

NO. 20-0066

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IN THE SUPREME COURT OF TEXAS

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HAYNES & BOONE, LLP AND  
ARTHUR L. HOWARD  
Petitioners

v.

NFTD, LLC F/K/A BERNARDO GROUP, LLC,  
BERNARDO HOLDINGS, LLC, PETER J. COOPER,  
AND JACQUELINE MILLER  
Respondents

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On Petition for Review from the Fourteenth Court of Appeals  
No. 14-17-00999-CV

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AMICUS BRIEF IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE

I am an attorney licensed to practice in the State of Texas, the United States District Courts for the Eastern, Northern, and Southern Districts of Texas, and the United States Court of Appeals for the Fifth Circuit. My practice includes defending attorneys against professional liability claims. I have defended Texas attorneys directly and for professional liability insurers. I have no pecuniary interest in the outcome of this litigation. My interest in this matter is professional because I have had the privilege to defend lawyers against claims made by third parties. Some of the cases cited by Petitioners, Respondents, and other Amici are cases in which I have defended the lawyer.<sup>1</sup> As a result, I have a particular interest in and understanding of the attorney immunity defense.

As required by Rule 11 of the Texas Rules of Appellate Procedure, I disclose that I am presenting this brief on my behalf, I have not been promised or received a fee for preparing this brief, and copies of this brief have been served on all parties.

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<sup>1</sup> See, e.g., *Sheller v. Corral Tran Singh, LLP*, 551 S.W.3d 357, 366 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2018, pet. denied); *Kelly v. Nichamoff*, 868 F.3d 371, 375 (5<sup>th</sup> Cir. 2017).

## **SUMMARY OF ARGUMENT**

This amicus brief is submitted to present an important issue not addressed in briefs by the parties and other Amici. As the record and the briefing reveal, the Petitioners' client has made a claim against them resulting in a waiver of the attorney-client privilege under Texas Rule of Evidence 503(d)(3). However, not every suit by a third party against the lawyer- those suits to which the attorney immunity defense may apply- involves a client that has chosen to waive the attorney-client privilege. If a client has not waived the attorney-client privilege, the most important evidence for the lawyer's defense will often be shielded by that privilege and deprive the lawyer of a full and fair defense because the Texas Rule of Evidence establishing the attorney-client privilege does not contain a waiver for circumstances where the lawyer is sued by a third party.

The problem with the decision of the Fourteenth Court of Appeals in this case, which is a problem that will continue if attorney immunity is not extended to transactional lawyers, is it creates a new class of vulnerable defendants by placing transactional lawyers in a position where their fiduciary duty to their client and the Texas Rules of Evidence prevent them from defending themselves fully. If attorney immunity is not extended to transactional lawyers, some lawyers will have to defend themselves against claims by third parties on an uneven playing field. This Court should avoid such a problem by extending attorney immunity to all lawyers when

their actions are within the scope of representing a client and are not foreign to the duties of an attorney.

### ARGUMENT

Drawing from firsthand experience, there are several common traits one can observe in cases when a transactional lawyer is sued, the allegations concern an underlying transaction on which the lawyer worked, and the plaintiff is the opposing party in the transaction. First, the lawyer's client is often insolvent or lacks the resources to make the other party to the transaction, the plaintiff, whole. Second, the lawyer works for a solvent firm, has an errors and omissions policy, or both. As a result, the lawyer becomes a convenient defendant for a plaintiff who, having made a bad business deal, is looking for any defendant that can make it whole regardless of that defendant's responsibility or the poor judgment of the plaintiff.

The Petitioners have pointed out that the rules and legal theories behind attorney immunity apply to transactional lawyers as well as trial lawyers. Petitioners have explained their conduct is in the course and scope of representing a client, and is not foreign to the duties of an attorney. Petitioners have further explained fraud is a basis for liability only when a lawyer takes an action foreign to the duties of an attorney, and the practice of law is not foreign to those duties.<sup>2</sup>

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<sup>2</sup> Following Petitioner's historical analysis of *Poole v. H. & T. C. R'y Co.*, a case that illustrates this distinction is *LJH, Ltd. v. Jaffe*, 2017 U.S. Dist. LEXIS 14436, 2017 WL 447572 (E.D. Tex. February 2, 2017). There, a law firm and individual attorney were both sued based on the

