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## SPECIAL PROJECT - Third-Party Actions against Attorneys

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# **SPECIAL PROJECT**

## **THIRD-PARTY ACTIONS AGAINST ATTORNEYS**

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## COUNTERSUITS AGAINST ATTORNEYS—A PREFACE

DAVID G. OWEN\*

A growing phenomenon and annoyance for lawyers is the increasing incidence of countersuits brought against them for illegally filing frivolous claims. The special project that follows these prefatory remarks examines a variety of different policy issues raised by this type of litigation in the context of the three most common theories of liability underlying countersuits against attorneys—malicious prosecution, abuse of process, and defamation—and problems faced by lawyers seeking to obtain liability insurance against such countersuits. No attorney is today immune from having such an action filed against him or her, and the risks to every lawyer of becoming the defendant in such an action are increasing every day. Although the courts have thus far allowed these countersuits against attorneys only reluctantly and in the most extreme cases, every lawyer should be aware of the fundamental issues and recent changes in this tumultuous area of the law.

An initial step for analysis of the attorney countersuit problem is to inquire into the reasons for the recent increase in such actions, and a preliminary excursion into these causes is all that will be attempted here. The first place to look for an explanation is toward the plaintiff in this type of action and toward the type of harm that has allegedly been inflicted. Typically, the plaintiff is a physician who has been sued unsuccessfully by the defendant attorney in an earlier malpractice action brought on behalf of a party who suffered harm as a patient under the physician's treatment. The basic claim in the doctor's later countersuit against the lawyer ordinarily alleges that the earlier malpractice suit was groundless, frivolous, and should never have been brought—as a reasonable investigation by the attorney before filing the lawsuit would have revealed. The harm to the defendant in a groundless lawsuit can indeed be very great, involving considerable time, expense, anguish, embarrassment, damage to reputation and professional standing, loss of business, increase

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in insurance premiums, and sometimes loss of employment. Even if the defendant in the groundless suit prevails (and there is always some risk of losing even a "groundless" action), his victory in the first action alone often cannot fully remedy many of his losses. It is no wonder, then, that the defendant in a frivolous suit looks to the courts to give him satisfaction.

Another explanation for the proliferation of these claims lies with the defendants to the countersuits examined here—the lawyers themselves. It can be postulated with confidence that some lawyers do sometimes file groundless suits, that sometimes these suits result from the careless (and on occasion reckless) action or inaction of the lawyer who fails adequately to examine the facts or the law of the case, and that sometimes lawyers file actions that they know full well are devoid of merit. It is easy for a lawyer to become so accustomed to living daily with the law that he forgets the awesome power under his control that he can at will turn loose upon another person—whose life may be seriously and irreparably altered as a result when the law appears on his doorstep in the form of a sheriff bearing a summons and complaint. Nor should it be surprising when the plaintiff's attorney in an apparently groundless lawsuit becomes the target in a subsequent action based on his role in the prior suit. Especially when the first action looks clearly frivolous to the defendant, the plaintiff's lawyer in that action may well appear to the defendant as little more than a hired gun, and an unscrupulous one at that. The lawyer, moreover, may have intimidated and embarrassed the defendant at deposition or at trial—perhaps intentionally—in a manner naturally engendering enormous hostility in the person facing the brunt of such attacks. Lawyers themselves, therefore, are to some extent responsible for the increase in countersuits of this type.

A third source of the increasing incidence of these actions lies in the courts. For at least the past generation, judicial activism has been marching forward throughout the nation. Although recent signs indicate that in some respects and places this general movement may be slowing down, and in some instances even turning back toward a policy of restraint, the "forward" march of the courts creating rights and duties from former dust is beginning to appear from place to place in the context of countersuits against attorneys.

A final reason for the increase in these actions may lie in the

law schools. Institutions of legal education have been pumping out more and more new lawyers in recent years, especially over the last decade, and the ramifications for actions of the kind examined here should be apparent. In their search for business, some new attorneys may not fully understand their new-found power and responsibilities and hence may be more likely than their senior brethren to file groundless suits. Moreover, there are presumably only a determinate number of suits with "merit," yet the influx of new lawyers must find business of some type. So, as the supply of "meritorious" legal business spreads thin, some lawyers may look harder for merit in a dispute brought by a potential client who might have been turned away as having a "groundless" suit if there were more "meritorious" business to go around. The law schools may thus be responsible not only for churning out too many lawyers but also for failing to instill in them an adequate sense of their powers and responsibilities as officers of the law and of the courts. Perhaps the emphasis in law schools on creative thinking in deciding *why* and *how* to sue should be tempered by some basic thought regarding the ethics of deciding *whether* and *when* an attorney may *fairly* sue.

Whether countersuits against attorneys will soon become a serious threat is difficult to predict. Yet, because such actions are definitely becoming more common, their essential causes, elements, implications and insurability need to be studied by lawyers, judges and legal academics. The following project examining this topic is thus most timely and should serve as a helpful springboard into this important area of the law.



# MALICIOUS PROSECUTION

## I. INTRODUCTION

A malicious prosecution is a civil or criminal action<sup>1</sup> brought maliciously and without probable cause to believe that it will succeed, by or at the instance of the plaintiff, which terminates in favor of the defendant, who is damaged thereby.<sup>2</sup> To hold his prosecutor liable, a maliciously prosecuted defendant cannot cross-claim or counterclaim in the original action<sup>3</sup> but instead must bring a subsequent tort action for malicious prosecution.<sup>4</sup>

Victims of malicious prosecution frequently sue the plaintiffs who instigated the original actions,<sup>5</sup> but victims are increasingly seeking damages from attorneys who represent plaintiffs in maliciously prosecuted actions.<sup>6</sup> Although pleading and proof requirements for malicious prosecution are essentially the same in actions against attorneys as in actions against any other defendant, a plaintiff proceeding against an attorney must overcome the reluctance of the courts to hold attorneys liable for what may have been the good faith exercise of professional duty and judgment.<sup>7</sup>

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1. In some jurisdictions, the term "malicious prosecution" applies only to the wrongful initiation of criminal proceedings, while the term "malicious use of civil process" is used to denote the wrongful initiation of civil proceedings. See, e.g., *Crawford v. Theo*, 112 Ga. App. 83, 84, 143 S.E.2d 750, 753 (1965); *Baldwin v. Davis*, 188 Ga. 587, 588-89, 4 S.E.2d 458, 461-62 (1939).

2. *Truett v. Georgeson*, 273 S.C. 661, 662, 258 S.E.2d 499, 499 (1979).

3. *Babb v. Superior Court*, 3 Cal. 3d 841, 846, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971).

4. *Id.* at 846, 479 P.2d at 381, 92 Cal. Rptr. at 181.

5. See, e.g., *Truett v. Georgeson*, 273 S.C. 661, 258 S.E.2d 499 (1979); *Ruff v. Eckersds Drugs Inc.*, 265 S.C. 563, 220 S.E.2d 649 (1975); *Patterson v. Bogan*, 261 S.C. 87, 198 S.E.2d 586 (1973).

6. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376, 1384 (N.D. Iowa 1978), *aff'd mem.*, 590 F.2d 341 (8th Cir. 1978); Note, *Malicious Prosecution Liability of Plaintiff's Counsel for an Unwarranted Medical Malpractice Suit—New Developments in Physician Countersuits for Unfounded Medical Malpractice Claims*, 7 N. Ky. L. Rev. 265 (1980). The majority of the recent malicious prosecution actions against attorneys have been brought by physicians as a counterattack to the growing number of medical malpractice claims. From 89 to 111 physician countersuits have been filed in the last twenty years; most were filed in the last five years. *Id.* at 266.

7. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376, 1381 (N.D. Iowa 1978), *aff'd mem.*,



This hesitancy stems in part from the nature of malicious prosecution as a tort that allows a party in an adversary relationship with an attorney to recover damages for some breach of duty owed to him by the attorney. Courts are interested in minimizing this duty of attorneys to third parties in order to avoid the conflict of interest that could result from recognizing an attorney's duty of care to both his client and his client's adversary.<sup>8</sup> This concern of the courts must be balanced against the rights of wrongfully sued defendants to be compensated.<sup>9</sup> This section of the project will outline the basic elements of a cause of action in malicious prosecution and will consider the willingness of the courts to impose liability on attorneys who bring frivolous actions.

## II. BACKGROUND

The tort of malicious prosecution was originally designed to achieve a balance between the competing policies of keeping vindictive and harassing suits out of court and of giving the public free access to the courts without fear of reprisal by retaliatory litigation.<sup>10</sup> The tort arose in England and evolved there as part of a comprehensive system, the central feature of which is an internal sanction against frivolous litigation.<sup>11</sup>

The early Anglo-Saxon legal system harshly punished the instigation of false suits, but the system was replaced after the Norman invasion of England by a system of amercement, which allowed the King or court to assess a monetary penalty against one found guilty of bringing a false suit.<sup>12</sup> Although amercement was more flexible than its predecessor, it did not provide an adequate remedy for victims of frivolous suits, because penalties

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590 F.2d 341 (8th Cir. 1978).

8. See, e.g., *Norton v. Hines*, 49 Cal. App. 3d 917, 922, 123 Cal. Rptr. 237, 240 (1975); *Martin v. Trevino*, 578 S.W.2d 763, 768 (Tex. Civ. App. 1979).

9. 49 Cal. App. 3d at 922, 123 Cal. Rptr. at 240.

10. *Mallen, An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort*, 46 INS. COUNSEL J. 407, 409 (1979).

11. Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1229 (1979).

12. *Id.* at 1221. Anglo-Saxon courts required a losing complainant to pay his opponent a sum based on the opponent's social status or, in lieu of payment, to lose his tongue. *Id.*

were paid directly to the King or court.<sup>13</sup> In response to the plight of the victims of false suits, the writ of conspiracy was created as the first external sanction for misuse of the English legal system. This writ recognized an action for the wrongful initiation of legal process but was available only against straw-parties.<sup>14</sup>

With the appearance of action on the case, the English courts were able to fashion a broader remedy for the many types of malicious prosecutions that were unreachable by the writ of conspiracy.<sup>15</sup> In 1269, the Statute of Marlbridge<sup>16</sup> created a statutory right in successful defendants in maliciously prosecuted civil actions to recover costs and damages in the same action. This right eventually led to the requirement in the English system that a person seeking to bring a subsequent tort action for malicious prosecution must show special damage beyond that ordinarily incurred in defending a lawsuit and for which he had already been compensated.<sup>17</sup> Because the tort of malicious prosecution is a remedy that is secondary to the imposition of costs in the original action, it is disfavored by the English courts.

The American legal community has adopted the tort of malicious prosecution, but without the internal sanctions of the English system. Since its adoption, the tort has developed in two forms. A significant minority of American jurisdictions follow the English rule in civil cases,<sup>18</sup> requiring a plaintiff to plead and prove malice, lack of probable cause, favorable termination, and special injury beyond that normally incurred in defending a lawsuit.<sup>19</sup> "Special injury" ordinarily means deprivation of liberty or

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13. *Id.* at 1222-23.

14. *Id.* at 1224-25.

15. *Id.* at 1227.

16. Statute of Marlbridge, 1269, 52 Hen. 3.

17. Note, *Groundless Litigation*, *supra* note 11, at 1228-29. In dictum in the early English case of *Savile v. Roberts*, 1 *Ld. Raym.* 374, 91 *Eng. Rep.* 1147 (1698), the court created the special damage category that evolved into the modern English rule. *Id.*

18. Eighteen jurisdictions follow the minority English rule. See note 19 *infra*.

19. *Davis v. Boyle Bros.*, 73 A.2d 517 (D.C. 1950); *Price v. Fidelity Trust*, 74 Ga. App. 836, 41 S.E.2d 614 (1947); *Schwartz v. Schwartz*, 366 Ill. 247, 8 N.E.2d 668 (1937); *Wetmore v. Mellinger*, 64 Iowa 741, 18 N.W. 870 (1884); *Harter v. Lewis Stores, Inc.*, 240 S.W.2d 86 (Ky. 1951); *North Point Constr. Co. v. Sagner*, 185 Md. 200, 44 A.2d 441 (1945); *Potts v. Imlay*, 4 N.J.L. 382 (1816); *Johnson v. Walker-Smith Co.*, 47 N.M. 310, 142 P.2d 546 (1943); *Burt v. Smith*, 181 N.Y. 1, 73 N.E. 495 (1905), *appeal dismissed*, 203 U.S. 129 (1906); *Pittsburg J.E. & E.R. Co. v. Wakefield Hardware Co.*, 138 N.C. 174, 50 S.E. 571 (1905); *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489, 56 N.E. 198

property,<sup>20</sup> and courts in a minority of jurisdictions strictly construe the special injury requirement.<sup>21</sup> Humiliation, embarrassment, emotional anguish, subjection to public scorn and ridicule,<sup>22</sup> injury to reputation, and increased liability insurance premiums<sup>23</sup> have been held insufficient to constitute special injury. Some jurisdictions, however, have recognized as special damages the loss of the right to practice a profession<sup>24</sup> and business losses resulting from a suit.<sup>25</sup>

The majority of American jurisdictions,<sup>26</sup> including South Carolina,<sup>27</sup> have eliminated the special injury requirement, recognizing that because the tort of malicious prosecution is not a secondary remedy in the United States and is unaccompanied by an internal sanction system, the English rule should not be ap-

(1900); *Mitchell v. Silver Lake Lodge*, 29 Or. 294, 45 P. 798 (1896); *Norcross v. Otis Bros. & Co.*, 152 Pa. 481, 25 A. 575 (1893); *Ring v. Ring*, 102 R.I. 112, 228 A.2d 582 (1967); *Smith v. Adams*, 27 Tex. 28 (1863); *Ayyildiz v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980); *Petrich v. McDonald*, 44 Wash. 2d 211, 266 P.2d 1047 (1954); *Myhre v. Hessey*, 242 Wis. 638, 9 N.W.2d 106 (1943).

20. *Ayyildiz v. Kidd*, 220 Va. 1080, 266 S.E.2d 108, 111 (1980).

21. See Note, *Malicious Prosecution Liability of Plaintiff's Counsel*, *supra* note 6, at 274.

22. *Greer v. State Farm Fire & Cas. Co.*, 139 Ga. App. 74, 78, 227 S.E.2d 881, 885 (1976).

23. *Berlin v. Nathan*, 64 Ill. App. 3d 940, 946, 381 N.E.2d 1367, 1371 (1978).

24. *Carver v. Lykes*, 262 N.C. 345, 353, 137 S.E.2d 139, 145 (1964).

25. *Rivers v. Dixie Broadcasting Corp.*, 88 Ga. App. 131, 138, 76 S.E.2d 229, 236 (1953).

26. Twenty-three states follow the majority rule. See *Peerson v. Ashcroft Cotton Mills*, 201 Ala. 348, 78 So. 204 (1917); *Ackerman v. Kaufman*, 41 Ariz. 110, 15 P.2d 966 (1932); *Leek v. Brasfield*, 226 Ark. 316, 290 S.W.2d 632 (1956); *Eastin v. Bank of Stockton*, 66 Cal. 123, 4 P. 1106 (1884); *Sell v. Simpson*, 91 Colo. 461, 15 P.2d 1084 (1932); *Calvo v. Bartolotta*, 112 Conn. 396, 152 A. 311 (1930); *Tatum Bros. Real Estate & Inv. Co. v. Watson*, 92 Fla. 278, 109 So. 623 (1926); *McCardle v. McGinley*, 86 Ind. 538 (1882); *Carbondale Inv. Co. v. Burdick*, 67 Kan. 329, 72 P. 781 (1903); *Graffagnini v. Schnaider*, 164 La. 1108, 115 So. 287 (1927); *White v. Dingley*, 4 Mass. 433 (1808); *Brand v. Hinchman*, 68 Mich. 590, 36 N.W. 664 (1888); *O'Neill v. Johnson*, 53 Minn. 439, 55 N.W. 601 (1893); *Harvill v. Tabor*, 240 Miss. 750, 128 So. 2d 863 (1961); *Brady v. Ervin*, 48 Mo. 533 (1871); *McCormick Harvesting Mach. Co. v. Willan*, 63 Neb. 391, 88 N.W. 497 (1901); *Kolka v. Jones*, 6 N.D. 461, 71 N.W. 558 (1897); *Johnson v. Moser*, 181 Okla. 75, 72 P.2d 715 (1937); *Cisson v. Pickens Sav. and Loan Ass'n*, 258 S.C. 37, 186 S.E.2d 822 (1972); *Teesdale v. Liebschwager*, 42 S.D. 323, 174 N.W. 620 (1919); *Lipscomb v. Shofner*, 96 Tenn. 112, 33 S.W. 818 (1896); *Closson v. Staples*, 42 Vt. 209 (1869); *Van Hunter v. Beckley Newspapers Corp.*, 129 W. Va. 302, 40 S.E.2d 332 (1946).

27. *Cisson v. Pickens Sav. and Loan Ass'n*, 258 S.C. 37, 186 S.E.2d 822 (1972). The court in *Cisson* stated that "while there is authority to the contrary, we find no sound basis to deny a cause of action for malicious prosecution founded upon any ordinary civil proceeding, where the necessary elements are present." *Id.* at 43, 186 S.E.2d at 825.

plied. These jurisdictions follow the American or Restatement rule,<sup>28</sup> which requires a plaintiff, when the prior action is civil, to plead and prove only malice, lack of probable cause, and favorable termination of the prior action.<sup>29</sup> When the underlying action is criminal, both majority and minority jurisdictions require pleading and proof only of malice, lack of probable cause, and favorable termination.<sup>30</sup>

### III. ELEMENTS OF THE CAUSE OF ACTION

#### A. *Favorable Termination of a Prior Proceeding*

At the threshold, a plaintiff in a malicious prosecution action must be able to show that a prior proceeding has terminated<sup>31</sup> and that the termination was in his favor.<sup>32</sup> Two considerations underlie this rule. First, the possibility exists that juries in two separate actions might render inconsistent verdicts concerning lack of probable cause for the original action.<sup>33</sup> Second, and more important in the context of malicious prosecution actions against attorneys, concurrent actions might result in deprivation of effective counsel for the plaintiff in the original action: if a malicious prosecution action could be filed before termination of the original action, an attorney's interest in protecting himself against a possible malicious prosecution claim might

28. RESTATEMENT (SECOND) OF TORTS § 674 (1977).

29. See cases cited at note 26 *supra*. In jurisdictions following the majority rule, a successful plaintiff may recover attorney's fees, costs, and other such damages as he may prove. RESTATEMENT (SECOND) OF TORTS § 674 (1977). In jurisdictions following the English rule, once a plaintiff alleges and proves special injury beyond that normally incurred in defending litigation, actual damages may also be recovered. *Bickel v. Mackie*, 477 F. Supp. 1376 (N.D. Iowa 1978). Punitive damages may normally be awarded in both jurisdictions when a cause of action exists for actual damages. *Theo v. Crawford*, 119 Ga. App. 81, 166 S.E.2d 368 (1969). For further discussion of the availability of punitive damages, see note 70 *infra*.

