

Case Comment

Can Attorneys and Clients Conspire?

Farese v. Scherer, 342 F.3d 1223 (11th Cir. 2003).

A conspiracy is traditionally defined as “[a]n agreement between two or more persons to commit an unlawful act.”¹ The condition that two or more persons be involved is known as the “plurality” requirement. In *Farese v. Scherer*, the Eleventh Circuit held that an attorney acting within the scope of representation cannot be counted as a conspirator for purposes of the plurality requirement.² In other words, there can be no such thing as a conspiracy between an attorney and her client. This Comment argues that the Eleventh Circuit’s limitation on attorney-client conspiracies is illegitimate as a matter of statutory interpretation and ill advised as a matter of policy. Part I sets out the facts of *Farese*. Part II argues that a categorical rule against attorney-client conspiracies is misguided. Part III concludes.

I

In 2001, Thomas Farese filed suit against Harold Dude in federal district court under 42 U.S.C. § 1985(2), clause 1, which imposes civil liability for conspiracies to intimidate or injure parties or witnesses to federal lawsuits. Farese alleged that Dude and Dude’s attorneys intimidated and harassed him in order to compel his withdrawal of a prior lawsuit against Dude. The campaign of intimidation included personal threats and frivolous lawsuits filed against members of Farese’s family. The district court dismissed Farese’s claim, holding that he lacked standing and that he had failed to state a claim upon which relief could be granted.³

Farese appealed the dismissal to the Eleventh Circuit. After concluding that Farese had standing, the circuit court turned to what it described as “an

1. BLACK’S LAW DICTIONARY 329 (8th ed. 2004).
2. 342 F.3d 1223 (11th Cir. 2003).
3. *Id.* at 1226-27.

issue of first impression in our circuit: whether attorneys operating within the scope of their representation may be deemed conspirators in a § 1985 conspiracy.”⁴ Because of § 1985’s plurality requirement, whether Farese’s suit could survive summary judgment would turn on whether the court counted Dude’s attorneys as conspirators; if not, the claim would have to be dismissed.

After observing that few circuits had addressed the subject, the Eleventh Circuit reasoned that subjecting an attorney-client conspiracy to the prospect of liability might threaten the “right of a litigant to independent and zealous counsel.”⁵ The court further noted that other disciplinary mechanisms to punish attorney misconduct already exist.⁶ Given these considerations, it concluded that “as long as an attorney’s conduct falls within the scope of the representation of his client, such conduct is immune from an allegation of a § 1985 conspiracy.”⁷

II

The Eleventh Circuit’s decision to immunize attorney-client conspiracies was ill considered. Section 1985 speaks categorically, addressing conspiracies against “any party or witness in any court of the United States.”⁸ The words evince no intention to exempt attorney-client conspiracies, nor did the Eleventh Circuit claim otherwise. Indeed, the court made no attempt to justify its decision with respect to the words of the statute or the intent behind it. The court instead relied on policy grounds alone, limiting the reach of one right (the right to be free from conspiracies to intimidate or injure witnesses or parties to a lawsuit) in favor of another (the right to effective legal representation) without any legislative guidance about their relative importance. Tradeoffs between these sorts of incommensurable values are precisely the kinds of decisions least suitable for judicial resolution.

4. *Id.* at 1230.

5. *Id.* at 1231 (quoting *Heffernan v. Hunter*, 189 F.3d 405, 413 (3d Cir. 1999)).

6. *Id.*

7. *Id.* at 1232. At the time of publication, the only other circuit to have directly addressed the issue presented in *Farese* was the Third Circuit, from whose opinion the Eleventh Circuit quoted heavily. *See Heffernan v. Hunter*, 189 F.3d 405 (3d Cir. 1999). Other courts have addressed the related but distinct issue of whether a corporation and its outside counsel can fulfill § 1985(2)’s plurality requirement, but these cases involve considerations inapplicable to *Farese*. *See, e.g., Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108 (7th Cir. 1990) (relying on the intracorporate-conspiracy doctrine to find that a corporation and its outside counsel did not conspire). For a description of the intracorporate-conspiracy doctrine and an explanation of why it does not apply to *Farese*’s facts, see *infra* note 26.

8. 42 U.S.C. § 1985(2) (2000).

