ARTICLE

Sam Johnson

The Litigation Privilege in Texas

Abstract. Certain Texas cases have arisen where one party in litigation sues the attorney representing an opposing party. In response to such cases, Texas courts promulgated a judicial doctrine generally referred to as the litigation privilege or qualified immunity in order to protect litigants' right to zealous representation from their attorney. The general rule is that one party to a lawsuit cannot sue the other party's attorney. However, exceptions to this doctrine exist. This Article explores the contours of the litigation privilege in Texas by analyzing the primary Texas cases where one party's claim against the opposing party's attorney was dismissed based on the litigation privilege and discussing relevant Texas cases where the court found an exception to the litigation privilege, therefore allowing one party in litigation to sue an opposing party's attorney.

Author. Sam Johnson is an attorney at Scott, Douglass & McConnico, where he focuses on legal malpractice defense work. He graduated from Baylor University in 1984 Summa Cum Laude, Phi Beta Kappa, and was selected as a Truman Scholar in 1983. He graduated from the University of Texas School of law in 1987 with High Honors, where he has also taught as an adjunct professor. In law school, he was a member of Chancellors, the Texas Law Review, Order of the Coif, and a teaching quizmaster. Following law school, he clerked for Federal District Judge Sydney A. Fitzwater, Northern District of Texas in Dallas. The author has been listed in the Best Lawyers in America and as a *Texas Monthly* Super Lawyer.

ARTICLE CONTENTS

I. INTRODUCTION

In Texas litigation, the following scenario has occurred on a fairly regular basis: Attorney 1 represents Client X in a dispute with opposing party Y. Opposing Party Y becomes upset with actions by Attorney 1. Even though Attorney 1 does not represent Opposing Party Y (and instead only represents Client X), Opposing Party Y sues Attorney 1. Hereafter, this is referred to as the "Party Suing the Opposing Attorney Scenario."

The Party Suing the Opposing Attorney Scenario gives rise to a surprisingly large number of Texas cases. These cases address if and when one party can sue the opposing party's attorney. The purpose of this Article is to address and analyze these cases.

II. UNDER THE TEXAS LITIGATION PRIVILEGE, AN OPPOSING PARTY GENERALLY CANNOT SUE THE OPPOSING PARTY'S ATTORNEY

As a general rule, Texas courts frown on a non-client suing an attorney.[1] For example, in Texas, a non-client cannot sue an attorney for negligence.[2] In fact, in the estate-planning context, if a lawyer makes a mistake in drafting a will that causes the will to fail, the intended beneficiaries who would have otherwise taken under the failed will cannot sue the lawyer for negligence because those intended beneficiaries were not the attorney's clients.[3] In refusing to allow a non-client intended will beneficiary to sue the attorney who negligently drafted the will, Texas adopted the minority view.[4]

1. *See* Helen Bishop Jenkins, *Privity—A Texas-Size Barrier to Third Parties for Negligent Will Drafting—An Assessment and Proposal*, 42 BAYLOR L. REV. 687, 697–98 (1990) ("Courts in . . . Texas still regard the privity barrier as a bar to recovery by the third party will beneficiary."); Brian J. Davis, Comment, *Lawyers' Negligence Liability to Non-Clients: A Texas Viewpoint*, 14 ST. MARY'S L.J. 405, 408–09 (1983) (noting that Texas still follows the Supreme Court ruling of non-liability to parties in Savings Bank v. Ward who lack privity of contract.

2. *Cf.* Belt v. Oppenheimer, Blend, Harrison, & Tate, Inc., 192 S.W.3d 780, 783 (Tex. 2006) (listing the requirements a plaintiff must prove for negligence and noting attorneys do not owe any duty to non-client beneficiaries).

3. *E.g.*, Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996) ("We therefore hold that an attorney retained by a testator or settler to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust."). However, intended beneficiaries can recover from the attorney through a suit by the estate's personal representative. *Belt*, 192 S.W.3d at 789.

4. *See Barcelo*, 923 S.W.2d at 577 (indicating most states allow non-clients to bring suit for

Likewise, Texas developed a specific doctrine that prevents one party from suing the attorney of an opposing party under any theory if the attorney's alleged wrongful actions are those that an attorney engages in when representing his clients.[5] This doctrine is generally referred to as the "litigation privilege" and is sometimes called "qualified immunity."[6] The litigation privilege is not a statutory doctrine; instead, it is a common law doctrine developed by the Texas courts.[7]

As discussed in detail below, the general theory behind the litigation privilege is that "[t]he public has an interest in 'loyal, faithful[,] and aggressive representation by the legal profession.'"[8] Attorneys have a duty to zealously represent clients "within the bounds of the law."[9] In fulfilling this duty, attorneys should have the right to interpose any defense and/or make use of any right on behalf of their clients without liability for damages to the opposing party.[10] Texas courts hold that any other rule would potentially cripple the ends of justice because "a litigant might be denied full development of her case if her attorney were subject to the threat of liability" to the opposing party.[11] Thus, under the litigation privilege, Texas attorneys can aggressively assert a client's rights and defenses without being subject to a claim by an opposing party.[12]

However, the litigation privilege is not absolute because it does not prevent all claims by one party against the opposing party's attorney.[13] For example, assume Attorney 1 represents Client X in a trial against Opposing Party Y. During the trial, Attorney 1 physically and violently assaults Opposing Party Y in the courtroom. In this hypothetical, no one

legal malpractice in estate planning).

5. *See* Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) ("An attorney in Texas . . . is not liable to non-client third parties for legal malpractice.").

6. FinServ Cas. Corp. v. Settlement Funding, L.L.C., 724 F. Supp. 2d 662, 673 (S.D. Tex. 2010); T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 916 (2004).

7. *E.g.*, *Alpert*, 178 S.W.3d at 405 (referring to the limits of the common law rule of privity and the extension of qualified immunity shielding an attorney's conduct when representing a client in litigation).

8. Bradt v. West, 892 S.W.2d 56, 71 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (quoting Maynard v. Caballero, 752 S.W.2d 719, 721 (Tex. App.—El Paso 1988, writ denied)).

9. *Id.*

10. *Id.*

11. *Id.* (quoting Morris v. Bailey, 398 S.W.2d 946, 947–48 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.)).

12. *Cf. id.* at 72 (disallowing litigation immunity for attorneys would result in tentative representation and would not serve the interests of justice).

13. *See* Thomas Borton, *The Extent of the Lawyer's Litigation Privilege*, 25 J. LEGAL PROF. 119, 124 (2001) (noting the litigation privilege fails in the face of unethical conduct and perjury).

could argue the litigation privilege should prevent opposing party Y from suing Attorney 1 for assault.[14] As discussed in further detail below, in some cases, the protection an attorney receives is limited because the litigation privilege fails to protect an attorney from a claim by an opposing party who can prove the attorney's actions were "foreign to the duties of an attorney."[15]

The purpose of this Article is to discuss, in chronological order, the primary Texas cases that have established and analyzed this litigation privilege. It will first examine primary Texas cases where an attorney, in the Party Suing the Opposing Attorney Scenario discussed above, successfully asserted the litigation privilege and the courts dismissed the opposing party non-client's claims. The second part of the Article will discuss the primary Texas cases where an attorney in the Party Suing the Opposing Attorney Scenario failed to assert the litigation privilege.

III. SUCCESSFULLY ASSERTING THE LITIGATION PRIVILEGE AGAINST A CLAIM BY A NON-CLIENT OPPOSING PARTY

What follows is a discussion of Texas cases where a Texas attorney successfully asserted the litigation privilege against a claim asserted by an opposing party who was not a client.

A. *Kruegel v. Murphy*

Kruegel[16] marks the first time a Texas court dismissed a claim against an attorney brought by a non-client opposing party.[17] *Kruegel* arose from an underlying case[18] involving fraudulent commercial activities, where the court rendered judgment against the plaintiff.[19] Upon losing his original case, the plaintiff brought an action for wide-ranging conspiracy to defraud his claims against the prevailing defendants, as well as against particular judges, court clerks, and opposing attorneys also involved in the

14. *See* T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 937 (2004) ("Courts also reject the application of the litigation privilege when the conduct in question had no apparent connection at all to furthering the lawsuit."); Thomas Borton, *The Extent of the Lawyer's Litigation Privilege*, 25 J. LEGAL PROF. 119, 125 (2001) (noting the litigation privilege does not extend to excuse criminal conduct).

15. Poole v. Hous. & T.C. Ry. Co., 58 Tex. 134, 137 (1882).

16. Kruegel v. Murphy, 126 S.W. 343 (Tex. Civ. App.—Dallas 1910, writ ref'd).

17. Jason D. Pinkall, Comment, *From* Barcelo *to* McCamish*: A Call to Relax the Privity Barrier in the Estate-Planning Context in Texas*, 37 HOUS. L. REV. 1275, 1277 n.9 (2000).

18. *Kruegel*, 126 S.W. at 343.

19. *Id.* at 343–44.

underlying case.[20] The district court dismissed the plaintiff's claims on special exceptions.[21] The court of appeals affirmed the dismissal.[22] Addressing the attorney-defendants, the court stated: "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."[23] This statement sets out one of the primary reasons for the litigation privilege.[24] Texas courts believe attorneys should be given the ability to advise their clients and raise any defense without exposing themselves to liability to the opposing party and that any other role would lead to tentative representation by the attorneys.[25]

B. *Morris v. Bailey*

In *Morris v. Bailey*,[26] the plaintiff brought an action for damages against an assistant attorney general in Texas alleging willful and consistent abuse of litigation and delays in litigation related to multiple cases involving the plaintiff and the state's attorney general.[27]

In *Morris*, the attorney-defendant filed a motion for summary judgment, and the trial court granted the motion.[28] Subsequently, the court of appeals affirmed.[29] The court of appeals concluded attorneys do not typically owe a duty to the clients of opposing attorneys because attorneys' authority and competency should be focused on defending their respective clients and asserting their clients' rights without concern for liability to adverse parties.[30] Further, the court reasoned the attorney

20. *Id.* at 345.

21. *Id.* at 343.

22. *Id.* at 344–45.

23. *Id.* at 345.

24. *Compare* FinServ Cas. Corp. v. Settlement Funding, L.L.C., 724 F. Supp. 2d 662, 671–72 (S.D. Tex. 2010) (listing Texas cases supporting non-liability to further the public interest in zealous client representation), *and Kruegel*, 126 S.W. at 345 ("[A]ttorneys are authorized to practice their profession . . . without making themselves liable for damages."), *with* T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 916 (2004) ("Lawsuits filed against litigation lawyers by their clients' adversaries primarily seek vengeance.").

25. *E.g.*, Bradt v. West, 892 S.W.2d 56, 71–72 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (citing Morris v. Bailey, 398 S.W.2d 946, 947–48 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (indicating this litigation rule supports authorized zealous representation as opposed to hesitant representation, which would not serve the public's best interests)).

