 820 (Tex. App.—Dallas 1984, writ ref'd, n.r.c.)).

25. *Odeaneal*, 668 S.W.2d at 820 (citing *James v. Brown*, 637 S.W.2d 914, 917 (Tex. 1982); *Runge v. Franklin*, 10 S.W. 721 (Tex. 1889)).

26. *James*, 637 S.W.2d at 916–17 (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 114 (4th ed. 1971)).

of and preliminary to judicial proceedings.”²⁷ The judicial-proceeding privilege has been applied to letters written by lawyers to potential defendants prior to suit.²⁸ Under Texas law, the judicial proceedings privilege also extends to statements to the news media.²⁹ A press release advising the media that a lawsuit has been filed, including a basic description of the allegations, is protected.³⁰

The judicial proceedings privilege also extends to statements made by an attorney to a newspaper at some point before a judicial proceeding is filed.³¹ In finding the statements to the press were protected by the judicial proceedings privilege, even though the statements were made before the suit was filed, the Court explained:

[I]t is clear that a suit was being contemplated and that [attorney’s] statements were based, in part, on his beliefs of how the new information would affect his suit. That his statements were made before the actual filing of the suit has no bearing on whether they are protected by judicial privilege. The only factors are whether his statements bore some relationship to the proposed litigation and furthered his representation of his client, regardless of the time when they were made.³²

So, attorneys have the judicial proceedings privilege to protect them from litigation for statements made in trial, in hearings, in pleadings and other filings, and even statements to the press—for those bold enough to seek publicity.

B. Standing, The Lack of Privity Defense.

Attorneys are not limited to trial lawyers. Many, if not most, attorneys will never file suit, participate in an arbitration, or try a case. Their work will be focused on transactional work that drives the economy. As a result, the claims against attorneys do not only arise from litigation, but can also

27. *Watson v. Kaminski*, 51 S.W.3d 825, 827 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

28. *Id.*; *Krishnan v. L. Offices of Preston Henrichson, P.C.*, 83 S.W.3d 295, 301–02 (Tex. App.—Corpus Christi 2002, pet. denied); *Crain v. Smith*, 22 S.W.3d 58, 62–63 (Tex. App.—Corpus Christi 2000, no pet.).

29. *Hill v. Herald-Post Publ’g Co.*, 877 S.W.2d 774, 782–83 (Tex. App.—El Paso 1994), *rev’d in part on other grounds*, 891 S.W.2d 638 (Tex. 1994); *Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 239 (Tex. App.—Dallas 2000, pet. denied).

30. *Dallas Indep. Sch. Dist.*, 27 S.W.3d at 239.

31. *Daystar Residential, Inc. v. Collmer*, 176 S.W.3d 24, 27–28 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

32. *Id.* at 28.

arise from transactional work.³³ When a plaintiff claims an attorney was negligent, but the plaintiff was not a client of the attorney at the time of the alleged act or omission, courts have held there is a lack of privity and found no duty to third parties outside the attorney-client relationship.³⁴

In *Barcelo v. Elliott*, an attorney prepared a will and trusts for his client.³⁵ After the client died, a trust was challenged by two of the decedent's children and set aside by a court.³⁶ After the trust was set aside, its intended beneficiaries filed suit not against their family members, but against the attorney claiming its malpractice cost them a greater share of the decedent's estate.³⁷

The Texas Supreme Court rejected the beneficiaries' claims holding an attorney owes a duty of care only to his or her client and not to third parties who may have been damaged by the attorney's negligence in representing the client.³⁸ The Court expressed a concern, "This potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries."³⁹ Further, "Such a cause of action would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust."⁴⁰ The Texas Supreme Court created a bright line rule that protected lawyers from actions by third parties in a transactional context, including estate planning, which would "ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation."⁴¹

In contrast to *Barcelo*, which concerned transactional work, the attorney in *Morris v. Bailey* was sued for his representation of a client in litigation.⁴² There, as the Texas Supreme Court later held in *Barcelo*, the appellate court rejected claims by a third party to the attorney-client relationship based on the legal principle that "[i]n general, an attorney deals at arm's

33. *Hamlin v. Gutermuth*, 909 S.W.2d 114, 115–16 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

34. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Ints.*, 991 S.W.2d 787, 792 (Tex. 1999); *Chapman Children's Tr. v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 442 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Martin v. Trevino*, 578 S.W.2d 763, 771 (Tex. App.—Corpus Christi 1978, writ ref'd n.r.e.); *Morris v. Bailey*, 398 S.W.2d 946, 947 (Tex. App.—Austin 1966, writ ref'd n.r.e.).

35. 923 S.W.2d 575, 576 (Tex. 1996).

36. *Id.*

37. *Id.*

38. *Id.* at 579.

39. *Barcelo*, 923 S.W.2d at 578.

40. *Id.*

41. *Id.* at 578–79.

42. 398 S.W.2d 946, 947 (Tex. App.—Austin 1966, writ ref'd n.r.e.).

length with adverse parties, he owes them no duty, and is not liable to them for his actions as an attorney in behalf of his client.”⁴³

Technically, lack of standing is not a defense. It is an inability to prove, as a matter of law, the first element of a legal malpractice claim—that the attorney owed a duty to the claimant. Still, even though it concerns an inability to prove the first element of legal malpractice, the concept of lack of privity was relied upon by those courts that set the elements of what eventually became known as the litigation immunity and then the attorney immunity defense.⁴⁴ The policy reasons in litigation are not too different from the ones given in *Barcelo v. Elliott*. As one court explained in applying the principles behind the privity defense to litigation immunity:

Perhaps as an offshoot of its privity jurisprudence, Texas case law has discouraged lawsuits against an opposing counsel if the lawsuit is based on the fact that counsel represented an opposing party in a judicial proceeding. An attorney has a duty to zealously represent his clients within the bounds of the law. In fulfilling this duty, an attorney has the right to interpose defenses and pursue legal rights that he deems necessary and proper, without being subject to liability or damages.⁴⁵

Whether the attorney is a trial lawyer or transactional lawyer, the courts prefer to avoid the risk of conflicting loyalties and concerns and limit the attorney’s duty to one person, the client. In transactional work, negligence claims by third parties have been barred by lack of privity.⁴⁶ In litigation when the plaintiff is a third party, public policy supports attorneys having the utmost freedom in representing their clients and bars all claims.⁴⁷ To preserve that freedom, courts decided suits brought against attorneys by non-parties were disallowed because, “an attorney’s knowledge that he may be sued . . . would

43. *Id.*; see also *Martin v. Trevino*, 578 S.W.2d 763, 771 (Tex. App.—Corpus Christi 1978, writ ref’d n.r.e.) (holding the attorney was exempt from liability to the opposing party in litigation “because an attorney deals at arm’s length with adverse parties”).

44. See *Alpert v. Crain*, *Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citing *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996)); *Chapman Children’s Tr. v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 442 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (citing *Barcelo*, 923 S.W.2d at 577); *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 401 (Tex. App.—Houston [14th Dist.] 1997, writ dismissed by agr.) (citing *Barcelo*, 923 S.W.2d at 577).

45. *Alpert*, 178 S.W.3d at 405 (citations omitted).

46. See *Barcelo*, 923 S.W.2d at 578–79.

47. See *Alpert*, 178 S.W.3d at 405; *Chapman Children’s Tr.*, 32 S.W.3d at 441; see also *Renfroe v. Jones & Assocs.*, 947 S.W.2d 285, 288 (Tex. App.—Fort Worth 1997, writ denied); see also *Bradt v. West*, 892 S.W.2d 56, 70–71 (Tex. App.—Houston [1st Dist.] 1994, writ denied); see also *Butler v. Lilly*, 533 S.W.2d 130, 131 (Tex. App.—Houston [1st Dist.] 1976, writ dismissed).

favor tentative rather than zealous representation of the client, which is contrary to professional ideals and public expectations.”⁴⁸ What the Texas Supreme Court has not yet decided is whether these defenses extend to transactional attorneys when the claim against them is not legal malpractice, but something else.

C. An Exception Develops and Tries to Swallow the Rule.

In 1999 the Texas Supreme Court held attorneys may be liable to third parties for a misrepresentation, despite the lack of privity or litigation immunity defense, but narrowed the class of potential third-party claimants as follows:

[L]iability is limited to loss suffered: (a) by the person or one of a limited group of persons for whose benefit and guidance [one] intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that [one] intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.⁴⁹

The *McCamish* exception, when it was established, only applied if an attorney: (1) intended to supply the information to the third party, or knows that the recipient intends to supply the information to the third party; and (2) the attorney intends for the representation to influence the third party, or knows that the recipient intends for the third party to rely on the representation.⁵⁰ Under *McCamish*, a fraud or misrepresentation cause of action is only available against the attorney if that attorney transferred information to a known party for a known purpose.⁵¹ Explaining the circumstance where this limited window of liability could arise, the Texas Supreme Court explained that a lawyer could be liable to a third party, “[W]hen and to the extent that: (a) a lawyer . . . invites the non-client to rely on the lawyer’s opinion or provision of other legal services, and the non-client so relies, and (b) the non-client is not, under applicable tort law, too remote from the lawyer to be entitled to protection.”⁵²

48. *Chapman Children’s Tr.*, 32 S.W.3d at 440 (citing *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528, 532 (N.D. Tex. 1996)); see also *Bradt*, 892 S.W.2d at 72.