By resting its decision on its own policy judgment rather than on the statute's language, the court exceeded its judicial mandate.⁹ It is controversial whether courts should *ever* read equitable exceptions into statutes, even when a literal reading would seem to generate an outcome at odds with congressional intent.¹⁰ But even if equitable exceptions are sometimes appropriate to effectuate legislative intent, nothing about § 1985 suggests that a concern for zealous advocacy crossed Congress's mind while enacting it.¹¹ Congress may one day decide that the attorney-client relationship warrants an exception to federal conspiracy law. Until that happens, judges are not free to limit the scope of federal law merely because they decide it would be preferable for policy reasons.¹²

Not only is shielding attorney-client conspiracies from liability incompatible with the plain language of § 1985, but it is also bad policy. Though the "right of a litigant to independent and zealous counsel" is undoubtedly important, the Eleventh Circuit offered no reason to believe that the prospect of § 1985 liability would chill effective advocacy. Good faith lawyering is generally immune from liability, and "[c]ourts have been reluctant to impose any professional liability where the lawyer deals at arm's length with a client's antagonist . . . within minimum bounds of decency and orderly judicial process."¹³ If an attorney initiates a suit for

9. See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) ("To go beyond [a statute's words] is to usurp a power which our democracy has lodged in its elected legislature.").

10. Compare ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) ("[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."), with *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 439 (1990) (Marshall, J., dissenting) ("Where strict adherence to the literal language of the statute would produce results that Congress would not have desired, this Court has interpreted other statutes to authorize equitable exceptions though the plain language of the statute suggested a contrary result.").

11. Cf. *Langley v. FDIC*, 484 U.S. 86, 94 (1987) ("Petitioners are . . . urging us to engraft an equitable exception upon the plain terms of the statute. Even if we had the power to do so, the equities petitioners invoke are not the equities the statute regards as predominant.").

12. See *United States v. Granderson*, 511 U.S. 39, 74 n.7 (1994) ("Where the language of a statute is clear, that language . . . should be followed."); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990) (refusing to create an equitable exception to a statute on policy grounds); *id.* at 377 ("Understandably, there may be a natural distaste for the result we reach here. The statute, however, is clear."). A court may interpret a statute contrary to its plain meaning "[w]here the plain language of the statute would lead to patently absurd consequences that Congress could not *possibly* have intended." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment) (citation and internal quotation marks omitted). However, this "narrow exception," *id.*, applies only when Congress has made a scrivener's error, not an error of judgment, see Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 463-64 (2002) (describing the "'scrivener's error exception'" to the rule that courts should enforce a statute's plain language).

13. ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 301:602 (2003); see *id.* at 301:602-03 (describing various scenarios in which courts have declined to impose liability for lawyers' good faith advocacy); see also RESTATEMENT (SECOND) OF TORTS § 674 cmt. d (1977) (maintaining that an attorney who "acts primarily for the purpose of aiding his client in obtaining

good faith reasons—rather than to deter or injure a party or witness to a suit—by its terms § 1985(2) does not apply. Courts have consistently held that an alleged conspirator must act with the specific purpose of interfering with trial rights to come within § 1985(2)'s ambit.¹⁴ Further protecting zealous advocacy, courts have held that mere conclusory allegations of wrongdoing do not suffice to establish liability.¹⁵ Where a plaintiff can show deliberate, wrongful conduct by an attorney and her client, however, § 1985 should offer relief.

In other contexts, courts do not hesitate to hold lawyers accountable for intentionally collusive, fraudulent, or abusive behavior.¹⁶ Indeed, attorney misconduct gives rise to conspiracy liability in a variety of circumstances—for instance, attorney-client conspiracies to commit health care fraud or to obstruct justice.¹⁷ Yet the Eleventh Circuit's rule would shield an attorney from § 1985(2) liability even for clearly unethical actions, as long as the client's interests motivated his behavior.¹⁸ No reason exists to believe that an attorney's accountability for intimidating or intentionally injuring parties or witnesses to federal suits poses any greater risk to his client's rights than conspiracy liability in other contexts. Zealous advocacy ceases to merit protection when attorneys use their legal skills for improper purposes such as interfering with the administration of justice.¹⁹

a proper adjudication of his claim" rather than to harass or intimidate does not face liability even if he knows the claim is unlikely to succeed).

14. See, e.g., *Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 758 (5th Cir. 1987) (noting that a successful § 1985(2) plaintiff must connect the alleged conspiracy to a specific federal court proceeding with which the defendant has intentionally interfered); *Brawer v. Horowitz*, 535 F.2d 820, 840 (3d Cir. 1976) (same).