26. Morris v. Bailey, 398 S.W.2d 946 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

27. *Id.* at 947.

28. *Id.*

29. *Id.*

30. *Id.* at 947–48.

acted entirely within the scope of his professional responsibilities in defending his client.[31] Thus, based upon legal precedent and his authority as an officer of the court, the attorney was not liable for any damages to his adversary. Had the court allowed an opposing party to subject another attorney to liability for vigorous representation of his client, clients would be exposed to ineffective advocacy that would cripple the judicial system.[32] Thus, *Morris* upheld and reiterated the litigation privilege to preserve judicial integrity in allowing attorneys to fully and zealously develop their clients' cases without fear of liability from non-clients.[33]

C. *Maynard v. Caballero*

The *Maynard v. Caballero*[34] case grew out of an underlying criminal prosecution whereby the federal government prosecuted three defendants for violations of the Racketeering Influenced and Corrupt Organization Act (RICO).[35] In the preceding RICO case, the government alleged that the defendants entered into a bribery scheme that violated the RICO Act.[36] A federal court convicted all three defendants, which was affirmed on appeal.[37]

Criminal Defendant 1 in the underlying RICO case subsequently sued the attorney for Criminal Defendant 2 for alleged tortious interference with contract.[38] Criminal Defendant 1 contended the attorney for Criminal Defendant 2 wrongfully persuaded the attorney for Criminal Defendant 1 that the proper strategy during the trial of the underlying RICO case was to limit the cross-examination of the prosecution's witnesses.[39] Criminal Defendant 1 contended, instead, the prosecution

31. *See id.* at 948 (finding the Texas Rules of Civil Procedure "expressly authorize" an attorney "to request a continuance on behalf of the party or parties he represent[s]").

32. *Id.* at 947–48. The court reasoned:

> In this connection it should be noted that any other result would act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled.

Id.

33. *Id.*

34. Maynard v. Caballero, 752 S.W.2d 719 (Tex. App.—El Paso 1988, writ denied).

35. *Id.* at 720.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

witnesses should have been vigorously cross-examined and impeached at trial.[40]

In this tortious interference with contract case, the trial court granted summary judgment in favor of the attorney for Criminal Defendant 2.[41] The court of appeals affirmed the summary judgment, stating:

> We find that [the attorney for Criminal Defendant 2's] conduct was privileged. As long as our statutes permit the joinder of parties in criminal and civil litigation, there is an ethical and vital need for attorneys, on behalf of their respective clients, to meet, discuss, compromise[,] and plan joint defenses or strategies. This should be done without fear that if one or more of the parties are unsuccessful that the attorneys not in privity with the other litigants should be subject to a tortious interference with contract suit. *In such instances, privilege should, as a matter of law, bar recovery as long as the interference is done to protect one's contract right to represent one's own client.*
>
> In the RICO trial that gave rise to his lawsuit, each defendant had his or her own attorney. In such instances, privilege should bar recovery of a suit by a dissatisfied defendant not in privity with the other attorney or attorneys. If a particular client feels that he was not properly represented, his recourse should be against his attorney and not someone else who is not in privity and owes him no duty. Otherwise, the interest of the public in loyal, faithful[,] and the aggressive representation by the legal profession will be severely hampered to the detriment of all.[42]

Again, in dismissing the plaintiff's claim against the attorney, the court stressed the public interest in "loyal, faithful[,] and aggressive representation" by the attorney.[43]

Maynard is particularly interesting because it is the only Texas case that discusses the litigation privilege in the context of a claim by one party against an attorney for a commonly-aligned party. Almost all other related cases discuss the litigation privilege in the context of a claim by one party against an attorney for an opposing party.

D. *Bradt v. West*

Bradt v. West[44] arises out of a series of related lawsuits involving a divorce and child custody dispute.[45] After a federal court dismissed the first case for lack of jurisdiction, attorney Bradt represented the father,

40. *Id.*
41. *Id.*
42. *Id.* at 721.
43. *Id.*
44. Bradt v. West, 892 S.W.2d 56 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
45. *Id.* at 61–62.

Mark Metzger, in a second case brought in state court with the same causes of action and the same defendants.[46] In the second case, the father brought claims of civil conspiracy and malicious prosecution against numerous defendants, contending they entered into a civil conspiracy to assert child abuse claims against the father, which caused the father to lose custody of his children.[47]

Metzger denied the child abuse allegations and passed a lie detector test concerning the allegations.[48] Based upon a motion in limine, the court prohibited attorney Bradt from mentioning the lie detector test.[49] Despite this, in the trial of the underlying case, attorney Bradt twice mentioned the fact that the father previously passed a lie detector test.[50] Because Bradt violated the motion in limine, the defense attorneys moved for attorney Bradt to be held in contempt, and the court granted their motion, sanctioning Bradt.[51]

After a federal court dismissed the third lawsuit, Bradt initiated the fourth lawsuit, suing numerous attorneys, witnesses, and insurance companies involved in the underlying case.[52] Attorney Bradt alleged the defendants entered into a conspiracy to maliciously prosecute him for contempt.[53] Subsequently, the trial court granted the defendants' motion for summary judgment on all causes of action.[54]

On appeal, the court discussed at length the public interest in "loyal, faithful[,] and aggressive representation by the legal profession."[55] If an attorney proceeded to court with the fear that opposing counsel may sue her for the actions taken to effectively represent her client, the result would be *tentative* representation; the public has a right to expect zealous representation, and an attorney has a duty to advocate on behalf of her client.[56] The court of appeals further stated it would not be in the interest of justice to "dilute the vigor with which Texas attorneys represent their clients."[57] In fulfilling the duty to zealously represent clients within the

46. *Id.* at 62.
47. *Id.* at 60–62 (emphasis added).
48. *Id.* at 62–63.
49. *Id.*
50. *Id.*
51. *Id.* at 63–64.
52. *Id.* at 64–65.
53. *Id.* at 65.
54. *Id.*
55. *Id.* at 71 (quoting Maynard v. Caballero, 752 S.W.2d 719, 721 (Tex. App.—El Paso 1988, writ denied)).
56. *Id.* at 72.
57. *Id.*

boundaries of the law, an attorney must be able to introduce any defense and use any right on behalf of her client that she considers to be proper and necessary, without subjection to liability and damages.[58] If this were not the rule, there would be

> a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled.[59]

Based on these principles, the court of appeals held "an attorney does not have a right of recovery, under any cause of action, against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party."[60] This holding is focused "on the kind of conduct engaged in, not on whether the conduct was meritorious in the context of the underlying lawsuit."[61] The law consists of mechanisms to punish attorneys when their actions lack merit.[62]

Thus, in *Bradt*, the court dismissed attorney Bradt's claims against the opposing attorneys because allowing such claims would hamper an attorney's ability to zealously represent his client.[63] In doing so, the *Bradt* court noted that the trial court in the underlying case could sanction any wrongful conduct by a litigant's attorney.[64]

58. *Id.* at 71 (citing Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App—Austin, 1966, writ ref'd n.r.e.)).

59. *Id.* (quoting *Morris*, 398 S.W.2d at 947–48).

60. *Id.* at 72.

61. *Id.* at 71–72.

62. *Id.* at 72; *see, e.g.*, TEX. GOV'T CODE ANN. § 21.002 (West 2004) (sanctioning attorneys for contempt of court); TEX. R. CIV. P. 13 (penalizing attorneys for filing improper pleadings, motions or other papers); *id.* R. 215.3 (punishing attorneys for abusing discovery).

63. *See Bradt*, 892 S.W.2d at 71–72, 76 (affirming summary judgment granted to attorney-appellees). *See generally* David J. Beck & Geoff A. Gannaway, *The Vitality of* Barcelo *After Ten Years: When Can an Attorney Be Sued for Negligence by Someone Other Than His Client?*, 58 BAYLOR L. REV. 371 (2006) (reviewing ten years of case law to find limited exceptions to the general rule that third parties may not sue an attorney for legal malpractice).

64. *See Bradt*, 892 S.W.2d at 72 (citing the Texas Rules of Civil Procedure that grant trial courts the authority to sanction attorneys). The *Bradt* decision was reaffirmed in *Authorlee v. Tuboscope Vetco Int'l Inc.*, 274 S.W.3d 111 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). *Id.* at 120. The case arose when certain silica plaintiffs sued defendants for silica exposure. *Id.* at 113. These silica plaintiffs (along with other co-plaintiffs) settled with the defendants. *Id.* at 117. Later, the silica plaintiffs, represented by new counsel, sought to rescind the settlement by motion for new trial, whereby they contended the silica plaintiffs' original attorneys and the defendants' attorneys fraudulently colluded to have the silica plaintiffs agree to an improper aggregate settlement. *Id.* at 117–18. The trial court denied the motion for new trial and the First Court of Appeals in Houston

E. *Taco Bell Corp. v. Cracken*

Taco Bell Corp.[65] arose from an incident where Jerome Green robbed a Taco Bell in Irving, Texas, and killed four people.[66] Attorney John Cracken represented certain survivors of the deceased murder victims in *Deborah R.V. Fraga, et al. v. American Sec. Prods. Co. & Jerome Green*.[67] On behalf of the plaintiffs (hereafter referred to as the "*Fraga* plaintiffs") in Duval County, Cracken sued American Security Products Company (ASP), the designer and manufacturer of the Taco Bell wall safe, and Green.[68]

Attorney Douglas Parks was Green's court appointed criminal counsel.[69] Cracken asked Parks to represent Green in Cracken's contemplated wrongful death lawsuit against Green, and Parks agreed. Cracken paid attorney Parks $150 an hour to represent Green in the *Fraga* case.[70]

Cracken filed the *Fraga* case in Duval County, which is in South Texas and considered to be a plaintiff-friendly venue.[71] At the time the *Fraga* case was filed, Green was incarcerated in Anderson County in East Texas.[72] The events giving rise to the suit occurred in Dallas County.[73] Before his imprisonment, Green resided in Dallas County, but never in Duval County.[74] However, in the *Fraga* petition, Cracken "alleged on information and belief . . . Green was a resident of Duval County."[75] In response to requests for admissions from the *Fraga* plaintiffs, Green

affirmed. *Id.* at 118. In doing so, the First Court of Appeals specifically reaffirmed its holding in *Bradt*, holding all of the defendants' wrongful actions were related to settling the lawsuit. *Id.* The court further agreed with the trial court, stating, "'[T]here can be no conspiracy to commit fraud in the litigation setting.'" *Id.*

65. Taco Bell Corp. v. Cracken, 939 F. Supp. 528 (N.D. Tex. 1996).

66. *Id.* at 529.

67. *Id.*

68. *Id.* at 529–30.

69. *Id.* at 530.