49. *McCamish v. F. E. Appling Ints.*, 991 S.W.2d 787, 794 (Tex. 1999) (quoting RESTATEMENT (SECOND) OF TORTS § 552(2) (AM. L. INST. 1977)).

50. *Id.*

51. *Id.*

52. *Id.* at 794–95 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2) (AM. L. INST., Tentative Draft No. 8, 1997)).

In *McCamish*, the action giving rise to the claim was an opinion provided to one party by the attorneys for the other party wherein they opined that the deal would be enforceable in a specific set of circumstances.⁵³ The opposing party was the audience of the opinion and the party to whom the opinion was provided.⁵⁴ The remarkable circumstance in *McCamish*—rarely seen elsewhere—is that a party in litigation asked for a legal opinion from the opposing counsel, and the opposing counsel provided it!⁵⁵

Focusing on the Texas Supreme Court’s opinion in *Barcelo*, the problem for claimants would be the absence of a relationship with the attorney that could give rise to a duty.⁵⁶ While the intended beneficiaries in *Barcelo* could not establish a relationship with the attorney giving rise to a duty, the court viewed the recipient of the attorney’s opinion in *McCamish* differently.⁵⁷ In *McCamish*, the exception to lack of privity arose when the attorney provided advice to a third party, with the understanding and intention that the third party would rely on the advice.⁵⁸ Quite simply, the attorney, by inviting and intending another to rely on the attorney’s opinion, created a duty to the third party.

Viewed through the prism of lack of duty rather than an immunity, *McCamish* makes sense. Even though the opposing party was not paying the attorney, where the attorney had specialized knowledge and offered that knowledge to the other side at the other side’s request, the court recognized that a duty *might* exist.⁵⁹

After *McCamish*, third-party claimants, often on the other side in an unsuccessful deal or suit, began trying to fit all types of cases against opposing counsel into this narrow exception. Lawyers began getting sued for fraud, negligent misrepresentation, and other claims with the plaintiff claiming to have relied on the representations or warranties in a contract prepared by the lawyer.⁶⁰ Plaintiffs argued that attorneys representing a partnership owed duties not just to the entity but to the partners as well and made misrepresentations to them in preparing documents for the partnership.⁶¹ Shareholders in a corporation alleged that a lawyer committed fraud by working in concert with

53. *McCamish*, 991 S.W.2d at 789.

54. *Id.*

55. *Id.*

56. See *Barcelo v. Elliott*, 923 S.W.2d 575, 577–78 (Tex. 1996) (denying a cause of action to beneficiaries whom the attorney did not represent).

57. *McCamish*, 991 S.W.2d at 793.

58. *Id.* at 793–94.

59. *Id.* at 795 (“*McCamish*, Martin may owe a duty to Appling . . .”).

60. See *Blankinship v. Brown*, 399 S.W.3d 303, 306 (Tex. App.—Dallas 2013, pet. denied) (involving claims for fraud and negligent misrepresentation against an attorney).

61. *Kastner v. Jenkins & Gilchrist, P.C.*, 231 S.W.3d 571, 577–78 (Tex. App.—Dallas 2007, no pet.).

his client—the corporation—and preparing inaccurate and back-dated documents for the corporation to help the client enrich itself at the expense of the plaintiff.⁶² In one case, the plaintiff claimed the lawyer representing another party should have realized the other party was defrauding her.⁶³

As fraud and misrepresentation claims against attorneys increased, courts recognized a need to protect attorneys from creative efforts to expand the *McCamish* exception. Often an attorney is placed in a position where one must prepare documents and communicate with third parties by passing on information provided to the lawyer by a client. When the information provided by the client is allegedly incorrect, lawyers have faced claims that they are aiding the fraud, conspiring to defraud, or committing fraud themselves in performing their legal duty to the client. While opinions did not use the phrase “attorney immunity” to describe the defenses used to protect attorneys, those decisions rejected efforts by plaintiffs to hold attorneys responsible for passing on information or for preparing legal documents in commercial transactions.⁶⁴

D. The Texas Supreme Court Establishes the Attorney Immunity Defense.

In 2015, the Texas Supreme Court grappled with the litigation immunity fraud exception.⁶⁵ Under that exception, an attorney is liable to a third party “if he knowingly commits a fraudulent act that injures a third person, or if he knowingly enters into a conspiracy to defraud a third person.”⁶⁶ After examining cases where lack of privity or litigation immunity was used to bar claims against attorneys, and considering different rules employed by intermediate appellate courts, the Texas Supreme Court established the attorney immunity defense: “An attorney who pleads the affirmative defense of attorney immunity has the burden to prove that his alleged wrongful conduct, regardless of whether it is labeled fraudulent, is part of the discharge of his duties to his client.”⁶⁷ The Texas Supreme Court developed a two-part test and held attorneys are immune from suit by third parties if: (1) the lawyer’s actions were within the scope of representing a client, and (2) the lawyer’s

62. *Cunningham v. Tarski*, 365 S.W.3d 179, 182–83 (Tex. App.—Dallas 2012, pet. denied).

63. *Chu v. Hong*, 249 S.W.3d 441, 443 (Tex. 2008).

64. *Blankinship*, 399 S.W.3d at 311; *Cunningham*, 365 S.W.3d at 189; *Kastner*, 231 S.W.3d at 578.

65. *See Cantey Hanger, L.L.P. v. Byrd*, 467 S.W.3d 477, 481–82 (Tex. 2015).

66. *Likover v. Sunflower Terracc II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ).

67. *Cantey Hanger, L.L.P.*, 467 S.W.3d at 484.

actions were not foreign to the duties of an attorney.⁶⁸ The Texas Supreme Court's bright-line rule does not focus on the outcome or effect of the conduct, but instead focuses on the type of conduct.⁶⁹ The type of conduct, even if it is wrongful, is still protected if the lawyer's action was within the scope of representing a client.⁷⁰ What is established beyond question is the attorney immunity defense protects attorneys sued for acts taken in the course and scope of representing a client in litigation if those acts are not foreign to the duties of an attorney.⁷¹

1. *What is Outside the Scope of Representing a Client?*

Considering the two elements of the attorney immunity defense, the first is the attorney's actions must be within the scope of representing a client. The Texas Supreme Court provided the following guidance on the bounds of this element pointing out the courts of appeals have identified examples of attorney conduct that would fall outside the scope of client representation.⁷² One obvious example is "[a]ssaulting the opposing attorney is not part of the discharge of an attorney's duties in representing a party."⁷³

Another example can be found in *McCamish*. In that case, the attorney was alleged to have provided an opinion to the opposing party for the purpose of persuading the opposing party to enter into a settlement agreement.⁷⁴ The action in providing an assurance on the agreement's enforceability against the FSLIC would not be foreign to the duties of an attorney. After

68. See *id.* at 485.

69. See *id.*

70. *Id.*

71. See *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 657 (Tex. 2020); see also *Youngkin v. Hines*, 546 S.W.3d 675, 681–82 (Tex. 2018); see also *Sheller v. Corral Tran Singh, LLP*, 551 S.W.3d 357, 364 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); see also *Rogers v. Walker*, No. 09-15-00489-CV, 2017 WL 3298228, *4–6 (Tex. App.—Beaumont Aug. 3, 2017, pet. denied) (mem. op.) (holding attorney immunity applied in administration of estate proceeding); see also *Santiago v. Mackie Wolf Zientz & Mann, P.C.*, No. 05-16-00394-CV, 2017 WL 944027, *3–5 (Tex. App.—Dallas Mar. 10, 2017, no pet.) (mem. op.) (holding attorney immunity applied in foreclosure proceeding); see also *Farkas v. Wells Fargo Bank, N.A.*, No. 03-14-00716-CV, 2016 WL 7187476, at *6–8 (Tex. App.—Austin Dec. 8, 2016, no pet.) (mem. op.) (same); see also *Highland Cap. Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at *1 (Tex. App.—Dallas Jan. 14, 2016, pet. denied) (mem. op.) (holding attorney immunity applied in litigation).

72. *Cantey Hanger, L.L.P.*, 467 S.W.3d at 482 (citing *Bradt v. West*, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

73. *Bradt*, 892 S.W.2d at 72.

