ATTORNEY IMMUNITY DOCTRINE: THE SECOND PUNCH IN LEGAL MALPRACTICE DEFENSE, BY: DONALD PATRICK ECKLER, ESQ. AND JENNIFER BERARD, ESQ., C.P.C.U.

In our first article we discussed the first punch of legal malpractice defense: judgmental immunity. Now we turn to the second punch, what is variously called the absolute attorney litigation privilege or attorney immunity doctrine. This doctrine establishes the public policy that lawyers must be able to conduct litigation in the manner they see fit within the rules and that subsequent litigation of issues that were already adjudicated in prior proceedings should not be permitted.

It is almost commonplace for a suit to be brought against opposing counsel who successfully, and most often rather aggressively, prosecuted or defended a case. From disappointed commercial litigants to aggrieved spouses in divorce proceedings, attorneys are facing claims from opposing parties whom they did not represent. These claims are being brought even in situations in which the court found in their client's favor in the original proceeding. While chutzpah should be a legal defense to such claims, it is not. As plaintiff's lawyers continue to be ever more creative in the claims they bring against their fellow lawyers, the attorney immunity doctrine has expanded as a defense to some of these claims.

The Restatement and Public Policy Basis

The Restatement of Torts, cited by many courts, describes the litigation privilege as follows:

> An attorney at law is absolutely privileged to publish *defamatory* matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Restatement (Second) of Torts § 586 (1977) (emphasis added).

On its face, the Restatement only immunizes an attorney when the alleged tortious act was defamation, and only when there is a judicial proceeding. Courts across the country have expanded the scope of the privilege to effectuate its important public policy role. See *Johnson v. Johnson & Bell, Ltd.*, 2014 IL App (1st) 122677 (applied to claims for negligent infliction of emotional distress and breach of contract); *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 833 (1st Dist. 2006) (to communications to a potential adversary prior to litigation); *Golden v. Mullen,* 295 Ill. App. 3d 865, 872 (1st Dist. 1997) (false light claim factually identical to claim for defamation); *Scheib v. Grant,* 22 F.3d 149 (7th Cir. 1994) (defense to claim of violation eavesdropping statute); *Loigman v. Township Committee of the Township of Middletown,* 889 A.2d 426, 439 (N.J. 2006) (defense to sequestration motion in an administrative proceeding); *Miller v. Reinert,* 839 N.E.2d 731 (Ind. Ct. App. 2005) (statements made in appellate brief are not actionable); *Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP,* 175 F.3d 14 (1st Cir. 1999) (statements in complaint allegedly defamed a nonparty to the lawsuit, but were protected because the statements were not "palpably irrelevant" to the litigation).

The immunity, and its limits, also has its basis in the Rules of Professional Conduct. The preamble to the ABA Model Rules provides "[a]s an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." ABA Model Rule 1.3 requires that a lawyer must "act with reasonable diligence and promptness in representing a client" and Comment 1 states "[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Limiting the zeal with which a lawyer must represent his client are the requirements of ABA Model Rule 3.4 of fairness to opposing parties, ABA Model Rule 4.1 in truthfulness in statements, and ABA Model Rule 4.4 with respect to the rights of third persons. These competing interests both define the nature and outer bound of the immunity.

> "[T]he absolute attorney litigation privilege is intended to provide attorneys with 'the utmost freedom in their efforts to secure justice for their clients.'"

To allow attorneys to meet their ethical duties to their clients, the absolute attorney litigation privilege is intended to provide attorneys with "the utmost freedom in their efforts to secure justice for their clients." *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 701-02 (1st Dist. 2000) (internal quotation marks omitted) (citing Restatement (Second) of Torts § 586, comment a, at 247. This privilege also encourages and promotes a full and frank consultation between an individual and a legal advisor. *Popp v. O'Neil*, 313 Ill. App. 3d 638, 642-34 (2nd Dist. 2000). The privilege also fosters a free flow of honest information to a court or disciplinary tribunal. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 228 Ill. App. 3d 156, 165-66 (1st Dist. 2003). Courts have also noted that limiting the privilege could "frustrate an attorney's ability to settle or resolve cases favorably for his client without resorting to expensive litigation or other judicial processes." *Atkinson*, 369 Ill. App. 3d at 833.

Many years ago in *Bussewitz v. Wisconsin Teachers' Association*, 205 N.W. 808, 811 (Wis. 1925), the Wisconsin Supreme Court may have described the immunity and its purpose best:

> There is good reason for such a rule that oral or written statements of parties, counsel, or witnesses, made in the course of judicial proceedings, should be liberally construed when they are the subject of actions for libel or slander. It is the

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> true theory that in all litigation justice is the end to be sought. If parties are shadowed by the fear that by some mistake as to facts or some excess of zeal, or by some error of counsel, they may be subjected to harassing litigation in an action for slander or libel, they may well feel that justice is too dearly bought and that it is safest to abandon its pursuit. In actions arising out of torts and in criminal cases, lawsuits are not peace conferences, but battles. They are not physical contests like the wager of battle in ancient times, but encounters in which feelings are often wounded and reputations are sometimes soiled.

As will be seen in the discussion of two recent cases below, the touchstone for the use of the immunity is the relationship between the statements and the issues in the case.

O'Callaghan v. Satherlie

Recently, and in the most recent expansion of the privilege in Illinois, the Illinois Appellate Court, First District, held that an attorney's conduct, as opposed to written or verbal statements, is protected by the privilege. *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 27. In *O'Callaghan*, the underlying dispute arose out of a complaint filed against a condominium association by a unit owner for the growth of black mold. The underlying lawsuit named the association's counsel as defendants. *Id*. at ¶ 4. Ultimately, the majority of the case was dismissed, including the claims against the attorneys. *Id*.