70. *Id.*

71. *See id.* (noting Duvall County is "located several hundred miles from the murder scene); Coyt Randal Johnston & Robert L. Tobey, *Legal Malpractice Update*, 46 ADVOC. (TEX.), Spring 2009, at 6, *available at* http://www.litigationsection.com/downloads/46_Best_Of_Part_2.pdf (describing Duvall County as "a county generally perceived to be more favorable to plaintiff's claims than Dallas County during the relevant time period").

72. *Taco Bell Corp.*, 929 F. Supp. at 530.

73. *See id.* at 529 (stating the *Fraga* case arose from the murder of four people at a Taco Bell in Irving, Texas, which is in Dallas County).

74. *Id.* at 530.

75. *Id.*

admitted he chose "Duval County as his residence."[76]

Defendant ASP moved to transfer venue to Dallas County.[77] The *Fraga* plaintiffs then "entered into a 'high-low' settlement" with ASP that limited ASP's exposure to $250,000.[78] The Duval County trial court denied the ASP motion to transfer venue following a hearing.[79]

Immediately after the state district court denied the motion to transfer venue, the *Fraga* plaintiffs sued Taco Bell in the *Fraga* case.[80] Taco Bell sought to have Duval County District Court reconsider its ruling on the motion to transfer, but the district court denied that request.[81] Taco Bell subsequently settled with the *Fraga* plaintiffs for $8,250,000.[82]

Taco Bell then sued attorney Cracken, attorney Parks, and Green in this case in federal court in Dallas alleging "fraud, abuse of process, and conspiracy."[83] Taco Bell contended it incurred damages including attorney fees and other costs to discover and reveal the defendants' conduct and to negate the allegedly harmful effects of the defendants' venue fraud and abuse of the justice system.[84]

Attorneys Cracken and Parks filed a motion for summary judgment based on the litigation privilege.[85] The district court granted their motion for summary judgment.[86] In granting this motion, the court stated as follows: "The knowledge of an attorney for one party that he may be sued by the other party would exacerbate the risk of tentative representation to at least the same degree as would knowledge that opposing counsel could sue him."[87] To allow such would create a "greater chilling effect" among legal professionals and force them to consider their personal exposure to liability, rather than pursuing legal rights and defenses on behalf of their clients.[88]

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.* ("Within minutes of the ruling, Cracken filed an amended petition that named Taco Bell as a defendant.").

81. *Id.*

82. *Id.* at 531.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 529.

87. *Id.* at 532.

88. *See id.* ("The court therefore predicts that Texas would apply the principles of Bradt to bar claims by one party against the opposing party's attorney."); *cf.* Martin v. Trevino, 578 S.W.2d 763, 771 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (noting courts generally hold that an attorney for one party is exempt from liability to a non-client party for damages resulting from the

In *Taco Bell Corp. v. Cracken*, the federal court made clear it would not validate a non-client opposing party suing to hold attorney-defendants liable for actions or omissions committed merely by serving as legal counsel and advocating on behalf of their clients.[89] "*Because, under Texas law, it is the kind—not the nature—of conduct that is controlling, Taco Bell's claims must be dismissed*."[90] Thus, Judge Fitzwater dismissed Taco Bell's claims because the "kind" of conduct the opposing lawyers engaged in by allegedly manufacturing venue in Duval County was conduct that those lawyers took in discharging their duties to their clients.[91] As such, the district court held that Taco Bell could not maintain its suit against the lawyer-defendants.[92]

F. *Renfroe v. Jones & Associates*

In the underlying case, a creditor filed for a writ of garnishment against a debtor whom he previously obtained a judgment against.[93] Subsequently, the court granted the judgment debtor's motion to dissolve the writ of garnishment.[94]

In *Renfroe*,[95] the judgment debtor filed suit against the judgment creditor's attorney alleging the attorney filed a wrongful garnishment.[96] The attorneys for the judgment creditor moved for summary judgment,

performance of services the attorney engages in and that require the office, professional training, skill, and authority of an attorney).

89. The court further stated:

> Taco Bell's claims all rest on the premise that defendants manipulated the judicial system, and engaged in tortious conduct, for the purpose of obtaining venue in a particular forum. *See* Am. Compl. at 40 (complaining of representations made concerning Green's residence and propriety of venue in Duval County, and those giving appearance of adversity between the Fraga Plaintiffs and Green); 47 (defendants made illegal, improper, or perverted use of legal process); 51 (defendants committed wrongful acts so as improperly to place and maintain venue in Duval County); [and] 58 (Cracken, P.C. made misrepresentations to guide Taco Bell). Taco Bell states in its brief that it seeks *inter alia* "to reverse the effects of [defendants'] misrepresentations, conspiracy, venue fraud and abuse of the legal process."

Taco Bell Corp., 939 F. Supp. at 532.

90. *Id.* at 532–33 (emphasis added).

91. *Id.*; *see* Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 442 (Tex. App.—Houston [14th Dist.] 2000, no pet.) ("Because under Texas law it is the kind of conduct that is controlling, and not whether that conduct is meritorious or sanctionable, the trial court's decision to grant summary judgment . . . was proper." (citing *Taco Bell Corp.*, 939 F. Supp. at 532–33)).

92. *Taco Bell Corp*., 939 F. Supp. at 533.

93. Renfroe v. Jones & Assocs., 947 S.W.2d 285, 286 (Tex. App.—Fort Worth 1997, writ denied).

94. *Id.*

95. Renfroe v. Jones & Assocs., 947 S.W.2d 285 (Tex. App.—Fort Worth 1997, writ denied).

96. *Id.* at 286.

which the trial court granted.[97] The court of appeals affirmed.[98]

In this context, the court concluded attorneys only owe a duty to their clients.[99] To hold attorneys liable to opposing parties would thwart the judicial system.[100] The attorney-defendants were not "held liable for wrongful litigation conduct" to opposing parties.[101]

Thus, the *Renfroe* court dismissed the wrongful garnishment claims against the attorney because his alleged wrongful acts were committed while representing the attorney's client (the judgment creditors) in the underlying action.[102] The court found that allowing the judgment debtor's claims against the attorney to proceed would necessarily "dilute the vigor with which Texas attorneys represent their clients."[103] The court further stated that if the attorney's conduct violated his professional duties, the remedy would be public and not private.[104]

97. *Id.*

98. *Id.* at 286–88.

99. *See id.* at 287 ("An attorney's duties that arise from the attorney–client relationship are owed only to the client, not to third persons, such as adverse parties."). Third persons, unlike the client, lack privity of contract as there is no existing agreement with the attorney. *Id.* "They have no right of action against the attorney for any injuries they suffer because of the attorney's fault in performing duties owed only to the client." *Id.*

100. *Id.* "Texas law has long authorized attorneys to 'practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages.'" *Id.* at 286–87 (citing Kruegel v. Murphy, 126 S.W. 343, 345 (Tex. Civ. App.—Dallas 1910, writ ref'd)).

101. *Id.* "An attorney may assert any of his client's rights without being personally liable for damages to the opposing party." *Id.* (citing Bradt v. West, 892 S.W.2d 56, 76 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App—Austin 1966, writ ref'd n.r.e.)).

> If an attorney's conduct violates his professional responsibility, the remedy is public, not private. *See generally* Martin v. Trevino, 578 S.W.2d 763, 771 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (holding physician could not recover damages from former patient's attorneys based on theory that attorneys filed frivolous medical malpractice suit for patient without proper investigation and without informed basis of determining before filing suit that it had reasonable merit). Under Texas law, attorneys cannot be held liable for wrongful litigation conduct. *See Bradt*, 892 S.W.2d at 71–72. A contrary policy "would dilute the vigor with which Texas attorneys represent their clients" and "would not be in the best interests of justice." *Id.* at 72.

Renfroe, 947 S.W.2d at 287–88.

102. *Id.* at 288.

103. *Id.*

104. *Id.* at 287. *But see* Mendoza v. Fleming, 41 S.W.3d 781, 788 (Tex. App.—Corpus Christi 2001, no pet.) (finding a private cause of action against attorneys whose actions were not within the bounds of the law); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ) ("An attorney has no general duty to the opposing party, but he is liable for injuries to third parties when his conduct is fraudulent or malicious.").

G. *Lewis v. American Exploration Co.*

Lewis[105] arose from an underlying personal injury case.[106] Bobby Lewis was injured in 1990 when a large oilrig hit the vehicle where Lewis was a passenger.[107] The accident occurred on premises owned by American Exploration Company (AEC), so Lewis sued AEC in state court based on a premises liability theory.[108]

In the state court case, Lewis asked AEC to produce any documents showing instructions regarding access to AEC job sites for business invitees.[109] AEC, represented by Liddell Sapp (LS), denied possessing any such documents.[110] An AEC employee also denied ever giving any instructions of that kind.[111] In a companion case brought by another plaintiff, AEC produced documents showing AEC provided instructions to Lewis's group as to what route to follow to the job site.[112]

Concerning these alleged misrepresentations regarding the documents, Lewis proceeded to sue AEC and LS in federal court.[113] AEC settled out of court.[114] Against LS, Lewis alleged the firm committed fraud by refusing to produce documents and coaching their client to provide false testimony.[115]

Based on the litigation privilege, the trial court granted summary judgment for LS, and the court of appeals affirmed.[116] After an in-depth discussion of the litigation privilege, the court held:

> In this case, the Lewises challenge Liddell Sapp's conduct in preparing discovery responses on its client's behalf and in producing a client representative for a deposition in the Lewises' state court case. All the claims rest on the allegation that the Liddell Sapp lawyers engaged in improper discovery when its client denied the existence of certain documents and facts. The Lewises, unsuccessful state court plaintiffs, are seeking to hold Liddell Sapp and two of its lawyers liable for their work in discovery, work undertaken as part of the discharge of their duties as attorneys defending the party that the Lewises had sued in the same lawsuit. Taking the Lewises'

105. Lewis v. Am. Exploration Co., 4 F. Supp. 2d 673 (S.D. Tex. 1998).
106. *Id.* at 674.
107. *Id.*
108. *Id.*
109. *Id.* at 675.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 674–75.

> summary judgment evidence as true for the purpose of this motion, the only acts and omissions alleged are acts undertaken by lawyers representing a client in responding to discovery requests from an opposing party. *The type of conduct in which the attorneys allegedly engaged is without dispute part of discharging their duties in representing their client. Such conduct does not make the attorneys liable in tort damages to the opposing party. Labeling such conduct as fraudulent or as part of a conspiracy to defraud does not subject the attorneys to liability for tort damages to the opposing party under Texas law.*[117]

Although the plaintiff alleged LS fraudulently failed to produce relevant documents, it was insufficient to overcome the litigation privilege.[118] Instead, the *Lewis* court held that because producing documents is an action an attorney takes in discharging her duties in representing a client, the attorney's actions could not subject the attorney to liability to the opposing party.[119]

H. *Chapman Children's Trust v. Porter & Hedges, L.L.P.*

In this case,[120] in 1992, certain children's trusts (Trusts) sued Barry Atkins for nonpayment of certain notes.[121] "In 1994, the Trusts agreed to settle their claims against Atkins" (the Atkins settlement) in exchange for particular net proceeds Atkins hoped to receive in a separate proceeding against Motorola (the Motorola suit).[122] The settlement provided Atkins's attorneys would pay these net proceeds from the Motorola Suit, less attorneys' fees and expenses, directly to the Trusts.[123]

"In early 1997, Atkins agreed to accept a confidential, multi-million dollar settlement from Motorola" to settle the Motorola suit.[124] In anticipation of this settlement, the Trusts issued objections to different expenses that were recommended by Atkins and his attorney for "deducting from the gross proceeds" of the Atkins settlement.[125]

117. *Id.* at 679–80 (emphasis added).