74. *McCamish, Martin, Brown & Loeffler v. F. E. Appling Ints.*, 991 S.W.2d 787, 789 (Tex. 1999).

all, the attorneys had experience representing financial institutions.⁷⁵ However, when the attorney provides an assurance or opinion to a third party in order to persuade it to enter an agreement, that attorney has left the scope of representing his client and is providing his legal services to another, even if no agreement exists and no fee is being charged to the third party. While the client may benefit from the attorney providing the opinion to the opposing party, the intended recipient of the alleged harmful communication is not the client—it is the third party.⁷⁶ Thus, providing a legal opinion to a third party, while not foreign to the duties of an attorney, would be outside the scope of representing a client.⁷⁷

As will be the case with most decisions on the application of attorney immunity, the focus is “on the kind of conduct engaged in, not on whether the conduct was meritorious in the context of the underlying lawsuit.”⁷⁸ This focus considers two attributes. First, is the conduct such that it requires “the office, professional training, skill, and authority of an attorney[?]”⁷⁹ Actions such as pugilism or operating a motor vehicle which are outside the bounds of providing legal advice or a legal service—in other words services or actions that any person can provide—are outside the scope of representing a client. Even if one is driving to the courthouse for a hearing, one’s law degree and law license are not required to operate the vehicle.

Second, there is conduct that, even if it requires the professional training, skill, and authority of an attorney, is being provided to a third party with the intention that the third party justifiably rely on it as a statement of material fact.⁸⁰ This is a limited circumstance where the attorney provides the information, is aware of the nonclient, and intends that the nonclient rely on the information.⁸¹ Requiring that a claimant justifiably rely on the lawyer’s representation of material fact eliminates claims against a lawyer for basic representations made at the behest of the client in the course of negotiations.⁸² This area of work outside the scope of representing a client is limited to those rare circumstances where the lawyer provides legal advice directed to a third

75. *See id.*

76. *Id.*

77. *Id.*

78. *Bradt*, 892 S.W.2d at 72.

79. *Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548, at *7 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied) (mem. op.) (citing *Miller v. Stonchenge/Fasa-Tex., JDC, L.P.*, 993 F. Supp. 461, 464 (N.D. Tex. 1998)).

80. *McCamish, Martin, Brown & Loeffler v. F. E. Appling Ints.*, 991 S.W.2d 787, 793–94 (Tex. 1999) (citations omitted).

81. *Id.*

82. *Id.*

party primarily for the third party's benefit. As the Court set out in *McCamish*:

Several jurisdictions have held that an attorney can be liable to a nonclient for negligent misrepresentation, as defined in section 552, based on the issuance of opinion letters Other jurisdictions have indicated a willingness to subject lawyers to a section 552 claim by a nonclient in connection with the preparation of different types of evaluations, given the proper circumstances. Thus, section 552 has been cited favorably in a variety of lawyer liability contexts.⁸³

If either of these facts exist, then the conduct is outside the scope of representing a client. Absent that, any actions taken for a client that require the professional training and skill of an attorney are within the course and scope of representing a client.

2. *There are no Exceptions for Fraud or Crimes.*

Attorneys frequently face allegations of fraud or aiding and abetting fraud when they are sued by a third party or opposing party for their work.⁸⁴ In determining how to deal with an allegation of fraud, the Texas Supreme Court recognized prior dicta that reads, “[a]n attorney who personally steals goods or tells lies on a client’s behalf may be liable for conversion or fraud in some cases.”⁸⁵ After looking at different ways of dealing with fraud allegations—is it an exception to attorney immunity or simply an action that may fall outside the scope of the defense—the Court adopted the latter approach.⁸⁶ As the Court explained:

We think the latter view is consistent with the nature and purpose of the attorney-immunity defense. An attorney is given latitude to “pursue legal rights that he deems necessary and proper” precisely to avoid the inevitable conflict that would arise if he were “forced constantly to balance his own potential exposure against his client’s best interest.” Because the focus in evaluating attorney liability to a non-client is “on the kind—not the nature—of the attorney’s conduct,” a general fraud exception would significantly undercut the defense. Merely labeling an attorney’s conduct “fraudulent” does not and should not remove it from the scope of client representation or render it

83. *Id.* at 793.

84. *See Cantey Hanger, L.L.P. v. Byrd*, 467 S.W.3d 477, 479 (Tex. 2015).

85. *Id.* at 483 (citing *Chu v. Hong*, 249 S.W.3d 441, 446 (Tex. 2008)).

86. *Id.* at 483–84.

“foreign to the duties of an attorney.” (“Characterizing an attorney’s action in advancing his client’s rights as fraudulent does not change the rule that an attorney cannot be held liable for discharging his duties to his client.”).

Fraud is not an exception to attorney immunity; rather, the defense does not extend to fraudulent conduct that is outside the scope of an attorney’s legal representation of his client, just as it does not extend to other wrongful conduct outside the scope of representation. An attorney who pleads the affirmative defense of attorney immunity has the burden to prove that his alleged wrongful conduct, regardless of whether it is labeled fraudulent, is part of the discharge of his duties to his client.⁸⁷

After *Cantey Hanger, L.L.P. v. Byrd*, another assault on the immunity defense was to allege it did not apply to conduct where the attorney has committed a crime and must answer for and face the consequences of criminal conduct.⁸⁸ The Fifth Circuit rejected this effort at creating an exception to the defense explaining that the only circumstances where criminal conduct has not been shielded by immunity are those circumstances where the conduct falls outside the scope of the defense because the attorney is not in the scope of representing the client or the conduct is foreign to the duties of an attorney.⁸⁹

The Texas Supreme Court was quick to reject any argument for exceptions to the immunity defense explaining:

This would ‘significantly undercut’ the protections of attorney immunity by allowing non-client plaintiffs to sue opposing counsel so long as the plaintiffs alleged that the attorney’s actions were criminal in nature. . . . We therefore conclude that criminal conduct is not categorically excepted from the protections of attorney civil immunity when the conduct alleged is connected with representing a client in litigation.⁹⁰

Recognizing that the immunity is not boundless, the Texas Supreme Court reminded everyone that the focus, whether the conduct is alleged to be criminal, fraudulent, or something else altogether, “looks to the type of conduct, not whether that conduct was wrongful.”⁹¹

87. *Id.* at 484 (emphasis added) (citations omitted).

88. *See Troice v. Greenberg Traurig, L.L.P.*, 921 F.3d 501, 506 (5th Cir. 2019); *see also* *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 657 (Tex. 2020) (“Bethel urges us to recognize an exception where a third party alleges that an attorney engaged in criminal conduct during the course of litigation.”).

89. *Troice*, 921 F.3d at 506–07.

90. *Bethel*, 595 S.W.3d at 657.

91. *Id.* at 658.

3. *What is Foreign to the Duties of an Attorney?*

Because an attorney's participation in fraud, *as a party*, should be foreign to the duties of an attorney, the absence of fraud exception is raised prior to the second element of the attorney immunity defense. The case that best sets out and follows this distinction is *Jaffe*.⁹² There, the court considered an underlying transaction in which the attorney and his firm represented a client.⁹³ An individual attorney with the law firm was also a part owner of the client, but the law firm held no such interest.⁹⁴ The claims against the attorney and the law firm included negligent misrepresentation and fraud.⁹⁵ The law firm was dismissed from the litigation because of attorney immunity.⁹⁶ The individual attorney was not dismissed.⁹⁷ In making a distinction between the attorney and the law firm, the court focused on the allegation in the complaint that the attorney was also an owner of the business and was listed as its "owner and authorized representative" in the pleadings.⁹⁸ The court recognized attorney immunity did not apply "when the attorney acts outside of his legal capacity" and it was possible, based on the allegations in the complaint, the attorney was "acting based upon his ownership interest" in the company rather than as an attorney.⁹⁹ The firm, on the other hand, "did not have a personal stake in the sale of the equipment and realty, and thus, if it was involved in the transaction at all, its actions were purely those of legal representation, which must be protected under the attorney immunity doctrine."¹⁰⁰

The attorney, by owning an interest in the entity selling assets, ceased to be an attorney and was a party to the alleged fraud as an owner of the entity. Owning the business was foreign to the duties of an attorney. The firm, on the other hand, holding no ownership interest in the entity, could only be acting as attorneys even though its actions were the actions of the same individual attorney. The difference between the two, as the court noted, was the individual attorney's ownership interest in the client.¹⁰¹ Taking ownership or having ownership of the client made the attorney a party to the fraud and the actions of the attorney, as owner, were foreign to the duties of an attorney.

92. *LJH, Ltd. v. Jaffe*, No. 4:15-CV-00639, 2017 WL 447572, at *2 (E.D. Tex. Feb. 2, 2017) (mem. op.).

93. *Id.* at *3.

94. *Id.* at *1.

95. *Id.*

96. *LJH, Ltd.*, 2017 WL 447572, at *4.

97. *Id.* at *3.

98. *Id.* at *1.

99. *Id.* at *3.

100. *LJH, Ltd.*, 2017 WL 447572, at *3.