15. See, e.g., *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230-31 (10th Cir. 1990) (affirming the dismissal of the plaintiff's § 1985(2) claim on summary judgment because it lacked substantiation); *Rylewicz v. Beaton Servs.*, 888 F.2d 1175, 1181 (7th Cir. 1989) (rejecting the plaintiff's § 1985(2) claim for failure to show that "he was in fact hampered from testifying 'freely, fully, and truthfully'" (quoting § 1985(2))).

16. See, e.g., *Aranson v. Schroeder*, 671 A.2d 1023, 1027 (N.H. 1995) (creating "malicious defense" liability for "counsel who engages in the fostering of an unfounded defense or pursues a defense for an improper purpose"); *Nineteen N.Y. Props. Ltd. P'ship v. Uk Jee Kim*, 674 N.Y.S.2d 642 (N.Y. App. Div. 1998) (holding that an attorney may be liable if he maliciously pursues a baseless suit). See generally ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, *supra* note 13, at 301:603-05 (describing misconduct, including abuse of process, for which a lawyer may be held accountable to nonclients).

17. See, e.g., *United States v. McClatchey*, 217 F.3d 823 (10th Cir. 2000) (reversing a lower court's award of a new trial following the conviction of an attorney for conspiracy to commit Medicare and Medicaid fraud under 18 U.S.C. § 2 and 42 U.S.C. § 1320a-7b(b)(2)(A)); *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987) (affirming the conviction of an attorney for conspiracy to obstruct justice under 18 U.S.C. § 371 and § 1503).

18. See *Farese*, 342 F.3d at 1231 (holding that attorneys are immune from § 1985(2) liability "even if the challenged activity violates the canons of ethics").

19. See RESTATEMENT (SECOND) OF TORTS § 674 cmt. d (1977) (maintaining that if an attorney files a frivolous suit "for an improper purpose, . . . he is subject to the same liability as any other person"); Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 927 (1984) ("When the lawyer goes beyond the role of counselor and intentionally initiates defensive

Furthermore, traditional safeguards remain available to ensure that good faith advocacy is not chilled along with malicious behavior. For instance, attorney-client privilege prevents a § 1985 plaintiff from gaining access to an attorney's confidential statements unless the plaintiff presents evidence to support a reasonable belief that the statements will establish attorney misconduct and the court determines *in camera* that such misconduct has occurred.²⁰ And if an attorney is accused of participating in a conspiracy but possesses privileged information that will exonerate him, ethics rules permit him to disclose the privileged information for the purpose of clearing his name.²¹ Baseless accusations of attorney-client conspiracy are thus unlikely to prevail, and immunizing such conspiracies is unnecessary to safeguard lawful and vigorous advocacy.

After expressing its concerns over the potential chilling effects of § 1985 liability, the Eleventh Circuit went on to suggest that § 1985 liability is unnecessary because "disciplinary structures are currently in place to address any wrongful conduct by an attorney."²² This second argument undercuts the first one. If § 1985 does not provide significantly more deterrence than existing structures, then it is also unlikely to chill zealous advocacy. But if § 1985 meaningfully increases attorney liability, then presumably it also deters. The relevant inquiry, however, is not merely whether § 1985 liability provides additional deterrence, but also whether it provides the right kind of deterrence. Section 1985 represents a legislative judgment that access to federal courts deserves special protection above and beyond the protection that comes from general prohibitions on intimidation and threats. By holding to account attorneys whose abuses harm federal rightsholders, extending § 1985 liability to lawyers provides precisely the special safeguards for which the statute calls.

Beyond its deterrence value, § 1985 also allows conspiracy victims to receive compensation for any damages they have suffered. Other remedies for attorney wrongdoing do not necessarily include full compensation. For instance, 28 U.S.C. § 1927 covers "excess costs, expenses, and attorneys'

action that harasses the plaintiff and that the attorney knows or should know is without a credible basis, then the attorney, no less than the client, should be liable.").

20. See *United States v. Zolin*, 491 U.S. 554, 563 (1989) (holding that attorney-client privilege "does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime" (internal quotation marks omitted)); *id.* at 574 (explaining that, upon a party's claim that the crime-fraud exception applies, the court should conduct *in camera* review to determine the exception's applicability); *id.* at 574-75 ("[B]efore a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability.").

21. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83 (2000) ("The attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding . . . to defend the lawyer . . . against a charge by any person that the lawyer . . . acted wrongfully during the course of representing a client.").

22. *Farese*, 342 F.3d at 1231.

fees reasonably incurred because of vexatious litigation, but it does not provide for general compensatory damages.²³ The explicit purpose of Rule 11 sanctions is to deter, not to compensate, and Rule 11 sanctions are typically paid to the court, not the opposing litigant.²⁴ Suing under § 1985(2), clause 1 allows a victim of an attorney-client conspiracy to recover full compensation for the harms suffered, including nonfinancial harms.