30. See, e.g., *Powell v. Cohen*, 116 Ga. App. 48, 50, 156 S.E.2d 495, 496 (1967); *Ruff v. Eckers Drugs, Inc.*, 265 S.C. 563, 566, 220 S.E.2d 649, 651 (1975).

31. *Harrellson v. Johnson*, 119 S.C. 59, 61, 111 S.E. 882, 882 (1921); *Whaley v. Lawton*, 57 S.C. 256, 259, 35 S.E. 558, 559-60 (1900)(dictum).

32. *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965).

33. See *Mallen*, *supra* note 10, at 412; Note, *What Constitutes a Termination in Favor of the Plaintiff in Order to Successfully Maintain an Action for Malicious Prosecution in South Carolina?*, 6 S.C.L.Q. 375, 376 (1954).

Lack of probable cause is a question of fact in an action for malicious prosecution and is usually determined by the jury. *Parrot v. Plowden Motor Co.*, 246 S.C. at 323, 143 S.E.2d at 609.

conflict with his interest in pursuing his client's original action.<sup>34</sup>

Although criminal proceedings and civil suits commonly supply the basis for malicious prosecution claims, other proceedings having "the earmarks of a separate proceeding" will support an action for malicious prosecution.<sup>35</sup> Thus, a cross-complaint for affirmative relief<sup>36</sup> or interposition of a defense by an intervening party<sup>37</sup> may support a subsequent action for malicious prosecution, but a request for admissions and other discovery proceedings will not.<sup>38</sup> Other types of proceedings that courts have held sufficient to sustain malicious prosecution actions include issuance of a search<sup>39</sup> or arrest<sup>40</sup> warrant; some types of federal<sup>41</sup> or state<sup>42</sup> administrative proceedings; and interference with property by the appointment of a receiver, the granting of an injunction, or the issuance of a writ of replevin.<sup>43</sup>

Because a plaintiff in a malicious prosecution action must show termination of a prior proceeding in his favor, he cannot seek relief through a cross-claim or counterclaim in the original action.<sup>44</sup> The plaintiff may establish favorable termination by showing, among other things, the dismissal of a criminal charge,<sup>45</sup> a discharge by a magistrate upon preliminary investiga-

34. See Mallen, *supra* note 10, at 412.

35. *Twyford v. Twyford*, 63 Cal. App. 3d 916, 922, 134 Cal. Rptr. 145, 148 (1976).

36. *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 53, 529 P.2d 608, 616, 118 Cal. Rptr. 184, 192 (1975).

37. *Cisson v. Pickens Sav. and Loan Ass'n*, 258 S.C. at 43-44, 186 S.E.2d at 825.

38. *Twyford*, 63 Cal. App. 3d at 922, 134 Cal. Rptr. at 148.

39. *Spangler v. Booze*, 103 Va. 276, 278, 49 S.E. 42, 43 (1904).

40. See, e.g., *Patterson v. Bogan*, 261 S.C. 87, 198 S.E.2d 586 (1973). An arrest based upon a void warrant will not sustain a malicious prosecution action in some states. See, e.g., *Lowe v. Turner*, 115 Ga. App. 503, 506, 154 S.E.2d 792, 795 (1967).

41. *Rivers v. Dixie Broadcasting Corp.*, 88 Ga. App. 131, 76 S.E.2d 229 (1953).

42. *Carver v. Lykes*, 262 N.C. 345, 137 S.E.2d 139 (1964). An administrative proceeding that is adjudicatory in nature and that may adversely affect legally protected interests will support a malicious prosecution action. *Id.* at 352, 137 S.E.2d at 145.

43. *Manufacturers & Jobbers Fin. Corp. v. Lane*, 221 N.C. 189, 196, 19 S.E.2d 849, 853 (1942)(dictum)(defendant's counterclaim failed to state a cause of action for malicious prosecution). For examples of other proceedings that will sustain a malicious prosecution action, see Mallen, *supra* note 10, at 410-11.

44. *Babb v. Superior Court*, 3 Cal. 3d 841, 846, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971)(dicta); *Metro Chrysler-Plymouth, Inc. v. Pearce*, 121 Ga. App. 835, 840, 175 S.E.2d 910, 915 (1970).

45. *Jennings v. Clearwater Mfg. Co.*, 171 S.C. 498, 506, 172 S.E. 870, 873 (1934). Dismissal of a charge by reason of failure of the complainant to appear and prosecute has been held to constitute favorable termination. *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 913 (1966).

tion,<sup>46</sup> an order discharging the accused,<sup>47</sup> or in some jurisdictions, an entry of *nolle prosequi*.<sup>48</sup> On the other hand, terminations of proceedings by agreement between the parties or at the instance or consent of the maliciously prosecuted party<sup>49</sup> and settlements or compromises in the absence of fraud or duress do not constitute favorable terminations.<sup>50</sup> Furthermore, dismissal or discharge by a magistrate with no jurisdiction to try the case,<sup>51</sup> placement of a criminal prosecution on a dead docket,<sup>52</sup> and return of a "no bill" by a grand jury without discharge by the court<sup>53</sup> cannot be deemed favorable terminations.

### B. Lack of Probable Cause

In addition to showing favorable termination of a prior proceeding, a plaintiff must prove that no probable cause existed for the belief that the action would succeed.<sup>54</sup> Probable cause in the context of malicious prosecution actions is defined as that

46. *Glover v. Heyward*, 108 S.C. 486, 489, 94 S.E. 878, 878 (1918).

47. *Clemmons v. Nicholson*, 188 S.C. 124, 130, 198 S.E. 180, 183 (1938)(prima facie evidence of termination).

48. *Perry v. Hurdle*, 229 N. C. 216, 219, 49 S.E.2d 400, 402 (1948). A *nolle prosequi* is a formal entry by the prosecuting officer in which he declares that he will not prosecute the case further. *State v. Gaskins*, 263 S.C. 343, 347, 210 S.E.2d 590, 592 (1974).

Whether an entry of *nolle prosequi* will sustain a malicious prosecution action in South Carolina is uncertain. Early cases held that it would not. *See, e.g., Heyward v. Cuthbert*, 15 S.C.L. (4 McCord) 354 (1827). The United States District Court in South Carolina, however, has found an entry of *nolle prosequi* sufficient to support a subsequent malicious prosecution claim. *White v. Coleman*, 277 F. Supp. 292, 297 n.2 (D.S.C. 1967). In its decision, the district court relied on an early South Carolina Supreme Court case, *Harrelson v. Johnson*, 119 S.C. 59, 111 S.E. 882 (1921). *Harrelson*, however, cited *Heyward* with approval. Thus, the district court's reason for reliance on *Harrelson* is not clear. It is certain, however, that the filing of a *nolle prosequi* accompanied by a discharge by the court, which will support favorable termination, may be used as prima facie evidence of lack of probable cause in South Carolina. *Lipford v. M'Collum*, 19 S.C.L. (1 Hill) 82 (1833).

49. *E.g., Jennings v. Clearwater Mfg. Co.*, 171 S.C. 498, 506, 172 S.E. 870, 873 (1934)(dictum)(facts of case did not establish termination by consent or agreement).

50. *See Leonard v. George*, 178 F.2d 312 (4th Cir. 1949), *cert. denied*, 339 U.S. 965 (1950).

51. *See Whaley v. Lawton*, 57 S.C. 256, 35 S.E. 558 (1900).

52. *Courtenay v. Randolph*, 125 Ga. App. 581, 583, 188 S.E.2d 396, 397-98 (1972).

53. *Thomas v. DeGraffenreid*, 11 S.C.L. (2 Nott & McC) 143, 145 (1819).

54. *See Kinton v. Mobile Home Indus., Inc.*, 274 S.C. 179, 181, 262 S.E.2d 727, 728 (1980); *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965)(defendant in malicious prosecution action need not prove that he had probable cause to bring the original action; the burden of proof is on the plaintiff); *Hogg v. Pinckney*, 16 S.C. 387, 393 (1881).

which would warrant the belief by a reasonable man, taking into account the surrounding facts and circumstances, that the prosecution is legally just and proper.<sup>55</sup> One court has articulated a two-part test for determining whether an attorney has probable cause to bring an action.<sup>56</sup> First, probable cause exists when, after a reasonable investigation and an industrious search of legal authority, an attorney has an honest belief that his client's claim is tenable in the forum in which it is brought. Second, the attorney's subjective belief in his client's claim must satisfy an objective standard—the belief must be that of a reasonable attorney.<sup>57</sup> Only those facts and circumstances that were or should have been known to the defendant in a malicious prosecution action at the time he brought the original action may be taken into account in determining whether he had probable cause.<sup>58</sup>

For purposes of determining the existence of probable cause, an attorney is not required to view the representations of his client with such distrust that he conducts a thorough investigation of the facts to ensure that his client is telling the truth,<sup>59</sup> a good faith inquiry into the facts before him is all that is required.<sup>60</sup> Even a showing that the attorney has discovered evidence contrary to the position taken by his client does not in itself support an inference of a lack of honest belief in the tenability of his client's claim.<sup>61</sup> Moreover, an attorney need not be convinced that his client's claim is strong or that it will be successful.<sup>62</sup>

Surrounding facts and circumstances such as a conviction in the prior proceeding<sup>63</sup> or a return of a bill of indictment by a grand jury<sup>64</sup> may be sufficient to show probable cause. The in-

55. *Ruff v. Eckerd's Drugs, Inc.*, 265 S.C. 563, 568, 220 S.E.2d 649, 652 (1975); *Hyde v. Southern Grocery Stores*, 197 S.C. 263, 277, 15 S.E.2d 353, 359 (1941).

56. *See Tool Research and Eng'g. Corp. v. Henigson*, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

57. *Id.* at 683, 120 Cal. Rptr. at 297.

58. *Elletson v. Dixie Home Stores*, 231 S.C. 565, 572, 99 S.E.2d 384, 387 (1957).

59. 46 Cal. App. 3d at 684, 120 Cal. Rptr. at 297-98.

60. *Id.* at 683, 120 Cal. Rptr. at 297.

61. *Id.* at 684, 120 Cal. Rptr. at 298.

62. *Id.* at 683, 120 Cal. Rptr. at 297. Requirement of such a belief would encourage attorneys to take only popular cases or those cases that do not contradict existing policy. *Mallen, supra* note 10, at 414.

63. *Falkner v. Almon*, 22 N.C. App. 643, 645, 207 S.E.2d 388, 389 (1974) (conclusive evidence of probable cause).

64. *Kinton v. Mobile Home Indus., Inc.*, 274 S.C. 179, 182, 262 S.E.2d 727, 728

verse is not true, however, and an acquittal<sup>65</sup> or a return of a "no bill" by a grand jury<sup>66</sup> is not *prima facie* evidence of a lack of probable cause. In the absence of fraud, a finding of probable cause by a magistrate or lower court in the original action is *prima facie* evidence of probable cause to bring the action, notwithstanding a reversal or acquittal by a higher court.<sup>67</sup>

### C. Malice

Malice, "a critical element in an action for malicious prosecution,"<sup>68</sup> must also be proved by an injured plaintiff.<sup>69</sup> Generally, malice is evidenced by "a wrongful act intentionally done without just cause or excuse."<sup>70</sup> In malicious prosecution actions against attorneys, malice has been found upon a showing that an attorney acted in bad faith and with an improper purpose in bringing suit.<sup>71</sup> A showing that an attorney had knowledge of his client's malice and lack of probable cause and that he participated in the prosecution with that knowledge is sufficient to establish that the attorney himself was motivated by malice.<sup>72</sup>

(1980)(*prima facie* evidence of probable cause).

65. *Fowle v. Fowle*, 263 N.C. 724, 729, 140 S.E.2d 398, 402 (1965).

66. *Fulmer v. Harmon*, 34 S.C.L. (3 Strob.) 576, 581 (1849).

67. *See, e.g., Baranan v. Kazakos*, 125 Ga. App. 19, 22, 186 S.E.2d 326, 328 (1971); *Priddy v. Cook's United Dep't Store*, 17 N.C. App. 322, 324, 194 S.E.2d 58, 59 (1973).

68. *Truett v. Georgeson*, 273 S.C. 661, 662, 258 S.E.2d 499, 499 (1979)(citation omitted).

69. *Margolis v. Telech*, 239 S.C. 232, 237, 122 S.E.2d 417, 419 (1961).

70. *Id.* at 238, 122 S.E.2d at 419-20 (citing *Hogg v. Pinckney*, 16 S.C. 387, 398 (1881)). There are two types of malice: actual and legal. The definition provided in the text is that generally given for legal malice. Actual malice or malice in fact can be shown by establishing that the prosecutor was motivated by ill will, spite, grudge, or conscious disregard of the rights of another. *Lee v. Southland Corp.*, 219 Va. 23, 244 S.E.2d 756 (1978). Because both types of malice will support an action for malicious prosecution, the distinction, for the most part, is unimportant in this context. In some jurisdictions, however, a plaintiff may recover punitive damages only when he has shown that the defendant acted with actual malice; legal malice will not sustain an award of punitive damages. *E.g., id.* at 27, 244 S.E.2d at 759; *Carver v. Lykes*, 262 N.C. 345, 353, 137 S.E.2d 139, 145 (1964).

71. *Munson v. Linnick*, 255 Cal. App. 2d 589, 595, 63 Cal. Rptr. 340, 344 (1967).

72. *Peck v. Chouteau*, 91 Mo. 138, 150-51, 3 S.W. 577, 581 (1887). An attorney's partners in a law firm ordinarily will not be held vicariously liable, absent a showing that they were active, knowledgeable participants in the frivolous suit. *See Jackson v. Jackson*, 20 N.C. App. 406, 201 S.E.2d 722 (1974)(the court relied in part on NORTH CAROLINA STATE BAR CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(1),-(7), to hold that an attorney engaging in a malicious prosecution is not acting within the ordinary course of partnership business, and thus his partners cannot be held vicariously liable).



When an attorney acts in good faith reliance on his client's representations, courts have declined to infer or find malice, even though his advice to sue was mistaken.<sup>73</sup> "Good faith" implies that the attorney has a reasonable basis for believing his client's representations.<sup>74</sup> Unless the presence of malice is obvious from the facts or the attorney has special knowledge that his client is maliciously motivated and has no probable cause, an attorney may act on the assumption that his client is honest.<sup>75</sup>

In some jurisdictions, malice sufficient to sustain a malicious prosecution action is evidenced by "wanton or reckless refusal to make reasonable investigation with regard to the propriety of a prosecution, or by the refusal to terminate such prosecution upon notice that it is wrongful."<sup>76</sup> At least one court, however, has refused to find malice when an attorney failed to interview or consult with any witnesses before filing a medical malpractice suit, noting that an opposite ruling might have serious consequences when a failure to investigate before filing suit was reasonably motivated by considerations such as imminent expiration of the statute of limitations.<sup>77</sup> Another court has construed an attorney's violation of the ABA Code of Professional Responsibility to be evidence of malice in an action for malicious prosecution.<sup>78</sup> In *DeDavies v. U-Haul Co.*,<sup>79</sup> the Georgia Court of Appeals held an attorney liable for malicious prosecution and predicated its finding of malice on the attorney's pursuit of a criminal course of action to collect a debt in violation of a canon

73. See, e.g., *Kassan v. Bledsoe*, 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799, 803 (1967).

74. See *North Point Constr. Co. v. Sagner*, 185 Md. 200, 208, 44 A.2d 441, 445 (1945). See notes 59-61 and accompanying text *supra*.

75. *Maechtle v. Clapp*, 121 Kan. 777, 781, 250 P. 303, 304 (1926).

76. *Ray v. City Bank & Trust Co.*, 358 F. Supp. 630, 638 (S.D. Ohio 1973)(citations omitted).

77. See *Spencer v. Burglass*, 337 So. 2d 596, 599 (La. App. 1976).

78. Many plaintiffs in malicious prosecution actions against attorneys have argued violation of the ABA Code of Professional Responsibility as an alternative cause of action to malicious prosecution, but the courts have been reluctant to interpret the attorney's code of ethics as creating a private cause of action. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978); *Martin v. Trevino*, 578 S.W.2d 763 (Tex. Civ. App. 1979); *Ayyildiz v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980). Plaintiffs frequently argue that the ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(1) (1980), which prohibits an attorney from bringing a suit to maliciously injure another, creates a duty of care to the attorney's adversary.

79. 154 Ga. App. 124, 267 S.E.2d 633 (1980).

of the Georgia code of ethics.<sup>80</sup>

Malice need not be demonstrated explicitly but may be inferred from want of probable cause,<sup>81</sup> although this inference may be rebutted by a showing of no malice on the part of the defendant.<sup>82</sup> Courts are willing to draw this inference because "where a person institute[s] a prosecution against another without probable cause, it is difficult to conceive of any other motive but a malicious one for bringing the prosecution."<sup>83</sup> Drawing this inference is not in keeping with the usual strictures placed on standards of proof in malicious prosecution cases, however, and courts generally do not draw the opposite inference—that the presence of malice creates an inference of a lack of probable cause.<sup>84</sup>

#### IV. APPLICATION OF THE TORT IN ACTIONS AGAINST ATTORNEYS

Malicious prosecution is, with few exceptions,<sup>85</sup> the sole cause of action available to many victims of frivolous lawsuits.<sup>86</sup> Other potential theories of liability such as negligence, prima facie tort, and violation of an attorney's code of ethics<sup>87</sup> have been uniformly rejected because of the courts' reluctance to create an unduly broad duty of care when a cause of action molded by centuries of judicial attention to competing policies already exists under the tort of malicious prosecution.<sup>88</sup>

80. *Id.* at 126, 267 S.E.2d at 635.