101. *Id.*

This distinction can be seen in cases pre-dating *Cantey Hanger, L.L.P. v. Byrd* as well.¹⁰² In one of the first cases to consider a privilege or immunity for attorneys, the Texas Supreme Court explained the attorney was not acting as a lawyer when he took possession of goods in order to keep them from the plaintiff.¹⁰³ As the court described the facts:

[T]he La Prelles made a fraudulent assignment of the bill of lading to Scott, and at the same time gave him a written order on the station agent at Hearne for the goods. Armed with these, *Scott intercepted the shipment at Hearne, obtained possession of the goods, effaced from the boxes the name of La Prella & Bro., and inserted that of J. L. Scott & Co. (a bogus firm).* He then shipped, by the same line, the goods to the bogus firm at Marlin, taking a bill of lading in that name.¹⁰⁴

The court permitted the claims against the lawyer Scott holding:

*Having assumed the apparent ownership of the goods, for the purpose and with the intention of consummating the fraud upon appellant, he will not be heard to deny his liability to appellant for the loss sustained by reason of his wrongful acts, under the privileges of an attorney at law, for such acts are entirely foreign to the duties of an attorney[.]*¹⁰⁵

Thus, almost 140 years ago, the Texas Supreme Court explained that being a party to a fraud, as opposed to the attorney representing a party to a fraud, is foreign to the duties of an attorney. Like the attorney in *Jaffe*, the attorney in *Poole*, by taking possession of the goods and acting as their owner, became a party to the fraud and not an attorney for the client.¹⁰⁶

JJJJ Walker, LLC v. Yollick, which also pre-dates *Cantey Hanger, L.L.P. v. Byrd*, illustrates this distinction as well.¹⁰⁷ There, the court relied on several actions by the attorney that it found were outside the scope of representing the client:

- (1) [T]here is more than a scintilla of evidence that [attorney] witnessed the board's actions *and even directed them*.¹⁰⁸
- (2) [I]n signing the *Letter Agreement*, [attorney] was not relying on his professional knowledge and training as an attorney to make a statement in the course of representing his

102. Compare 467 S.W.3d 477 (Tex. 2015), and *Poole v. H. & T. C. R'y Co.*, 58 Tex. 134, 137 (Tex. 1882).

103. *Poole*, 58 Tex. at 137 (Tex. 1882).

104. *Id.* (emphasis added).

105. *Id.* (emphasis added).

106. *Id.*

107. 447 S.W.3d 453, 462 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (emphasis added).

108. *Id.*

client in an adversarial context; he was simply signing his name, acting as the Bank's agent with actual authority to bind his principal to a promise of future performance.¹⁰⁹

The attorney had directed the board meetings of one of the parties to the transaction, and signed an agreement binding a party to perform the contract.¹¹⁰ In taking those actions not as an attorney, but as one who could control a party and bind it to perform a contract by signing it, the attorney ceased to act as an attorney and was a party to the fraud.

The fraud that is foreign to the duties of an attorney is different from an attorney whose legal work for a client facilitates a fraud by that client.¹¹¹ Acting as an attorney in a fraud perpetrated by the client does not remove the attorney from the protection of attorney immunity.¹¹² Again, even if an attorney's conduct is wrongful, it is protected if it falls within the scope of client representation.¹¹³ Focusing on the kind—not the nature—of the attorney's conduct, those cases where the acts of the attorney are foreign to the duties of an attorney are those cases where the attorney may be acting not just as the attorney, but also in the role of a party to the transaction through an ownership interest or position as a client's officer. Assuming ownership of the property at issue is foreign to the duties of an attorney.¹¹⁴ That is true even if the ownership may just be a partial interest.¹¹⁵ Signing contracts as a representative of the client is foreign to the duties of an attorney.¹¹⁶ So too is taking actions as an officer or director of the client.¹¹⁷ Once the attorney steps out of the role of legal advisor and becomes an active party to the transaction, the attorney is taking actions foreign to the duties of an attorney.

109. *Id.* at 469–70 (emphasis added).

110. *Id.* at 470.

111. *See* *Cantey Hanger, L.L.P. v. Byrd*, 467 S.W.3d 477, 482 (Tex. 2015) (explaining how the attorney's alleged actions as an attorney permitted the alleged fraud).

112. *Id.* at 485.

113. *Id.*

114. *Poole v. H. & T. C. R'y Co.*, 58 Tex. 134, 137 (Tex. 1882).

115. *LJH, Ltd. v. Jaffe*, No. 4:15-CV-00639, 2017 WL 447572, at *3 (E.D. Tex. Feb. 2, 2017) (mem. op.).

116. *JJJJ Walker, LLC v. Yollick*, 447 S.W.3d at 469–70 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (emphasis added).

117. *Id.* at 462.

4. *Attorney immunity should apply to commercial and transactional work.*

An important distinction for the Texas Supreme Court in *Cantey Hanger, L.L.P. v. Byrd* was whether the work was transactional or litigation.¹¹⁸ The law firm prepared a bill of sale for its client to convey a plane the client received in the divorce.¹¹⁹ The bill of sale was prepared so that the entity selling the plane was not the client, but a company the client's ex-husband received in the divorce.¹²⁰ This action created a tax liability for the ex-husband's business.¹²¹ However, the sale occurred over one year after the divorce decree was entered.¹²² Further, it was not a motion or pleading in the divorce proceeding, but the sale of an asset received in the divorce.¹²³ Despite the transactional nature of the bill of sale and the passage of time since the divorce became final, the five-justice majority viewed the actions of the firm as within the firm's representation of the client in the divorce proceeding.¹²⁴ The dissent disagreed and characterized the work as transactional.¹²⁵

The dissent viewed the transaction or litigation distinction as outcome-determinative because it viewed attorney immunity as limited to litigation and not covering transactional work.¹²⁶ This was despite one of attorney immunity's cited origins being lack of privity in a transaction—estate planning.¹²⁷ The majority appears to disagree, pointing out numerous intermediate appellate opinions in which attorney immunity's predecessor was applied to transactional work or in which the appellate courts declared the immunity was not limited to litigation.¹²⁸ Still, the majority declined to hold attorney immunity also covered transactional work because it was dealing with a fact pattern where it determined the underlying work to be litigation.¹²⁹

This distinction was important to the Court, but should it really matter? In the dissent, Justice Green looked at cases often viewed as the origin

118. 467 S.W.3d 477, 479–80 (Tex. 2015).

119. *Id.*

120. *Id.*

121. *Id.* at 479–80.

122. *Byrd v. Vick, Carney & Smith LLP*, 409 S.W.3d 772, 779 (Tex. App.—Fort Worth 2013, pct. granted), *rev'd sub nom.*, *Cantey Hanger, L.L.P.*, 467 S.W.3d at 477.

123. *Cantey Hanger, L.L.P.*, 467 S.W.3d at 479.

124. *Id.* at 485.

125. *Id.* at 491–92.

126. *Id.* at 488 (Green, J., dissenting).

127. See *Cantey Hanger, L.L.P.*, 467 S.W.3d at 481 (citing *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996)).

128. *Id.* at 482 n.6.

129. *Id.*

of the attorney immunity defense and determined there was only one distinction between two such cases:

A comparison of *Kruegel* and *Poole* is critical to understanding the context in which litigation immunity applies. In both cases, the attorney or law firm allegedly engaged in conduct that would be actionable without attorney immunity. The only meaningful distinction between the outcomes is the context in which that conduct occurred. In *Kruegel*, the conduct occurred in litigation, while in *Poole* the conduct occurred outside of any litigation. In my view, the only way to reconcile these cases and give meaning to the purpose behind attorney immunity is to require the defendant-attorney's conduct to have occurred in litigation.¹³⁰

There are numerous differences between these two cases. They cannot be distilled to the simple difference that one concerned litigation and another did not, especially when that is not the critical distinction. Another distinction, arguably the critical distinction, concerned the actions of the attorneys. As explained above, the attorney in *Poole*, by assuming ownership of the goods, left his role as an attorney and became owner of the goods. When he did so, that attorney became a participant in the fraud by acting other than as an attorney. Assuming ownership of the goods was foreign to the duties of an attorney. In contrast, the court in *Kruegel* affirmed a directed verdict by the trial court in the attorneys' favor explaining:

[T]here are no specific acts set forth showing plaintiff's right to recover damages, or that the judges, attorneys, and clerks *did not have the right to do the acts complained of*. The acts of the district judges, as well as the acts of the county judge, were acts within their judicial functions, delegated to them by the laws of the state, and they are not liable in damages for such acts. The attorneys are authorized to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages.¹³¹

The record in *Kruegel* recounted by the court did not reveal any action foreign to the duties of the attorney. That is the key distinction. Unlike the attorney in *Poole* there was no action by Cobb & Avery, the lawyers in *Kruegel*, that was foreign to the duties of an attorney. They did not take ownership of goods; they represented a client.

Prior to *Byrd*, there are cases where the attorney was protected from liability to a third party even though the conduct took place outside litigation.

130. *Id.* at 488 (Green, J., dissenting).

131. *Kruegel v. Murphy*, 126 S.W. 343, 345 (Tex. App.—Dallas 1910, writ ref'd) (emphasis added) (citation omitted).