118. *Id.*; *see* T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 922–23 (2004) (concluding the litigation privilege is in place for the protection of attorneys from threat of a lawsuit).

119. *Lewis*, 4 F. Supp. 2d at 680; *see* Douglas R. Richmond, *The Lawyers Litigation Privilege*, 31 AM. J. TRIAL ADVOC. 281, 287–89 (2007) (acknowledging that courts are dealing with the fact that not only communications, but conduct can factor into the litigation privilege).

120. Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

121. *Id.* at 433.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

When resolution of this dispute was not reached, "the Trusts intervened in the Motorola suit."[126] Later, Motorola funded its settlement with Atkins and deposited $1,895,925 in the trust account of Atkins's attorneys at that time, Porter & Hedges (P&H).[127]

At that point, there remained a dispute between Atkins and the Trusts as to what amount of the $1,895,925 constituted net proceeds and should be paid to the Trusts.[128] Subsequently, Atkins and the Trusts mediated this matter and agreed $1,510,000 of the $1,895,925 from Motorola would be paid out to the Trusts as net proceeds.[129]

After this settlement, the Trusts sued Atkins's attorney, P&H, for breach of contract, breach of fiduciary duty, and breach of common law duties.[130] All of the Trusts' claims were "based on allegedly wrongful acts" performed by P&H while it was allocating net proceeds from the settlement of the Motorola suit.[131] The Trusts contended that P&H breached its duties to the Trusts by failing to provide supporting documents for the deductions from the gross proceeds, denying responsibility for distributing the net proceeds to the Trusts, and other actions concerning the money in question.[132]

P&H moved for summary judgment on the Trusts' claims.[133] The trial court granted P&H's motion for summary judgment.[134] The Trusts then appealed to the court of appeals, which held:

> Taking all of the Trusts' allegations as true, as we must, the Trusts have failed to raise a genuine issue of material fact on whether Porter & Hedges was involved in assisting Atkins to perpetrate a fraud on the Trusts. Rather, the allegations made by the Trusts do no more than demonstrate that Porter & Hedges attempted to negotiate a smaller settlement with the Trusts on their clients' behalf in light of Atkin[s'] precarious financial situation. The conduct complained of here, unlike the role played by the lawyer in *Likover*, involves acts or omissions undertaken as part of the discharge of Porter & Hedges' duties as counsel to an opposing party. *Because under Texas law it is the kind of conduct that is controlling, and not whether that conduct is meritorious or sanctionable, the trial court's decision to grant summary judgment*

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 441.
133. *Id.* at 434.
134. *Id.*

> *on the Trusts' fraud and conspiracy claims against Porter & Hedges was proper.*[135]

Thus, *Porter & Hedges* again emphasized it is "the kind of conduct that is controlling" in these types of cases.[136] If the kind of wrongful conduct alleged against the attorney is conduct that attorneys take in representing clients in litigation, that conduct will be protected even if the conduct is "sanctionable."[137]

I. *Mitchell v. Chapman*

The *Mitchell* case[138] involved two underlying cases where plaintiff Herman E. Mitchell sued an insurance company to recover disability benefits allegedly owed to Mitchell under an insurance policy. Attorney Carlyle H. Chapman represented the insurance company.[139]

In the first case, plaintiff Mitchell sought to discover certain documents in the insurance company's underwriting file.[140] On behalf of the insurance company, attorney Chapman denied that the requested documents existed.[141] Contrary to attorney Chapman's assertion, the specified documents did exist and allegedly were in attorney Chapman's office.[142] Further, it was undisputed that the documents in question would enhance the amount of disability benefits to which plaintiff Mitchell was entitled.[143]

In the chief case, plaintiff Mitchell sued attorney Chapman alleging that the attorney "acted either willfully or negligently" when he denied the documents' existence.[144] The trial court granted summary judgment for attorney Chapman.[145]

135. *Id.* at 442 (emphasis added) (citations omitted).

136. *Id.*; *see* Steve McConnico & Robyn Bigelow, *Summary of Recent Developments in Texas Legal Malpractice Law*, 33 ST. MARY'S L.J. 607, 647 (2002) (proposing that the litigation privilege focuses on the "type of conduct in which the attorney engages").

137. *Chapman Children's Trust*, 32 S.W.3d at 441–42; *see* David J. Beck & Geoff A. Gannaway, *The Vitality of* Barcelo *After Ten Years: When Can an Attorney Be Sued for Negligence by Someone Other Than His Client?*, 58 BAYLOR L. REV. 371, 373–74 (2006) ("In Texas, it is hornbook law that an attorney owes no duty to non-clients and will not be held liable to third parties for damages resulting from legal malpractice.").

138. Mitchell v. Chapman, 10 S.W.3d 810 (Tex. App.—Dallas 2000, pet. denied).

139. *Id.* at 811.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

The court of appeals affirmed, stating:

> The summary judgment turned only on whether Mitchell had a cause of action against Chapman. Accordingly, we do not address whether Chapman had the underwriting file, as alleged, or whether Chapman acted either willfully, negligently, or unethically in not producing the document in response to discovery. Neither do we address Chapman's argument that there is another remedy available to Mitchell, by bill of review in the United States District Court where the earlier suits were pending. We hold Mitchell does not have a cause of action against Chapman for willfully failing to produce the document because of the nature of their relationship in the earlier two suits. Mitchell's interests are outweighed by the public's interest in loyal, faithful, and aggressive representation by attorneys employed as advocates. If Chapman's conduct violated his professional responsibility, the remedy is public rather than private.[146]

This is the second case where a lawyer's failure to produce documents, even if willful, was held not to give rise to a cause of action that could defeat the litigation privilege.[147]

J. *White v. Bayless*

The facts of *White*[148] began when Anne H. Bayless became engaged to Gene White.[149] During their engagement, Bayless and White together entered into several complicated financial investments.[150] Later, Bayless decided against marrying White and terminated all financial investments with him.[151] However, Bayless and White were not able to amicably disentangle their investments.[152]

At that point, Bayless hired two attorneys, J. Anthony Guajardo Sr. and Matthew S. Muller (the two attorneys).[153] The two attorneys, on behalf of Bayless, then sued Mr. White "for breach of fiduciary duty, accounting of funds, and recovery of investments."[154]

Mr. White then counter-claimed against Ms. Bayless and brought a third party claim against the two attorneys for conspiracy to defraud Mr.

146. *Id.* at 811–12 (citations omitted).

147. The first one was the *Lewis* case, discussed above. *See* Lewis v. Am. Exploration Co., 4 F. Supp. 2d 673, 679–80 (S.D. Tex. 1998) (holding an attorney was not liable for failing to produce documents requested in discovery).

148. White v. Bayless, 32 S.W.3d 271 (Tex. App.—San Antonio 2000, pet. denied).

149. *Id.* at 273.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

White and to "destroy him financially, physically, mentally, and emotionally."[155] Mr. White's claims against the two attorneys concerned their actions in the case, including seeking a temporary restraining order and writs of sequestration against White.[156] Bayless and the two attorneys moved for summary judgment on White's claims.[157] The trial court granted summary judgment in favor of the two attorneys based on the litigation privilege.[158]

On appeal, the San Antonio Court of Appeals affirmed the summary judgment as to the two attorneys. The court of appeals specifically held that Texas law allows attorneys to try their suit on behalf of their client without fear of being held personally liable for damages incurred by the opposing party.[159] Opposing parties who incur harm because of the suit have no recourse against the opposing attorney who is exercising duties on behalf of and in furtherance of his client's interest.[160] An attorney has a duty only to his client's interests.[161]

The court then noted that the plaintiffs' allegations in the present suit fit directly into the situation previously referenced. The two attorneys' complained of actions were performed in their capacity as attorneys representing Bayless.[162] Because they were performing these actions in the context of their representation, the court held that White did not have a cause of action against the two attorneys.[163]

155. *Id.*

156. *Id.* at 275.

157. *Id.* at 273.

158. *Id.* at 273–74.

159. *Id.* at 275–76 (citing Kruegel v. Murphy, 126 S.W. 343, 345 (Tex. Civ. App.—Dallas 1910, writ ref'd)).

160. *Id.* (citing Bradt v. West, 892 S.W.2d 56, 76 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e)).

161. *Id.* at 275–76 (citing Renfroe v. Jones & Assoc., 947 S.W.2d 285, 287 (Tex. App.—Fort Worth 1997, pet. denied)). The court continued:

> Any other rule would act as a severe and crippling deterrent to the ends of justice because a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled.

Id. at 276 (citations omitted) (quoting *Morris*, 398 S.W.2d at 947–48).

162. *Id.*

163. *Id.* at 275–76 (citations omitted).

> *The principle that there is no cause of action against opposing counsel for representing a client in a judicial proceeding focuses on the kind of conduct engaged in, not on whether the conduct was meritorious in the context of the underlying lawsuit.* A disgruntled litigant has no right of recovery against the opposing attorney for that attorney's having made certain motions in the underlying lawsuit, regardless of whether the motions were meritless or even frivolous, because making

Thus, the *White* court again held that an attorney can assert any of her client's rights without being held liable for damages.[164] The court held an "attorney[] cannot be held liable for wrongful litigation conduct"[165] and any other rule would deter an attorney from fully developing her client's case.[166] The court continued that even if "an attorney engages in wrongful conduct as part of the discharge of [her] duties in representing a party in a lawsuit, there is no cause of action to the party on the other side."[167] Finally, because all of the complained of actions committed by the two attorneys were made in the course of representing their clients, White's (the opposing party) claims against the two attorneys were dismissed.[168]

K. *Alpert v. Crain, Caton & James, P.C.*

In this case,[169] attorney Mark R. Riley represented Robert Alpert.[170] Attorney Riley and Alpert experienced a falling out,[171] and subsequently,

> motions is conduct an attorney engages in as part of the discharge of his duties in representing a party in a lawsuit. Even when an attorney engages in wrongful conduct as part of the discharge of his duties in representing a party in a lawsuit, there is no cause of action to the party on the other side.
>
> Here, each of the complained of actions by Guajardo and Muller involve a pleading filed with or orders obtained from a court. White does not assert he was unlawfully harmed by any single pleading or order; instead, he contends the pleadings and orders evidence a pattern of conspiracy to harm him. However, White's claims against Guajardo and Muller arose from Guajardo and Muller's actions taken as attorneys representing their client, Bayless. The attorneys' preparing and filing various pleadings with the trial court and the bankruptcy court were within the context of discharging their duties in representing their client. Guajardo and Muller owed no duty to White.