The plaintiffs then filed an action against the attorneys for intentional infliction of emotional distress and strict liability for ultrahazardous activity and sought punitive damages. *Id*. at ¶ 8. The plaintiffs claimed that the attorneys failed to disclose an expert report regarding the manner in which the mold should have been handled and withheld other information that allowed the attorneys to pursue a non-meritorious defense that prolonged the underlying litigation and further manipulated the testimony of expert. *Id*. Further, the plaintiffs alleged that the defendant attorneys directed a containment barrier be removed which required the plaintiffs to obtain a court order to have the barrier re-erected. *Id*. at ¶ 9.

The defendant attorneys filed a motion to dismiss the complaint based upon deficiencies on the face of the pleading. *Id*. at ¶ 10. The trial court granted the motion to dismiss. *Id*. at ¶ 12. In affirming the dismissal, the appellate court found that "although Illinois generally follows the restatement, it appears that our supreme court has never expressly adopted [section 586] and all of its language." *Id*. at ¶ 27. Therefore, while section 586 of the Restatement references only defamation, the court expanded the privilege to encompass conduct because it furthered Illinois policy to do so. *Id.* (citing *Ripsch v. Goose Lake Ass'n*, 2013 IL App (3d) 120319, ¶ 17). The court noted a trend in the case law on the litigation privilege that policy is furthered by disregarding arbitrary distinctions. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 17. Because the conduct alleged against the defendant attorneys all related, or was "pertinent," to the representation of the clients in the underlying litigation, the privilege applied and the case was properly dismissed. *Id*.

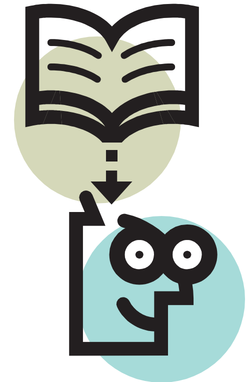
Highland Capital Management v. Looper Reed & McGraw, P.C.

An even greater expansion of the immunity has been seen in Texas. In *Highland Capital Management v. Looper Reed & McGraw, P.C.*, 2016 Tex. App. LEXIS 442, the Court of Appeals of Texas, Fifth District, Dallas held, in an opinion in which the Texas Supreme Court declined to review, that a law firm was not liable to a suit brought by an opposing party in which the underlying lawsuit was, among other claims, a breach of employment agreement and misuse of confidential information. The Looper Reed firm represented the defendant employee in the underlying dispute. *Highland Capital Management*, 2016 Tex. App. LEXIS at * 1-2. Highland Capital asserted claims of theft, breach of duty of confidentiality, conversion, aiding and abetting breach of fiduciary duty, tortious interference with contract, and civil conspiracy to commit theft, extortion, slander, and disparagement. *Id*. at * 2.

The gravamen of the complaint was that Looper Reed stole 60,000 documents and attempted to extort Highland using the stolen documents. *Id*. Highland further alleged that Looper Reed did not advise their client to return all of the stolen documents and then aided the former employee disclosing the information to third parties. *Id*. at * 3-4. Finally, Highland alleged that Looper Reed lied to the court about its activities. *Id*. at * 4.

Looper Reed filed a motion to dismiss on the ground that attorney immunity barred Highland's claims. *Id*. at * 4. On that motion the trial court dismissed some of the claims. Looper Reed then filed a motion for summary judgment which resulted in judgment in favor of Looper Reed on the remaining claims. *Id*.

Before analyzing the facts of Highland's appeal, the Court looked at the recent Texas Supreme Court decision of *Cantey Hanger LLP v. Byrd*, 467 S.W.3d 477 (Tex. 2015). In *Byrd*, the Court upheld the dismissal of a claim against attorneys in divorce proceeding brought by a husband who claimed that the lawyers had intentionally and knowingly included false information on a bill of sale for an aircraft to assist the wife in avoiding tax liability. *Id*. at * 7-8. The Court held that because the conduct was "within the scope of the [the law firm's] legal representation of [the wife] in the divorce proceedings" summary judgment was



"[T]he touchstone for the use of the immunity is the relationship between the statements and the issues in the case."

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proper. *Id*. at * 8. The court stated that even wrongful or fraudulent conduct may fall within the scope of client representation. *Id*. The only limit that the Texas Supreme Court placed on the immunity in *Byrd* was when the actions are not of "the kind of conduct in which an attorney engages when discharging his duties to his client." *Id*. at * 9.

Turning to the merits of the *Highland* case, the court ruled that the alleged actions of Looper Reed in acquiring the disputed documents from their client that were the subject of the litigation, reviewing those documents, copying them, retaining copies of them, and generally using them as any attorney would do in the representation of a client were part of the discharge of the attorneys' duties. *Id*. at * 15. As these activities were within the scope of those usual duties they were protected by the attorney immunity doctrine. *Id*. at *16. The complained of conduct, that the court found immune from suit, included threatening Highland with the consequence of disclosure of the confidential information if certain demands made on behalf of Looper Reed's client were not met by Highland. *Id*. at *15. The court recognized, as did the *Byrd* court, that there are other avenues to hold attorneys accountable for their conduct, but those remedies are public, not private remedies. *Id*. at * 15-16.

Conclusion

Attorney immunity can be a powerful defense to claims brought by parties whom the attorney did not represent but who are, nonetheless, dissatisfied with the outcome or conduct of the litigation. The doctrine should not be seen as a license to engage in questionable conduct, as seems may have occurred in the *Byrd* and *Highland* cases, because there are consequences worse than being faced with a lawsuit.

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