Barcelo, the lack of privity case so often cited by intermediate appellate courts that affirm the use of the attorney immunity defense, involved estate planning.¹³² However, it also only dealt with allegations of negligence; there was no allegation of fraud.¹³³

In *Rawhide Mesa-Partners, Ltd. v. Brown McCarroll, LLP*, Brown McCarroll represented a tenant in lease negotiations opposite Rawhide, the landlord.¹³⁴ The law firm had previously worked for a partner of Rawhide.¹³⁵ After the tenant defaulted on the lease, Rawhide sued Brown McCarroll, the tenant's lawyers.¹³⁶ There, the court considered the attorney immunity defense and the arguments of the other party to the transaction that the law firm was not immune because it committed fraud while representing its client, the tenant.¹³⁷ The court rejected appellant's argument, recognizing that permitting such a claim, "would also place the lawyer in the impossible situation of representing two opposing sides in a business transaction."¹³⁸ The complained of conduct was Brown McCarroll's transactional role of negotiating the lease.¹³⁹

Courts have applied attorney immunity outside litigation to the non-judicial foreclosure of real property.¹⁴⁰ In doing so, the Fifth Circuit announced, "[t]he [plaintiffs] argue that attorney immunity applies only in the litigation context, but that stance is not in line with Texas law."¹⁴¹ In one circumstance, an attorney provided advice to his clients about a billboard on their property.¹⁴² In affirming a summary judgment in the attorney's favor, the court of appeals commented, "Moreover, while it is true that many of the cases addressing the attorney-immunity doctrine arise in the context of pending litigation, neither the case law, nor the doctrine's underlying policy rationales, are limited to that setting."¹⁴³

132. *Barcelo*, 923 S.W.2d at 576–77.

133. *Id.*

134. 344 S.W.3d 56, 58 (Tex. App.—Eastland 2011, no pet.).

135. *Id.*

136. *Id.* at 58–59.

137. *Id.* at 60.

138. *Rawhide Mesa-Partners, Ltd.*, 344 S.W.3d at 62.

139. *See id.* at 58.

140. *See* *Campbell v. Mortg. Elec. Registration Sys., Inc.*, No. 03-11-00429-CV, 2012 WL 1839357, at *6 (Tex. App.—Austin May 18, 2012, pet. denied) (mem. op.).

141. *Iqbal v. Bank of Am., N.A.*, 559 F. App'x. 363, 365 (5th Cir. 2014) (per curiam); *see also* *Lassberg v. Bank of Am., N.A.*, 660 F. App'x. 262, 267 n.12 (5th Cir. 2016) (per curiam) (noting two unpublished decisions in which the Fifth Circuit has found a law firm was protected by attorney immunity for actions taken outside litigation).

142. *Reagan Nat'l Advert. of Austin, Inc. v. Hazen*, No. 03-05-00699-CV, 2008 WL 2938823, at *1 (Tex. App.—Austin July 29, 2008, no pet.) (mem. op.).

143. *Id.* at *8.

Since *Byrd* was decided, other courts have applied the defense to transactional work. The Beaumont Court of Appeals affirmed the dismissal of claims against an attorney in a probate proceeding based upon the attorney immunity defense.¹⁴⁴ In *Rogers v. Walker*, the complained of actions were not litigation, but the administration of an estate.¹⁴⁵ Specifically, the plaintiff alleged, “[t]hrough a series of fraudulent and tortious actions by Creel and [the attorney], Louise Rogers’ Estate funds were misappropriated, her house and land [were] repossessed, and the Estate was left deeply in debt.”¹⁴⁶ The court held, in response to an argument that transactional work was outside litigation and the scope of attorney immunity, “Rogers presents no authority, nor are we aware of any, that supports his contention that the context of the present case falls outside the purview of *Cantey Hanger*.”¹⁴⁷

One claimant argued a law firm’s work on the sale of a business’ assets was outside litigation and therefore outside the scope of the attorney immunity defense.¹⁴⁸ There, the attorney negotiated the sale of real estate and equipment from a client to the claimant.¹⁴⁹ In finding that the law firm was protected by attorney immunity, even though the work was clearly transactional in nature, the court ruled, “the attorney immunity doctrine is not limited to only litigation.”¹⁵⁰

The Fifth Circuit has held attorney immunity applies to transactional work.¹⁵¹ In deciding the attorney immunity defense applies to all attorneys, the Fifth Circuit explained the immunity’s “underlying rationale is to free attorneys ‘to practice their profession’ and ‘advise their clients . . . without making themselves liable for damages.’ The most likely understanding is that this includes the multitude of attorneys that routinely practice and advise clients in non-litigation matters.”¹⁵²

Recently, in *NFTD, LLC v. Haynes & Boone, LLP*, one Texas court of appeals broke from the rationale announced by so many other courts prior to it.¹⁵³ That case concerns the work of an attorney in the negotiation and sale

144. See e.g., *Rogers v. Walker*, No. 09-15-00489-CV, 2017 WL 3298228, at *1, *6 (Tex. App.—Beaumont Aug. 3, 2017, pet. denied) (mem. op.).

145. *Id.* at *1.

146. *Id.* at *4.

147. *Id.*

148. *LJH, Ltd. v. Jaffe*, No. 4:15-CV-00639, 2017 WL 447572, at *3 (E.D. Tex. Feb. 2, 2017) (mem. op.).

149. *Id.* at *2–3.

150. *Id.* at *3.

151. See *Troice v. Greenberg Traurig, L.L.P.*, 921 F.3d 501, 505–06 (5th Cir. 2019).

152. *Id.* at 506 (citation omitted) (quoting *Cantey Hanger, L.L.P. v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015)).

153. 591 S.W.3d 766, 767 (Tex. App.—Houston [14th Dist.] 2019, pet. filed).

of a business.¹⁵⁴ The court began with the basic premise that the majority in *Cantey Hanger v. Byrd* did not extend attorney immunity to transactional work.¹⁵⁵ From there, it refused to extend attorney immunity to transactional work.¹⁵⁶ Faced with the policy argument the Fifth Circuit found persuasive, the Houston appellate court relied heavily on the dissent in *Cantey Hanger v. Byrd* and announced:

There might be a need to ensure loyal and aggressive representation in business transactions, but this need is counteracted by inadequate protection for attorney misconduct. The *Cantey Hanger* majority listed sanctions, contempt, and attorney disciplinary proceedings as possible remedies for attorney misconduct during litigation. However, neither contempt nor sanctions are available remedies outside the litigation context. Although attorney disciplinary proceedings can be brought against an attorney for his or her misconduct, such proceedings often might not adequately compensate non-clients for damages (like substantial monetary damages) they suffered from attorney misconduct.¹⁵⁷

The court further pointed out it was not bound by the Fifth Circuit's decision in *Troice v. Greenberg Traurig, LLP*, which it deemed to "misread *Cantey Hanger*."¹⁵⁸

There appear to be serious flaws with the court's decision in *NFTD, LLC v. Haynes & Boone, LLP*. First, while the appellate court does not come out and say it, the opinion suggests an underlying belief by the panel that litigation is adversarial and transactional work is not.¹⁵⁹ That is not the case. Ultimately, the opposing sides to a transaction, while both wanting the deal, are looking to maximize their return to the other side's detriment. While there may be exceptions, the general rule, just like in litigation, is that transactional work—when it involves multiple parties and negotiations—is adversarial.¹⁶⁰

154. *Id.* at 768–69.

155. *Id.* at 773.

156. *Id.*

157. *NFTD, LLC*, 591 S.W.3d at 773–74 (citation omitted).

158. *Id.* at 774–75.

159. *Id.* at 773 ("There *might* be a need to ensure loyal and aggressive representation in business transactions[.]") (emphasis added).

160. See 1001 McKinney Ltd. v. Credit Suisse First Bos. Mortg. Cap., 192 S.W.3d 20, 37 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) ("The parties, operating at arm's length, were adversarial, and thus the Borrower was required to exercise ordinary care in its dealings with the Lender and the Lender's Parent."); see also Coastal Bank SSB v. Chase Bank of Tex., N.A., 135 S.W.3d 840, 843 (Tex. App.—Houston [1st Dist.] 2004, no pet.) ("Generally, reliance on representations made in a business or commercial transaction is not justified when the representation takes place in an adversarial context."); see also Swank v. Sverdlin, 121 S.W.3d 785, 803 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) ("Chudnoff, LDNGH, and LDE were adversaries of appellees

There is a key difference with transactional work, but that difference supports attorney immunity applying to all attorneys. Transactions are voluntary, but litigation is not. In transactional work—when two sides are negotiating for the sale of an asset or business—if one party does not like the terms, they are free to walk away. Whereas in litigation, the defendant in a lawsuit is not there voluntarily. Instead, the defendant is sued and must file an answer and defend themselves. If not, a default judgment will be rendered against them.¹⁶¹ A defendant cannot voluntarily walk away from litigation.

The court used the absence of sanctions and contempt in transactional work as a reason not to extend immunity to transactional attorneys.¹⁶² As pointed out above, this difference exists in part because litigation is not a voluntary exercise. In litigation, the two sides are forced together through the filing of the suit and often fight to keep the other side from knowing what is in each other's file. Discovery exists to force the exchange of information, and sanctions exist, in part, to punish bad conduct in discovery.¹⁶³ In a negotiation for the sale of an asset or business, the sides voluntarily exchange information. Unlike a litigant, if a potential buyer is not getting enough information during the due diligence phase, they are free to avail themselves of the exits and not go through with the transaction. If an attorney misbehaves during negotiations, the remedy the other side has in a transaction—a remedy that does not exist in litigation—is to walk away from the deal.