Id. at 276 (emphasis added) (citations omitted).

164. The court stated: "We hold that White does not have a cause of action against Guajardo and Muller because the relationship was adversarial and the attorneys owed no legal duty to White." *Id.* at 276–77.

165. *Id.* at 276 (citing *Bradt*, 892 S.W.2d at 71–72); Steve McConnico & Robyn Bigelow, *Summary of Recent Developments in Texas Legal Malpractice Law*, 33 ST. MARY'S L.J. 607, 647 (2002).

166. *White*, 32 S.W.3d at 276.

167. *Id. But see* Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C., No. 01-06-00696-CV, 2008 WL 746548, at *8 (Tex. App.—Houston [1st Dist.] March 20, 2008, pet. denied) (mem. op.) ("An attorney's protection from liability is not boundless."). For example, "[a]n attorney can be held liable by a third-party for actions that are not part of the discharge of his duties to his client." *Id.*

168. *White*, 32 S.W.3d at 276–77.

169. Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

170. *Id.* at 402.

171. *Id.*

attorney Riley sued Alpert for unpaid fees in probate court.[172] In the probate court suit, Alpert later counterclaimed against attorney Riley.[173] Attorney Riley hired the law firm of Crain, Canton & James, P.C. (the CC firm) to represent him against Alpert in the probate court case.[174]

Alpert then brought a separate suit against the CC firm in state district court alleging the firm conspired with attorney Riley to defraud Alpert.[175] Alpert also contended the CC Firm "aided and abetted, and tortiously interfered with[] [attorney] Riley's fiduciary duty to Alpert."[176] Based on the litigation privilege, the CC firm specially excepted to Alpert's claims.[177] The trial court granted these special exceptions and dismissed Alpert's claims against the CC firm.[178] Alpert appealed.[179]

The appellate court affirmed summary judgment for the CC firm.[180] Concerning Alpert's conspiracy to defraud claim, the appellate court stated:

> To determine whether Alpert alleges a valid conspiracy to defraud action against Crain Caton, we examine the nature of the complained-of conduct. In his appeal, Alpert contends the following allegations support his conspiracy to defraud claim: Crain Caton assisted Riley in denying that he served as legal counsel for Alpert; Crain Caton filed numerous lawsuits against Alpert on Riley's behalf in order to conceal improper actions and to deflect attention away from Riley's own wrongful conduct; Riley, while represented by Crain Caton, alleged that Alpert committed bad acts in order to force Alpert to accede to demands for money; Crain Caton aided Riley in concealing the fact that he had reported Alpert to the IRS; Crain Caton aided Riley in misusing confidential information by filing lawsuits, complaints and other allegations; Crain Caton aided Riley in his falsely stating that some of the trusts had no loans; and Crain Caton aided Riley in his claims that certain loans of the trusts were taxable gifts.
>
> We hold that none of these alleged acts constitutes conduct "foreign to the duties of an attorney" in the representation of a client. Instead, the complained-of actions involve the filing of lawsuits and pleadings, the providing of legal advice upon which the client acted, and awareness of settlement negotiations—in sum, acts taken and communications made to

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 406.
180. *Id.* at 408.

> facilitate the rendition of legal services to Riley. Such acts fall within the context of Crain Caton discharging its duty to represent Riley and are not the basis for an actionable fraud claim against attorneys for whom Alpert alleges neither (1) any legal privity, nor (2) any independent duty to Alpert, together with justifiable reliance upon any representation or act made by Crain Caton.[181]

Thus, under *Alpert*, as long as the attorney's alleged actions (i) were actions the attorney took in representing his client and (ii) were not actions "foreign to the duties of an attorney," the claims against the attorney must be dismissed.[182] The "foreign to the duties of an attorney" language originated in *Poole v. Houston & T.C. Railway Co.*,[183] which was decided by the Supreme Court of Texas in 1882.[184] The *Poole* case is discussed further in the next section of this Article.

L. *Chu v. Hong*

Chu[185] does not directly address the Texas litigation privilege, but it gives insight as to how the Supreme Court of Texas, at least in 2008, viewed claims against opposing attorneys.[186] This case arose out of a divorce and the sale of a donut shop.[187]

In 1996, Gyu Chui Kim (Gyu) married Chong Hui Hong (Hong).[188] Hereafter, they are jointly referred to as the "Hong-Gyu couple." In 1997, the Hong-Gyu couple purchased "a donut shop in Mansfield, Texas."[189]

Marital problems later arose between the Hong-Gyu couple and Hong eventually filed assault charges against Gyu.[190] "At about the same time, they both signed a contract to sell the donut shop for $180,000 to another couple, Myong Nam Kim and Kyon S. Kim ([]the Kims[])."[191]

The closing date on this sale passed with no action.[192] At that point,

181. *Id.* at 407–08.

182. *Id.* at 408; *see* Alpert v. Riley, No. H-04-CV-3774, 2008 WL 304742, at *14 (S.D. Tex. Jan. 31, 2008) (mem. op.) ("Under Texas law, attorneys are generally not liable to a third party for actions taken in connection with representing a client.").

183. Poole v. Hous. & T.C. Ry. Co., 58 Tex. 134 (1882).

184. *Id.* at 137.

185. Chu v. Hong, 249 S.W.3d 441 (Tex. 2008).

186. *See id.* at 446 ("We are especially reticent to open the door to such claims here against an opposing party's attorney.").

187. *Id*. at 443.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

"the Kims stopped payment on their $20,000 down[] payment check" to purchase the donut shop.[193] Hong and Gyu sent the Kims a letter demanding performance of the down payment and threatening criminal charges.[194]

Later, the Kims hired attorney William Chu.[195] Attorney Chu demanded that the Hong-Gyu Couple perform on the donut shop sale contract within four days.[196] "A few days later, Gyu appeared alone at [attorney] Chu's office and agreed to close the sale."[197] Gyu then signed a bill of sale that represented he was the lawful owner of the donut shop.[198] In return for the donut shop, the Kims paid Gyu the $180,000 purchase price with "$90,000 in cash and checks," a $46,668.29 note, and assumed a note for the remaining amount the Hong-Gyu couple still owed on the shop.[199]

After Gyu received the funds from the sale, he wired the money to his family in South Korea and filed for divorce from Hong.[200] In response to Gyu's divorce petition, Hong counterclaimed against Gyu for defrauding the community estate from the proceeds of the donut shop sale[201] and included claims against the Kims and "attorney Chu for conversion and conspiracy."[202] When Gyu's "criminal assault case came to trial, [he] was convicted and deported from the United States."[203]

The divorce case and the fraud case were tried together.[204] The jury answered all questions in Hong's favor.[205] The final judgment of the trial court (i) granted the divorce, (ii) declared the donut shop sale void and declared that the Kims turn over the equipment and premises of the donut shop to Hong, (iii) allowed Hong and Gyu to keep any community property in their possession, and (iv) ordered that Gyu pay Hong $65,000 in attorney's fees.[206] The court also (i) assessed identical attorney's fees jointly against the Kims and attorney Chu, (ii) assessed $247,000 against

193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*

the Kims and attorney Chu for interest and lost profits, (iii) assessed $20,000 against the Kims in punitive damages, and (iv) assessed $1,500,000 in punitive damages against attorney Chu.[207]

Only attorney Chu appealed the trial court's judgment.[208] The Supreme Court of Texas reversed and dismissed all of Hong's claims against attorney Chu.[209]

The primary holding of *Chu* is that, as a general rule, when one spouse wrongfully disposes community assets to a third party, it does not give rise to a claim by the other spouse against that third party.[210] The proper claim in this situation would be a claim by Hong against Gyu for wrongful disposition of community assets.[211] Such a claim should be considered by the court in deciding how to divide the community property among the Hong-Gyu couple.[212]

The *Chu* court went on to hold that, as a general rule, a third party cannot "be held liable in tort when community property is taken by one of the spouses" from another spouse.[213] This was the primary basis the court relied on in dismissing the claims against attorney Chu.[214]

Although this holding does not directly impact the litigation privilege,[215] the court made important statements that affect suits by one party against an opposing party's attorney.[216] The court stated:

> We are especially reticent to open the door to such claims here against an opposing party's attorney. As an attorney, Chu had a fiduciary duty to further the best interests of his clients, the buyers; imposing a second duty to the sellers would inevitably conflict with the first. An attorney who personally steals goods or tells lies on a client's behalf may be liable for conversion or fraud in some cases. But there are no such allegations here; the only claim is that Chu should have refused to draw up the bill of sale

207. *Id.*

208. *Id.*

209. *Id.* at 447.

210. *See id.* ("Because Hong has no tort claim against her former husband under Texas community-property law, she has no conspiracy claim against Chu for conspiring in such a tort.").

211. *See id.* at 444 (suggesting a wrongful disposition suit as a resolution).

212. *Id.*

213. *Id.* at 445.

214. *See id.* at 447 (dismissing the cause of action because there was no tort claim).

215. *See* Jennifer Knauth, Steve McConnico & Robyn Hargrove, *Legal Malpractice for Litigators: An Update on Recent Developments in Texas Legal Malpractice and Ethics Law*, ADVOC. (TEX.), Spring 2008, at 15, *available at* http://www.litigationsection.com/downloads/42_Best_Of_Part_II.pdf ("Texas courts have protected attorneys involved in litigation against claims by the opposing party by fashioning a litigation privilege, sometimes referred to as 'attorney immunity,' which prevents most claims by opposing parties or attorneys.").

216. *Chu*, 249 S.W.3d at 446.

> (although his client asked him to) because he knew one spouse was selling the shop without the other spouse's consent—even though neither spouse was his client. We need not approve of Chu's ethics to hold that *Schlueter* requires Hong to seek restitution from her own husband before seeking it from someone else's lawyer.[217]

The foregoing quote indicates that the Supreme Court of Texas, as a general matter, is reluctant to allow conspiracy claims against an opposing attorney who is simply doing her job.

The court went on to make an important statement concerning claims for conspiracy against opposing attorneys.[218] The Court stated:

> Chu could only be liable for conspiracy if he agreed to the *injury* to be accomplished; agreeing to the *conduct* ultimately resulting in injury is not enough. Viewing all the evidence in a light favorable to the verdict, Chu knew that Gyu was selling his wife's interest without her knowledge or consent. But Gyu told the Kims the money from the sale would be used to pay off a loan from his parents, and the rest would be shared with Hong; Hong denied there was any such loan, but there was no evidence Chu or the Kims knew that at the time. Conspiracy may be proved by inferences from circumstantial evidence, but inferring an agreement to the ultimate injury generally arises "from joint participation in the transactions *and from enjoyment of the fruits of the transactions*." As there was no evidence Chu's fee depended on keeping the proceeds from Hong, there is no basis for inferring he intended for her to be cheated.[219]

Thus, the *Chu* court appears to be saying that since attorney Chu's fee did not depend on keeping the proceeds from the donut shop sale from Ms. Hong, there is no evidence that attorney Chu intended for Ms. Hong to be cheated; therefore, there is no viable conspiracy claim against attorney Chu. This arguably means that, generally, an attorney cannot be sued for wrongfully conspiring to defraud an opposing party if the attorney's fee does not depend on the opposing party being so defrauded.