81. *Elletson v. Dixie Home Stores*, 231 S.C. 565, 574, 99 S.E.2d 384, 389 (1957).

82. *Bell v. Graham*, 10 S.C.L. (1 Nott & McC.) 278 (1818).

83. *Baker v. Hornik*, 57 S.C. 213, 227-28, 35 S.E. 524, 529 (N.D. Iowa 1900).

84. *Cisson v. Pickens Sav. and Loan Ass'n*, 258 S.C. 37, 44, 186 S.E.2d 822, 825 (1972)(citing *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965)).

85. Under certain circumstances, a wrongfully prosecuted party may be able to proceed against an attorney on theories of abuse of process or false imprisonment. See *Courtenay v. Randolph*, 125 Ga. App. 581, 188 S.E.2d 396 (1972)(dictum); *Huggins v. Winn Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693, *appeal after remand*, 252 S.C. 353, 166 S.E.2d 297 (1967)(dictum).

Although not directly beneficial to him, a wrongfully prosecuted party may also make a complaint to the bar committee to have a disciplinary action brought against an attorney. *Petrou v. Hale*, 43 N.C. App. 655, 662, 260 S.E.2d 130, 135 (1979)(dictum).

86. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376, 1384 (N.D. Iowa 1978).

87. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978)(negligence, abuse of process, and violation of the code of ethics); *Drago v. Buonagurio*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978)(prima facie tort).

88. See, e.g., *Norton v. Hines*, 49 Cal. App. 3d 917, 920-22, 123 Cal. Rptr. 237, 239-41 (1975); *Petrou v. Hale*, 43 N.C. App. 655, 661, 260 S.E.2d 130, 135 (1979).

Because damages for malicious prosecution may be a plaintiff's exclusive remedy and because a standard of care that is too restrictive may vitiate the right of maliciously prosecuted parties to be compensated, the standard of care applied in malicious prosecution actions should approximate the public's expectations of reasonable competence in attorneys. It is reasonable to expect that attorneys will undertake at least a preliminary investigation of the facts and law before bringing a suit.<sup>89</sup> Moreover, if an attorney has reason to believe that no basis exists for a claim or that his client is motivated by malice, then he should advise the client of the potential liability that attaches to vengeance suits and should consider the possibility of withdrawing from the case or declining the employment.<sup>90</sup>

In practice, however, attorneys are rarely held liable to adversaries unless the conduct in question is particularly egregious. *Peerman v. Sidicane*,<sup>91</sup> a recent Tennessee case, illustrates the level of conduct that will support an action for malicious prosecution. In that case an attorney was held liable for the malicious prosecution of a medical malpractice suit after he alleged, with absolutely no factual basis, that the defendant physician had engaged in fee splitting.<sup>92</sup> In *Munson v. Linnick*,<sup>93</sup> a California attorney was held liable for bringing suit solely to harrass a party into paying for goods in order that he might recover his fifty percent contingency fee.<sup>94</sup> By limiting recovery under the tort of malicious prosecution to cases concerning flagrant conduct, the courts overlook the plight of legitimately injured victims of less offensive conduct.

A more equitable balance of the various parties' interests might be achieved by adopting the approach of assessing costs within the maliciously prosecuted action—the internal sanction

89. See *Tool Research and Eng'g. Corp. v. Henigson*, 46 Cal. App. 3d 675, 683, 120 Cal. Rptr. 291, 297 (1975).

90. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(B)(1) (1980), which provides that an attorney must withdraw from an action if he knows the suit was maliciously brought.

91. 605 S.W.2d 242 (Tenn. App. 1980).

92. *Id.* at 243.

93. 255 Cal. App. 2d 589, 63 Cal. Rptr. 340 (1967).

94. *Id.* at 591-92, 63 Cal. Rptr. at 341-42. One observer notes that the more egregious instances of misconduct may never go to trial but are settled, which may account for the small number of cases holding attorneys liable to their opposing parties. Note, *Malicious Prosecution Liability of Plaintiff's Counsel*, *supra* note 6, at 280.

that is the pillar of the English system.<sup>95</sup> Yet, because the imposition of costs is generally considered a matter within the purview of the legislature, few courts have been willing to assess costs in frivolously prosecuted suits.<sup>96</sup> Thus, absent legislative action, attorneys are likely to be safe from liability for malicious prosecution unless their conduct can be characterized as intentional and egregious.

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95. Note, *Groundless Litigation*, *supra* note 11, at 1232-33.

96. See Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 621-22(1977).



## ABUSE OF PROCESS

### I. INTRODUCTION

Recent years have witnessed a significant expansion of tort liability<sup>1</sup> and a dramatic increase in the amount of damages awarded to successful litigants.<sup>2</sup> These circumstances, coupled with the prosperity that they have occasioned for attorneys, have led to an increase in the number of frivolous lawsuits.<sup>3</sup> The targets of groundless suits, often physicians who have been sued for medical malpractice,<sup>4</sup> occasionally seek legal redress for financial and personal costs resulting from suits in which they were ultimately found to be without liability. Although the success of these efforts to recover such losses has generally been limited,<sup>5</sup> the attorney who has represented a plaintiff in a groundless suit nevertheless may become the defendant in a law suit brought by his client's opponent<sup>6</sup> for abuse of process.<sup>7</sup> This section of the project will consider the elements of a cause of action for abuse of process and the efficacy of this remedy as a deterrent to attorneys who might bring frivolous lawsuits on behalf of their clients.<sup>8</sup>

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1. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, *Preface*, at xi (4th ed. 1971); Note, *Attorneys' Liability to Clients' Adversaries for Instituting Frivolous Lawsuits: A Reassertion of Old Values*, 53 ST. JOHNS L. REV. 775 (1979).

2. Note, *Attorneys' Liability*, *supra* note 1, at 775; Project, *The Medical Malpractice Threat: A Study of Defensive Medicine*, 1971 DUKE L. J. 939, 940-42 & n.4.

3. Biernbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003, 1008-14 (1977).

4. See, e.g., *Morowitz v. Marvel*, 423 A.2d 196 (D.C. 1980); *Bull v. McCuskey*, — Nev. —, 615 P.2d 957 (1980); *Peerman v. Sidicane*, — Tenn. App. —, 605 S.W.2d 242 (1980); *Petrou v. Hale*, 43 N.C. App. 655, 260 S.E.2d 130 (1979).

5. Note, *Attorneys' Liability*, *supra* note 1, at 775.

6. See *Antelman v. Lewis*, 480 F. Supp. 180 (D. Mass. 1979); *Voytko v. Ramada Inn*, 445 F. Supp. 315 (D.N.J. 1978); *Bird v. Rothman*, — Ariz. App. —, 627 P.2d 1097 (1981); *Laird v. Vogel*, 334 So. 2d 650 (Fla. Dist. Ct. App. 1976); *Little v. Sowers*, 167 Kan. 72, 204 P.2d 605 (1949); *Jacobs v. Mann*, 300 Mass. 258, 15 N.E.2d 482 (1938); *Friedman v. Dozor*, 83 Mich. App. 429, 268 N.W.2d 673 (1978); *Journeymen, Inc. v. Judson*, 40 Or. App. 249, 608 P.2d 563 (1980).

7. The attorney may also be sued for libel and slander, 33 S.C.L. REV. 341 (1981); malicious prosecution, 33 S.C.L. REV. 315 (1981); negligence, *Morowitz v. Marvel*, 423 A.2d 196; or "prima facie tort", *Fox v. Issler*, 77 A.D.2d 860, 431 N.Y.S.2d 69 (1980).

8. Thus, the scope of this section will not extend beyond the liability of a private

## II. BACKGROUND

Abuse of process, first recognized as a separate and distinct cause of action in 1838 in the landmark case of *Grainger v. Hill*,<sup>9</sup> evolved out of the necessity to provide a remedy for injured parties who had no cause of action for malicious prosecution. In *Grainger*, the mortgagee of a ship, aware that the ship's master would be unable to repay a loan secured by the ship's registry, had the master arrested before the loan was due and threatened him with imprisonment to compel him to surrender the ship's registry.<sup>10</sup> Although the court held that there could be no recovery for malicious prosecution,<sup>11</sup> the plaintiff nevertheless prevailed on the novel theory of abuse of process. This theory dispensed with the requirements of want of probable cause and successful termination of the prior proceeding, both of which must be proved in an action for malicious prosecution.<sup>12</sup>

American courts soon accepted the rationale of *Grainger*,<sup>13</sup> and, today, every American jurisdiction recognizes the tort of abuse of process.<sup>14</sup> Although the first abuse of process suit against an attorney, *Dishaw v. Wadleigh*,<sup>15</sup> was unsuccessful, the court in that case recognized that such a cause of action could lie

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attorney for abuse of process, although others involved in the judicial system face such potential liability. See, e.g., *State ex rel. Richardson v. Edgeworth*, 214 So. 2d 579 (Miss. 1968)(justice of the peace); *Earl v. Winne*, 14 N.J. 119, 101 A.2d 535 (1953)(prosecutor); *Dean v. Kochendorfer*, 206 A.D. 777, 220 N.Y.S. 919 (1923), *rev'd*, 237 N.Y. 384, 143 N.E. 229 (1924) (magistrate).

9. 4 Bing (N.C.) 212, 132 Eng. Rep. 769 (1838).

10. *Id.* at 215-16, 132 Eng. Rep. at 770-71.

11. Here, a lack of favorable termination of the prior action precluded an action for malicious prosecution. *Id.* at 215-16, 132 Eng. Rep. at 770-71. See also W. PROSSER, *supra* note 1, § 121; Note, *Abuse of Process: A Gap in Alabama Law*, 10 CUM. L. REV. 209, 210 (1979); Note, *Abuse of Process—A Misunderstood Concept*, 20 CLEV. ST. L. REV. 401, 402-03 (1971).

12. 4 Bing (N.C.) at 215-16, 132 Eng. Rep. at 770-71.

13. See, e.g., *Page v. Cushing*, 38 Me. 523 (1854); *Smith v. Weeks*, 60 Wisc. 94, 18 N.W. 778, 784 (1884)(implicitly).

14. See, e.g., *Antelman v. Lewis*, 480 F. Supp. 180 (D. Mass. 1979); *Wilson v. Brooks*, 369 So. 2d 1221 (Ala. 1979); *Bird v. Rothman*, \_\_\_ Ariz. App. \_\_\_, 627 P.2d 1097 (1981); *Morowitz v. Marvel*, 423 A.2d 196 (D.C. 1980); *Friedman v. Dozorc*, 83 Mich. App. 429, 268 N.W.2d 673 (1978); *Bull v. McCuskey*, \_\_\_ Nev. \_\_\_, 615 P.2d 957 (1980); *Journeyman, Inc. v. Judson*, 40 Or. App. 249, 608 P.2d 563 (1980); *Huggins v. Winn Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967); *Peerman v. Sidicane*, \_\_\_ Tenn. App. \_\_\_, 605 S.W.2d 242 (1980). See also, *Annot.*, 97 A.L.R.3d 688 (1980).

15. 15 A.D. 205, 44 N.Y.S. 207 (1897).

against an attorney as well as against his client.<sup>16</sup>

### III. A CAUSE OF ACTION

An action for abuse of process<sup>17</sup> arises whenever regularly issued legal process is used to accomplish a goal or purpose for which the process was not designed.<sup>18</sup> Generally, a plaintiff must prove only three essential elements to be successful: (1) an ulterior motive or malice; (2) an act in the use of process that amounts to a misuse or perversion of legal procedure; and (3) an injury resulting from the misuse of process against him.<sup>19</sup>

#### A. *Ulterior Motive*

The plaintiff in an action for abuse of process must first establish that the party who allegedly abused the legal process did so with an ulterior motive or malice.<sup>20</sup> This element requires a showing that the defendant had a wrongful purpose in his use of

16. *Id.* at 211-12, 44 N.Y.S. at 210.

17. The cause of action is sometimes called "malicious abuse of process". 3 J. DOOLEY, *MODERN TORT LAW* § 41.09 (1977); 1 F. HARPER & F. JAMES, *LAW OF TORTS* § 4.9 (1956); 72 C.J.S. *Process* § 119 (1951).

18. R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* § 46 (1977). The *Restatement (Second) of Torts* states that "[o]ne who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." *RESTATEMENT (SECOND) OF TORTS* § 682 (1977).

19. 1 AM. JUR. 2d *Abuse of Process* § 4 (1962); 72 C.J.S. *Process* § 120(b) (1951). Most courts incorporate the third element as part of the second element. *See, e.g., Bird v. Rothman*, \_\_\_ Ariz. App. \_\_\_, 627 P.2d 1097 (1981); *Geier v. Jordan*, 107 A.2d 440, 441 (D.C. 1954); *Bull v. McCuskey*, \_\_\_ Nev. \_\_\_, \_\_\_, 615 P.2d 957, 960 (1980); *Peerman v. Sidicane*, \_\_\_ Tenn. App. \_\_\_, \_\_\_, 605 S.W.2d 242, 245 (1980). A small minority of courts require additional elements. *See Walden v. Walden*, 355 So. 2d 372 (Ala. Civ. App. 1978) (requiring both regularly issued process and a want of probable cause); *Delk v. Colonial Fin. Co.*, 118 Ohio App. 451, 194 N.E.2d 885 (1963) (drawing no distinction between actions for abuse of process and those for malicious prosecution). A number of commentators have criticized the minority positions. *See Note, Abuse of Process: A Gap in Alabama Law*, *supra* note 11, at 210-14; *Note, Abuse of Process—A Misunderstood Concept*, *supra* note 11, at 405-07.

20. *Bird v. Rothman*, \_\_\_ Ariz. App. \_\_\_, 627 P.2d 1097 (1981); *Younger v. Solomon*, 38 Cal. App. 3d 289, 297, 113 Cal. Rptr. 113, 118 (1974); *Brody v. Ruby*, 267 N.W.2d 902, 905 (Iowa 1978); *Peisner v. Detroit Free Press*, 68 Mich. App. 360, 366, 242 N.W.2d 775, 778 (1976); *Bull v. McCuskey*, \_\_\_ Nev. \_\_\_, \_\_\_, 615 P.2d 957, 960 (1980); *Petrou v. Hale*, 43 N.C. App. 655, 659, 260 S.E.2d 130, 133 (1979); *Haggerty v. Moyerman*, 321 Pa. 555, 559, 184 A. 654, 655 (1936); *Nagy v. McBurney*, \_\_\_ R.I. \_\_\_, \_\_\_, 392 A.2d 365, 367 (1978); *Peerman v. Sidicane*, \_\_\_ Tenn. App. \_\_\_, \_\_\_, 605 S.W.2d 242, 244-45 (1980).



process in a prior action,<sup>21</sup> that is, that the goal of the prior action was not encompassed within the proper use of process.<sup>22</sup>

Ultrior motive may be difficult to prove.<sup>23</sup> The courts have recognized, however, that several motives are clearly improper. It has been held, for example, that an unsuccessful attempt to force a settlement in one case may be evidence of an ultrior motive for the instigation of a second, unfounded suit;<sup>24</sup> that the desire by one attorney to gain an advantage over another in pending litigation may be a malicious motive for instituting disciplinary proceedings against the other attorney;<sup>25</sup> and that an ultrior motive exists if an action is brought solely to harass an opponent<sup>26</sup> or to extort money not owed.<sup>27</sup> Furthermore, some courts have been willing to infer the existence of an ultrior motive from misuse or misapplication of legal process.<sup>28</sup>

### B. Misuse of Legal Procedure

Because "there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions,"<sup>29</sup>

21. 72 C.J.S. *Process* § 121 (1951). See also *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980); *Little v. Sowers*, 167 Kan. 72, 204 P.2d 605, 608 (1949); *Bull v. McCuskey*, — Nev. —, —, 615 P.2d 957, 960 (1980). The term "wrongful purpose" is sometimes referred to as an intent to seek a collateral advantage. *Twyford v. Twyford*, 63 Cal. App. 3d 916, 923, 134 Cal. Rptr. 145, 148 (1976).

22. 72 C.J.S. *Process* § 121 (1951); 1 AM. JUR. 2d *Abuse of Process* § 1 (1962).

23. It is especially difficult to prove that an attorney had an ultrior motive. See notes 53-79 and accompanying text *infra*.

24. *Bull v. McCuskey*, — Nev. —, —, 615 P.2d 957, 960 (1980).

25. *Netterville v. Lear Seigler, Inc.*, No. 52,531 (Miss., filed April 29, 1981). See also *Younger v. Solomon*, 38 Cal. App. 3d 289, 298, 113 Cal. Rptr. 113, 119 (1974) (desire to use interrogatory for purpose of making disciplinary proceedings known to public constituted malicious motive).

26. *Board of Educ. v. Farmingdale Classroom Teachers Ass'n*, 46 A.D.2d 794, 795, 360 N.Y.S.2d 922, 925, *aff'd*, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975). But see *Twyford v. Twyford*, 63 Cal. App. 3d 916, 923, 134 Cal. Rptr. 145, 148 (1976) (holding that intent to harass is not sufficient ultrior motive).

27. *Voytko v. Ramada Inn*, 445 F. Supp. 315, 324-25 (D.N.J. 1978); *Little v. Sowers*, 167 Kan. 72, 204 P.2d 605, 608 (1949); *Huggins v. Winn Dixie Greenville, Inc.*, 249 S.C. 206, 212, 153 S.E.2d 693, 696 (1967).

28. For examples of factual situations in which courts have permitted this inference, see text accompanying notes 33-40 *infra*.