Discovery under the Texas Rules of Civil Procedure or the Federal Rules of Civil Procedure do not apply in transactions, so there is no need for sanctions. Thus, using sanctions as a distinction is a false narrative. Ultimately, the important issue is the attorney's duty to the client. There is not a tougher set of disciplinary rules for a trial lawyer. Both the trial lawyer and the transactional lawyer are subject to the Texas Disciplinary Rules of Professional Conduct.¹⁶⁴

The court also mentions that disciplinary proceedings against an attorney might not adequately compensate non-clients for damages.¹⁶⁵ Adequate compensation is not the stated purpose of sanctions. "The legitimate purposes of discovery sanctions are threefold: 1) to secure compliance with discovery rules; 2) to deter other litigants from similar misconduct; and

in negotiating the June and September 1996 contracts. Thus, representations made by Chudnoff, LDNGH, and LDE during the contract negotiations do not justify reliance by Sverdlin and AMPS.").

161. TEX. R. CIV. P. 239.

162. See *NFTD, LLC*, 591 S.W.3d at 773–74.

163. See TEX. R. CIV. P. 215.3 (Abuse of discovery).

164. See TEX. GOV'T CODE ANN. § 81.072(d) ("Each attorney is subject to the Texas Rules of Disciplinary Procedure and the Texas Disciplinary Rules of Professional Conduct.").

165. *NFTD, LLC*, 591 S.W.3d at 773–74.

3) to punish violators.”¹⁶⁶ Just compensation is not one of those stated purposes.¹⁶⁷ While courts will occasionally use sanctions to grant relief in the case through a default judgment or other dispositive relief, those circumstances are severely limited to the rare case in which a party’s hindrance of the discovery process justifies a presumption that its claims or defenses lack merit.¹⁶⁸ In other words, sanctions as just compensation only exist when the conduct undermines the offending party’s case or defense entirely. The inability of disciplinary proceedings, or sanctions, to compensate non-clients for damages is ultimately no different in a transaction than it is in a courtroom.

The transactional attorney must pass the same bar exam to be licensed in Texas and abide by the same disciplinary rules and duties to a client as the trial lawyer. If the discipline is the same and the standards for admission are the same, why should the two be treated differently just because one spends the majority of their time in a court room and the other in a board room?

Failing to shield transactional lawyers from suits by third parties gives rise to another problem. The attorney-client privilege belongs not to the lawyer but the client.¹⁶⁹ While the lawyer may claim the privilege for the client, that is because the rules of evidence entitle the lawyer to do so in the client’s place.¹⁷⁰ What happens when the attorney has evidence that would clear them of liability, but cannot use it? Let’s say this attorney is a defendant in a suit brought by the other side in a deal gone wrong. The attorney’s favorable evidence is protected by the attorney-client privilege, and the client refuses to waive the privilege. Is the attorney free to save their own skin over the objection of a client to whom the attorney still owes a fiduciary duty? Add to this hypothetical a client that is no longer solvent or lacks the ability to satisfy a judgment. The attorney, on the other hand, having professional liability insurance or working for a solvent firm, does not face the same financial impediment. In those circumstances, the claimant—the other side in the transaction—may also prevent the attorney from defending themselves by objecting to any waiver of the attorney-client privilege.

If not protected by attorney immunity, the transactional attorney will find him or herself in a position where a full and vigorous defense cannot be

166. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992).

167. *See id.*

168. *See Trans American Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991) (citing *Societe Internationale v. Rogers*, 357 U.S. 197 (1958)).

169. TEX. R. EVID. 503(b).

170. *See id.* 503(c) (“The person who was the client’s lawyer or the lawyer’s representative when the communication was made may claim the privilege on the client’s behalf—and is presumed to have authority to do so.”).

made because of a contrary duty to the client. If the attorney immunity defense does not protect transactional attorneys, they are now faced with the dilemma of defending themselves with one or both hands tied behind their back. The law should not permit a cause of action against a defendant where the rules of evidence dictate an unfair playing field for that defendant. It is not permissible to make the transactional attorney a defendant and not permit him or her to mount a full defense because of a duty to the client.

There is a crime-fraud exception to the attorney-client privilege.¹⁷¹ Still, that exception will not help the transactional attorney who becomes a defendant in a suit brought by the other side. First, attorneys are bound by their fiduciary duty to the client, which requires that they further their client's best interests.¹⁷² In a circumstance where disclosing privileged information would aid the attorney's defense, but would not assist the client and may even harm the client, the attorney's duty is to the client first.¹⁷³ The attorney is not in a position where he or she can put his or her interest first by arguing for the waiver of the privilege. Even if the client's conduct is criminal and Texas Disciplinary Rule of Professional Conduct 1.05(c) may require an attorney to make disclosures of the client's conduct, the disciplinary rule does not address the admissibility of evidence.¹⁷⁴

Second, "[t]he crime-fraud exception applies only if a prima facie case is made of contemplated fraud."¹⁷⁵ To prove contemplated fraud, a party must show a relationship between the communication for which the privilege is challenged and the prima facie proof offered.¹⁷⁶ That relationship must be established for each privileged communication.¹⁷⁷ The exception also requires evidence establishing the fraud was ongoing, or about to be committed at the time of the communication.¹⁷⁸ The fraud alleged to have occurred must have happened at or during the time the communication took place, and the communication must have been created as part of perpetrating the fraud.¹⁷⁹ These strict requirements to breach the attorney-client privilege are unlikely to save an attorney whose testimony would assist their defense.¹⁸⁰ If the attorney's testimony about the negotiations is that the attorney never received

171. *Id.* 503(d)(1).

172. *Chu v. Hong*, 249 S.W.3d 441, 446 (Tex. 2008).

173. *Id.*

174. *Warrantech Corp. v. Comput. Adapters Servs., Inc.*, 134 S.W.3d 516, 527–28 (Tex. App.—Fort Worth 2004, no pet.).

175. *Granada Corp. v. First Ct. of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992).

176. *Id.*

177. *In re Harco Nat'l Ins. Co.*, No. 2-09-351-CV, 2010 WL 2555629, at *5 (Tex. App.—Fort Worth June 24, 2010, no pet.) (mem. op.).

178. *In re Scigel*, 198 S.W.3d 21, 28 (Tex. App.—El Paso 2006, no pet.).

179. *Id.* at 28–29.

180. *Id.*

a key document alleged to contain a fraudulent statement, there is no communication as part of perpetrating the fraud. Instead, there is an absence of communication, and that testimony is still protected by the attorney-client privilege and confidential under the Texas Disciplinary Rules of Professional Conduct. What if the attorney's testimony would be that they told the client to correct a document, but the client sent the document without correcting it? Such communications are not made to enable or aid the client in the fraud.¹⁸¹

These limitations mean if an exception to the attorney-client privilege exists, then the attorney cannot assert it to the detriment of the client without potential consequences. Simply put, there is no need for a cause of action against transactional lawyers, which they are not permitted to fully defend themselves against, that the law will not permit against trial lawyers. The attorney immunity defense should apply to both transactional and litigation work, just like the rules and laws that dictate how the attorney must behave. Until transactional lawyers are subject to a different set of disciplinary rules and duties to the client, they should not bear the burden of different rules for liability to third parties.

II. "SAY MY NAME" – MALPRACTICE CANNOT BE CALLED SOMETHING ELSE

Often, a lawyer that is accused of negligence will be sued for more than just legal malpractice. The enterprising plaintiff's attorney will try to craft an alleged act or omission into something more. Allegations that the attorney represented himself as having skills he did not possess, which is an issue of competence, will be called a negligent misrepresentation, fraud, and DTPA violation.¹⁸² DTPA claims are a favorite because the statute permits the recovery of attorney's fees.¹⁸³ Lawyers will see allegations that they failed to fulfill their promise in the fee agreement when they committed an alleged error, or the allegation will be crafted into a breach of contract claim.¹⁸⁴ Again, breach of contract is a claim permitting the recovery of attorney's fees.¹⁸⁵ It will be alleged the attorney did not put the client's best interest first in committing an alleged act or omission, and that allegation is designed to

181. TEX. R. EVID. 503(d)(1).

182. See *Beck v. L. Offs. of Edwin J. Terry, Jr.*, 284 S.W.3d 416, 431 (Tex. App.—Austin 2009, no pet.) (“[A] complaint that a lawyer ‘misrepresented’ his competence to provide legal services or ‘failed to disclose’ his incompetence implicates only the lawyer’s duty of ordinary care and is not independently actionable as a fiduciary duty, DTPA, or other tort claim.”).

183. See TEX. BUS. & COM. CODE ANN. § 17.50(d) (“Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys’ fees.”).

184. See, e.g., *Duerr v. Brown*, 262 S.W.3d 63, 67 (Tex. App.—Houston [14th Dist.] 2008, no pct.).

185. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001.

support a fiduciary duty claim.¹⁸⁶ The fiduciary duty claim will be alleged to support the equitable remedy of fee forfeiture in an effort to recover what has already been paid to the attorney.¹⁸⁷ In short, allegations of malpractice will give rise to a multitude of claims.