M. *Cunningham v. Tarski*

In the suit underlying *Cunningham v. Tarski*,[220] David Tindol was a majority shareholder in a small Texas corporation,[221] and KC

217. *Id.*
218. *Id.* at 446–47.
219. *Id.*
220. Cunningham v. Tarski, 365 S.W.3d 179 (Tex. App.—Dallas 2012, no pet.).
221. *Id.* at 182.

Cunningham was a minority shareholder in the same corporation.[222] Cunningham and Tindol had a dispute.[223] On April 27, 2006, Tindol allegedly terminated Cunningham's involvement with the corporation.[224]

Tindol hired attorney Mike Tarski to assist Tindol in his dispute with Cunningham.[225] Subsequently, in the relevant case, Cunningham sued attorney Tarski concerning work he did on behalf of Tindol.[226]

Cunningham contended that, prior to April 27, 2006, Tindol and attorney Tarski devised a plan to unlawfully terminate Cunningham's involvement with the corporation.[227] Cunningham alleged Tindol and attorney Tarski "discussed, agreed on[,] and each committed various intentional acts designed to unlawfully deprive [Cunningham] of his rights and interest in" the corporation.[228] Specifically, Cunningham contended that attorney Tarski drafted and backdated certain corporate documents that terminated Cunningham's interest in the corporation.[229] Attorney Tarski then transmitted these documents to Tindol.[230]

In the main case, Cunningham sued attorney Tarski "for negligent misrepresentation and assisting, participating in, and conspiring to commit shareholder oppression and breach of fiduciary duties."[231] Attorney Tarski filed a motion for summary judgment, which the trial court granted.[232] Cunningham then appealed to the Dallas Court of Appeals.[233]

The Dallas Court of Appeals affirmed the summary judgment for attorney Tarski and in doing so, the court stated:

> Generally, "[a] lawyer is authorized to practice his profession, to advise his clients, and to interpose any defense or supposed defense, without making himself liable for damages." However, a lawyer's protection from liability claims arising out of representation of a client is not without limits. "When an attorney acting for his client participates in fraudulent activities, his action is 'foreign to the duties of an attorney.' Thus an attorney is liable if

222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 182–83.
227. *Id.* at 182.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 181.
232. *Id.* at 182.
233. *Id.*

> he knowingly commits a fraudulent act that injures a third person or knowingly enters into a conspiracy to defraud a third person."[234]

In affirming the summary judgment for attorney Tarski, the *Cunningham* court held that simply sending corporate documents to an opposing party could not be a fraudulent representation.[235] The court held that simply sending such documents to an opposing attorney was not conduct that was "foreign to the duties of an attorney," and as such, Cunningham's claims were properly dismissed.[236]

IV. LIMITS ON THE TEXAS LITIGATION PRIVILEGE

As illustrated in the preceding section, there are numerous Texas cases that, based on the litigation privilege, dismissed claims by one party against an opposing party's attorney.[237] Still, the Texas litigation privilege does

234. *Id.* at 186 (citations omitted).

235. *Id.* at 191–92.

236. *See id.* (rejecting Cunningham's argument that "the trial court erred by concluding there was no genuine issue of material fact as to whether Tarski's conduct was 'the type of fraudulent conduct that is foreign to the duties of an attorney'").

237. *See* Lewis v. Am. Exploration Co., 4 F. Supp. 2d 673, 680 (S.D. Tex. 1998) ("The type of conduct in which the attorneys allegedly engaged is without dispute part of discharging their duties in representing their client. Such conduct does not make the attorneys liable in tort damages to the opposing party. Labeling such conduct as fraudulent or as part of a conspiracy to defraud does not subject the attorneys to liability for tort damages to the opposing party under Texas law."); Taco Bell Corp. v. Cracken, 939 F. Supp. 528, 532 (N.D. Tex. 1996) (reasoning that permitting an attorney to recover from an opposing attorney would encourage timid representation rather than the zealous advocacy that is expected in Texas); Bradt v. West, 892 S.W.2d 56, 76 (affirming summary judgment because "[a]n attorney has no right of recovery, under any cause of action, against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party"); Chu v. Hong, 249 S.W.3d 441, 446 (Tex. 2008) (expressing reluctance to "open the door to such claims against an opposing party's attorney" when there are more appropriate parties from which to first seek restitution); *Cunningham*, 365 S.W.3d at 191–92 (affirming the trial court's conclusion that "there was no genuine issue of material fact as to whether Tarski's conduct was 'the type of fraudulent conduct that is 'foreign to the duties of an attorney'"); Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 405 ("[T]o promote zealous representation, courts have held that an attorney is 'qualifiedly immune' from civil liability, with respect to non-clients, for actions taken in connection with representing a client in litigation."); Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 440 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (stating that exposing attorneys to liability in damages "'would act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled'" (quoting *Bradt*, 892 S.W.2d at 71)); White v. Bayless, 32 S.W.3d 271, 275–76 (Tex. App.—San Antonio 2000, pet. denied) (affirming that Texas attorneys may zealously advocate for their clients, without fear of liability to opposing clients or counsel); Mitchell v. Chapman, 10 S.W.3d 810, 812 (Tex. App.—Dallas 2000, pet. denied) (holding a party's claims against an opposing attorney "are outweighed by

have some limits.

As discussed below, there are certain Texas cases that allowed claims by a party to go forward against an opposing attorney despite the litigation privilege.[238] Generally, as the following section will show, these cases were allowed to proceed because: 1) there was some substantial evidence the defendant attorney committed affirmative fraud against the plaintiff; and/or 2) there was some substantial evidence that the defendant attorney's actions were clearly "foreign to the duties of an attorney." The following section of the Article discusses these Texas cases.

A. *Poole v. Houston & T.C. Railway Co.*

Poole is the first Supreme Court of Texas case to address the limits of what would later be identified as the litigation privilege.[239] *Poole* arose in 1875 when a seller, W. E. Poole out of Galveston, sold thirteen cases of boots and shoes to a buyer out of Marlin, Texas, named La Prelle & Bro. (LPB).[240] Upon the sale, Poole put the cases on a train to Marlin for delivery to LPB.[241] Shortly thereafter, Poole learned that the buyer, LPB, was insolvent so Poole then telegraphed his attorney in Marlin to stop the delivery of the cases to LPB.[242]

However, LPB learned of Poole's actions concerning the cases and assigned their LPB bill of lading for the goods to their attorney, J. L. Scott.[243] Then, Scott obtained possession of the goods in transit, erased the LPB name from the cases, inserted the name of J. L. Scott & Co. and

the public's interest in loyal, faithful, and aggressive representation by attorneys employed as advocates" (citing *Bradt*, 892 S.W.2d at 71)); Renfroe v. Jones & Assocs., 947 S.W.2d 285, 287 (Tex. App.—Fort Worth 1997, writ denied) ("An attorney's duties that arise from the attorney–client relationship are owed only to the client, not to third persons, such as adverse parties."); Maynard v. Caballero, 752 S.W.2d 719, 721 (Tex. App.—El Paso 1988, writ denied) (finding attorney's actions were privileged because joinder statutes in civil and criminal cases create "an ethical and vital need for attorneys, on behalf of their respective clients, to meet, discuss, compromise and plan joint defenses or strategies"); Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) ("[T]he [attorney] had the right to interpose any defense or supposed defense and make use of any right in behalf of such client or clients as [he] deemed proper and necessary, without making himself subject to liability in damages to the appellant."); Kruegel v. Murphy, 126 S.W. 343, 345 (Tex. Civ. App.—Dallas 1910, writ dism'd judgm't cor.) ("[A]ttorneys are authorized to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages.").

238. Poole v. Hous. & T.C. Ry. Co., 58 Tex. 134, 137 (1882).

239. *Id.* at 134.

240. *Id.* at 135, 137.

241. *Id.* at 135.

242. *Id.*

243. *Id.* at 137.

reshipped the cases on a different bill of lading. The cases were ultimately delivered to LPB in this manner.[244]

Accordingly, Poole sued the railroad company, Scott, and LPB.[245] The case was tried and the jury returned a verdict for the defendants; Poole appealed.[246]

In this case, attorney Scott contended that because he was acting as an attorney, he could not be held liable to Poole.[247] The Texas Supreme Court rejected this contention:

> Having assumed the apparent ownership of the goods, for the purpose and with the intention of consummating the fraud upon appellant, [attorney Scott] 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*; neither will he be permitted, under such circumstances, to shield himself from liability on the ground that he was the agent of LPB, for no one is justified on that ground in knowingly committing [willful] and premeditated frauds for another. In this particular the charge of the court was clearly erroneous.[248]

Based on this logic, the Texas Supreme Court reversed the trial court judgment and remanded the case for further proceedings.[249]

In *Poole*, the court indicated that, even though Scott was an attorney, Scott could not on that basis assert a privilege from liability because his actions were "entirely foreign to the duties of an attorney."[250] In other words, it appears that if an attorney's actions are "entirely foreign to the duties of any attorney," the attorney may not be able to rely on her status as an attorney to shield her from liability.[251]

As discussed below, subsequent Texas cases have used this "foreign to the duties of an attorney" language to limit the applicability of the litigation privilege when one party sues an opposing party's attorney.

244. *Id.*

245. *Id.*

246. *Id.* at 135.

247. *See id.* at 137 (rejecting attorney's denial of "liability to appellant for the loss sustained by reason of his wrongful acts, under the privileges of an attorney at law").

248. *Id.* at 137–38 (emphasis added).

249. *Id.* at 139.

250. *Id.* at 137.

251. *Id.*; *see* Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney–Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 659 (1994) ("Under the traditional approach to legal malpractice, an attorney is liable for negligence only to a client, with whom the attorney is in a privity relationship. Thus, an attorney's duties to non-clients are limited primarily to the avoidance of intentional wrongs.").