29. *DiSante v. Russ Financial Co.*, 251 Pa. Super. Ct. 184, 189, 380 A.2d 439, 441 (1977). See also *Peisner v. Detroit Free Press*, 68 Mich. App. 360, 362, 242 N.W.2d 775, 778 (1976); *Drago v. Buonagurio*, 61 A.D.2d 282, 402 N.Y.S.2d 250, *rev'd*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978).

ulterior motive alone does not constitute an abuse of process.<sup>30</sup> The essence of the tort is the improper use of regularly issued process.<sup>31</sup> Thus, even if a plaintiff establishes that the defendant had an ulterior motive in bringing an earlier suit, he must still prove that the defendant misused or perverted the legal process. Misuse or perversion may be found when an act of the defendant was done "under the authority of the court . . . [and this act was equivalent to] a perversion of the judicial process to the accomplishment of an improper purpose."<sup>32</sup>

Courts have held that a variety of acts constitute a perversion of legal process.<sup>33</sup> Misuse of process has been found in the initiation, without any investigation of the facts, of a groundless medical malpractice action;<sup>34</sup> in receipt of judgments against a

30. Absent an allegation of abuse of process, mere allegation of improper motive is insufficient to state a cause of action. *Hannes v. DeLuca*, 203 Misc. 562, 562-63, 117 N.Y.S.2d 522, 522 (1952) (no legal "process" involved because compliance concerned a "request to appear which, unlike response to a subpoena, was voluntary"). See also *Cartwright v. Wexler, Wexler & Heller, Ltd.*, 53 Ill. App. 3d 983, 986, 369 N.E.2d 185, 188 (1977); *Peisner v. Detroit Free Press, Inc.*, 68 Mich. App. 360, 242 N.W.2d 775, 778 (1976); *DiSante v. Russ Financial Co.*, 251 Pa. Super. 184, 189, 380 A.2d 439, 441 (1977).

31. *Younger v. Solomon*, 38 Cal. App. 3d 289, 113 Cal. Rptr. 113 (1974). "The gist of the tort is the misuse of the power of the court . . ." *Id.* at 297, 113 Cal. Rptr. at 118. See also, 1 F. HARPER & F. JAMES, *supra* note 11, § 4.9; 3 J. DOOLEY, *supra* note 17, § 41.11. Some courts have denied recovery for abuse of process where no probable cause to initiate legal process existed. *E.g.*, *Bickel v. Mackie*, 447 F. Supp. 1376, 1383 (N.D. Iowa), *aff'd*, 590 F.2d 341 (8th Cir. 1978); *Wilson v. Brooks*, 369 So. 2d 1221, 1225 (Ala. 1979). These decisions, however, have been criticized for their unsound reasoning. See Note, *Abuse of Process: A Gap in Alabama Law*, *supra* note 11, at 209; Note, *Abuse of Process—A Misunderstood Concept*, *supra* note 11, at 1401.

32. *Younger v. Solomon*, 38 Cal. App. 3d 289, 297, 113 Cal. Rptr. 113, 118 (1974). The term "process" has been broadly interpreted to include a summons and complaint, *Remes v. Duby*, 69 Mich. App. 265, 268, 244 N.W.2d 440, 442 (1976); a subpoena, *Board of Educ. v. Farmingdale Classroom Teachers Assn.*, 46 A.D.2d 794, 796, 360 N.Y.S.2d 922, 924, *aff'd*, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975); a writ of garnishment, *Nagy v. McBurney*, — R.I. —, —, 392 A.2d 365 (1978); and even a request for admission, *Twyford v. Twyford*, 63 Cal. App. 3d 916, 923, 134 Cal. Rptr. 145, 149 (1976).

33. Generally, no distinction is drawn between perversion of civil process and perversion of criminal process. *Sachs v. Levy*, 316 F. Supp. 44, 47 (E.D. Pa. 1963) ("[T]he question of whether the proceedings utilized were civil or criminal is not the determining issue . . ."). See also RESTATEMENT (SECOND) OF TORTS § 682 (1977); 1 AM. JUR. 2D *Abuse of Process* §§ 1, 13, 14 (1962); Annot., 97 A.L.R.3d 688, 691 (1980).

34. *Peerman v. Sidicane*, — Tenn. App. —, —, 605 S.W.2d 242, 245 (1980). See also *Bull v. McCuskey*, — Nev. —, —, 615 P.2d 957, 960 (1980). But see *Drago v. Buonagurio*, 61 A.D.2d 282, 402 N.Y.S.2d 250, *rev'd*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978) (no liability for abuse of process, negligence, malicious prosecution or "prima facie tort," although physician sued for medical malpractice had not even treated

party who owed no money;<sup>35</sup> in the use of criminal or civil proceedings to coerce a person to relinquish money,<sup>36</sup> bonds,<sup>37</sup> or any other property;<sup>38</sup> and in the issuance of a writ directing the sale of real estate valued far in excess of the amount of the debt owed, which resulted in the sale of the property.<sup>39</sup> At least one court has held that the use of force in the service of a summons and complaint can be a perversion of legal process.<sup>40</sup>

### C. Injury to Plaintiff

Finally, a plaintiff in an abuse of process action must prove that he has been injured by the earlier action.<sup>41</sup> Generally, a

deceased for fatal illness).

35. *Little v. Sowers*, 167 Kan. 72, 77, 204 P.2d 605, 608 (1949) (misuse of civil process).

36. *Huggins v. Winn Dixie, Greenville, Inc.*, 249 S.C. 206, 212, 153 S.E.2d 693, 696 (1967)(misuse of criminal process, *discussed in* Annot., 27 A.L.R.3d 1195 (1980). *Accord*, *Voytko v. Ramada Inn*, 445 F. Supp. 315, 324-25 (D.N.J. 1978)(misuse of criminal process to force payment by plaintiffs of hotel bill not owed).

37. *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780, 786-87 (1947)(misuse of criminal process).

38. *E.g.*, *Ash v. Cohen*, 119 N.J.L. 54, 56, 194 A. 174, 175 (1937)(chattels); *Adelman v. Rosenbaum*, 133 Pa. Super. 386, 389, 3 A.2d 15, 16 (1938)(household goods).

39. *Haggerty v. Moyerman*, 321 Pa. 555, 558-59, 184 A. 654, 655 (1936). The debt was only one hundred dollars while the property was valued at thirteen hundred dollars. *Id.* at 558-59, 184 A. at 655.

40. *Remes v. Duby*, 69 Mich. App. 265, 269, 244 N.W.2d 440, 442 (1976)(plaintiff alleged that the two process servers used force to enter the plaintiff's house to serve a summons and complaint). A further illustration of abuse of process involving a form of the use of force is stated in the *Restatement (Second) of Torts*:

A, an attorney to whom C has entrusted the collection of a debt owed by B, assigns C's claim to D, who resides some distance from B. In accordance with A's instructions, D brings an action as assignee and causes a subpoena to issue at a time when it is extremely inconvenient for B to appear, A's purpose being to force B to pay the claim rather than to undergo the inconvenience of appearance. B not appearing, A causes a bench warrant to issue for his arrest under which B is fined and execution against his body is ordered. Before this order is carried out, B brings his action against A. A is subject to liability to B for abuse of process.

RESTATEMENT (SECOND) OF TORTS § 682, comment a, Illustration 1 (1977).

41. *E.g.*, *Ingo v. Koch*, 127 F.2d 667, 670 (2d Cir. 1942). *See* 3 J. DOOLEY, *supra* note 17, § 41.13; W. PROSSER, *supra* note 1, § 121; 1 AM. JUR. 2d *Abuse of Process* § 25 (1963). Some courts require proof that the defendant's actions have resulted in a seizure of the plaintiff's person or property, *Sachs v. Levy*, 216 F. Supp. 44, 47 (E.D. Pa. 1963), *Ewert v. Wieboldt Stores, Inc.*, 38 Ill. App. 3d 42, 347 N.E.2d 242 (1976); *John Allan Co. v. Brandow*, 59 Ill. App. 2d 328, 207 N.E.2d 339 (1965); while some others require the plaintiff to prove that he has been forced to do something he would not otherwise have to do, or that he has been forced to refrain from performing a permissible act. *Fox v. Issler*, 77

plaintiff may recover for all actual damage he suffers that is proximately caused by the abuse, "including any special or peculiar damage" that can be established.<sup>42</sup> The loss may be financial,<sup>43</sup> emotional,<sup>44</sup> physical,<sup>45</sup> or in the nature of injury to a business<sup>46</sup> or other property.<sup>47</sup>

A plaintiff who can establish that a prior action was motivated by actual malice may also recover punitive damages.<sup>48</sup> Actual malice requires a showing that the conduct of the defendant, who was the plaintiff in the prior action, "was willful, intentional, and done in reckless disregard of its possible consequences."<sup>49</sup> Courts have awarded punitive damages in cases in which an attorney instituted a lawsuit without investigating the facts of the case,<sup>50</sup> in which property exempt from execution was seized for the purpose of breaking up the plaintiff's business,<sup>51</sup> and in which witnesses were subpoenaed for a hearing for the

A.D.2d 860, 862, 431 N.Y.S.2d 69, 71 (1980); *Fite v. Lee*, 11 Wash. App. 21, 23, 521 P.2d 964, 968 (1974). See also R. MALLIN & V. LEVIT, *supra* note 18, § 46 (1977). This only confuses the matter, however, and "any completed use of the process which involves an interference with the (plaintiff's) right will necessarily involve such damage." W. PROSSER, *supra* note 1, § 121. See also Note, *Counterclaiming for Malicious Prosecution and Abuse of Process: Washington's Response to Unmeritorious Civil Suits*, 14 WILLAMETTE L. REV. 401, 410 n.80 (1978).

42. *Peerman v. Sidicane*, \_\_\_ Tenn. App. \_\_\_, \_\_\_, 605 S.W.2d 242, 245 (1980). See also *Board of Educ. v. Farmingdale Classroom Teachers Ass'n*, 46 A.D.2d 794, 360 N.Y.S.2d 922, *aff'd*, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975) (plaintiff allowed to recover expense of hiring 87 substitute teachers); 1 AM. JUR. 2D *Abuse of Process* § 25 (1963).

43. *E.g.*, *Voytko v. Ramada Inn*, 445 F. Supp. 315 (D.N.J. 1978); *Board of Educ. v. Farmingdale Classroom Teachers Ass'n*, 46 A.D.2d 794, 360 N.Y.S.2d 922, *aff'd*, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975).

44. *Bull v. McCuskey*, \_\_\_ Nev. \_\_\_, \_\_\_, 615 P.2d 957, 960 (1980) ("The compensatory damages recoverable in an action for abuse of process . . . include compensation for fears, anxiety, mental and emotional distress.").

45. *McGann v. Allen*, 105 Conn. 177, 184, 134 A. 810, 815 (1926). See also 72 C.J.S. *Process* § 124(y) (1952).

46. *Juchter v. Boehm & Co.*, 67 Ga. 534, *overruled on other grounds*, *Wilcox v. McKenzie*, 75 Ga. 73 (1886).

47. *Id.* See also *Saliem v. Glovsky*, 132 Me. 402, 172 A. 4 (1934); *Malone v. Belcher*, 216 Mass. 209, 103 N.E. 637 (1913); *Barnett v. Reed*, 51 Pa. 190 (1865).

48. *Bull v. McCuskey*, \_\_\_ Nev. \_\_\_, \_\_\_, 615 P.2d 957, 961 (1980) (malice could be inferred from defendant's conduct); *Peerman v. Sidicane*, \_\_\_ Tenn. App. \_\_\_, \_\_\_, 605 S.W.2d 242, 245 (1980). See generally 1 AM. JUR. 2D *Abuse of Process* § 26 (1963).

49. *Bull v. McCuskey*, \_\_\_ Nev. \_\_\_, \_\_\_, 615 P.2d 957, 961 (1980).

50. *Peerman v. Sidicane*, \_\_\_ Tenn. App. \_\_\_, \_\_\_, 605 S.W.2d 242 (1980).

51. *Coleman & Newsome v. Ryan*, 58 Ga. 132 (1876).

primary purpose of harassing their employer.<sup>52</sup>

#### IV. EFFECTIVENESS OF REMEDY AGAINST ATTORNEYS

For an attorney to be held liable for an abuse of process, the acts complained of must be his own acts<sup>53</sup> or acts of others that are "wholly instigated and carried on" by the attorney.<sup>54</sup> Although some attorney's acts may be protected by the absolute privilege "to publish false and defamatory matter of another in communications . . . during the course and as a part of the judicial proceeding, if it has some relation thereto,"<sup>55</sup> this immunity does not bar an action for abuse of process.<sup>56</sup> Notwithstanding the nature of the particular abuse alleged, when attorneys are sued for abuse of process, the courts must balance the interests and policies that militate against holding the attorney liable against those policies that favor the imposition of liability.

##### A. *Considerations Opposing Liability*

The nature of the adversary system provides a sound reason for drastically limiting the liability of attorneys for abuse of process. As stated by the District of Columbia Court of Appeals:

It is axiomatic that the American system of jurisprudence favors free access to the courts as a medium of dispute settlement. It is the announced policy of this jurisdiction to allow unfettered access to our courts. In an effort to avoid infringing upon the right of the public to utilize our courts, we are cau-

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52. *Board of Educ. v. Farmingdale Classroom Teachers Ass'n*, 46 A.D.2d 794, 360 N.Y.S.2d 922, *aff'd*, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975).

53. *Adelman v. Rosenbaum*, 133 Pa. Super. 386, 3 A.2d 15 (1938). *See generally* Annot., 97 A.L.R.3d 688 (1980).

54. *Adelman v. Rosenbaum*, 133 Pa. Super. 386, 3 A.2d 15 (1938). *See, e.g.*, *Laird v. Vogel*, 334 So. 2d 650 (Fla. App. 1976); *Remes v. Duby*, 69 Mich. App. 265, 244 N.W.2d 440 (1976).

55. RESTATEMENT OF TORTS § 586 (1934). This privilege extends even to situations where the publication was made with actual malice, provided the statement is reasonably related to the lawsuit. *Bradley v. Hartford Acc. & Indem. Co.*, 30 Cal. App. 3d 818, 824-25, 106 Cal. Rptr. 718, 722 (1973).

56. *See Younger v. Solomon*, 38 Cal. App. 3d 289, 113 Cal. Rptr. 113 (1974); *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 980 (1947); *Peerman v. Sidicane*, \_\_\_ Tenn. App. \_\_\_, 605 S.W.2d 242 (1980). *But see Netterville v. Lear Siegler, Inc.*, No. 52,531 (Miss., filed April 29, 1981) (such an absolute immunity extends to persons instituting disciplinary proceedings, although an attorney who abuses such process may also face disciplinary action).

tious not to adopt rules which will have a chilling and inhibitory effect on would-be litigants of justiciable issues.<sup>57</sup>

This need of potential litigants to have free and open access to courts is also promoted by the ABA Code of Professional Responsibility, which dictates that lawyers "should assist the legal profession in fulfilling its duty to make legal counsel available."<sup>58</sup> The Code emphasizes clients' need for assistance in identifying and resolving their legal problems.<sup>59</sup> An attorney's fear of exposure to liability for abuse of process as a result of an assertion of a client's claim might undesirably limit free and open access to the courts.<sup>60</sup>

Apart from an attorney's obligation to assist in making legal counsel available to the general public, he owes to his own clients, as their agent, a fiduciary duty of loyalty.<sup>61</sup> This duty includes the obligations to further the clients' best interests "zealously within the bounds of the law"<sup>62</sup> and to do all that is ethically and legally possible on the clients' behalf.<sup>63</sup> If courts routinely imposed upon attorneys liability for abuse of process, attorneys might be constrained in their zealous representation of clients. Therefore, attorneys arguably should be liable only for egregious abuses.<sup>64</sup>

57. *Morowitz v. Marvel*, 423 A.2d 196, 197-98 (D.C. 1980). See also Note, *Counterclaiming for Malicious Prosecution*, *supra* note 41, at 401.

58. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2 (1978). See also Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978) ("The lawyer, by virtue of his or her training and skills, has a legal and practical monopoly with respect to access to the legal system and knowledge about the law.").

59. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-1 (1978) states that "[t]he need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel."

60. See, e.g., *Drago v. Buonagurio*, 89 Misc.2d 171, 391 N.Y.S.2d 61, *rev'd*, 61 A.D.2d 282, 402 N.Y.S.2d 250, *order aff'd*, 46 N.Y.S.2d 780, 413 N.Y.S.2d 910, 386 N.E.2d 821 (1978); *DiSanti v. Russ Financial Co.*, 251 Pa. Super. 184, 380 A.2d 439 (1977).

61. F. MEECHAM, *OUTLINES ON THE LAW OF AGENCY* § 76 (4th ed. 1952); Note, *Attorneys' Liability*, *supra* note 1, at 792-93.

62. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-1 (1978). See *Friedman v. Dozor*, 83 Mich. App. 429, 268 N.W.2d 673 (1978). It is the "duty of the advocate . . . to be zealous and the public is charged with that knowledge." *Id.* at 433, 268 N.W.2d at 675.

63. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-1; EC 7-4; DR 7-101(A)(1) (1978). The new ABA MODEL RULES OF PROFESSIONAL CONDUCT (proposed final draft, May 30, 1981) also emphasize this concern. See Rule 1.2(a).

64. See Note, *Attorneys' Liability*, *supra* note 1, at 775.

## B. Considerations Favoring Liability

Misuse of legal procedure is a serious offense; "when a party abuses process, his tortious conduct injures not only the intended target, but [it] offends the spirit of the legal procedure itself."<sup>65</sup> A groundless suit causes harm to another without "economic or social excuse or justification."<sup>66</sup> That a victim of such a suit should suffer the time, expense, and embarrassment<sup>67</sup> of unnecessary litigation without recourse seems basically unfair.<sup>68</sup> A right of recourse against the guilty party arguably should not be denied simply because that party is an attorney.<sup>69</sup>

Furthermore, abuse of legal process wastes the time and energy of the courts. Although free and open access to the courts is a desirable objective, legal process must "be utilized in a manner consonant with the purpose for which that procedure was designed."<sup>70</sup> An attorney's abuse of process not only fails to "avoid . . . the appearance of . . . impropriety"<sup>71</sup> but violates his oath as an attorney<sup>72</sup> and the public duty he owes as an officer of the judicial system.<sup>73</sup> In addition, this conduct constitutes a violation of the attorney's duty to represent clients "within the bounds of the law."<sup>74</sup> Conduct of this type denigrates the judicial system and should not be condoned.<sup>75</sup>

65. Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 404, 343 N.E.2d 278, 281, 380 N.Y.S.2d 635, 640 (1975), *aff'g*, 46 A.2d 794, 360 N.Y.S.2d 922 (1974).