Still, failing to shield transactional lawyers from suits by third parties gives rise to another problem. The attorney-client privilege belongs not to the lawyer but the client.<sup>3</sup> While the lawyer may claim the privilege for the client, that is because the rules of evidence entitle the lawyer to do so in the client's place.<sup>4</sup> What happens to the transactional lawyer if they have evidence that would clear them of liability to the disgruntled opposing party in the transaction, but that evidence is protected by the attorney-client privilege and the client refuses to waive it? Further, what if the plaintiff does not seek to develop evidence protected by the privilege because the plaintiff anticipates the privileged evidence will help the lawyer and harm the plaintiff's case against the lawyer?<sup>5</sup> Transactional lawyers, if not protected by attorney immunity, will find themselves in a position where a full and vigorous

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individual attorney's conduct representing a client in a transaction. *Id.* The individual attorney was also a part-owner of the client, which sold equipment to another entity. *Id.* The individual attorney was not dismissed because he was an "owner and authorized representative" of the client and the court recognized attorney immunity did not apply when the attorney acts outside of his legal capacity based upon his ownership interest in the company. *Id.* Owning the seller is foreign to the duties of an attorney. *Id.* The firm, on the other hand, was dismissed even though its actions were those taken by the individual attorney because it owned no interest in the client. As a result, "its actions were purely those of legal representation, which must be protected under the attorney immunity doctrine." *Id.*

<sup>3</sup> TEX. RULE EVID. 503(b).

<sup>4</sup> See TEX. RULE EVID. 503(c)(reading, "The person who was the client's lawyer or the lawyer's representative when the communication was made may claim the privilege on the client's behalf—and is presumed to have authority to do so.").

<sup>5</sup> Currently, this Court has before it another case in which this is taking place. In Cause No. 20-0727; *Taylor v. Tolbert*, the Fourteenth Court of Appeals also refused to extend attorney immunity to criminal conduct despite this Court's holding in *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651 (Tex. 2020). On page seven of her Petition for Review, Terisa Taylor reveals, "She could not defend herself—privilege prevented her from addressing the actual allegations or in disclosing conversations."



defense cannot be made because of their fiduciary duty to the client. Transactional lawyers will have to defend themselves with one or both hands tied behind their back. The law should not permit a cause of action against a defendant where the rules of evidence dictate an unfair playing field for that defendant.

**A. A Third Party is not the Client.**

Texas Rule of Evidence 503 contains exceptions to the attorney-client privilege.<sup>6</sup> Unfortunately, when the plaintiff is a third party to the attorney-client relationship the exceptions contained in Texas Rule of Evidence 503 are useless.

The exception contained in Texas Rule of Evidence 503(d)(5) is the joint client doctrine, which applies when an attorney simultaneously represents two or more clients on the same matter.<sup>7</sup> “Where [an] attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.”<sup>8</sup> When the attorney immunity defense may apply to a claim, the circumstances will be mutually exclusive to the joint client doctrine. This Court has limited the defense to claims by non-clients.<sup>9</sup> So, this exception, which is limited

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<sup>6</sup> TEX. R. EVID. 503(d).

<sup>7</sup> *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 50 (Tex. 2012).

<sup>8</sup> *Id.* (citing *In re JDN Real Estate—McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, pet. denied) and TEX. R. EVID. 503(d)(5)).

<sup>9</sup> *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 657 (Tex. 2020); *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 482 (Tex. 2015).

to joint clients, would not permit a lawyer to testify about attorney-client privileged communications when the plaintiff is a third party to the attorney-client relationship.

The exception most often available to lawyers who are sued for their work representing a client is Texas Rule of Evidence 503(d)(3), which is available when the communication is relevant to an issue of breach of duty by a lawyer to the client.<sup>10</sup> When a lawyer is sued by the client, the lawyer is permitted to reveal privileged information so far as necessary to defend themselves.<sup>11</sup> Again, because this exception is limited to suits by clients, it is not available when the plaintiff is a third party.