B. *Likover v. Sunflower Terrace II, Ltd.*

Likover[252] arose out of a complicated set of real estate transactions where a seller conveyed a piece of property to a purchaser.[253] To cure a defect in title that occurred in the original conveyance, the seller and purchaser reached an agreement whereby the purchaser would re-convey the property to the seller; thereafter, the seller would properly convey the property back to the purchaser.[254] Subsequently, the purchaser signed a deed re-conveying the property to the seller.[255] However, the seller, based upon the advice of his attorney, Sanford Likover, refused to re-convey the property to the purchaser unless the purchaser paid the seller an additional $400,000.[256]

The purchaser sued the seller and Likover for fraud.[257] The jury found against both the seller and Likover, determining they had "engaged in a civil conspiracy to defraud" the purchaser.[258]

Likover argued his actions were in the capacity of an attorney representing his client and—as a matter of law—he owed no duty to non-client third parties like the purchaser; thus, he could not be held liable.[259] The court of appeals rejected this argument and affirmed the jury findings against the attorney-defendant.[260] The court stated:

> An attorney has no general duty to the opposing party, *but he is liable for injuries to third parties when his conduct is fraudulent or malicious*. He is not liable for breach of duty to the third party, but he is liable for fraud.
>
> A lawyer is authorized to practice his profession, to advise his clients, and to interpose any defense or supposed defense, without making himself liable for damages.
>
> However, an attorney is liable if he knowingly commits a fraudulent act that injures a third person, or if he knowingly enters into a conspiracy to

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

253. *Id.* at 469.

254. *Id.*

255. *Id.*

256. *Id.* at 471.

257. *Id.*

258. *Id.*

259. *Id.* at 472; *see* Steve McConnico & Robyn Bigelow, *Summary of Recent Developments in Texas Legal Malpractice Law*, 33 ST. MARY'S L.J. 607, 610–11 (2002) ("Generally, in the absence of privity, an attorney owes no duty to third party non-clients. Thus, persons outside the attorney–client relationship have no cause of action for injuries sustained due to an attorney's malpractice."); Lief Kjehl Rasmussen, Note, *Abolishing the Privity Doctrine in Texas—Just Do It!*, 2 TEX. WESLEYAN L. REV. 559, 565–66 (1996) (discussing the harm the privity doctrine can cause third party non-clients and the arguments supporting the privity doctrine).

260. *Likover*, 696 S.W.2d at 469.

> defraud a third person. *Over 100 years ago, the Supreme Court of Texas held that where a lawyer acting for his client participates in fraudulent activities his action in so doing is "foreign to the duties of an attorney."* The [c]ourt held that a lawyer cannot shield himself from liability on the ground that he was an agent, because no one is justified on that ground in knowingly committing a willful and premeditated fraud for another.[261]

Thus, the court affirmed the judgment against Likover.[262] The court held that, despite the litigation privilege, an attorney may be liable to an opposing party if the attorney's conduct is fraudulent because such conduct is "foreign to the duties of an attorney."[263]

C. *Miller v. Stonehenge/FASA-Texas, JDC, L.P.*

In this case,[264] Stonehenge obtained a $23,600,000 judgment against Vance Miller.[265] Attorney Brenda Collier represented Stonehenge in their collection efforts against Vance Miller.[266] Stonehenge subsequently obtained a writ of execution and an order in aid of execution, which allowed Stonehenge to seize all non-exempt property at Miller's residence.[267]

Collier and two federal marshals visited the Miller residence to execute the writ.[268] At that time, Miller's wife Geraldine Miller was at home while he was out.[269] Geraldine objected to Collier's actions in searching the home for property to seize.[270] Collier allegedly "demanded access to the premises and, under threat of force, inspected, inventoried, and videotaped [Geraldine's] personal and intimate property and effects."[271] Collier also allegedly "accosted" Geraldine when she attempted to leave the house by telling Geraldine she could not leave and demanding to know where Geraldine was going.[272]

Geraldine subsequently sued Collier "for abuse of process, invasion of

261. *Id.* at 472 (emphasis added) (citations omitted).

262. *Id.* at 469.

263. *See id.* at 472 (holding "that where a lawyer acting for his client participates in fraudulent activities, his action in so doing is 'foreign to the duties of an attorney'" (quoting Poole v. Hous. & T.C. Ry. Co., 58 Tex. 134, 137 (1882))).

264. Miller v. Stonehenge/FASA-Texas, JDC, L.P., 993 F. Supp. 461 (N.D. Tex. 1998).

265. *Id.* at 463.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* (internal quotation marks omitted).

272. *Id.*

privacy, intentional infliction of emotional distress, conspiracy, and civil rights violations."[273] Attorney Collier moved for summary judgment based on the litigation privilege.[274]

After an in-depth discussion of the litigation privilege, the federal district court denied Collier's motion for summary judgment.[275] The court declared Collier's actions while serving a writ of execution were not a part of her duties as an attorney.[276] "Counsel for the judgment creditor is not an anticipated or essential participant in this process."[277] Although Collier was entitled to be present, her duties did not require participation.[278] "[H]er skills *as an attorney* had no role in the events that transpired."[279] Because the court found Collier's alleged wrongful actions were not taken in "performing . . . professional duties," Collier was not entitled to the protection of the litigation privilege.[280] Thus, under *Miller*, if an attorney's alleged wrongful actions are not actions related to "performing . . . professional duties," then such actions may not be protected by the litigation privilege.[281]

273. *Id.*

274. *Id.*

275. *Id.* at 465.

276. *See id.* ("[T]he allegations against Collier do not involve the type of conduct that requires 'the office, professional training, skill, and authority of an attorney.' Plaintiff [] sued Collier for her actions regarding the writ of execution. The U.S. Marshal is responsible for serving the writ. Counsel for the judgment creditor is not an anticipated or essential participant in this process." (citations omitted)).

277. *Id.*

278. *See id.* (disregarding the argument and stating, "Collier . . . was authorized to participate in the execution of the writ by court order. However, this does not imbue the process with any additional significance.").

279. *Id.*

280. *See id.* (explaining a lack of privity between an attorney and a plaintiff does not bar suits based upon an attorney's actions that are not related to performance of their professional responsibilities). *But see* FinServ Cas. Corp. v. Settlement Funding, L.L.C., 724 F. Supp. 2d 662, 673–74 (S.D. Tex. 1998) (refusing to find an exception to the litigation privilege that would allow plaintiff's suit against the attorney). Contrary to *Miller*, the court in *FinServ* stated:

> If the attorney's execution of the writ is in error, the aggrieved party has a cause of action against the judgment creditor for wrongful execution, but not against the attorney. Since the execution of writs frequently involves disputed transfers of property, and since clients frequently work with attorneys to execute writs, it can be expected that if there were an exception to qualified immunity for conspiracies to commit wrongful execution, plaintiffs could—and almost certainly would—bring such claims against the attorneys in virtually every case in which wrongful execution was pled. Since [plaintiff] has not shown that any Texas court has declared that such an exception exists, the court must conclude that no such exception exists.

Id. at 676.

281. *Miller*, 993 F. Supp. at 465.

D. *Querner v. Rindfuss*

This case[282] arose when a mother died leaving a fairly substantial estate that, according to the mother's will, was to be divided between her two children: Thera and Jimmie Querner.[283] The mother's will appointed a woman named Zinn as the executor.[284] In probating the estate, Zinn was represented by attorney James A. Rindfuss.[285]

Subsequently, major inconsistencies surfaced between accountings filed by executor Welda Gay Zinn and the corresponding checks written during the administration of the estate.[286] Inconsistencies related to medical bills were also found.[287] Jimmie and Thera sued executor Zinn.[288] Pursuant to a settlement, a judgment for Thera and Jimmie of $250,000 in actual damages and $500,000 in punitive damages was awarded against executor Zinn.[289]

Thera and Jimmie sued Zinn's attorney, Rindfuss, for "civil conspiracies, fraud, unlawful conversion, unjust enrichment, DTPA, constructive fraud, and breach of fiduciary duties."[290] Rindfuss moved for summary judgment contending he never represented Thera and Jimmie and that he instead represented executor Zinn in contested litigation against Thera and Jimmie.[291] Based on the litigation privilege, the trial court granted summary judgment for Rindfuss.[292]

The San Antonio Court of Appeals reversed summary judgment and remanded the claims for trial.[293] The court stated:

> If an attorney acting for his client participates in fraudulent activities, his action is "foreign to the duties of an attorney." An attorney, therefore, is liable if he knowingly commits a fraudulent act or knowingly enters into a conspiracy to defraud a third person. Even in the litigation context, a lawyer cannot shield himself from liability on the ground that he was an agent because no one is justified on that ground in knowingly committing a willful

282. Querner v. Rindfuss, 966 S.W.2d 661 (Tex. App.—San Antonio 1998, pet. denied).

283. *Id.* at 663.

284. *Id.* at 664.

285. *See id.* ("Rindfuss signed . . . documents as the attorney for the estate.").

286. *Id.* at 665.

287. *See id.* (remarking that "inconsistencies between the Paragon [Healthcare] expenses set forth in the accountings and the actual Paragon invoices" were found and discussing the excessive line of credit extended to the decedent before payment was demanded from Paragon Healthcare).

288. *Id.*

289. *Id.* at 666.

290. *Id.* at 663–64.

291. *Id.* at 666.

292. *Id.*

293. *Id.* at 670–71.

> and premeditated fraud for another.
>
> Rindfuss is incorrect in asserting a global privilege as to all actions taken in the litigation context. Each claim must be considered in light of the actions . . . taken by Rindfuss in order to determine whether he can be held liable for such actions. If an attorney actively engages in fraudulent conduct in furtherance of some conspiracy or otherwise, the attorney can be held liable.[294]

Thus, the *Querner* court indicated if an attorney's actions constitute fraudulent conduct in furtherance of a conspiracy, then—notwithstanding the litigation privilege—the attorney could potentially be held liable to the opposing party.[295]

E. *IBP, Inc. v. Klumpe*

In *IBP, Inc. v. Klumpe*,[296] Steven Klumpe (the father) and his stepson Chris Escamilla (son) both worked at an IBP meat processing facility.[297] At the IBP facility, the son's hand was injured while operating a meat cutter.[298]

The son consulted with attorney Jeff Blackburn concerning his injury, and Blackburn referred the son to the Fadduol & Glasheen, P.C. law firm (F&G).[299] On behalf of the son, F&G filed suit against IBP for the son's personal injuries.[300] If the son's claim was successful, Blackburn was to receive a referral fee from F&G.[301]

IBP possessed confidential documents called "Crewing Guides."[302] IBP contended the Crewing Guides were trade secrets and thus immune from discovery.[303] As a supervisor, the father had access to the Crewing Guides but was contractually prevented from disclosing them to third parties.[304]

---

294. *Id.* at 666 (citations omitted).

295. *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 793 (Tex. 1999) (noting that several jurisdictions recognize certain exceptions to the litigation privilege under certain circumstances).

296. IBP, Inc. v. Klumpe, 101 S.W.3d 461 (Tex. App.—Amarillo 2001, pet. denied).

297. *Id.* at 465.

298. *Id.* at 466.

299. *Id.*

300. *Id.*

301. *Id.* at 475.

302. *Id.* at 466.

