

The Immunities of Lawyers

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 **EXECSENSE**

THE IMMUNITIES OF LAWYERS

Executive Summary

Lawyers are granted unique protections against civil liability under a variety of state and federal statutes and principles of common law going back as far as six centuries. These laws grant privileges and immunities to lawyers that shield them from liability for the purpose of preserving the lawyer's independence and zeal in the pursuit of a client's interest. Except in the unique example of a public defender, lawyers are not immunized from liability to their clients for errors and omissions, but the burdens of proving liability are significant even in such cases because of enhanced rules for proving causation and the broad latitude extended to lawyers – and other professionals – for judgmental decisions.

The immunity of lawyers from civil liability for actions within their professional role is not easy to pigeon-hole in a sentence or two. State and federal jurisdictions, while generally agreeing on the broad policy interests that support immunities for lawyers, can and often do vary in the application of, and the crafting of exceptions for, the various doctrines. Sometimes, as shown in the example of the Federal Fair Debt Collection Practices Act, 15 U.S.C. 1692 et seq, the immunity doctrines are avoided by simply re-characterizing the lawyer as something else when in fact the lawyer is acting in the most classic of lawyer activities, representing a client in collecting a debt. In the case of the FDCPA, the lawyer becomes a "debt collector" and is accordingly stripped of all litigation and transactional immunities. The lawyer as debt collector is not differentiated in exposure to statutory liability from his lay counterpart in debt collection. Lawyers who involve themselves as participants in a client's business dealings directly hazard such an unfavorable redefinition of their role when litigation ensues.

Given the doctrinal complexity and the growing pressure in litigation to expand lawyer liability, it is important for professional liability litigators to possess a strong grasp of the general rules, the major jurisdictional differences or exceptions, and the basic concepts that support the maintenance of the privileges and immunities extended to the legal profession.

The principal areas of immunity are litigation immunity, transactional immunity, judicial immunity, governmental immunity, Noerr-Pennington immunity in federal courts, Anti-Slapp ("Strategic Litigation Against Public Participation") immunity under a number of state statutes, public defender immunity and the inaccurately termed "judgmental immunity" which is not an immunity at all. Also in this discussion the term "immunity" will be employed generically to embrace both "absolute" immunity and "qualified" immunity. Absolute immunity, the more rare example, is extended without regard to the intentions or purposes of the actor or the harm done, but is entirely based on his status. This level of immunity is often described as an immunity from suit. Qualified immunity is extended except where the actions in question were motivated by malice, a state of mind which combines knowledge of wrongful action with a desire to inflict harm. This lesser level of immunity is sometimes described as immunity from liability.

The legal profession is regulated by the courts that admit lawyers to practice before them. The regulation of lawyers and the administration of discipline for violations of the Rules of Professional Conduct will not be discussed in this narrative except to point out that immunity from suit or liability affords a lawyer no immunity from disciplinary action.

Lawyers who make a practice of representing lawyers in malpractice and related litigation are aware of the immunity defenses. Lawyers generally, however, are not. My purpose here is to cover the subject broadly and increase this awareness.

The History of Lawyer Immunities

Two principal areas of immunity – governmental and litigation – have their roots in the common law of England and the United States. Other areas such as Anti-Slapp are granted in current statutes.

In the U.S. Supreme Court decision in *Filarsky v. Delia*, 132 S.Ct. 1657 (2012), where the court allowed qualified immunity to a lawyer who was acting on behalf of a municipal government in an employment matter, Justice Roberts details the history of allowing immunity under state and federal law to persons acting on behalf of a governmental entity equivalent to what would be allowed to an employee of the government. The court recites the long history of lawyers devoting portions of their practice to serving government, a common situation in rural communities in America where the chief prosecuting attorney for a city or county maintains a full time private practice. Although the issue in *Filarsky* was immunity from liability under the civil rights laws, Roberts' opinion highlights the prevalence in all jurisdictions of a grant of immunity to lawyers

who represent a government entity in a matter pertinent to the public purposes of the entity. Although the doctrine is not specified for the benefit of the legal profession directly, it has not been generously extended to other private servants of government. For example in *Richardson v. McKnight*, 521 U.S. 399 (1997), the Supreme Court refused to immunize prison guards at a federal prison being operated by a private concern under contract with the government. The court's attempt to distinguish the prison guard from the lawyer for immunity purposes is unpersuasive.

Litigation immunity or the immunity of the advocate has strong antecedents in the English common law.

