



## Alerts

### Exoneration Rule Is Alive and Well in Texas

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*Lawyers for the Profession® Alert*

*Futch v. Baker Botts, LLP*, --- S.W.3d ---, 2014 WL 2583769 (Tx.Ct.App.)

#### Brief Summary

Despite the law firm's sharing of attorney-client information with law enforcement officials — leading to an indictment and guilty plea — a Texas appellate court concluded that the sole-proximate cause defense (or exoneration rule) applied to bar the plaintiff's legal malpractice claims.

#### Complete Summary

Plaintiff's employer hired the defendant law firm to represent the company and the plaintiff personally in relation to a Federal Energy Regulatory Commission (FERC) investigation. What followed were multiple actions that the plaintiff later alleged as the basis for his claims against the firm.

Defendant advised plaintiff to give a deposition, which was later used against him in an obstruction of justice prosecution. The FERC issued an order allegedly creating a conflict of interest between the plaintiff and his employer. Defendant allegedly did not inform the plaintiff of the alleged conflict and continued representing him.

Defendant then interviewed plaintiff and later provided that interview to the U.S. Attorney's Office without notifying plaintiff. Defendant never told the plaintiff that it was voluntarily cooperating with the government and providing information which was later used to indict plaintiff, including at least six discs of audio recordings focused on plaintiff. It was only later that the defendant "disengaged" from its representation of plaintiff, stating that information had recently come to its attention making further representation of plaintiff impossible.

After the resulting indictment, the plaintiff pled guilty to one of four felony counts, and he was sentenced to 57 months of imprisonment. Plaintiff sued defendant for breach of the retainer agreement, seeking benefit of the bargain damages, and for breach of fiduciary duty for disclosure of privileged information, seeking the equitable remedy of fee forfeiture, rather than damages.

The trial court granted summary judgment, and plaintiff appealed. The appellate court dismissed the contract claim reasoning that "if the gist of a client's complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then

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that complaint should be pursued as a negligence claim, rather than some other claim."

The more intriguing reasoning came in the appellate court's application of the actual innocence or the exoneration rule to plaintiff's claim. Despite the role allegedly played by the defendant leading to the indictment, which led to the guilty plea, the court concluded that the guilty plea prohibited recovery by plaintiff because everything that happened arose from plaintiff's illegal conduct. That is, plaintiff's "conviction was the sole proximate cause of [his] injuries, whether those injuries occurred pre-trial or during trial." "[T]he *Peeler* doctrine is based on strong public policy considerations that preclude civil liability in the situations in which the doctrine applies, despite the possibility that the attorney may have engaged in serious misconduct."

Plaintiff argued that the basis for the exoneration rule — preventing a plaintiff from profiting from his/her illegal acts — did not apply because he sought only fee forfeiture, and not damages. The court disagreed, citing Texas precedent.

### **Significance of Opinion**

This decision is significant because it demonstrates the vitality of the actual innocence or exoneration rule, despite alleged misconduct taken by a law firm. While liability may be avoided, lawyers should seriously consider whether or not to disclose client confidences (and consult with counsel), even during a criminal investigation.

For more information, please contact [Terrence P. McAvoy](#) or [Noah D. Fiedler](#).

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*