66. *Id.* at 403, 343 N.E.2d at 283, 380 N.Y.S.2d at 642.

67. Injury can result in other ways such as loss of reputation and emotional strain. Peerman v. Sidicane, — Tenn. App. —, —, 605 S.W.2d 242, 244 (1980).

68. Bull v. McCuskey, — Nev. —, 615 P.2d 957 (1980); Peerman v. Sidicane, — Tenn. App. —, 605 S.W.2d 242 (1980). See Note, *Attorneys' Liability*, *supra* note 1, at 775.

69. See, e.g., Morowitz v. Marvel, 423 A.2d 196 (D.C. 1980) ("We are likewise cognizant of our obligations to protect the innocent against frivolous litigation and to make victims of groundless lawsuits whole where they suffer special injury as the result of the suit."); Bull v. McCuskey, — Nev. —, 615 P.2d 957 (1980) (client did not know about or authorize the attorney to appeal a frivolous malpractice action).

70. Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 404, 343 N.E.2d 278, 283, 380 N.Y.S.2d 635 (1975), *aff'g*, 46 A.D.2d 794, 360 N.Y.S.2d 922 (1974).

71. *Id.* at 404, 343 N.E.2d at 282, 380 N.Y.S.2d at 643.

72. Fite v. Lee, 11 Wash. App. 21, 28, 521 P.2d 964, 969 (1974).

73. *Id.* See Note, *Counterclaiming for Malicious Prosecution*, *supra* note 41, at 411.

74. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1980). See also *id.*, DR 2-109, 7-102, EC 7-4, 7-10.

75. Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 400-

### C. *The Judicial Response*

In striking an appropriate balance between conflicting policies, courts have found the considerations militating against imposition of liability on attorneys to be more persuasive than those martialled for imposition.<sup>76</sup> In light of the exigencies of our adversary system, it may be appropriate, particularly in close cases, that courts faced with conduct other than that which is egregious and deplorable have seldom held attorneys liable for abuse of process.<sup>77</sup> When an attorney's conduct is particularly offensive, however, liability should be found. Nevertheless, several courts have declined to find liability in cases in which an attorney's conduct has appeared egregious.<sup>78</sup>

### V. CONCLUSION

Judicial leniency in this area may lead to unjustifiable and perplexing results. Innocent persons, who would otherwise be made whole again, may be denied a remedy simply because their injury has been caused by attorneys. Therefore, in their attempts to avoid the possible chilling effect that imposition of liability in abuse of process cases would have on attorneys' zealous representation of their clients, courts should be wary of overcompensating by allowing attorneys to avoid liability even when their conduct is outrageous.

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01, 343 N.E.2d 278, 281, 380 N.Y.S.2d 635, 640.

76. See generally *Sachs v. Levy*, 216 F. Supp. 44 (D.C. Pa. 1963); *Morowitz v. Marvel*, 423 A.2d 196 (D.C. 1980); *Geier v. Jordan*, 107 A.2d 440 (D.C. 1954); *Fox v. Issler*, 77 A.D.2d 860, 431 N.Y.S.2d 69 (1980). But see *Weiss v. Hunna*, 312 F.2d 711 (2d Cir.), cert. denied, 374 U.S. 853, rehearing denied, 375 U.S. 874 (1963); *Voytko v. Ramada Inn*, 445 F. Supp. 315 (D.N.J. 1978); *Younger v. Solomon*, 38 Cal. App. 3d 289, 113 Cal. Rptr. 113 (1974).

77. See, *Morowitz v. Marvel*, 423 A.2d 196 (D.C. 1980); *Cartwright v. Wexler, Wexler & Heller, Ltd.*, 53 Ill. App.3d 983, 369 N.E.2d 185 (1977); *Tricomi v. Tricomi*, 192 Misc. 763, 81 N.Y.S.2d 750 (1948).

78. *E.g.*, *Drago v. Buonagurio*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978) (a physician who was sued for wrongful death was denied recourse against his opponent's attorney although he had never treated the deceased); *Nagy v. McBurney*, 392 A.2d 365, 367 (R.I. 1978) (court held that a jury could reasonably infer that an attorney had no ulterior motive when he had attached more than twice the amount of money he was owed by the plaintiff after allegedly having told him, "You dirty son-of-a-bitch, you took me before the Bar Association, I'm going to attach your pay at any time I want, for any amount I want . . ."). For recent cases in which recovery was permitted on the basis of an attorney's egregious conduct, see *Bull v. McCuskey*, \_\_\_ Nev. \_\_\_, 615 P.2d 957 (1980); *Peerman v. Sidicane*, \_\_\_ Tenn. App. \_\_\_, 605 S.W.2d 242 (1980).



As officers of the court, attorneys are required to avoid conduct that abuses the legal process<sup>79</sup> and should be sanctioned for engaging in such conduct. Although it may be appropriate to avoid imposing liability on attorneys in close cases, courts should be less hesitant to impose liability in those cases in which an attorney has intentionally or recklessly misused legal process. This circumscribed imposition of liability on attorneys for the tort of abuse of process, if consistently applied, could enhance the professional conduct of the members of the legal community.<sup>80</sup>

*William E. Salter, III*

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79. See notes 70-74 *supra*.

80. See R. WISE, LEGAL ETHICS 16 (2d ed. 1970).

## IMMUNITY FROM LIABILITY FOR DEFAMATORY STATEMENTS

### I. INTRODUCTION

Defamation is comprised of the torts of slander and libel, the former oral and the latter written.<sup>1</sup> Dean Prosser has defined defamation as “that which tends to injure ‘reputation’ in the popular sense; to diminish the esteem, respect, good will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.”<sup>2</sup>

In fulfillment of their ethical obligation to represent clients “zealously within the bounds of the law,”<sup>3</sup> attorneys have frequent occasion to make statements that may be defamatory regarding third parties. Although a form of judicial immunity protects attorneys from liability for relevant defamatory statements made on their own behalf, defamatory statements outside the scope of client representation are not protected. Cause for concern arises with the realization that attorneys can, in the course of a client representation, make defamatory statements that immunity may not protect. This section of the project will examine the scope and underlying policy of the immunity that protects lawyers from liability for defamation and will consider sanctions

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1. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 111 (4th ed. 1971).

2. *Id.* 739 (citing G. BOWER, THE LAW OF ACTIONABLE DEFAMATION 4 (2d ed. 1923); RESTATEMENT OF TORTS § 559 (1934)). *Accord*, Capps v. Watts, 271 S.C. 276, 281, 246 S.E.2d 606, 609 (1978).

The North Carolina Court of Appeals has noted that “[s]lander is commonly defined as ‘the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood.’” *Beane v. Weisan Co.*, 5 N.C. App. 276, 278, 168 S.E.2d 236, 237 (1969).

The South Carolina Supreme Court has defined libel as a malicious defamation expressed either by writing or printing, or by signs, pictures, effigies, or the like, tending to blacken the memory of one who is dead or to impeach the honesty or integrity or reputation, or publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or obliquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation.

*Rogers v. Florence Printing Co.*, 230 S.C. 304, 307, 95 S.E.2d 616, 617 (1956)(citations omitted).

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, DR 7-101 (1977).

against defamatory statements by attorneys incorporated in the ABA Code of Professional Responsibility.

## II. POLICY UNDERLYING IMMUNITY FROM LIABILITY FOR DEFAMATION

The law of defamation protects the right to reputation,<sup>4</sup> but attitudes toward reputation are subject to changing moral and social values. Consequently, while judicial redress for harm to reputation is an ancient element of the law, the action for defamation has historically reflected social and political influences that are quite distinct from considerations of the right to reputation,<sup>5</sup> and courts have manifested an inconsistent commitment to protecting the right to reputation in specific circumstances.<sup>6</sup>

4. See note 2 and accompanying text *supra*.

5. Toward the end of the middle ages, the common-law courts contended vigorously with the ecclesiastical courts in England for control of the jurisdiction over defamation suits. See generally I. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 491 (5th ed. 1956). The first step in this process was the issuance of writs of prohibition to the ecclesiastical courts in actions for defamation that imputed crime, actionable in the common-law courts, to the defamed party. *Id.* at 492. This step probably was the genesis of the contemporary rule that slanderous statements imputing crime may afford recovery without proof of the special damages occasioned by them. See Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 560 n.1 (1903). See generally W. PROSSER, *supra* note 1, § 112, at 754. The converse rule that special damages must be shown in order to recover for slander apparently arose out of another stage of this battle for jurisdiction. In order to augment their jurisdiction still further, the royal courts characterized defamation as a temporal injury over which the common-law courts had jurisdiction, while the ecclesiastical courts preferred to view defamation as a spiritual injury to the soul of the defamer. The device seized upon by the royal courts near the end of the sixteenth century was the reasoning that any plaintiff who could prove special damages arising from defamation would have adequately proved temporal injury for the purpose of establishing common-law jurisdiction. See I. PLUCKNETT, *supra*, at 493-94. Perhaps the most important distinction in the law of defamation—that between the written and the oral forms—emerged from the monarch's suppression of a free press. In order to specially burden written publication of statements, the law abandoned the requirement that special damages be shown. Thus liability from written publication of defamatory statements, called libel, was more easily established than for the oral counterpart. See generally Veeder, *History and Theory*, *supra*, at 561.

6. A heightened standard of proof in defamation cases involving public figures is illustrated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). For a discussion of the origin of this standard, see Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 791 (1979). The common-law courts devised rules to reduce the number of defamation cases that could be brought within their jurisdiction soon after they had wrested jurisdiction from the church courts. See I. PLUCKNETT, *supra* note 5, at 495. Some minimum standard may be maintained to safeguard reputation under all circumstances, but beyond this level of protection, the law of defamation ordinarily responds to social conditions. See generally Veeder, *History and Theory*, *supra* note 5, at

When strong policy reasons militate against the imposition of liability for defamation, the right to reputation may be expected to yield to these competing concerns. As one commentator has observed,

[T]he general doctrine of immunity or privilege for the publication of defamatory matter in the public interest, or in the furtherance of the rights or lawful interests of individuals, may be traced far back in the history of the common law. For it was at once apparent that the general rule which holds the defamer to answer for the actual truth of his utterances would be unwarrantably severe if applied to those, who, in the performance of public or private duty, or in the legitimate protection of private interests, find it necessary to make defamatory imputations.<sup>7</sup>

The policy supporting attorneys' immunity for actions based on defamation is apparent. The public interest is better served by the resolution of conflict through resort to the judiciary than by self help. The potential of the law to achieve this goal would be restricted if participants in judicial proceedings were restrained in their pursuit of rights by consideration of potential liability for statements made in the course of the proceedings. Immunity "has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist."<sup>8</sup>

Immunities are generally disfavored because they are antagonistic to the basic principle that the law should provide relief for every wrong suffered,<sup>9</sup> and, during the past twenty years, a growing trend toward limiting the scope of immunities has developed.<sup>10</sup> Nevertheless, immunity from liability for defamatory statements made in connection with judicial proceedings has resisted substantial erosion in most American jurisdictions.<sup>11</sup> Al-

546; Note, *Developments in the Law of Defamation*, 69 Harv. L. Rev. 875, 889 (1956).

7. Veeder, *Absolute Immunity in Defamation*, 9 COLUM. L. REV. 463, 464 (1909).

8. *Id.* at 469.

9. *Id.* at 467.

10. See 56 WASH. L. REV., 289, 291 n.15 (1981); 33 VAND. L. REV. 775, 776 (1980).

11. See, e.g., *Bleecker v. Drury*, 149 F.2d 770 (2d Cir. 1945); *Bushbaum v. Heriot*, 5 Ga. App. 521, 63 S.E. 645 (1909); *McGranahan v. Dahar*, 119 N.H. 758, 408 A.2d 121 (1979). Some diversity in the rule of immunity exists among the several states, often because statutory law affects the precise rule applied. See *Andrews v. Gardiner*, 224 N.Y. 440, 445, 121 N.E. 341, 343 (1918). One notable exception to the American consensus in

though civil-law jurisdictions do not recognize this immunity,<sup>12</sup> arguments against it are rarely advanced in common-law courts. Rather, the rationale supporting immunity is ordinarily accepted without discussion or with the observation that immunity is founded on a compelling or obvious need.<sup>13</sup>

The potential conflict of interest that would result from imposition upon attorneys of liability for defamatory statements made in connection with judicial proceedings supports observations that the immunity is compelling. Attorneys, as agents for their clients,<sup>14</sup> owe their clients a duty of loyalty<sup>15</sup> and must represent their clients' interests "zealously within the bounds of the law."<sup>16</sup> Attorneys, if faced with potential liability for defamation, would find it necessary to balance their clients' interest in zealous advocacy against their own interests in avoiding defamatory statements.<sup>17</sup> Abrogation of immunity from liability for defamatory statements might well engender a circumspection on the part of attorneys that would be inimical to the interests of clients and contrary to the public interest in vigorous legal assistance.<sup>18</sup>

In order to avoid these results, absolute immunity from liability for relevant defamatory statements made in connection

favor of absolute immunity occurs in Louisiana where the courts, following the civil-law tradition, have not accepted the common-law policy justifying immunity. See *Lescale v. Joseph Schwartz Co.*, 116 La. 293, 40 So. 708 (1905).

12. See *Veeder, Absolute Immunity*, *supra* note 7, at 463-64.

13. This is not to say that courts always agree about the scope of immunity. See, e.g., *Devlin v. Greiner*, 147 N.J. Super. 446, 455-56, 371 A.2d 380, 385 (1977); *Bradley v. Hartford Acc. & Indem. Co.*, 30 Cal. App. 3d 818, 824-25, 106 Cal. Rptr. 718, 721 (1973). Virtually all courts, however, recognize a compelling need to apply the immunity when public policy is served. See, e.g., *Moore v. Smith*, 89 Wash. 2d 932, 936-37, 578 P.2d 26, 29 (1978).

14. F. MECHAM, *OUTLINES OF THE LAW OF AGENCY*, § 76 (4th ed. 1952).

15. *Id.*

16. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-1 (1977).

17. The lawyer would naturally be concerned about his personal liability incident to representing a client. Even if this problem could be overcome (by the use of liability insurance, for example) the lawyer would often find that he was bound either to run the risk of committing a tort or to violate his duty to represent his client zealously. See generally ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1977). This is particularly true in light of EC 7-3, which states that "[w]hile serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law." (citation omitted).

18. See, e.g., *Sullivan v. Birmingham*, \_\_\_ Mass. App. Ct. \_\_\_, \_\_\_, 416 N.E.2d 528, 533-34 (1981).

with judicial proceedings has become a settled rule of law. The rule is applied to assure attorneys and other participants in judicial proceedings that they may rely upon its protection for all statements that are relevant and adequately connected to a judicial proceeding. Liability for defamation by such parties is intended to be the exception rather than the rule.<sup>19</sup>

Immunity does not belong to lawyers alone but reaches all legitimate participants in judicial proceedings<sup>20</sup> and applies to a greater range of suits than merely those arising from defamation.<sup>21</sup> Because immunity in connection with judicial proceedings arises from the circumstances in which a defamatory statement is made, rather than from the source or substance of what is said,<sup>22</sup> it frequently results in the grant of summary judgment for the defendant in a defamation action.<sup>23</sup>

### III. THE SCOPE OF IMMUNITY

Attorneys are immune from liability for publication of defamatory material that, first, is made in connection with a judicial proceeding<sup>24</sup> and, second, is relevant to the action.<sup>25</sup> All questions concerning the applicability of immunity must be resolved through a determination of whether a particular instance

19. Veeder, *Absolute Immunity*, *supra* note 7, at 482-83.

20. See generally W. PROSSER, *supra* note 1, § 114, at 777-78.

21. See *Younger v. Soloman*, 38 Cal. App. 3d 289, 296, 113 Cal. Rptr. 113, 120-21 (1974). The immunity in defamation has barred actions for slander of title, *e.g.*, *Sailboard Key, Inc. v. Gardner*, 378 So. 2d 47, 49 (Fla. 1979); *Wendy's of S. Jersey, Inc. v. Blanchard Management Corp.*, 170 N.J. Super. 491, 494, 406 A.2d 1337, 1340 (1979); actions for negligent misrepresentation, *e.g.*, *Portman v. George McDonald Law Corp.*, 99 Cal. App. 3d 988, 989-93, 160 Cal. Rptr. 505, 506-07 (1979); tortious interference with business relations, *e.g.*, *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 563-64, 117 A.2d 889, 895 (1955); and for alleged damage to reputation in a malicious prosecution action, *e.g.*, *Schier v. Denny*, 12 Wis. 2d 544, 548-49, 107 N.W.2d 611, 613 (1961).

22. See Veeder, *Absolute Immunity*, *supra* note 7, at 468.

23. See, *e.g.*, *Izzi v. Rellas*, 104 Cal. App. 3d 255, 267-68, 13 Cal. Rptr. 689, 695 (1980); *Sullivan v. Birmingham*, — Mass. App. Ct. —, —, 416 N.E.2d 528, 533-34 (1981).

24. The term "absolute", which is frequently used to describe attorneys' immunity, is in part a vestige of the more nearly absolute version of the law as it has been applied in England. W. PROSSER, *supra* note 1, § 114, at 778. The continued use of the term absolute is partially explained by the need to distinguish this immunity from a conditional immunity which applies to defamation made in distinct circumstances. See generally *Devlin v. Greiner*, 147 N.J. Super. 446, 454-55, 371 A.2d 380, 385 (1977); *Bergman v. Hupy*, 64 Wis. 2d 747, 749, 221 N.W.2d 898, 899-900 (1974).

25. See RESTATEMENT (SECOND) OF TORTS § 586 (1977).

of defamation satisfies this two-prong test.