303. *Id.* The Texas Rules of Evidence allow discovery of trade secrets "only if necessary to prevent 'fraud' or 'injustice.'" *In re* Cont'l Gen. Tire, Inc., 979 S.W.2d 609, 612 (Tex. 1998); *see* TEX. R. EVID. 507 (describing the trade secrets privilege); *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d at 613 (explaining the correct application of the rule).

304. *IBP, Inc.*, 101 S.W.3d at 466.

On behalf of the son, F&G issued a deposition notice and subpoena *duces tecum* to the father.[305] The subpoena *duces tecum* requested the father produce the Crewing Guides.[306]

For the deposition, Blackburn represented the father as his personal attorney.[307] The father gave attorney Blackburn copies of the Crewing Guides.[308]

IBP filed a motion for protective order concerning the father's deposition subpoena and the Crewing Guides.[309] Despite this, Blackburn gave a copy of the Crewing Guides to F&G, the son's attorney, as part of informal discovery.[310] When the trial court subsequently reviewed IBP's motion for protective order, the trial court held that the Crewing Guides could not "be disclosed to any third parties other than witnesses or consulting experts."[311] The son's personal injury suit against IBP eventually settled during trial.[312]

In *Klumpe*, IBP sued the father, Blackburn, and F&G for, among other things, an alleged unlawful conspiracy to misappropriate IBP's trade secrets—the Crewing Guides.[313] F&G settled out of court with IBP.[314]

The father and attorney Blackburn filed a motion for summary judgment based on the litigation privilege.[315] The trial court granted attorney Blackburn and the father's motion for summary judgment; IBP subsequently appealed.[316]

The appellate court reversed summary judgment as to the father.[317] The appellate court held fact issues existed as to whether the father illegally obtained the Crewing Guides from IBP and illegally disclosed them without IBP's consent.[318]

As to the attorney, the appellate court stated as follows:

> As a general rule, neither a party in a lawsuit nor an attorney representing a party in a lawsuit has a right of recovery under any cause of action against

305. *Id.* at 470.
306. *Id.* at 466.
307. *Id.* at 466–67.
308. *Id.* at 467.
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at 467–68.
314. *Id.* at 466 n.1.
315. *Id.* at 468.
316. *Id.*
317. *Id.* at 473.
318. *Id.* at 473–74.

> another attorney arising from conduct the second attorney engaged in as part of discharging duties in representing a party in that lawsuit. *Not every action taken by an attorney during the litigation process is privileged, however, and determining whether specific actions taken by an attorney in the litigation context are privileged is a fact-intensive question. A lawyer is protected from liability claims only as to actions which are "within the bounds of the law."*[319]

The appellate court held that attorney Blackburn could not be liable for sending the Crewing Guides to F&G because this disclosure was made "as part of discovery proceedings in pending litigation."[320] The appellate court further held fact issues remained as to whether Blackburn entered into a conspiracy to have the father unlawfully appropriate the Crewing Guides.[321] The court stated:

> The claim against Blackburn for faxing the Guides to Fadduol & Glasheen is based on his communication and disclosure of the alleged trade secret contents of the Guides. As against a claim for civil liability, Blackburn was absolutely privileged to make such disclosure because he made the disclosure as part of discovery proceedings in pending litigation, even if he transmitted the Guides in violation of Penal Code [section] 31.05.
>
> The claim against Blackburn for conspiring to have [the father] take a copy of IBP's Guides, however, is not a claim based on the content of a communication in connection with judicial proceedings because [the father]'s access to the documents was not conclusively established to have been such lawful possession, custody or control within the meaning of the Texas Rules of Civil Procedure that his taking of them was merely an integral part of privileged disclosure of documents. The summary judgment record before us evidences an unusual set of facts. We agree with IBP that, under the record presented and summary judgment standards, a reasonable jury could infer that Blackburn conspired to have [the father] illegally take a copy of IBP's Guides.[322]

Thus, the court took a fine line with its ruling. It held Blackburn's production of the Crewing Guides to F&G was privileged because that was done "as part of discovery proceedings in pending litigation."[323] Despite this, the *Klumpe* court held that if attorney Blackburn unlawfully conspired with the father to appropriate the Crewing Guides, such action could give rise to a viable claim against Blackburn.[324]

319. *Id.* at 470 (emphasis added) (citations omitted).
320. *Id.* at 475.
321. *Id.* at 476.
322. *Id.* at 475–76 (citations omitted).
323. *Id.* at 475.
324. *Id.* (denying an attorney owes the client a duty of "violat[ing] a provision of the penal

F. *Mendoza v. Fleming*

In *Mendoza v. Fleming*,[325] Luke Fruia Investments, Inc. (LFI) obtained an agreed judgment against Robert Mendoza.[326] "The judgment became final and was not paid."[327] At that point, attorney Tom Fleming, on behalf of LFI, secured a writ of garnishment to seize all of Mendoza's assets held in the International Bank of Commerce.[328]

Mendoza subsequently appealed the garnishment action to the Corpus Christi Court of Appeals.[329] The court reversed the garnishment order because Mendoza was not "properly served with notice of the writ of garnishment."[330]

Mendoza responded by filing this suit in Cameron County against LFI, its attorney Fleming, and Fleming's law firm "for wrongful garnishment, conversion, civil conspiracy, intentional infliction of emotional distress, and abuse of process."[331] Fleming and his law firm, as attorney-defendants, filed a motion for summary judgment based on the litigation privilege. The trial court granted the motion for summary judgment; Mendoza subsequently appealed.[332]

In fighting the motion for summary judgment, Mendoza argued the LFI garnishment claim was filed for ulterior motives.[333] Mendoza argued the garnishment claim caused him great difficulty because he was running for district judge and the garnishment froze his campaign account just before the election.[334] Further, Mendoza argued the garnishment action was malicious and intended to harm his district judge campaign.[335]

The appellate court ruled for Mendoza and reversed summary judgment for the attorney-defendants.[336] The court stated:

> Appellees asserted the affirmative defense of attorney immunity. A lawyer is generally authorized to practice law to perform his duties as a lawyer without making himself liable for damages. A contrary policy "would dilute the vigor with which Texas attorneys represent their clients."

code or conspir[ing] to have another do so").

325. Mendoza v. Fleming, 41 S.W.3d 781 (Tex. App.—Corpus Christi 2001, no pet.).
326. *Id.* at 783.
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.* at 787.
334. *Id.* at 788.
335. *Id.* at 786.
336. *Id.* at 788.

> *However, a lawyer is immune only for actions which are "within the bounds of the law." It has long been held that where a lawyer acting for his client participates in wrongful activities, his action in doing so is "foreign to the duties of an attorney."* An attorney is liable 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. Attorney immunity
>
> > focuses on the type of conduct in which the attorney engages rather than on whether the conduct was meritorious in the context of the underlying lawsuit . . . [and] whether the attorney's conduct was part of discharging his duties in representing his client. If the conduct is within this context, it is not actionable even if it is meritless.
> >
> > . . . .
> >
> > We find the instant case distinguishable from *Renfroe*. In *Renfroe*, the plaintiff did not allege that the attorneys had a wrongful or malicious motive. In this case, appellant asserts that appellees filed the garnishment procedure, not merely to collect the debt appellant owed their client, but to wrongfully interfere with appellant's judicial campaign. Accordingly, we conclude that *Renfroe* is not dispositive of appellant's causes of action as a matter of law.[337]

Thus, *Mendoza* seems to indicate that if the attorney-defendants filed the garnishment action "not merely to collect the debt," but instead "to wrongfully interfere with" Mendoza's judicial campaign, then the attorney-defendants' actions may not be protected by the litigation privilege.[338]

G. *Essex Crane Rental Corp. v. Carter*

In the case underlying *Essex Crane Rental Corp. v. Carter*,[339] plaintiff obtained a $900,000 settlement for unpaid crane fees from two original defendants.[340] After this settlement, the two original defendants allegedly hired two attorneys, Carter and Farley (the attorney-defendants), to assist in avoiding the plaintiff's judgment.[341]

The attorney-defendants then set up a shell company and orchestrated certain assignments of rights and assets to frustrate collection of the

337. *Id.* at 787 (emphasis added) (citations omitted) (quoting Renfroe v. Jones & Assocs., 947 S.W.2d 285, 288 (Tex. App.—Fort Worth 1997, writ denied)).

338. *Id.*; *see* Reagan Nat'l Adver. of Austin, Inc. v. Hazen, No. 03-05-00699-CV, 2008 WL 2938823, at *3 (Tex. App.—Austin July 29, 2008, no pet.) (mem. op.) ("Whether immunity attaches turns on the *type* of conduct in which the lawyer is engaged." (emphasis added)).

339. Essex Crane Rental Corp. v. Carter, 371 S.W.3d 366 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

340. *Id.* at 370.

341. *Id.* at 371.

judgment.[342] This prompted the plaintiff to bring a separate claim against the attorney-defendants and the two original defendants alleging that they unlawfully conspired with each other to hide assets from the plaintiff.[343]

The trial court granted summary judgment for the attorney-defendants based on the litigation privilege.[344] The court of appeals reversed, stating:

> An attorney for an opposing party may not be held liable for breach of fiduciary duty or fraud merely for making representations to the opposing party in litigation that further the best interests of his own clients. *However, "[a]n attorney who personally . . . tells lies on a client's behalf may be liable for . . . fraud in some cases." Thus, an attorney may be held liable for conspiracy to defraud by knowingly assisting a client in evading a judgment through a fraudulent transfer.* In order to be held liable for conspiracy to defraud by so assisting his client, however, the attorney must have agreed to the injury to be accomplished, not merely the conduct ultimately resulting in injury.[345]

The appellate court held the plaintiff submitted enough evidence to raise a fact issue as to whether the attorney-defendants entered into a conspiracy to commit a fraudulent transfer of assets.[346] Therefore, the court reversed the summary judgment.

V. CONCLUSION

As set forth above, the general rule based on the litigation privilege is one party may not sue an opposing party's attorney. This rule exists to facilitate zealous representation for clients without attorneys acting in fear that their actions related to representation could give rise to a claim against the attorney. However, the litigation privilege in Texas is not unlimited. An attorney will not find protection in this doctrine if the attorney clearly commits fraud during the representation of a client. If an attorney's actions rise to the level of fraud against an opposing attorney or her actions are clearly "foreign to the duties of an attorney,"[347] the litigation privilege will no longer act as a shield and an opposing party may be able to sue the attorney.

342. *Id.* at 371–74.

343. *Id.* at 371, 376.

344. *Id.* at 382.

345. *Id.* at 378–79 (emphasis added) (citations omitted).

346. *Id.* at 380–81; *see* Toles v. Toles, 113 S.W.3d 899, 911 (Tex. App.—Dallas 2003, no pet.) ("[A]n attorney is liable if he knowingly commits a fraudulent act that injures a third person or knowingly enters into a conspiracy to defraud a third person." (citing Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ))).

347. Poole v. Hous. & T.C. Ry. Co., 58 Tex. 134, 137 (1882).