Texas has an affirmative defense called “fracturing” available to lawyers but few others. Texas law “does not permit a plaintiff to divide or fracture [a] legal malpractice [claim] into additional causes of action.”¹⁸⁸ Fracturing will not dispose of an entire case. However, when proven, fracturing will help narrow a multitude of cleverly drafted claims into a simple malpractice case. The fracturing defense prevents plaintiffs from converting what are professional negligence claims against an attorney into a misrepresentation, fraud, breach of contract, breach of fiduciary duty, or violation of the Texas Deceptive Trade Practices Act.¹⁸⁹

For the anti-fracturing rule to apply and prevent additional claims, the crux of a plaintiff’s complaint must focus on the quality or adequacy of the attorney’s work; whether he did what he was supposed to do as an attorney.¹⁹⁰

Courts do not allow a case arising out of an attorney’s alleged bad legal advice or [poor work] to be split out into separate claims for negligence, breach of contract, or fraud, because, [more often than not,] the real issue remains one of whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise.¹⁹¹

186. See *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

187. See *Webb v. Crawley*, 590 S.W.3d 570, 587 (Tex. App.—Beaumont 2019, no pet.).

188. E.g., *Goffney*, 56 S.W.3d at 190 (citing *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Kahlig v. Boyd*, 980 S.W.2d 685, 688–91 (Tex. App.—San Antonio 1998, pet. denied); *Smith v. Heard*, 980 S.W.2d 693, 697 (Tex. App.—San Antonio 1998, pet. denied); *Rodriguez v. Klein*, 960 S.W.2d 179, 184 (Tex. App.—Corpus Christi 1997, no pet.); *Am. Med. Elecs., Inc. v. Korn*, 819 S.W.2d 573, 576 (Tex. App.—Dallas 1991, writ denied); *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Bray v. Jordan*, 796 S.W.2d 296, 298 (Tex. App.—El Paso 1990, no writ)).

189. See *Won Pak v. Harris*, 313 S.W.3d 454, 457 (Tex. App.—Dallas 2010, pet. denied) (citing *Beck v. Law Offs. of Edwin J. Terry, Jr., P.C.*, 284 S.W.3d 416, 426–27 (Tex. App.—Austin 2009, no pet.)); see also *Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied) (“Texas courts do not allow plaintiffs to convert what are really negligence claims into claims for fraud, breach of contract, breach of fiduciary duty, or violation of the DTPA.”).

190. See *Murphy*, 241 S.W.3d at 692–93; see also *Echols v. Gullledge & Sons, LLC*, No. 10-13-00419-CV, 2014 Tex. App. LEXIS 10190, at *12 (Tex. App.—Waco Sept. 11, 2014, pet. denied).

191. *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2003, pet. denied) (quoting *Averitt v. Price Waterhouse Coopers L.L.P.*, 89 S.W.3d 330, 333 (Tex. App.—Fort Worth 2002, no pet.)); see also *Sledge v. Alsup*, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ).

The determination of whether a complaint against a lawyer is actionable in negligence versus some other legal theory is a question of law.¹⁹² The court gets to determine whether the allegations in the petition allege malpractice or something more. To determine whether a malpractice claim has been fractured, a court must look at the claim. What is alleged, and what does the plaintiff ask for because of the alleged breach? If the focus of the complaint is that the attorney did not provide adequate representation, the claim is one for legal malpractice.¹⁹³ This can be difficult.

In *Duerr*, the plaintiff, who was part of a class, alleged a breach of fiduciary duty claiming the attorneys had a conflict of interest because they used his valuable claim as leverage to obtain a larger settlement for other plaintiffs and, in return, larger fees for themselves.¹⁹⁴ Factual allegations of a conflict of interest or putting the attorney's interest above a client appear to be a breach of fiduciary duty.¹⁹⁵ To clarify the confusion the court looked for the purpose of the plaintiff's claims by reviewing the summary judgment evidence. Further, the court determined the relief being sought for the alleged breach of fiduciary was the same relief being sought for malpractice; the difference between what the plaintiff recovered and what he believed his case was worth.¹⁹⁶ The desired outcome made it clear that the focus of the case was the attorney's alleged inadequate representation.¹⁹⁷

Fracturing does not always work. A separate cause of action for breach of fiduciary duty can exist against an attorney if the allegations in the petition allege self-dealing, deception, or misrepresentations in the attorney's legal representation of the client.¹⁹⁸ Fiduciary duty claims may be warranted when the allegations touch upon doing unnecessary work or billing for work

192. *Duerr v. Brown*, 262 S.W.3d 63, 70 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

193. *Beck*, 284 S.W.3d at 427–28; (citing *Kimleco Petroleum, Inc.*, 91 S.W.3d at 924); see also *Averitt*, 89 S.W.3d at 333 (explaining a cause of action based on attorney's alleged failure to perform professional services is a tort rather than breach of contract, regardless of whether a written contract providing for professional services exists between attorney and client); see also *Goffney*, 56 S.W.3d at 191 (finding claims that an attorney failed to prepare for trial and abandoned client on day of trial to be claims for malpractice instead of breach of contract).

194. *Duerr*, 262 S.W.3d at 71.

195. *Id.* at 71–72 (“[A] breach of fiduciary duty claim encompasses whether an attorney obtained an improper benefit from the representation. See *Aiken v. Hancock*, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied)”).

196. *Id.* at 74.

197. *Id.*

198. *Trousdale v. Henry*, 261 S.W.3d 221, 228 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); see also *Burrow v. Arce*, 997 S.W.2d 229, 233 (Tex. 1999) (finding allegations of self-dealing found where attorneys signed up multiple clients *en masse* and negotiated a global settlement for all clients without regard to the individual injuries of each).

that was not done.¹⁹⁹ The relief sought for such claims would be the recovery of the overpayment or fee forfeiture.²⁰⁰ Following the analysis applied in *Duerr*, the damages sought are based on the overpayment, which is different from a legal malpractice allegation that the case was less valuable or cost more because of the attorney's neglect. Still, there is often not a dispute about fees or any other fiduciary obligation to support a separate claim. The only real complaint is the lawyer is alleged not to have met the standard of care. That alleged failure is malpractice and nothing more.

III. IT WOULD BE A CRIME TO FORGET THE CRIMINAL LAWYERS

Occasionally, malpractice claims are brought against criminal lawyers. In those cases, the critical issue and first question must be: Did the client get his conviction set aside on some basis? This question is outcome determinative because in Texas, while it is not technically a defense, malpractice claims against criminal lawyers fail unless the client can establish his or her innocence.²⁰¹

In *Peeler v. Hughes & Luce*, the Texas Supreme Court considered whether an attorney could be liable to a client when the client is a criminal defendant.²⁰² The client was offered absolute transactional immunity, but their attorney failed to disclose the offer.²⁰³ After the client pleaded guilty, she learned of the immunity offer and sued the firm and her lawyer.²⁰⁴ The issue was whether the lawyer could be liable for malpractice by failing to present the immunity offer, which would have kept the client out of prison.²⁰⁵

The Texas Supreme Court, after considering the elements of the plaintiff's claims, surveying the law of other states that have considered claims where the underlying lawsuit—the case within a case—is criminal, and considering broader public policy issues added another element to legal malpractice claims when the client is a criminal defendant.²⁰⁶ The Texas Supreme Court added the following burden for criminal clients to recover damages from their attorneys:

199. *Riverwalk CY Hotel Partners, Ltd. v. Akin Gump Strauss Hauer & Feld, LLP*, 391 S.W.3d 229, 239 (Tex. App.—San Antonio 2012, no pet.); *see also Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 481–82 (Tex. App.—Dallas 1995, writ denied).

200. *Riverwalk CY Hotel Partners, Ltd.*, 391 S.W.3d at 239.

201. *Gray v. Skelton*, 595 S.W.3d 633, 639 (Tex. 2020).

202. 909 S.W.2d 494, 495 (Tex. 1995).

203. *Id.* at 496.

204. *Id.*

205. *Id.* at 498.

206. *Id.* at 497–98.

[P]laintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise.²⁰⁷

The Texas Supreme Court adopted a proximate cause bar for claims brought by criminal clients against their attorneys.²⁰⁸ Further, the court placed the burden of proof on the plaintiff—who was a criminal defendant in the underlying case—to negate this sole proximate cause bar by proving its exoneration of the underlying criminal offense.²⁰⁹

The unresolved question in *Peeler* concerned the meaning of “exonerated”. Is it legal innocence or actual innocence? To clarify the distinction between legal innocence versus actual innocence, one can look to the Texas Court of Criminal Appeals, which has explained the meaning of actual innocence in the following fashion:

A prototypical example of “actual innocence” in a colloquial sense is the case where the State has convicted the wrong person of the crime. An actual innocence claim must be accompanied by new “affirmative evidence of the applicant’s innocence.” In the past we have evaluated the merits of actual innocence claims supported by new evidence in the form of witness recantations, scientific testing like DNA, and new expert testimony. Applicants’ requests for relief on a bare actual innocence basis do not allege any evidence establishing that had it been presented at trial, Applicants would not have been found guilty of the offense they were convicted of. Applicants do not contest that they engaged in the conduct for which they were convicted. The conduct on which the criminal prosecution was based still exists as a matter of historical fact. . . . We conclude that Applicants do not assert true claims of actual innocence for which relief may be granted; they are decidedly different.²¹⁰

Actual innocence is different from legal innocence.