### A. *Judicial Proceedings*

Immunity protects attorneys from liability for defamation only when the defamatory statement has been uttered in connection with a judicial proceeding.<sup>26</sup> This requirement arises in part from the goal of preserving truthful communication of facts in judicial proceedings<sup>27</sup> and is justified by the ability of the courts to regulate speech incident to judicial proceedings.<sup>28</sup> Determinations of whether a defamatory statement has been made in connection with judicial proceedings requires an initial conclusion that a judicial proceeding has occurred and then a finding of a sufficient connection between the proceeding and the defamatory statement.

1. *Existence of a Judicial Proceeding.*—The *Restatement (Second) of Torts* explains that “[j]udicial proceedings include all proceedings before an officer or other tribunal exercising a judicial function.”<sup>29</sup> Although immunity from liability for defamation ordinarily protects attorneys’ statements made in pleadings,<sup>30</sup> briefs,<sup>31</sup> affidavits,<sup>32</sup> and oral statements before a court,<sup>33</sup> the applicability of immunity in the context of quasi-judicial hearings, such as administrative or investigative hearings, is less clear. A commonly employed standard requires that in order for immunity to apply, a quasi-judicial proceeding must function either to resolve issues or to determine the rights of parties.<sup>34</sup> It has been suggested that quasi-judicial proceedings should be de-

26. Absolute immunity for defamation may be invoked by an attorney only when the statement is connected with a judicial proceeding. *Id.* § 586, comment c.

27. See note 8 and accompanying text *supra*.

28. See Veeder, *Absolute Immunity*, *supra* note 7, at 470. See also *Rainier’s Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 562, 117 A.2d 889, 894 (1955); *Moore v. Smith*, 89 Wash. 2d 932, 937, 578 P.2d 26, 29 (1978).

29. RESTATEMENT (SECOND) OF TORTS § 586, comment i (1977). *Accord*, W. PROSSER, *supra* note 1, at 779 (citing 13 Mo. L. Rev. 320 (1948)).

30. *E.g.*, *Westridge v. Wright*, 466 F. Supp. 234, 236-37 (D.C. Ark. 1979); *Cooperstein v. Van Natter*, 26 Wash. App. 91, 611 P.2d 1332, 1336 (1980).

31. *E.g.*, *Passon v. Spritzer*, — Pa. Super. Ct. —, —, 419 A.2d 1258, 1261 (1980).

32. *E.g.*, *Resciniti v. Padilla*, 72 A.D.2d 557, 558, 420 N.Y.S.2d 759, 760 (1979).

33. *E.g.*, *Sampson v. Rumsey*, 1 Kan. App. 2d 191, 194, 563 P.2d 506, 509 (1977).

34. See, *e.g.*, *Mock v. Chicago, R.I. & Pac. R.R.*, 454 F.2d 131, 134 (8th Cir. 1972); *Toker v. Pollack*, 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1977); *Lambdin Funeral Servs., Inc. v. Griffith*, 559 S.W.2d 791, 792 (Tenn. 1978). See generally W. PROSSER, *supra* note 1, § 114, at 779-80.

defined as those with both a purpose of substantial public importance and the presence of adequate safeguards against unnecessary defamation.<sup>35</sup>

The application of immunity from liability for defamatory statements made in connection with quasi-judicial proceedings has not been consistent. The New York Court of Appeals has held that an attorney was not entitled to absolute immunity from liability for defamatory statements made in connection with a grand jury proceeding.<sup>36</sup> Noting "considerable disagreement among the courts on this question,"<sup>37</sup> the New York court concluded that "the communication of a complaint, without more, does not constitute or institute a judicial proceeding"<sup>38</sup> and ruled that absolute immunity "applies only to a proceeding in court or one before an officer having attributes similar to a court."<sup>39</sup> The North Carolina Court of Appeals has adopted the broader definition of "quasi-judicial" as "[a] term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them as a basis for their official action, and to exercise discretion of a judicial nature,"<sup>40</sup> and has ruled that immunity protects defamatory statements made in the course of quasi-judicial hearings.<sup>41</sup> These divergent views on the availability of immunity in connection with quasi-judicial hearings leave uncertain the extent to which attorneys may rely on immunity in this context.

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35. See generally 8 N.Y.U. REV. OF L. & SOC. CHANGE 381, 394-97 (1979).

36. *Toker v. Pollack*, 44 N.Y.2d 211, 220-21, 376 N.E.2d 163, 166, 405 N.Y.S.2d 1, 6 (1978). The court compared absolute immunity with a qualified privilege, noting that a qualified privilege, unlike an immunity, does not bar the imposition of liability for defamation. Rather, the qualified privilege negates any presumption of malice in making a defamatory statement and places the burden of proving malice on the plaintiff. *Id.* at 219, 376 N.E.2d at 166, 405 N.Y.S.2d at 5. A communication is qualifiedly privileged when it "is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned." *Id.* at 219, 376 N.E.2d at 166-67, 405 N.Y.S.2d at 5 (citing *Lovell Co. v. Houghton*, 116 N.Y. 520, 526, 22 N.E. 1066, 1066-67 (1889)).

37. 44 N.Y.2d at 220, 376 N.E.2d at 167, 405 N.Y.S.2d at 5.

38. *Id.* at 220, 376 N.E.2d at 167, 405 N.Y.S.2d at 5.

39. *Id.* at 219, 376 N.E.2d at 167, 405 N.Y.S.2d at 5 (citing *Pecue v. West*, 233 N.Y. 316, 321, 135 N.E. 515, 516 (1922)).

40. *Angel v. Ward*, 43 N.C. App. 288, 293, 258 S.E.2d 788, 792 (1979) (citing *BLACK'S LAW DICTIONARY* 1411 (4th ed. rev. 1968)).

41. 43 N.C. App. at 293, 258 S.E.2d at 792.



Further difficult questions about the applicability of immunity arise when a judicial proceeding is defective. Courts have withheld immunity for defamatory statements made during a proceeding over which a court had no jurisdiction.<sup>42</sup> Because immunity is accorded to judges for acts undertaken pursuant to a colorable claim of jurisdiction,<sup>43</sup> it would seem reasonable to accord immunity to attorneys whenever a court's exercise of jurisdiction has been reasonably mistaken.<sup>44</sup>

2. *Sufficient Connection with Judicial Proceedings.*—The requirement of sufficient connection with judicial proceedings promotes a discriminating application of immunity by limiting protection to statements that are sufficiently proximate to a judicial proceeding to permit an inference that they are intended to promote the interests of justice. The *Restatement (Second) of Torts* lists several circumstances that have sufficient connection with judicial proceedings to justify immunity from liability for defamatory statements made therein.<sup>45</sup> These circumstances include the institution of proceedings, conferences and communications preliminary to such proceedings, and communications incidental to the preparation and conduct of litigation.<sup>46</sup> Immunity has also been applied to protect the maker of defamatory statements despite the fact that he was collaterally estopped from litigating the issue to which the statement was related.<sup>47</sup> Lack of sufficient connection may be asserted, however, when the allegedly defamatory statement precedes the institution of a judicial proceeding to such an extent that it may be doubted whether the defamation was intended to promote the resolution of any judicial proceeding.<sup>48</sup> Similar doubts arise when the de-

42. *E.g.*, *Kent v. Connecticut Bank & Trust Co.*, 386 So.2d 902, 903-04 (Fla. 1980).

43. *RESTATEMENT (SECOND) OF TORTS* § 585, comment f (1977).

44. *See* W. PROSSER, *supra* note 1 § 114, at 780.

45. *See* *RESTATEMENT (SECOND) OF TORTS* § 586, comment d (1977).

46. *Id.* *See generally* W. PROSSER, *supra* note 1, at 778-79.

47. *Passon v. Spritzer*, — Pa. Super. Ct. —, 419 A.2d 1258, 1260 (1980).

48. In *Devlin v. Greiner*, 147 N.J. Super. 446, 371 A.2d 380 (1977), defendant's motion for summary judgment based on the applicability of immunity was denied. The allegedly libelous statements appeared in a report written by defendant, a private detective, for the plaintiff in connection with a divorce action. The report was submitted to the court in the form of an affidavit, and the court found no adequate connection between the making of the report and the earlier divorce action because there had been no adequate showing of intention to engage in litigation at the time the report was made. The court also noted that an attorney's involvement does not necessarily establish an adequate connection with a judicial proceeding, because the attorney might simply be

famatory statement is part of a communication that carries forward the resolution of a suit or action only tangentially.<sup>49</sup>

An attorney cannot claim the protection of the immunity when he is acting outside a judicial or quasi-judicial setting. This is true even when his actions may arguably be professional in nature; for example, no immunity exists for an attorney's defamatory statements made after the conclusion of the litigation to which they were related.<sup>50</sup> The inapplicability of immunity is still clearer when a defamatory statement has no connection with a judicial proceeding or was made for reasons unrelated to the practice of law.<sup>51</sup>

### B. Relevance

Attorneys' immunity from liability for defamation is also qualified by a requirement that defamatory statements must be relevant to the issues presented in a judicial proceeding.<sup>52</sup> Although the standard of relevance is expressed differently by various jurisdictions,<sup>53</sup> the test is a liberal and nontechnical one. As Justice Cardozo noted in the early years of this century, the policy of immunity will admit "no room . . . for any strict or narrow test. Much must be left to the discretion of the advocate. The privilege embraces anything that may possibly be pertinent."<sup>54</sup> American courts generally follow the liberal test of relevancy,<sup>55</sup> but the immunity's application may be regulated by

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acting as an adviser. *Id.* at 458, 371 A.2d at 386.

49. See, e.g., *Kennedy v. Cannon*, 229 Md. 92, 98, 182 A.2d 54, 58 (1962); *Sullivan v. Birmingham*, — Mass. App. Ct. —, —, 416 N.E.2d 528, 536 (1981); *Troutman v. Erlandson*, 286 Or. 3, 6, 593 P.2d 793, 794 (1979).

50. See e.g., *Candelaria v. Robinson*, 93 N.M. 786, 789-90, 606 P.2d 196, 199-200 (1980).

51. See notes 24 & 25 and accompanying text *supra*.

52. RESTATEMENT (SECOND) OF TORTS § 586 (1977).

53. This requirement of relation to the proceeding has been expressed as necessitating "some relation to the proceeding," RESTATEMENT (SECOND) OF TORTS § 586 (1977); "some connection or logical relation to the action," *Izzi v. Rellas*, 104 Cal. App. 3d 261, 262, 163 Cal. Rptr. 689, 692 (1980) (quoting *Twyford v. Twyford*, 63 Cal. App. 3d 916, 925, 134 Cal. Rptr. 145, 149-50 (1976); "by any view or under any circumstances . . . considered pertinent to the litigation," *Resciniti v. Padilla*, 72 A.D.2d 557, 558, 420 N.Y.S.2d 759, 760 (1979); or "pertinent and material to the relief sought, whether logically sufficient to obtain it or not," *Garrett v. DeWorken*, 148 Ga. App. 656, 657, 252 S.E.2d 81, 82 (1979).

54. *Andrews v. Gardiner*, 224 N.Y. 440, 445, 121 N.E. 341, 343 (1918).

55. See W. PROSSER, *supra* note 1, § 114, at 779.

statute in specific instances.<sup>56</sup>

#### IV. AVAILABLE SANCTIONS AGAINST ATTORNEYS FOR DEFAMATION

Despite attorneys' immunity from tort liability for relevant defamatory statements made in connection with judicial proceedings, sanctions and penalties other than tort liability do exist. The policy underlying immunity relies in part on the general availability in judicial proceedings of alternative remedies:<sup>57</sup> "[b]ecause of their extraordinary scope, absolute privileges have been limited to situations in which authorities have the power both to discipline persons whose statements exceed the bounds of permissible conduct and to strike such statements from the record."<sup>58</sup> Although these remedies may not be available in every circumstance,<sup>59</sup> the effect of immunity has, nevertheless, thus been purposely tempered by the availability of other remedies.<sup>60</sup>

Professional discipline and disbarment under the provisions of the ABA Code of Professional Responsibility constitute additional sanctions against attorneys for spurious or abusive defamation. These provisions expressly prohibit attorneys from taking any "action on behalf of [their] client[s] when [they] know or when it is obvious that such action would serve merely to harass or maliciously injure another"<sup>61</sup> and from "stat[ing] or allud[ing] to any matter that [they have] no reasonable basis to believe is relevant to the case or that will not be supported by

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56. See e.g., GA. CODE ANN. § 105-709(5) and -710 (1968). See GA. CODE ANN. § 105-710 (1965)(imposing liability on attorneys for defamatory statements other than those made in pleadings to a court, upon a showing of malicious intent). California affords attorneys statutory immunity from liability for defamatory statements made in connection with judicial proceedings regardless of the relevance of the statements. CAL. CIV. CODE § 47(2)(West Supp. 1981). California courts have nevertheless applied a relevancy test. E.g., Bradley v. Hartford Acc. & Indem. Co., 30 Cal. App. 3d 818, 825, 106 Cal. Rptr. 718, 722 (1973); Thornton v. Rhoden, 245 Cal. App. 2d 80, 90, 53 Cal. Rptr. 706, 713-14 (1966).

57. See Veeder, *Absolute Immunity*, *supra* note 7, at 470.

58. Moore v. Smith, 89 Wash. 2d 932, 937, 578 P.2d 26, 29 (1978).

59. The courts seem increasingly willing to expand immunity and to apply it to protect statements over which they have little control. See, e.g., Angel v. Ward, 43 N.C. App. 288, 258 S.E.2d 788 (1979).

60. See Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 562, 117 A.2d 889, 894 (1955).

61. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(1) (1977).

admissible evidence.”<sup>62</sup> Although these rules of conduct do not provide grounds for civil liability,<sup>63</sup> at least one court has observed that “[i]t is . . . most doubtful that [immunity] could bar any action found arising out of ethical and disciplinary considerations.”<sup>64</sup>

## V. CONCLUSION

The nature of the adversary system affords frequent occasions for attorneys to make statements on behalf of their clients that may be regarded as defamatory. When these statements are made in connection with judicial or quasi-judicial proceedings and are relevant to issues under consideration, immunity protects attorneys from tort liability for defamation. Although close questions may arise in identifying proceedings as judicial or quasi-judicial and in determining whether a statement is relevant and sufficiently connected with the proceeding, immunity ordinarily protects attorneys when their statements exhibit a purpose of furthering the interests of justice. A potential exists for the employment of disciplinary sanctions when a defamatory statement has been flagrant, but a lack of precedent in this area and the unavailability of a civil remedy under the ABA Code of Professional Responsibility suggest that this sanction is not of great effect.

*Clifford F. Altekruze*

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62. *Id.*, DR 7-106(C)(1).

63. *Sullivan v. Birmingham*, \_\_\_ Mass. App. Ct. \_\_\_, \_\_\_, 416 N.E.2d 528, 534 (1981).

64. *Id.* at \_\_\_, 416 N.E.2d at 534.



# LAWYERS' PROFESSIONAL LIABILITY INSURANCE: COVERAGE FOR MALICIOUS PROSECUTION, ABUSE OF PROCESS, LIBEL, AND SLANDER

## I. INTRODUCTION

Historically, the majority of actions against attorneys have been filed by clients who claim that they have been damaged by the acts, errors, or omissions of their attorneys.<sup>1</sup> Generally, attorneys are protected from liability arising from attorney-client relationships by professional liability insurance: Suits to recover for the torts discussed in this project—malicious prosecution, abuse of process, and defamation—do not arise from attorney-client relationships but instead are brought by third parties: the defendants in prior suits.<sup>2</sup> This section of the project will examine the extent to which attorneys are covered for third-party tort liability under their present professional liability insurance policies and will consider whether additional insurance coverage should be written that would protect against liabilities not covered by current policies.

## II. COVERAGE UNDER PRESENT POLICIES

### A. Scope of Coverage

1. *Malicious Prosecution and Defamation.*—Lawyers' professional liability insurance, often referred to as malpractice insurance, covers the acts, errors, or omissions of an attorney in the performance of professional services. Legal malpractice is defined as "any professional misconduct whether attributable to a breach of the standard of care or of the fiduciary obligations."<sup>3</sup> The primary elements of legal malpractice are: "(1) a duty owed

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1. Pfennigstorf, *Types and Causes of Lawyers' Professional Liability Claims: The Search For Facts*, 1980 A.B. FOUNDATION RESEARCH J. 255, 274. See R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* 97-125 (1977).

2. R. MALLEN & V. LEVIT, *supra* note 1, at 69-96; Mallen, *Recognizing and Defining Legal Malpractice*, 30 S.C.L. REV. 203, 206 (1979). See Annot., 84 A.L.R. 3d 187 (1978).

3. Mallen, *Recognizing and Defining Legal Malpractice*, *supra* note 2, at 205 (1979).

to the injured party arising out of the contract for professional services, (2) a breach of that duty by failure to exercise professional skill, and (3) damage caused by the failure to exercise the requisite skill."<sup>4</sup> Because the torts of malicious prosecution, abuse of process, libel, and slander are brought by third parties and are intentional acts of malice,<sup>5</sup> they do not fall within this common definition of malpractice. Most policies, however, do provide limited coverage for these torts.

Policies underwritten by the American Bankers Insurance Company of Florida, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, and the SYII Guarantee Insurance Company policies<sup>6</sup> currently provide coverage for malicious prosecution and defamation. These torts are included in the definition of personal injury provided by the policies, which comprehends

(a) false arrest, detention or imprisonment, wrongful entry or eviction or other invasion of private occupancy, *malicious prosecution* or humiliation, except when maliciously inflicted by, at the direction of, or with the consent or acquiescence of the INSURED;

(b) the publication or utterance of a *libel* or other defamatory or disparaging material, . . . except when maliciously published or uttered by, at the direction of, or with the consent of acquiescence of the INSURED.<sup>7</sup>

Curiously, this definition specifically excludes malicious acts of the insured attorney, but provides coverage for malicious prosecution and defamation for each of which malice is an element.<sup>8</sup>

Malice can be of two types: actual and legal. Actual malice, or malice in fact, implies an intent or desire to cause harm, while legal malice is presumed from tortious acts, done intentionally

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4. Bridgman, *Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff's Case*, 30 S.C.L. Rev. 213, 221 (1979). See generally, *Symposium: Legal Malpractice*, 30 S.C.L. Rev. 201 (1979).