The House of Lords in *Rondel v. Worsley*, (1967) 3 All E.R. 993 (H.L. 1967), acknowledged the long history of immunity extended to the English barrister including immunity from liability for errors or omissions or what we commonly term "malpractice." In 2000 the House of Lords retreated from this blanket grant of immunity to barristers, also applicable to solicitors serving as advocates, and allowed liability for errors but immunity for other torts in connection with the litigation process was preserved. The jurisdictions in the United States, state and federal, recognize that the advocate is immune from liability for torts committed while in the advocate role. No immunity from malpractice liability has ever been extended to advocates. The tradition of protecting the advocate from concern that his activity might inspire actions against him for defamation or other torts seems well preserved in American jurisprudence.

Governmental Immunities

Lawyers heavily populate the employment rolls of government whether as prosecutors, counsel to regulatory agencies, or as judges and related court personnel. Governments also retain lawyers to represent them in a variety of matters. Sovereign immunity from tort liability for the state and federal governments and their subdivisions reflects a principle of law as old as the constitution itself. As the court stated in *Filarsky*, *supra*, "we proceed on the assumption that common law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Id.* citing *Puliam v. Allen*, 466 U.S. 522, 529 (1984). The Court held this application of immunity extends to those working for the government as an employee or "on some other basis." *Filarsky* himself had been engaged to investigate suspicions that a fireman was feigning disability to obtain benefits. In the course of his service he conducted a search of *Filarsky's* home that was challenged as a violation of the employee's civil rights. *Filarsky* was held immune to liability under 42 U.S.C. § 1983.

The immunity in the case of civil rights claims under federal statute is qualified except in the case of a prosecutor to whom is extended absolute immunity for actions in an official capacity. If the employee or retained lawyer proceeds to violate a "clearly established" constitutional

right, the immunity is lost. Clearly governmental immunity is not directly for the benefit of lawyers, but indirectly they are clearly a favored group. In *Richardson v. McKnight*, 521 U.S. 399 (1997), the Supreme Court denied immunity to prison guards in the private employment of a contractor hired by the state to operate its prison, reasoning that immunity was not needed in that situation because private prison guards would not be deterred in the faithful performance of their work if denied immunity. The court's completely unconvincing distinction of retained counsel from prison guards entitles any student of the doctrine to suppose that private lawyers are a favored group for application of immunity.

Outside the area of civil rights statutory liability, the federal government has waived sovereign immunity for torts arising from negligent acts or omissions by "employees" defined to embrace private individuals engaged on a temporary assignment. The statute is the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The FTCA is a limited waiver of immunity and operates only in circumstances where a private person would be liable for the same conduct. Suits under the FTCA must be against the government, not the employee. Private lawyers engaged by the federal government also have immunity from suit under the FTCA and broad immunity from areas of tort excluded from the FTCA.

Immunity under state law for lawyers engaged by or employed by the government also finds itself entangled with statutes providing limited waivers of immunity similar in concept to the FTCA. All state jurisdictions claim sovereign

immunity for the state government and its subdivisions subject to statutes providing a limited waiver with a damages cap. The distinction commonly drawn between the immunity retained and the immunity waived is the distinction between discretionary acts by a government agent, for example, a grant of parole or pardon to a convict or criminal, and "ministerial" actions, for example, maintaining an unsafe condition on the public roads. Liabilities arising from the latter are waived. Lawyers engaged by a government are most likely able to claim full immunity for their professional activity, which would tend to be discretionary.

The divide in the grant of governmental immunity of most interest, however, is the distinction between absolute immunity and qualified immunity. In the civil rights cases as exemplified in the *Filarsky* decision, immunity is qualified. If the public officer acts to deprive a citizen of a clearly established constitutional right, the immunity is abrogated. Thus denying a citizen access to the polls because of race would subject the public officer to liability. The retention of qualified immunity in civil rights cases is in fact mandated by what the civil rights statutes would do to declare the offending public official liable. The exception to such liability to allow qualified immunity where the constitutional right is not "clearly established" is an exception created by the Supreme Court. Absent the mandated liability of the offending public official in the civil rights statutes, the traditions of governmental immunity would grant absolute immunity to the official. The rationale for absolute immunity was stated by Judge Learned Hand many years ago in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir.1949), cert. denied, 339 U.S. 949, (1950). His statement holds today:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute,

