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Attorney Immunity—Who Me? Couldn't Be.

BY MELUSSA L. JAMES

A husband and wife's divorce decree, procured with the assistance of their attorneys, makes the wife responsible for taxes on the couple's airplanes. The wife's attorney then assists her with a sale of the airplanes, falsifying the bill of sale in such a way that puts the tax liability squarely on the husband. The husband has a claim against the wife's attorney, right?

Wrong. These were the facts alleged in *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477 (Tex. 2015), in which the Texas Supreme Court decided that fraud is not an exception to the attorney immunity doctrine. More recently,

the Dallas Court of Appeals decided that not even purportedly criminal conduct is an exception to attorney immunity. *Bethel v. Quilling, Selander, Lownds, Wimslett & Moser, P.C.*, 2018 WL 2434410 (Tex. App.—Dallas May 30, 2018, no pet.).

Under this well-established doctrine, attorneys are immune from suit by non-clients for conduct that is part of the discharge of that attorney's duties to his or her client. This is because an attorney does not owe a duty of professional care to third parties with whom the attorney does not have an attorney-client relationship. "Put differently," the Texas Supreme Court recently explained, "an attorney may be liable to

nonclients only for conduct outside the scope of his representation of his client or for conduct foreign to the duties of a lawyer." *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018). As such, attorney immunity applies to claims brought by any non-client and is not limited to an adversarial context.

Texas courts have applied this immunity to countless theories of recovery, including fraud, tortious interference, and conspiracy. How a claimant chooses to label its cause of action is irrelevant. It is the *kind* of conduct that is controlling. If it is the kind of conduct in which an attorney engages when discharging duties to his or her client, the conduct is protected by attorney immunity and is not actionable.

For example, the *Youngkin v. Hines* plaintiff complained about the entry of a land deed, which the court explained "were part of [the attorney's] responsibility to his clients, even if done improperly," such that the attorney was entitled to dismissal. *Id.* at 683. The court went on to explain that other potential repercussions for attorneys who engage in wrongful conduct may exist, including sanctions, contempt, and attorney disciplinary proceedings.

The elements required to establish the applicability of attorney immunity include the existence of an attorney-client relationship (with someone other than the claimant), and the type of conduct that requires the skill or training of an attorney that was performed on the client's behalf. In some cases, including *Youngkin v. Hines*, these elements have been shown through undisputed facts without the need for the introduction

of evidence.

Attorney immunity is entirely separate from the merits of a case. It is intended to not only protect attorneys against liability to non-clients, but also against incurring the costs of defending a lawsuit.

While attorney immunity is broad, courts have explained that it is not without limits. Frequently used examples of conduct that falls outside the scope of acting on behalf of a client that would not be protected by attorney immunity include assaulting opposing counsel during trial and participating in a fraudulent business scheme with a client.

Attorneys should encourage their clients to make sure that an attorney-client relationship exists with any attorney on whom the client or would-be client is relying. It is always best if that relationship is documented in an engagement letter.

Similarly, attorneys should clearly document who their client is—and who their client is not. A short, written statement can add clarification around otherwise confusing circumstances. *E.g.*, "You have hired our law firm to represent the partnership. We do not represent the individual partners."

The attorney immunity doctrine promotes loyal, faithful, and aggressive representation by attorneys. Attorneys can take comfort in their zealous representation of clients without accountability to non-clients for actions taken during the course of that representation.

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