5. R. MALLEN & V. LEVIT, *supra* note 1, §§ 45, 46, 50; W. PROSSER, *HANDBOOK ON THE LAW OF TORTS*, §§ 113, 115, 120, 121 (4th ed. 1971).

6. Copies of these policies are on file at the office of the South Carolina Law Review.

7. Lawyers Professional Liability Insurance Policy, American Bankers Insurance Company of Florida, Coverage (Broad Form) (emphasis added). These policies also contain an exclusion for any malicious acts by an attorney. The Potomac Insurance Company policy does not contain this qualifying language in the definition of personal injury but does contain the exclusion.

8. See note 5 and accompanying text *supra* & note 10 *infra*.

without cause or excuse, which are reasonably calculated to injure another.<sup>9</sup> Generally, either type of malice will support the tort actions discussed in this project.<sup>10</sup>

Nevertheless, as illustrated by a recent Florida decision, the distinction between actual and legal malice may be critical in determining the availability of insurance coverage. In *Employers Commercial Union Insurance Co. v. Kottmeier*,<sup>11</sup> a Florida court was presented with the question of whether an insurer had a duty, under policy terms similar to those listed above, to defend and provide coverage in a suit for slander against an insured. The court held that the language of the policy should be interpreted to provide coverage

for all libel or slander by the insured, except that which is published or uttered with *actual* malice. In other words, even though the defamatory words may carry with them a presumption of legal malice, coverage is still provided unless it be shown that the statements were made with actual malice.<sup>12</sup>

Under *Kottmeier*, coverage will be allowed for intentional acts from which malice may be implied but not for acts committed with actual malice or "the specific intent to cause the [resulting] injury."<sup>13</sup> Thus, if an attorney intends, by bringing suit, to cause a defendant harm and harm actually results, the attorney will be unable to recover under the policy. If, however, an attorney prosecutes a claim he considers legitimate but one that a jury later determines unreasonable, insurance coverage will be afforded. This interpretation of the language of the insurance contract appears to give effect to policy terms and to the intent of

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9. BLACK'S LAW DICTIONARY 863 (5th ed. 1979).

10. W. PROSSER, *supra* note 5, at 771-72. At one time the plaintiff had to prove that the defendant was "inspired by malice, in the sense of spite or an improper motive" or actual malice. Today, however, malice is implied by law when the defendant intentionally makes a defamatory statement or uses legal process for an improper purpose. *Id.* at 772.

11. 323 So. 2d 605 (Fla. Dist. Ct. App. 1975). The insurance company attempted to use the exclusionary language within its definition of personal injury to avoid a duty to provide coverage and defense. The question of coverage arose when an anesthesiologist sued a doctor and his insurance company for slander. The company made a motion to dismiss the claims against it and the doctor filed a cross-claim for specific performance and a declaratory judgment that he was entitled to a defense.

12. *Id.* at 606-07.

13. *Id.* at 607.



the parties to the contract.<sup>14</sup> Alternatively, if either type of malice, actual or legal, were deemed sufficient to exclude coverage, a policy's express coverage of malicious prosecution, libel, and slander would be rendered meaningless.

2. *Abuse of Process*.—Because abuse of process is neither expressly included nor excluded by standard policy terms,<sup>15</sup> the availability of coverage for claims brought under the tort is largely speculative. Although allegations of malicious prosecution are similar to allegations of abuse of process and are often brought in the same lawsuit, the torts are separate and distinct.<sup>16</sup> This distinction has led at least two courts<sup>17</sup> to hold that a policy providing coverage for malicious prosecution does not extend coverage to the tort of abuse of process when the terms of the policy do not expressly provide this coverage.<sup>18</sup> These courts concluded that the subject policies' omission of coverage for abuse of process did not create an ambiguity and that, consequently, the burden of proving coverage rested on the insureds.<sup>19</sup>

Several considerations militate against the conclusion reached by these courts. First, lawyers' professional liability policies should be construed according to the tenets used to interpret other insurance policies,<sup>20</sup> one of which is that an insurance contract, which is a contract of adhesion, is "strictly construed against its author. . . ."<sup>21</sup> Second, attorneys and the courts frequently confuse abuse of process with malicious prosecution, al-

14. *Id.* In *Levinson v. Aetna Cas. & Sur. Co.*, 42 A.D.2d 811, 812, 346 N.Y.S.2d 428, 430 (1973), the New York Supreme Court, Appellate Division, held that a policy that excluded intentional acts and included malicious prosecution, libel, and slander within the coverage inherently created an ambiguity to be resolved against the insurer and that coverage therefore should be provided. The *Kottmeier* result, however, is a more accurate reflection of the bargaining intentions of the parties.

15. See note 7 and accompanying text, *supra*.

16. *R. MALLEN & V. LEVIT*, *supra* note 1, §§ 45, 46, 50.

17. *Parker Supply Co. v. Travelers Indem. Co.*, 588 F.2d 180 (5th Cir. 1979) (applying Alabama law); *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wash. App. 290, 612 P.2d 456 (1980).

18. 588 F.2d at 182-83; 26 Wash. App. at —, 612 P.2d at 459.

19. 588 F.2d at 182-83; 26 Wash. App. at —, 612 P.2d at 459.

20. *R. MALLEN & V. LEVIT*, *supra* note 1, § 452.

21. *Id.* § 452, at 536. Even though an attorney is expected to be sophisticated in his grasp of contracts, he is unable to negotiate the terms of the coverage with the carrier; this negotiation is conducted by the state bar association. Therefore, the contract is still one of adhesion.

though they are separate torts,<sup>22</sup> because both arise from a misuse of the legal system.<sup>23</sup> Thus, the failure of a policy covering malicious prosecution to provide for abuse of process arguably creates an ambiguity<sup>24</sup> that should be construed against the insurer and in favor of the insured.<sup>25</sup> Finally, it may reasonably be assumed that an attorney and his insurer intend and expect that a policy provides coverage of both torts.<sup>26</sup> Thus, construction of these contracts to include coverage of abuse of process would give effect to the expectations of the parties and would avoid a harsh, unintended result.<sup>27</sup>

3. *Coverage Under Supplemental and Umbrella Endorsements.*—As illustrated above, lawyers' professional liability insurance may, pending a favorable interpretation of policy language, provide coverage of the torts of malicious prosecution, defamation, and abuse of process. If a policy is interpreted to provide coverage but the coverage is insufficient to satisfy a third party's tort claim, the availability of coverage under supplementary endorsements becomes an important determination.

Generally, if an attorney's malpractice policy fails to afford

22. Malicious prosecution is the institution of an action, without probable cause and with malice, that terminates favorably for the original defendant. *R. MALLEN & V. LEVIT*, *supra* note 1, § 45. Abuse of process is the malicious use of a proper legal process to accomplish something for which it was not designed. *Id.* § 46.

23. *R. MALLEN & V. LEVIT*, *supra* note 1, § 46.

24. Of the policies reviewed in the course of preparation of this article, none provides specific coverage for abuse of process within its terms. The policies reviewed were those of American Bankers Insurance Company of Florida (American Bankers), National Union Fire Insurance Company of Pittsburgh, Pennsylvania (National Union), SYII Guarantee Insurance Company (SYII), and Potomac Insurance Company (Potomac). The president of the General Agency of Charleston, South Carolina, the agency that provides the policies endorsed by the South Carolina Bar, stated that these policies would provide coverage for the tort of abuse of process. Interview with John Cappleman, President of the General Agency of Charleston (July 19, 1981). Because of the similarity of the torts and the policies' failure expressly to exclude coverage for abuse of process, the policies should be declared ambiguous.

25. *R. MALLEN & V. LEVIT*, *supra* note 1, § 452.

26. Claims for abuse of process are made against insured attorneys and defended by insurance companies. Pfennigstorf, *supra* note 1, at 274. As stated in note 24 *supra*, insurance companies might intend their policies to cover abuse of process. Interview, *supra* note 24.

27. The policy terms include very similar torts, and abuse of process actions are not the basis for a significant percentage of the claims made. Pfennigstorf, *supra* note 1, at 274. If the parties intend the policy to cover abuse of process, it would be a harsh result to declare that such coverage does not exist. See *Parker Supply Co.*, 588 F.2d 180 (5th Cir. 1979); *R.A. Hanson Co.*, 26 Wash. App. 290, 612 P.2d 456 (1980).

coverage for malicious prosecution, so will the supplementary or umbrella coverage he carries. For example, although an attorney may have, in addition to his malpractice policy, supplementary liability insurance,<sup>28</sup> this supplemental coverage is normally limited to bodily injury and property damage occurring on the attorney's premises or as a result of the operation of an owned or leased automobile or other vehicle;<sup>29</sup> supplementary liability insurance thus is of no value in the context of third party tort claims. Similarly, personal umbrella liability policies for lawyers,<sup>30</sup> which usually exclude liability arising from the insured's profession, and general professional umbrella liability policies,<sup>31</sup> which ordinarily expressly exclude lawyers' professional liability, do not provide coverage for the torts discussed in this project. Although business umbrella liability endorsements for lawyers<sup>32</sup> cover malicious prosecution and defamation, the language used is essentially the same as that used in lawyers' malpractice policies. Therefore, these endorsements are unlikely to provide coverage when a malpractice policy will not.<sup>33</sup>

### B. *Period of Coverage*

Apart from showing that a malicious prosecution, defamation, or abuse of process claim is covered by the terms of his professional liability insurance, an attorney must show that the claim falls within the policy's period of coverage. American insurance companies first entered the professional liability insurance market with the "occurrence" policy.<sup>34</sup> This type of policy

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28. R. MALLIN & V. LEVIT, *supra* note 1, app. at 581.

29. *Id.*

30. *Id.* app. at 584.

31. The South Carolina Insurance Company, Commercial Umbrella Liability Policy provides as follows:

#### LAWYERS PROFESSIONAL LIABILITY

In consideration of the premium charged, it is agreed that the insurance afforded by this policy shall not apply with respect to liability arising out of any act, error or omission of the insured, or of any other person for whose acts, error or omission the insured is legally responsible, in the performance of professional services for others in the insureds capacity as a lawyer.

32. R. MALLIN & V. LEVIT, *supra* note 1, app. at 581.

33. An attorney's homeowner's policy is equally unlikely to provide coverage for torts against third parties. See *St. Paul Fire & Marine Ins. Co. v. Lenzmeier*, 309 Minn. 134, 139, 243 N.W.2d 153, 156 (1976).

34. Comment, *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 U.C.L.A.L. REV. 925, 926 (1975). Before World War II, no American company wrote law-

provides coverage for "any acts or omissions that arise during the policy period, regardless of when claims are made."<sup>35</sup> Thus, under these policies, an insurer is obligated to defend and indemnify the insured attorney for his acts or omissions during the term of the policy, regardless of when suit is filed against the attorney.<sup>36</sup> Because the exposure period for the insurer under this type of policy lasts until the statute of limitations has run,<sup>37</sup> leaving the insurer to shoulder the inflated costs of claims made years after a policy's expiration,<sup>38</sup> almost all insurance companies now write only "claims made" policies.<sup>39</sup>

A "claims made" policy covers a lawyer's liability arising out of his professional services for claims<sup>40</sup> made during the policy period even when the acts, errors, or omissions were committed before the beginning of the policy period.<sup>41</sup> The "claims made" policy limits the insurer's exposure to the period for which the policy is written.<sup>42</sup>

yers' professional liability insurance; the only coverage available was issued by Lloyd's of London. Dautch, *Lawyers' Indemnity Insurance*, 46 Com. L.J. 412, 412 (1941).

35. Comment, *supra* note 34, at 926.

36. *Id.* at 926 n.4.

37. The statute of limitations probably runs from the date of discovery rather than from the date of occurrence. See, R. MALLIN & V. LEVIT, *supra* note 1, at 249, 284; Annot., 18 A.L.R.3d 978, 996 (1968); Comment, *supra* note 34, at 931.

38. Comment, *supra* note 34, at 926 n.7 (citing Shand, *Is Your Policy on a "Claims Made" Basis?*, WEEKLY UNDERWRITER, September 15, 1973, at 8).

39. Stern, *An Attorney's Guide for Purchasing Professional Liability Insurance and Practicing Within the Coverages*, 6 OHIO N.U.L. REV. 680, 681 (1979). See also Annot., 84 A.L.R.3d 187 (1978).

40. What constitutes a claim is far from clear. Generally, a claim is an assertion of a right or a demand for money, property or services; it is not a request for information or an explanation. Hoyt v. St. Paul Fire & Marine Ins. Co., 607 F.2d 864 (9th Cir. 1979). See, R. MALLIN & V. LEVIT, *supra* note 1, § 406 (West Supp. 1980).

41. The relevant policy language usually provides as follows:

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of any claim or claims, including claims for personal injury, first made against the insured and reported to the Company during the policy period, arising out of any act or omission of the insured in rendering or failing to render professional services for others in the insured's capacity as a lawyer . . . and caused by the insured or any other person for whose acts or omissions the insured is legally responsible, except as excluded or limited by the terms, conditions and exclusions of this policy.

Lawyers' Professional Liability Policy, National Union, I. Coverage (Sept. 1980). See R. MALLIN & V. LEVIT, *supra* note 1, app.

42. R. MALLIN & V. LEVIT, *supra* note 1, § 455. An attorney who is leaving the practice of law may purchase "risk tail" coverage which extends the period of coverage for reported claims. In effect, this extended reporting period provides the same type of

An important exclusion in the "claims made" policy denies coverage for "any acts or omissions occurring prior to the effective date of this policy if the insured, at the effective date, knew or could have reasonably foreseen that such acts or omissions might be expected to be the basis of a claim or suit."<sup>43</sup> The insurance company's application form normally requires disclosure by an attorney and his firm of any prior action that might give rise to a claim.<sup>44</sup> This requirement could present a problem in the context of third-party tort claims. The following hypothetical is illustrative. An attorney files suit on behalf of his client against the client's doctor on January 1, and the attorney's firm subsequently purchases a "claims made" policy on June 1. In February of the following year, the action against the doctor is tried, and the plaintiff loses. The doctor then sues the plaintiff and his attorney for malicious prosecution. Would the attorney's knowledge that the suit was faring poorly when the application for insurance was made exclude coverage? Would coverage be excluded if the doctor had threatened the attorney with a lawsuit at the time the first suit was initiated?<sup>45</sup> Apparently, no

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coverage as an "occurrence" policy. The pertinent policy language provides as follows:

IV. Extended Reporting Period Endorsement: In case of cancellation or non-renewal by either the Named Insured or the Company, the Named Insured shall have the right, upon payment within thirty (30) days of the termination of an additional premium, to have issued an endorsement providing an extended reporting period covering claims first reported during the extended reporting period on acts or omissions occurring prior to the end of the Policy period and otherwise covered by the Policy. The premium shall be equal to 200% of the Named Insured's last annual premium. The premium may be paid as directed by the Company in writing. If the Company cancels this policy because the Insured has failed to pay a premium when due or has failed, after demand, to reimburse the Company such amounts as the Company has paid in settlement or satisfaction of claims or judgments or for claims expenses in excess of the applicable limit of liability, or within the amount of the applicable deductible, the Insured shall not have the right to have such Extended Reporting Endorsement issued.

Lawyers' Professional Liability Policy, SYII, IV. Extended Reporting Period Endorsement (June 1980). See, Stern, *supra* note 39, at 682-83.

43. SYII policy, *supra* note 42, Exclusions (i).

44. The typical form requires the attorney and his firm to disclose any situations that they think may give rise to future claims. This disclosure is required by the insurance company to ensure that it does not issue a policy for an act that probably will result in a future claim. The effect is to prevent attorneys from buying coverage for acts already committed but not insured against.

45. The practical problem in such a situation is determining when an attorney should reasonably foresee that an act or omission will give rise to a claim. This is a

courts have yet considered this problem in relation to "claims made" policies. Courts considering analogous problems with occurrence policies have reached inconsistent conclusions.<sup>46</sup>

### C. *Extent of Coverage*

1. *Duty to Defend*.—An important feature in professional liability insurance coverage is the provision that the insurance company is bound to "defend *any suit* against the insured *alleging such act or omission* and seeking damages which are payable under the terms of this policy, *even if any of the allegations of the suit are groundless, false, or fraudulent*. . . ."<sup>47</sup> A good defense can be costly; thus the duty to defend is a vital part of the professional liability policy. Because rules governing the duty to defend vary among jurisdictions, an attorney should be aware of the rule within the jurisdiction in which he practices.

To determine whether an insurer has a duty to defend an action brought against its insured, a court will look first to the plaintiff's pleadings to determine whether the claim falls within the terms of the policy.<sup>48</sup> If the pleadings advance several theo-

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difficult question that should turn upon the facts of each situation; however, if it appears that no fraud is involved, coverage should be provided.

46. In *Muller Fuel Oil Co. v. Insurance Co. of North America*, 95 N.J. Super. 564, 232 A.2d 168 (1967), for example, the Appellate Division of the Superior Court of New Jersey held that the essence of the tort of malicious prosecution is the issuance of the complaint, and concluded that coverage was excluded under an occurrence policy because the act giving rise to liability, the original complaint, occurred before the issuance of the policy, even though the favorable termination occurred later. *Id.* at 576, 232 A.2d at 175. The court in *Roess v. St. Paul Fire & Marine Ins. Co.*, 383 F. Supp. 1231 (M.D. Fla. 1974), reached the opposite result. *Accord*, *Security Mut. Cas. Co. v. Harbor Ins. Co.*, 65 Ill. App. 3d 198, 382 N.E.2d 1 (1978), *rev'd on other grounds*, 77 Ill.2d 446, 397 N.E.2d 839 (1979). In *Roess*, the United States District Court of Florida held that a cause of action for malicious prosecution did not accrue until the first suit was terminated. *Roess*, 383 F. Supp. at 1235. The court also stated that because the first suit was on appeal when the policy was purchased by the insured, it had not terminated favorably when the policy was issued. Thus, the act or omission that gave rise to a claim had not occurred before the effective date of the policy. As a result, the insurer would be liable for failing to provide a defense and would be required to provide coverage under the terms of the policy if the insured did not fraudulently conceal the fact that the first law suit was pending. 383 F. Supp. at 1237. *See also* *Arant v. Signal Ins. Co.*, 67 Cal. App. 3d 516, 516, 136 Cal. Rptr. 689, 690 (1977) (holding that damages against the insured accrue at the time of the occurrence of an accident within the meaning of an indemnity policy).