or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. * * *

The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

Thus it is seen that absolute immunity is indeed immunity from suit. It matters not at all that the official was motivated in his or her discretionary actions by malice or corrupt persuasion, immunity attaches to public officials in performance of their official duty. The application of the distinction is most clearly demonstrated in the Minnesota Supreme Court decision in *Carradine v. State*, 511 N.W. 2d 733 (Minn. 1994). A state trooper had arrested the actor Robert Carradine charging a number of aggravated traffic offenses and resisting arrest. The trooper in his official arrest report detailed his charges against Carradine but also repeated them in a press conference. Carradine claimed the statements in both examples defamed him. The court held that the trooper was absolutely immune for statements made in the official report. The report was in fulfillment of an official duty and conferred upon the trooper absolute immunity. Qualified immunity, however, attached to the statements made in the press conference to the extent the statements made were not simply a repetition of the report. Responding to the press about the arrest was not in the mind of the court, an official duty. The court is quite unclear in its

reason for affording qualified immunity to the trooper for statements to the press. The case can be read to grant qualified immunity to public officials making public statements about their office and its performance or simply recognition of the qualified immunity from liability for defamatory statements made by anyone in regard to a public figure, which Carradine most certainly was.

Taking the *Filarsky* scenario into claims made under state tort law such as defamation or trespass, the qualified immunity allowed under federal law becomes absolute immunity under state law.

Judicial immunity and the immunity extended to the prosecutorial function are special categories of the immunity for governmental functionaries. Judges and judicial officers (e.g. magistrates, referees) are absolutely immune for liability for their actions within their official capacities. Similarly prosecutors and others performing duties similar to the prosecutorial function, e.g. lawyers initiating civil and administrative enforcement proceedings, are absolutely immune from liability for their actions. The absolute immunities extended to these officials also apply to claims under the federal civil rights statutes. Private lawyers retained by the public authority in the prosecutorial area would operate with absolute immunity.

Litigation Immunity

In the Restatement Second of Torts, § 586 (1977) the immunity of the advocate in American law is stated definitively:

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

The limitation in this statement to defamatory torts must not be read as limiting the application of immunity. In *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So.2d 606, 608 (Fla., 1994), the immunity was found applicable to all "misconduct occurring during the course of a judicial proceeding":

"...absolute immunity must be afforded to any

act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding."

The immunity of the advocate has deep roots in the common law, and Florida's recognition of its broad application to all manner of tort is consistent with its history. Under the English common law until 2000, the barrister and the solicitor appearing as an advocate in judicial proceedings, were not only accorded absolute immunity from claims by third persons but were also accorded immunity from malpractice liability to their clients. American law has not gone this far, and the advocate may be held liable to the client for errors and omissions within limits. A lawyer who misses a statute of limitations bar of the client's claim may be held liable if the foregone claim is shown to have value. This was not true in England until 2000.

The immunity has its limits and exceptions. First and foremost, the advocate retains no immunity from liability to his client for errors and omissions in the role of advocate. Thus the advocate is liable for missing a statute of limitations deadline resulting in the client's loss of his right of action. Likewise the advocate who omits to raise a defense, like absolute immunity, for example, may be held liable for a client's damages. It is extremely difficult, however, to challenge the strategic and tactical judgments made by the advocate in presenting a client's case to a court or other tribunal. To the extent it can be avoided, the courts will not entertain the malpractice case as the client's second chance to prevail in the underlying case. Lawyers as advocates, as well as in other roles, are accorded what is often termed "judgmental immunity." Where lawyers make judgments on strategy or interpret the law where the law is uncertain, the courts will relieve the lawyer of any liability even in the face of expert opinion that the judgments made were erroneous. The law holds that a lawyer is not liable for "honest errors in judgment." Unlike absolute and qualified immunity where the courts seek to rule on the defense at the outset of the case, "judgment immunity" is not an affirmative defense but is simply a denial of negligence that can rarely be disposed of before summary judgment and, in many examples, must go before a jury.

Second, the lawyer may be held liable to third persons for abusive litigation, an amalgamation of the common law torts of malicious prosecution and abuse of process. Even in these areas the lawyer's immunity is qualified in that the plaintiff must show both that the lawyer acted with

malice and without cause to believe in the merits of his client's cause.

Third, the lawyer's immunity affords him no protection from discipline from the presiding court – what are called “sanctions” – or discipline by the bar itself for violations of the Rules of Professional Conduct. The notorious case of the prosecution of several Duke University lacrosse players on false charges of rape, besides being abandoned once the fabrication of the charges came to light, resulted in the disbarment of the prosecutor for his misconduct in prosecuting charges he assisted in fabricating.