Texas Rule of Evidence 503(d)(2) provides an exception for communications relevant to an issue between parties claiming through the same deceased client.<sup>12</sup> This exception can provide limited relief when the claim is brought by a third party. For example, the attorney in *Barcelo v. Elliott* could arguably rely on this exception since the plaintiffs were intended beneficiaries under a trust established by a decedent.<sup>13</sup> However, 503(d)(3) will be limited primarily to probate proceedings. It would not have been available to the lawyer in *Cantey Hanger, LLP v. Byrd*, or to

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<sup>10</sup> TEX. R. EVID. 503(d)(3).

<sup>11</sup> *West v. Solito*, 563 S.W.2d 240, 245 n. 3 (Tex.1978).

<sup>12</sup> TEX. R. EVID. 503(d)(2).

<sup>13</sup> *Barcelo v. Elliott*, 923 S.W.2d 575, 576 (Tex. 1996).

the many transactional lawyers involved in deals where the two sides are entities that may face bankruptcy, but not death.

In summary, these exceptions to the attorney-client privilege are of little use to most transactional lawyers who find themselves sued by a third party because of their work for a client. These exceptions are not a solution to not being able to rely on all the evidence that would assist in the transactional lawyer's defense, which is a problem the undersigned counsel has faced.<sup>14</sup>

**B. The Crime-Fraud Exception does not Help.**

There is a crime-fraud exception to the attorney-client privilege.<sup>15</sup> Still, that exception will not help the transactional lawyer in a suit brought by a third party to the attorney-client relationship. Lawyers are bound by their fiduciary duty to the client, which requires that they further their client's best interests.<sup>16</sup> In a circumstance where disclosing privileged information would aid the lawyer's defense, but would not assist the client and may even harm the client, the lawyer's duty is to the client first.<sup>17</sup> The lawyer is not in a position where they can put their

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<sup>14</sup> Cause No. 4:15-cv-02563; *Kelly v. Rembach et al.*; in the U.S. District Court for the Southern District of Texas- Houston Division

<sup>15</sup> TEX. RULE EVID. 503(d)(1).

<sup>16</sup> *Chu v. Hong*, 249 S.W.3d 441, 446 (Tex. 2008).

<sup>17</sup> *Id.*

interest first by arguing for the waiver of the privilege. Further, not every allegation against the lawyer will involve a crime or fraud.<sup>18</sup>

Even when fraud is alleged, the crime-fraud exception applies only if a prima facie case is made of contemplated fraud.<sup>19</sup> In making a fraud case to get around the attorney-client privilege, one must show a relationship between the communication for which the privilege is challenged and the prima facie proof offered.<sup>20</sup> That relationship must be established for each privileged communication.<sup>21</sup> The exception also requires evidence establishing the fraud happened at or during the time the communication took place, and the communication must have been created as part of perpetrating the fraud.<sup>22</sup>

Following these limitations, communications by a lawyer that may be helpful in defense against the claims of a third party would still be covered by the privilege because communications favorable to the lawyer, i.e., urging a client not to take actions that are potentially fraudulent, would not be part of perpetrating the fraud.<sup>23</sup> Such communications are not made to enable or aid the client in a fraud, which is

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<sup>18</sup> See *id.* (“[T]here are no such allegations here; the only claim is that Chu should have refused to draw up the bill of sale (although his client asked him to)”).

<sup>19</sup> *Granada Corp. v. Honorable First Court of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992).

<sup>20</sup> *Id.*

<sup>21</sup> *In re Harco Nat. Ins. Co.*, No. 2-09-351-CV, 2010 WL 2555629, at \*5 (Tex. App.—Fort Worth June 24, 2010, no pet.).

<sup>22</sup> *In re Seigel*, 198 S.W.3d 21, 26 (Tex. App.—El Paso 2006, orig. proceeding).

<sup>23</sup> *Id.*

what the law requires to circumvent the attorney-client privilege.<sup>24</sup> Thus, transactional lawyers, if they are sued by third parties, cannot rely on prudent advice they provided to the client in order to defend themselves.