Additionally, many other anti-frivolous-suit measures compensate only the frivolous-suit defendant. Imagine that *A* is involved in a suit against *B*, and *B* and his attorney threaten suit in another court against *C*, one of *A*'s witnesses, to keep *C* from testifying. *A* may not have a cause of action against *B*—only *C* would.²⁵ But *A*, not *C*, is the primary victim of the conspiracy, because it is *A*'s suit that suffers if *C* is too intimidated to testify.

When, as in *Farese*, an attorney and his client conspire in a manner that harms third parties, they should be held liable for their conduct as would any other co-conspirators.²⁶ Indeed, § 1985(2), clause 1, which protects

23. 28 U.S.C. § 1927 (2000).

24. FED. R. CIV. P. 11(c)(2) (providing for “an order directing payment to the movant of some or all of the reasonable *attorneys’ fees* and other *expenses* incurred as a direct result of the violation” but not providing for general compensatory damages (emphasis added)); *id.* (“A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.”); *see id.* advisory committee’s note (“Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty.”).

25. *See, e.g.,* GRiD Sys. Corp. v. John Fluke Mfg. Co., 41 F.3d 1318, 1319 (9th Cir. 1994) (“[Section] 1927 limits a federal court’s ability to sanction an attorney for conduct before another court.”); Citizens Bank & Trust Co. v. Case (*In re Case*), 937 F.2d 1014, 1023 (5th Cir. 1991) (“The language of § 1927 limits the court’s sanction power to attorney’s actions which multiply the proceedings in the case before the court. Section 1927 does not reach conduct that cannot be construed as part of the proceedings before the court issuing § 1927 sanctions.”); Healy v. Labgold, 271 F. Supp. 2d 303, 305 (D.D.C. 2003) (“While this court has inherent authority to sanction misbehavior by litigants in matters before it, no one has ever suggested that this inherent authority extends to misbehavior before another district court.” (footnote omitted)); *see also* RESTATEMENT (SECOND) OF TORTS § 674 (1977) (providing that the party against whom a suit is maliciously initiated may sue for “wrongful civil proceedings” but offering no remedy for other aggrieved parties).

26. An exception to the general availability of conspiracy liability arises where the alleged conspirators are members of the same corporate entity. Under traditional agency principles, the actions of a corporation’s agents are attributed to the corporation itself. As a result, when multiple agents of the same corporation engage in an action, only one actor—the corporation—is involved, and the plurality requirement cannot be met. *See, e.g.,* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (holding intracorporate activity immune from conspiracy prosecution under section 1 of the Sherman Act). This so-called “intracorporate-conspiracy doctrine” rests on a notion of corporate personhood inapplicable to the attorney-client relationship. A corporation cannot act except through its agents, whose deeds the law ascribes to the corporation, while an attorney merely acts on her client’s behalf. *See Farese*, 342 F.3d at 1230 n.8 (“Because *Farese* alleges a conspiracy between *Dude* and his attorneys, this appeal does not implicate the intracorporate-conspiracy doctrine.”); *Heffernan v. Hunter*, 189 F.3d 405, 413 (3d Cir. 1999) (“Although the case law on intracorporate conspiracies provides a convenient analogy for the

parties and witnesses to federal lawsuits, is particularly suited to attorney-client conspiracies, because the prospect of litigation may be used to threaten parties against invoking their legal rights. Section 1985 was originally enacted as part of the Ku Klux Klan Act of 1871 to deal with a campaign of intimidation that prevented the evenhanded administration of justice in the South.²⁷ Congress's intent was to ensure that such intimidation would not be allowed to interfere with access to justice in federal courts. Intimidation has many incarnations, and today it may be more likely to take the form of vexatious litigation than of physical violence.²⁸ *Farese* itself shows how the threat of frivolous suits can be used just like the threat of violence to interfere with federal court proceedings: *Farese* alleged that Dude and his attorneys "filed malicious and frivolous lawsuits against members of *Farese's* family in order to (1) intimidate and threaten him and his subpoenaed witnesses; (2) obstruct judicial proceedings; and (3) block his access to the courts."²⁹ Whether violence or ruinous lawsuits are threatened, § 1985(2), clause 1 should be available as a tool to protect the integrity of federal court proceedings.³⁰

Denying federal protection against attorney-client conspiracies would force victims of conspiracies against parties or witnesses to federal lawsuits to seek remedy in state court³¹—assuming any such remedy were available—while other conspiracy victims would retain the right to sue in federal court. The 1871 Act grew out of concern that state courts in the Reconstruction South were "unable or unwilling" to protect litigants and witnesses from the Klan's conspiratorial machinations.³² Though today's state courts are undoubtedly better equipped to combat misconduct,

attorney-client situation, there are important differences between the agency relationships involved in private corporate activities and those arising in the practice of law.").