[T]he term ‘actual innocence’ shall apply, in Texas state cases, only in circumstances in which an accused did not, in fact, commit the charged offense or any of the lesser-included offenses. Looking back to its federal origins, the *Wilson* Court

207. *Peeler*, 909 S.W.2d at 497–98 (The reference to a conviction would clearly include pleas since Ms. Peeler pleaded guilty and was not convicted after a trial).

208. *Id.* at 498.

209. *Id.*

210. *Ex parte Fournier*, 473 S.W.3d 789, 793 (Tex. Crim. App. 2015) (citations omitted).

clarified that a bare actual innocence claim does not countenance ‘legal innocence’—the notion that, despite committing the alleged conduct, the applicant is nonetheless not guilty.²¹¹

The focus of actual innocence turns on the applicant’s or plaintiff’s conduct.²¹² Actual innocence means the plaintiff did not commit the offensive act.²¹³ By comparison, one can be legally innocent but not actually innocent due to a statute that is held to be unconstitutional,²¹⁴ or due to ineffective assistance of counsel.²¹⁵ Actual innocence is not a prejudicial jury charge and a State that elects not to re-try a criminal defendant due to limited resources,²¹⁶ or a reversal due to ineffective assistance of counsel.²¹⁷ Actual innocence is proof that the defendant did not commit any unlawful acts.²¹⁸

On February 21, 2020, the Texas Supreme court clarified *Peeler*.²¹⁹ In that case, Patricia Skelton, a lawyer, possessed a copy of client Ysidro Canales’s will, which had sustained substantial water damage in a flood.²²⁰ When the family could not find the original will, Ms. Skelton printed out a copy of the will from her computer, cut out the signatures from the flood-damaged copy, and attached those signatures to the newly printed copy.²²¹ Without telling the probate court what she had done, Ms. Skelton filed this copy of Mr. Canales’s will.²²² After being reported to the authorities, Ms. Skelton was indicted for forging the will, pleaded not guilty, went to trial, and was convicted of forgery.²²³ Ms. Skelton’s conviction was later vacated based on ineffective assistance of counsel.²²⁴ In her criminal case, the court of appeals did not find Ms. Skelton was actually innocent, granting her relief on other grounds.²²⁵ The State then dismissed the criminal charges against Ms. Skelton without re-trying her.²²⁶

Ms. Skelton sued her criminal defense attorney, Mr. Gray, for malpractice.²²⁷ Mr. Gray moved to dismiss the suit on the pleadings under Texas

211. *Id.* at 792 (citations omitted).

212. *See id.*

213. *See id.*

214. *See id.* at 793.

215. *See Ex parte Skelton*, 434 S.W.3d 709, 733 (Tex. App.—San Antonio 2014, pct. ref’d).

216. *See Glenn v. Aiken*, 409 Mass. 699, 705 (Mass. 1991).

217. *See Moore v. Owens*, 298 Ill. App. 3d 672, 675 (Ill. App. Ct. 1998).

218. *See Bailey v. Tucker*, 621 A.2d 108, 119 n.2 (Pa. 1993).

219. *Gray v. Skelton*, 595 S.W.3d 633 (Tex. 2020).

220. *Id.* at 635.

221. *Id.*

222. *Id.*

223. *Gray*, 595 S.W.3d at 635.

224. *Id.* at 636.

225. *Id.*

226. *Id.*

227. *Gray*, 595 S.W.3d at 636.

Rule of Civil Procedure 91a, which the trial court granted without ever reaching the summary judgment stage or reviewing any evidence.²²⁸

The Texas Supreme Court clarified the exoneration requirement in *Peeler* has two elements.²²⁹ The exoneration requirement is the added element barring a legal malpractice action unless the criminal defendant turned plaintiff can show he or she has been exonerated.²³⁰ First, the criminal defendant must have his or her conviction vacated in the criminal proceeding on direct appeal or through post-conviction relief.²³¹ Second, the criminal defendant must obtain a finding of actual innocence as a predicate to submit a legal malpractice claim.²³²

If the underlying criminal conviction is vacated on the ground of actual innocence, the claimant has met both elements of proof in the criminal proceeding and has cleared the proximate cause bar.²³³ However, if the claimant had his or her conviction vacated on grounds other than actual innocence, he or she may still meet the actual innocence element by obtaining a finding of actual innocence in the malpractice case as a predicate finding to a legal malpractice question.²³⁴ If the plaintiff was not found actually innocent in the criminal proceeding, there is a predicate question of actual innocence the factfinder must answer affirmatively before proceeding to the legal malpractice question.²³⁵ The burden of proof is on the plaintiff and is based on a preponderance of the evidence.²³⁶

While requiring actual innocence, not just legal innocence, in the underlying criminal proceeding would be a cleaner approach—allowing the criminal court to apply the appropriate standards in that forum—there are practical reasons for the court's decision. Ms. Skelton asserted actual innocence as one of two bases for habeas corpus relief.²³⁷ The district court denied the writ, but the court of appeals reversed and vacated her conviction without considering the actual innocence claim, instead finding that Gray rendered

228. *Id.*; see also TEX. R. CIV. P. 91(a)6 (“[T]he court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59.”).

229. *Id.* at 639.

230. *Peeler v. Hughes & Lucc*, 909 S.W.2d 494, 497–98 (Tex. 1995).

231. See *Gray*, 595 S.W.3d at 639 (“[W]e agree with Gray insofar as he argues that Skelton’s conviction must be vacated[.]”).

232. *Id.* (“[F]or those whose conviction has been vacated on grounds other than actual innocence, we add one more requirement: They must obtain a finding of their innocence as a predicate to the submission of their legal-malpractice claim.”).

233. See *id.* (“To be sure, having a conviction vacated on an actual-innocence finding will remove *Peeler*’s proximate cause bar.”).

234. *Id.*

235. *Gray*, 595 S.W.3d at 639.

236. *Id.*

237. *Id.* at 636.

ineffective assistance.²³⁸ It is not Ms. Skelton's fault the trial court chose to free her based on ineffective assistance of counsel without ever reaching the actual innocence question.²³⁹ There are practical reasons a trial court may avoid granting habeas corpus relief on an actual innocence claim if another claim is also viable, as the Texas Court of Criminal Appeals has identified:

One of the primary benefits of a declaration of actual innocence by this Court is that the Texas Comptroller will pay large sums of money as compensation for the period of time that the person was wrongfully incarcerated. *In re Allen*, 366 S.W.3d 696, 701 (Tex.2012). Under a civil statute known as the Tim Cole Act, anyone who has been declared actually innocent receives substantial financial compensation for his wrongful incarceration. Tex. Civ. Prac. & Rem. Code § 103.001(a).²⁴⁰

Moreover, the Texas Supreme Court's decision in *Gray* demonstrates that the innocence element is actual innocence, not legal innocence. First, the court rejected Ms. Skelton's argument that ineffective assistance of counsel met the proximate cause bar. The court explained:

[S]uch equation is inconsistent with both the plurality's and dissent's repeated use of the word 'innocence' in *Peeler* itself. . . . Having counsel that falls below the minimum Sixth Amendment standards, as Skelton did here, suggests nothing about the criminal defendant's innocence of the underlying crime. It merely says that a conviction cannot stand in the face of a constitutionally deficient trial.²⁴¹

Second, the court noted the definition of exoneration requires that one be cleared of blameworthy conduct or wrongdoing.²⁴² Third, the court used the phrase actual-innocence in its holding.²⁴³

In order for a criminal defense attorney to face a colorable malpractice claim, the former client must first have the conviction vacated, and then must prove actual innocence either by showing that was the basis for the vacated conviction, or by a preponderance of the evidence in the civil case.

IV. CONCLUSION

There are particular defenses that exist only for attorneys. Those defenses largely grow out of the circumstances of an attorney's involvement.

238. *Id.*

239. *Id.*

240. *Ex parte Fournier*, 473 S.W.3d 789, 797 (Tex. Crim. App. 2015).

241. *Gray*, 595 S.W.3d at 638 (citations omitted).

242. *Id.*

243. *Id.* at 639 ("It can be established in the underlying criminal proceeding when the conviction is vacated on an actual-innocence finding.").

The attorney has a special duty to the client that often requires the attorney to put his client's interest above the concerns of others. Thus, the law protects and preserves that duty and subsequently protects the attorney from third parties who take offense to the attorney's zealous work. Because the attorney often is engaged after the harm has taken place, the law also protects the attorney from being responsible for what has already occurred. Still, as illustrated in this paper, the scope of these defenses is undetermined. Time will determine whether courts accept that all attorneys should be treated the same, or whether a different set of rules is established for the transactional attorney.