Fourth, lawyers who represent clients in the collection of consumer debt are redefined as “Debt Collectors” under federal law and are fully exposed to liability to the putative debtor for violation of the Fair Debt Collection Practices Act. *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995) (“the Act applies to attorneys who regularly engage in consumer-debt-collection activity, even when that activity consists of litigation.”). FDCPA litigation against lawyers is rampant because of this ruling. The idea that the legislature, federal or state, can select a class of litigation that it disfavors, and strip from the advocates in this litigation the immunities available in other litigation, is cause for alarm. It is worth noting that litigation immunity is fully preserved for the advocate on the debtor's side of the case. Litigation immunity is a creation of the courts with roots in ancient English common law. The courts have consistently declared urgent policy prerogatives that justify litigation immunity, but the FDCPA example teaches that its existence depends on legislative favor.

Petitioning the Government – Anti-Slapp Statutes and Noerr-Pennington Immunities

The right of the people in the United States to petition the government for the redress of grievances is guaranteed by the First and Fourteenth Amendments to the Constitution. This right of petition has been elevated to a grant of immunity under constitutional doctrine constructed by the U.S. Supreme Court in a series of three decisions and by a multitude of

state statutes protecting “public participation.” These protections, although not specifically designed to protect lawyers in their professional endeavors, constitute in fact a significant protection to lawyers because it is most often lawyers who represent petitioners whether in court or in other settings. The lawyer gets the protection along with the client.

The Noerr-Pennington doctrine is named after two of the three Supreme Court decisions defining the doctrine. These are *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), first creating and applying the doctrine to petitioning a legislature for the passage of laws with anticompetitive intent. The doctrine is most closely associated with the defense of anti-trust violations. In *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the doctrine was applied to petitions of the executive for the enforcement of laws. Finally, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the doctrine was found to encompass petitions for relief before a court or administrative agency. The states have adopted the Noerr-Pennington doctrine and apply it to the lawyers representing the petitioners as exemplified in *Zeller v. Consolini*, 758 A. 2d 376 (Conn. App. Ct. 2000).

An increasing number of states have passed statutes immunizing “...lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights,” citing Minnesota Statutes 554.03 as an example. The important thrust of these so-called Anti-Slapp statutes is its creation of a procedure at the outset of a judicial claim for its dismissal unless the claimant can show the conduct was a tort which means typically abusive litigation of some sort. The burden is placed on the claimant to overcome the claim of immunity.

Because the lawyer will have litigation immunity in most judicial settings, the immunities granted for petitioning the government will be most valuable to lawyers in lobbying roles, petitioning regulatory agencies and petitioning local governments, e.g. zoning boards. The Anti-Slapp statutes have another valuable benefit to the successful defendant because these statutes for the most part allow the successful defendant to obtain an award of attorney fees. It is the only immunity defense that shifts the attorney fee.

Public Defender Immunity

Criminal defense lawyers are subject to malpractice liability if the accused error caused the conviction of the client and the client subsequently secures a reversal or vacation of the conviction. Most criminal defendants, however, are represented by public defenders who are provided at the expense of the state to satisfy the

requirement in the case of an indigent defendant that an accused has the right of legal counsel. Federally appointed public defenders are not considered "state actors" and do not possess exposure to liability under the civil rights statutes. The question of whether such federal public defenders are immune to malpractice liability is a state law question. So far the states that have ruled on the question of public defender immunity have split. In *Dziubak v. Mott*, 503 N.W.2d 771 (Minn. 1993), the Minnesota Supreme Court held that a public defender is immune from liability for malpractice. Although not finding them to be government agents, the Court emphasized that public defenders are performing a public service and do not have the privilege of selecting their clients. The Court found public policy goals important to maintaining immunity for defenders. In contrast, the Pennsylvania court, in *Veneri v. Pappano*, 622 A.2d 977 (Pa. Super Ct. 1993), found no reason to treat public defenders differently from privately retained counsel.