27. See Brian J. Gaj, Note, *Section 1985(2) Clause One and Its Scope*, 70 CORNELL L. REV. 756, 757-59 & nn.10-20 (1985).

28. See, e.g., Stephen Calkins, *Summary Judgment, Motions To Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1137 (1986) (observing that, in the antitrust context, "[c]ountersuits and crossclaims . . . are notoriously frivolous"); Note, *Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions*, 74 MICH. L. REV. 106, 107 (1975) (describing the use of countersuits as "a new litigation strategy . . . [d]esigned . . . to harass [environmental] plaintiffs into compromising or withdrawing their suits").

29. *Farese*, 342 F.3d at 1226.

30. See *McCord v. Bailey*, 636 F.2d 606, 614 n.12 (D.C. Cir. 1980) ("Preserving the integrity of the federal judicial process clearly includes discouraging all conspiracies . . . that use threats, force, or intimidation to deter free, full, and truthful testimony.").

31. See *Farese*, 342 F.3d at 1231 ("[A]n offended third party may . . . proceed against the offending attorney under state law or report the conduct to state disciplinary bodies.").

32. CONG. GLOBE, 42d Cong., 1st Sess. 321 (1871) (statement of Rep. Stoughton) ("The State authorities and local courts are unable or unwilling to check the evil or punish the criminals."); see also *id.* at 321-22 (arguing that the Klan's system of "perjury and fraud" was "ingeniously devised for the express purpose of enabling a few bad men . . . to control the State courts and local authorities"); *id.* at 653 (statement of Sen. Osborn) ("The State courts, mainly under the influence of this oath [of Klansmen to perjure themselves in defense of fellow members], are utterly powerless . . .").

situations still exist in which the preservation of a federal forum remains beneficial. Imagine a litigant who sues in federal court under diversity jurisdiction precisely because she suspects she is unlikely to get a fair shake in state court—because she is an out-of-towner who fears favoritism toward her local opponent, because her opponent or his lawyer has a close relationship with the state judges, or for some other reason. Her opponent and his lawyer threaten to file a frivolous claim against her in state court if the federal suit is not dropped. Such a conspiracy victim would be reluctant to proceed in state court, because fear of bias in state court is precisely what led her to file suit in federal court in the first place.

Finally, by taking license with the plurality requirement, the Eleventh Circuit created a tool that courts may later use to further scale back conspiracy law. Once the plurality requirement is qualified by a “compelling policy concerns” test, the qualification may be easily extended by imaginative judges unsympathetic to conspiracy claims. It may only be a matter of time before a different court decides that “compelling policy concerns” justify expanding the ban on conspiracy liability to other contexts, like the doctor-patient relationship. After all, isn’t the right to unfettered medical assistance just as important as the right to unfettered legal assistance? Yet were the limitation on conspiracy liability thus extended, it could potentially pose a significant obstacle to prosecutions for conspiracy to commit medical or insurance fraud.³³

III

In a unanimous opinion construing § 1985(2), clause 1, the Supreme Court observed that “[p]rotection of the processes of the federal courts was an essential component” of the 1871 Act.³⁴ The protection of federal witnesses and parties against intimidation and harassment remains an important goal today. While the Eleventh Circuit’s limitation on attorney-client conspiracies may have been motivated by legitimate concerns, the court overstepped the bounds of the statute and its role as interpreter. If any limitation on the reach of conspiracy law is to be implemented, it should be the product of legislative, not judicial, action.

—Allon Kedem

33. See 18 U.S.C. § 371 (2000) (criminalizing conspiracies by “two or more persons” to defraud the United States). Section 371 is routinely applied to medical and insurance fraud cases. See, e.g., *United States v. Neely*, 980 F.2d 1074 (7th Cir. 1992) (affirming the conviction of defendants engaged in a conspiracy to commit fraud in violation of § 371, in a scheme in which “patients” and their doctor submitted false medical reports); *United States v. Boscia*, 573 F.2d 827 (3d Cir. 1978) (same).

34. *Kush v. Rutledge*, 460 U.S. 719, 727 (1983).