47. *Conner v. Transamerica Ins. Co.*, 496 P.2d 770, 773 (Okla. 1972).

48. 7C J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4683 (Berdal ed. 1979). *See* *R. A. Hanson Co.*, 26 Wash. App. 290, —, 612 P.2d 456, 457 (1980).

ries of liability,<sup>49</sup> or, if the claim is potentially within the policy terms, the insurer has a duty to defend.<sup>50</sup> When the allegations of the complaint are partially within and partially outside the terms of the policy, the insured is usually required to defend the suit.<sup>51</sup> Clearly, no duty to defend exists if all of the allegations of the complaint fall outside the terms of the policy coverage.<sup>52</sup>

Generally, an insurer's duty to defend is broader than its duty to pay,<sup>53</sup> and most courts will resolve any doubt about coverage and ambiguities in the complaint in favor of the insured.<sup>54</sup> An example of liberal construction of pleadings is found in *Conner v. Transamerica Insurance Co.*,<sup>55</sup> in which the Supreme Court of Oklahoma held that any "words of exclusion [within a policy] are to be narrowly viewed and its words of inclusion are to be broadly viewed."<sup>56</sup> Applying this rule, the court held a duty to defend exists until all acts or omissions of the insured are *adjudged* to fall within the exclusions of the policy.<sup>57</sup> Thus, even though the conduct alleged in the complaint falls within the exclusionary terms of the policy, the duty to defend ceases only when the insured's *conduct* is in fact excluded from coverage.<sup>58</sup> Other courts, following what appears to be the majority

49. *Continental Cas. Co. v. Reinhardt*, 247 F. Supp. 173, 174 (D. Or. 1965).

50. *R. A. Hanson Co.*, 26 Wash. App. at —, 612 P.2d at 459; 7C J. APPLEMAN, *supra* note 48, §§ 4683, 4684.01.

51. *Stevens v. Horne*, 325 So. 2d 459, 461 (Fla. Dist. Ct. App. 1976). This rule might be used to provide coverage for abuse of process if the complaint also contained allegations of malicious prosecution.

52. *C.O. Morgan Lincoln-Mercury, Inc. v. Vigilant Ins. Co.*, 521 S.W.2d 318, 322 (Tex. Civ. App. 1975); 7C J. APPLEMAN, *supra* note 48, §§ 4684.01, 4685.

53. 7C J. APPLEMAN, *supra* note 48, § 4684; R. MALLIN & V. LEVIT, *supra* note 1, § 452.

54. 7C J. APPLEMAN, *supra* note 48, § 4683; R. MALLIN & V. LEVIT, *supra* note 1, § 452.

55. 496 P.2d 770 (Okla. 1972).

56. *Id.* at 774.

57. *Id.* at 775. See 7C J. APPLEMAN, *supra* note 48, § 4683.01.

58. The facts of *Conner* show that the suit brought against the insured was groundless, though within the exclusion of the policy. The plaintiff in the original suit had entered voluntary bankruptcy proceedings and subsequent to these proceedings sued over thirty-five defendants including the insured, "Internal Revenue officials, judges, The Governor, bankers and other lawyers . . ." 496 P.2d at 771. A professional buys professional liability insurance to protect his reputation and business. The insurer sells a duty to defend an attorney's reputation. The policy stated that the insured would defend any suit, even if *groundless*, payable under the terms of the policy. 496 P.2d at 773. If it appears the conduct alleged is within the exclusion but is probably groundless, the insurer should be required to defend. *Donnelly v. Transportation Ins. Co.*, 589 F.2d 761

position, have held that allegations of fact that, as stated, fall within the exclusionary clause excuse the insurer from its duty to defend.<sup>59</sup> Because insurance covers only those "damages which are payable under the terms of [the] policy,"<sup>60</sup> *Conner* appears to strain the plain meaning of policy language.

2. *Coverage for Punitive Damages.*—Standard lawyers' professional liability insurance policies exclude coverage for punitive damages.<sup>61</sup> Some jurisdictions do, however, allow insurance against punitive damages, and in those states, an attorney may purchase this additional coverage.<sup>62</sup>

3. *Persons Covered.*—Professional liability insurance policies ordinarily cover the attorney or partnership named as the insured within the policy,<sup>63</sup> including attorneys who join or leave

(4th Cir. 1979).

59. *Battisti v. Continental Cas. Co.*, 406 F.2d 1318 (5th Cir. 1969); *Grieb v. Citizens Cas. Co.*, 33 Wis. 2d 552, 148 N.W.2d 103 (1967).

60. R. KEETON, *INSURANCE LAW* § 7.6(a), at 476 (1971); 7C J. APPLEMAN, *supra* note 48, § 4684.01.

61. The American Bankers policy states that: "1. This Policy Does Not Apply . . . (h) to punitive or exemplary damages . . . ." American Bankers policy, *supra* note 7, Exclusions 1(h). All other policies examined have the same or a similar exclusion.

62. For further discussion of this topic see notes 79 to 88 and accompanying text *infra*.

63. Heffernan, *Professional Malpractice Insurance: Let the Attorney Beware*, 48 CONN. B.J. 347, 352 (1974). Under the "Persons Insured" clause of the SYII policy, the following are defined as being the insured:

#### III. Persons Insured:

Each of the following is an Insured under this insurance to the extent set forth below:

(a) if the Named Insured designated in the schedule is an individual, the person so designated, but only with respect to the conduct of a law practice of which the individual is the sole proprietor;

(b) if the Named Insured designated in the Schedule is a partnership, the partnership so designated and any lawyers who are partners thereof;

(c) if the Named Insured designated in the schedule is a Professional Corporation or Professional Association, the Professional Corporation or Professional Association so designated and any lawyers who are stockholders or members thereof;

(d) any lawyer who is an employee of the Named Insured;

(e) any lawyer who previously qualified as an Insured under subparagraphs III(b), (c) or (d) of this Policy prior to termination of the required relationship with the Named Insured, but only for professional services rendered prior to termination of such relationship;

(f) any partnership, professional corporation or professional association of which the Named Insured is the successor.

SYII policy, *supra* note 7, Insuring Agreements III(a)-(f).



a firm during the period of the policy.<sup>64</sup> Coverage of secretaries, paralegals, law clerks, process servers, and runners who usually are not among the "named insured" is less certain, but the typical policy's extension of coverage to "any person for whose acts, errors or omissions the Insured is legally responsible . . ." <sup>65</sup> may include these employees. Nevertheless, an attorney probably should consider additional coverage for all employees if it is available.<sup>66</sup>

A question of policy coverage may arise when a member of a firm commits an act, clearly excluded by the terms of the firm's policy, that implicates other members of the firm who did not participate in the act. Will insurance coverage extend to nonparticipant members and the firm?<sup>67</sup> This question usually will be answered in the affirmative. Professional liability policies normally contain a waiver of exclusions, which states that any member of the partnership who does not consent or acquiesce to an excluded act remains covered.<sup>68</sup> Thus, even though coverage of

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64. *Id.*; R. MALLIN & V. LEVIT, *supra* note 1, § 457. Notification of changes within a firm must be forwarded to the insurer within a specified time. The American Bankers policy states:

3. Firm Changes: Any changes among the partners or stockholders of the Named Insured, even though it results in changes in the name or business style of the firm, shall not effect this insurance but such change shall be reported to the Company promptly within 60 days and in no event later than the next anniversary date of the policy.

American Bankers policy, *supra* note 7, The Insured, cl. 3. See R. MALLIN & V. LEVIT, *supra* note 1, § 457.

65. American Bankers policy, *supra* note 7, Coverage, cl. 1(a).

66. R. MALLIN & V. LEVIT, *supra* note 1, § 457.

67. Partners within a partnership are liable for the acts, errors and omissions of each other. H. HENN, *LAW OF CORPORATIONS* § 22 (2d ed. 1970).

68. The National Union term states:

III. Waiver of Exclusion and Breach of Conditions

Whenever coverage under any provisions of this policy would be excluded, suspended or lost

(a) because of any exclusion or condition relating to dishonest, fraudulent, malicious or criminal acts or omissions by any insured or employee of an insured and with respect to which any other insured did not personally participate or personally acquiesce or remain passive after having personal knowledge thereof, or

(b) because of noncompliance with any condition relating to the giving of notice to the Company with respect to which any other insured shall be in default solely because of the default or concealment of such default by one or more partners or employees responsible for the loss or damage otherwise insured hereunder;

the Company agrees that such insurance as would otherwise be afforded under

the attorney who committed the act is precluded, the insurer must still defend and indemnify the firm.

### III. SHOULD MORE PROTECTIVE COVERAGE BE WRITTEN?

Assuming that a malicious prosecution, defamation, or abuse of process claim falls clearly within a policy's period of coverage and that the attorney-defendant is a named insured in the policy, several substantial problems remain regarding insurance recovery for third-party tort liability. First is the problem of policy construction: whether abuse of process is covered even though not expressly included in professional liability policies and whether a policy's exclusion of malicious acts includes conduct motivated by actual malice, legal malice, or both. Because malicious prosecution, defamation, and abuse of process are intentional torts,<sup>69</sup> a second problem faced by attorney-defendants in these actions is their uninsured exposure to punitive damages. These problems raise the question of whether additional, more protective insurance should be written. The answer to this question is largely a matter of public policy.

That public policy will not allow a wrongdoer to insure against his intentional acts is an accepted rule.<sup>70</sup> Public policy, however, permits a person to insure against acts of legal malice or intentional acts that cause unintentional results.<sup>71</sup> Attorneys

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this policy shall continue in effect, cover and be paid with respect to each and every insured who did not personally commit or personally participate in committing or personally acquiesce in or remain passive after having personal knowledge of one or more of the acts or omissions described in any such exclusion or condition; provided that if the condition be one with which such insured can comply, after receiving knowledge thereof, the insured entitled to the benefit of this Waiver of Exclusions and Breach of Conditions shall comply with such condition promptly after obtaining knowledge of the failure of any other insured or employee to comply therewith.

National Union policy, *supra* note 41, Conditions; III. Waiver of Exclusion and Breach of Conditions.

69. These torts are "intentional" in the sense that they require an element of malice. See notes 3-14 and accompanying text *supra*.

70. See, e.g., *St. Paul Ins. Co. v. Talladega Nursing Home, Inc.*, 606 F.2d 631, 633 (5th Cir. 1979); 9 R. ANDERSON, *COUCH ON INSURANCE* 2d § 39:15 (1962 & Supp. 1980). But see *Colson v. Lloyd's of London*, 435 S.W.2d 47 (Mo. Ct. App. 1968); *City of Newark v. Hartford Accident & Indemn. Co.*, 134 N.J. Super. 537, 546, 342 A.2d 513, 517-18 (1975).

71. *Kottmeier*, 323 So.2d 605, 607 (Fla. Dist. Ct. App. 1975); 7A J. APPLEMAN, *supra* note 48, § 4501.14 at 286-87.

may therefore insure themselves against intentional acts of malicious prosecution<sup>72</sup> and defamation<sup>73</sup> that are committed "without intent to harm."<sup>74</sup> This rule should be equally applicable to coverage for abuse of process.<sup>75</sup> Thus, attorneys should be able to purchase insurance coverage for those circumstances where their zealous pursuit of what they believe to be a legitimate claim is later determined to have been unreasonable by a jury in a malicious prosecution, defamation, or abuse of process action.<sup>76</sup>

This approach allows an attorney to represent his client without having to make the Hobson's choice between potentially incurring liability to his own client for failing to name a third party who may be liable or incurring liability to the third party for improperly naming him in a suit.<sup>77</sup> It should be noted, however, that the traditional rule of public policy—that a wrongdoer cannot insure against his intentional acts—probably will preclude insurance coverage for third-party torts motivated by actual malice or intent to cause the resulting harm. Nevertheless, allowing insurance coverage for the torts discussed in this project when the standard of liability is legal malice would serve another public policy—ensuring clients' access to court even for those claims that are more likely to generate actions against

72. 7A J. APPLEMAN, *supra* note 48, § 4501.14 at 288.

73. *Id.* at 286-88.

74. *Kottmeier*, 323 So. 2d at 607; 7A J. APPLEMAN, *supra* note 48, § 4501.14.

75. See notes 15-27 and accompanying text *supra*.

76. Another public policy question is presented by the Code of Professional Responsibility's prohibition of an attorney's bringing an action that will maliciously injure another. See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(1) (1980). Should an attorney be allowed to purchase insurance for an act that is clearly in violation of the Code? This question should be resolved with the same reasoning discussed above. If the attorney acts intentionally but without the intent to cause the resulting harm, he should be able to purchase insurance coverage. See notes 71-74 and accompanying text *supra*.

77. But see Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?* 8 PAC. L.J. 897, 907-911 (1977). The author of that comment concludes that there is no danger of an overlap between malpractice and malicious prosecution. In view of the rising number of suits brought for malicious prosecution and the higher likelihood of such a suit being successful, this view should be reassessed. See *Peerman v. Sidicane*, — Tenn. App. —, 605 S.W.2d 242 (1980); Note, *Malicious Prosecution Liability of Plaintiff's Counsel for an Unwarranted Medical Malpractice Suit—New Developments in Physician Countersuits for Unfounded Medical Malpractice Claims*, 7 N. Ky. L. REV. 265 (1980).

their attorneys.<sup>78</sup>

Jurisdictions are split on the issue of whether it is against public policy for a wrongdoer to insure against punitive damages.<sup>79</sup> Several courts have reasoned that insurance coverage defeats the purposes of an award of punitive damages—punishment of wrongdoers and deterrence of similar behavior by others<sup>80</sup> and is therefore void as against public policy.<sup>81</sup> Other courts,<sup>82</sup> however, have reached the opposite conclusion. These courts have recognized that denying insurance for punitive damages can work a hardship on businesses and professional persons by exposing them to liability in situations when a jury may infer malice from intentional conduct that results in unintended injury;<sup>83</sup> that insuring against punitive damages does not shift the burden of punishment to the insurance company because the company may charge higher rates for such coverage;<sup>84</sup> that parties should be free to contract; and that only when the “common sense of the entire community would so pronounce it,”<sup>85</sup> should a contract be precluded by public policy.<sup>86</sup>

The latter position seems reasonable in the context of third-party tort claims against attorneys. Because attorneys are required to provide zealous representation of their clients, they should be free to obtain insurance coverage against punitive damages to protect themselves against the unintended results of

78. *Peerman*, — Tenn. App. —, 605 S.W.2d 242, illustrates that the odds of a physician recovering against an attorney for malicious prosecution are increasing. If attorneys must fear liability in these situations, which is the result desired by physicians, they will be more hesitant to bring close cases.

79. Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431 (1976).

80. *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 440 (5th Cir. 1962); Note, *supra* note 79, at 440.

81. *E.g.*, *McNulty*, 307 F.2d at 440. See Note, *supra* note 79, at 440; Annot., 20 A.L.R.3d 343, 347 (1968).

82. *E.g.*, *First Nat'l Bank v. Fidelity & Deposit Co.*, 283 Md. 228, 389 A.2d 359 (1978); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964) (leading case allowing insurance coverage of punitive damages). See Annot., *supra* note 81, at 350-51.

83. *First Nat'l Bank*, 283 Md. at 236, 389 A.2d at 363-64 (quoting *Harrell v. Travelers Indem. Co.*, 279 Or. 199, 209-11, 567 P.2d 1013, 1018-19 (1977)).

84. 283 Md. at 237, 389 A.2d at 364 (quoting *Harrell*, 279 Or. at 213, 567 P.2d at 1019).

85. 283 Md. at 238, 389 A.2d at 364 (quoting *In re Trust Estate of Woods, Weeks & Co.*, 52 Md. 520, 536 (1879)).

86. 283 Md. at 238, 389 A.2d at 364.

their actions during such representation. Moreover, in those jurisdictions that currently permit such coverage, it is available only at additional cost to attorneys who must purchase a rider to their basic policy.<sup>87</sup> Attorneys should not, however, be able to insure against punitive damages that result from acts of actual malice. Public policy or the "common sense of the entire community" requires that attorneys be held directly accountable for the consequences of conduct that results in intended harm.<sup>88</sup>

#### IV. CONCLUSION

The professional liability insurance policies held by most attorneys are likely to afford some coverage of the torts of malicious prosecution and defamation, provided that it can be established that the claim was initiated during a policy's period of coverage and that the defendant-attorney is a named insured under the policy. The scope and extent of the coverage provided, however, is unclear. State bar associations may wish to request revisions in policy form that will resolve present uncertainties and expressly include coverage for abuse of process. Although attorneys who act with actual malice and intent to cause a resulting harm should be denied coverage, a policy's coverage of conduct tainted only by legal malice should be stated more clearly. Moreover, because courts may construe present policies to exclude coverage for abuse of process, despite the similarity of the tort to malicious prosecution, policies should be revised to provide express coverage of abuse of process. In those states in which public policy is not adverse to insuring against punitive damages resulting from intentional acts yielding unintentional injuries, attorneys may want to purchase a rider affording such coverage. As the frequency and success of third-party tort actions against attorneys continue to increase,<sup>89</sup> insurance that

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87. The SYII policy rider states: "In consideration of the premium charged and the mutual covenants contained in the Policy, it is mutually agreed and declared that: The Punitive Damage Exclusions under the policy is hereby deleted." SYII policy, *supra* note 42, Punitive Damage Deletion Endorsement E-133. The cost of these riders normally is approximately twenty percent of the base premium.

88. See *Kottmeier*, 323 So. 2d at 606. The appeal in *Kottmeier* was on the issue of coverage for compensatory damages. Coverage for punitive damages was deemed excluded at trial. *Id.*

89. Note, *Malicious Prosecution Liability*, *supra* note 78, at 265, 283-86.

provides more complete coverage for these torts becomes more necessary.

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