Case Study:

In *Wright v. Linebarger, Googan, Blair & Sampson, LLP*, 782 F. Supp. 2d 593, (W.D. Tenn. 2011), the court refused to dismiss claims of conversion and unjust enrichment against a law firm which had represented the City of Memphis in litigation to collect delinquent property taxes. In the multitude of suits, the claims had successfully resulted in judgments against the taxpayers for attorney fees of 20% of the delinquent sum plus the unpaid taxes. The 20% fee was paid by the taxpayer to the City in securing satisfaction of the judgment. The City in turn paid the law firm its contingent fee. The taxpayers then were collected in a class action as plaintiffs suing the law firm

on a variety of theories including malpractice, violation of the Tennessee Consumer Protection Act, conversion and unjust enrichment. On motions to dismiss by the firm, the court expressly found that the firm was engaged in the practice of law as counsel for the City in the collection of lawsuits and dismissed the TCPA and malpractice claims but retained the conversion and unjust enrichment claims. No discussion appears in the decision on litigation immunity or governmental immunity. Apparently the arguments were not raised at the initial stage.

It appears quite clear, however, that the law firm's attorneys were acting in an official capacity to aid the City in collecting taxes due it. Tennessee has not extended its waiver of immunity to conversion. Moreover the questioned fee was claimed in pleadings accepted by the court. Both circumstances suggest absolute immunity and require the issue be raised. There are other issues raised in this unique lawsuit as well. On what basis does the federal district court entertain a claim by the City's judgment debtors, asserting that their payment of a lawful state judgment constitutes conversion or renders the City's lawyers liable to them for accepting a fee for their representation of the City?

The case is not resolved at this writing and it will remain of great interest to observers of the law of attorney liability to see how the court ultimately rules. As a consistent strategy for lawyers defending such cases, however, it is an essential strategy to raise the immunity defenses at the very initial stages of pleading. It is a Pyrrhic victory for the lawyer in such cases to sub-

mit to litigation and its expense for a year or more only to be vindicated on grounds that would, if timely asserted, had absolved him completely at the outset.

CONCLUSION

It remains true that the source of the immunities granted to lawyers in their various roles, is lawyers sitting on the judicial bench, i.e. judges. It is not infrequently argued that these grants of immunity are simply examples of the brotherhood or sisterhood protecting itself. In some measure this argument has weight but in any case, where a court allows immunity, the rationale has to be tested. The grant of sovereign immunity to lawyers in public service whether by engagement or employment, is in furtherance of the long established doctrine insulating the sovereign from liability. As long as that doctrine is preserved, it makes no sense to deny it to lawyers.

The immunity of the advocate is a tradition carried over from English law. The rationale is that society gains more by allowing the advocate to faithfully and zealously protect the interests of the client without concern about retaliatory litigation from the client's adversaries. As the example of the FDCPA experience teaches us, this immunity will be preserved only with the grace of the legislature.

For the time being then, lawyers are granted substantial defenses in the civil courts. These defenses should be pressed on all occasions.



About Phillip Cole

Phil Cole is a tenacious and talented litigator. He has extensive litigation experience

in handling the defense of all types of claims brought against lawyers, shareholder disputes, commercial disputes, business torts, class actions and medical malpractice claims. Mr. Cole is a frequent lecturer and is a published author in the areas of trial strategies and professional liability subjects.

Mr. Cole is certified as a civil trial specialist by the National Board of Trial Advocacy. Mr. Cole, a member of the American Board of Professional Liability Attorneys, is certified as a specialist in the litigation of both legal and medical professional liability claims (this national organization is not accredited by the Minnesota Board

of Legal Certification). He is also a Leaders Forum Member of the American Association for Justice (formerly the Association of Trial Lawyers of America). He is president of Lommen Abdo.

Mr. Cole was selected as the Minneapolis Best Lawyers Legal Malpractice Lawyer of the Year for 2011. He is also recognized in the International *Who's Who, Who's Who in American Law*, the *National Registry of Who's Who*, and as a one of The Best Lawyers in America by *U.S. World & News Report*. He has been repeatedly included in the list of the Top 100 *Minnesota Super Lawyers*®. He is rated AV (the highest rating) by his peers as published in Martindale-Hubbell and is listed in the Martindale-Hubbell Bar Register of Preeminent Lawyers.

Bar Admissions:

- Minnesota, 1968
- U.S. Court of Appeals Eighth Circuit, 1968
- U.S. District Court District of Minnesota, 1968
- U.S. Supreme Court, 1967

Published Works

- "Legal Profession at the Crossroads," Bench & Bar, September, 1999

Classes or Lectures

- Dealing with Complex Litigation, Minnesota Institute of Legal Education

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- American Board of Professional Liability Attorneys, Member
- International Association of Defense Counsel, Member
- Minnesota Defense Lawyers Association, Past President, 1986-1988
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