**C. This Court Should Not Place Transactional Lawyers on an Unfair Playing Field.**

A lawyer is not going to be in a situation where he or she can assert an exception to the privilege in Texas Rule of Evidence 503 because it is helpful to the lawyer. Add to the lawyer's dilemma that the communication could be detrimental to the client, thereby breaching the fiduciary duty.<sup>25</sup> If attorney immunity is not recognized as protecting transactional attorneys, then transactional attorneys will also find themselves unable to defend themselves fully because the same principles that support them being protected by attorney immunity-encouraging zealous representation to protect the client's interest- will also prevent them from mounting a full defense.

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<sup>24</sup> TEX. R. EVID. 503(d)(1).

<sup>25</sup> See *Chu v. Hong*, 249 S.W.3d 441, 446 (Tex. 2008) (“As an attorney, Chu had a fiduciary duty to further the best interests of his clients, the buyers”); *Riverwalk CY Hotel Partners, Ltd. v. Akin Gump Strauss Hauer & Feld, LLP*, 391 S.W.3d 229, 236 (Tex. App.—San Antonio 2012, no pet.) (“A breach of fiduciary duty occurs when an attorney, among other things, subordinates his client's interest to his own”).

The attorney immunity defense established by this Court effectively protects transactional lawyers from the dilemma of being subject to liability to third parties and not being able to defend oneself because of the attorney-client privilege by restricting potential liability to third parties. The attorney immunity defense only protects the lawyer when one is in the course and scope of representing a client and the conduct is not foreign to the duties of an attorney.<sup>26</sup> The requirements for the defense to apply are roughly the same requirements for the privilege to attach to a lawyer's communications and work.

Communications outside the scope of client representation or foreign to the duties of an attorney are not protected by the attorney-client privilege.<sup>27</sup> If an attorney's liability concerns communications made to take ownership of another's property, there is no privilege because communications about taking another's property would not be made to facilitate the rendition of professional legal services as required by the Texas Rules of Evidence for the privilege to attach.<sup>28</sup> Communications made as a stockholder or director of a corporation, which are not in the course and scope of representing the client, also would not be privileged

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<sup>26</sup> *Cantey Hanger, L.L.P. v. Byrd*, 467 S.W.3d 477, 485 (Tex. 2015).

<sup>27</sup> See TEX. R. EVID. 503(b)(1)(limiting the privilege to "confidential communications made to facilitate the rendition of professional legal services to the client").

<sup>28</sup> *Poole v. H. & T. C. Ry Co.*, 58 Tex. 134, 137 (Tex. 1882).

because those communications are not made to facilitate the rendition of professional legal services.<sup>29</sup>

By preventing claims against lawyers when they are in the course and scope of representing a client, even transactional lawyers, this Court would protect lawyers from having to defend themselves without being able to truly defend themselves. This Court should clarify that the attorney immunity defense extends to transactional lawyers whose acts are taken in the course and scope of representing a client and whose conduct is not foreign to the duties of an attorney.

### CONCLUSION

There is no need for a cause of action against transactional lawyers that the law will not permit against trial lawyers. The attorney immunity defense should apply to transactional work as well litigation, just like the rules and laws that dictate how the lawyer must behave. Until transactional lawyers are subject to a different set of disciplinary rules and duties to the client, they should not suffer the burden of different rules for liability to third parties. Leaving transactional lawyers in a position where they cannot present all the evidence in their defense would “defeat

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<sup>29</sup> *LJH, Ltd. v. Jaffe*, 2017 U.S. Dist. LEXIS 14436, 2017 WL 447572 (E.D. Tex. February 2, 2017); *JJJJ Walker, LLC v. Yollick*, 447 S.W.3d 453, 462 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

the goal of hearing cases on their merits whenever possible, without advancing any corresponding policy considerations.”<sup>30</sup>

For this reason, in addition to all those advanced by the Petitioners, this Court should reverse the decision of the court of appeals and recognize attorney immunity is available to all Texas lawyers who are sued by third parties based on work performed for a client.

Respectfully submitted,

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Amicus Curiae

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<sup>30</sup> *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 282 (Tex. 1994).



## **CERTIFICATE OF COMPLIANCE**

Under Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned attorney certifies:

1. This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(1) and (2) because this brief contains 2,870 words.
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Respectfully submitted,

By: /s/ Richard G. Wilson  
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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing brief has been served on all counsel of record by electronic notice on this 22nd day of January, 2021, as follows:

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