An Analysis of Current Theories of Liability

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I. INTRODUCTION

The number of claims against attorneys continues to increase in South Carolina. Until recently, attorney malpractice claims were generally brought only by clients, and the theories of liability most commonly sounded in negligence and breach of contract.1 Third parties were discouraged from presenting attorney malpractice claims because of strict privity requirements.2

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1. See, e.g., Floyd v. Kosko, 285 S.C. 390, 391, 329 S.E.2d 459, 460 (Ct. App. 1985) (per curiam). In Floyd a client brought an action against his attorney for breach of contract, negligence, and "professional malpractice" arising out of attorney's defense of the client in a medical malpractice action. In a footnote to the decision, the court noted that it discerned no difference between the causes of action for negligence and professional malpractice. Id. at 391 n.1, 329 S.E.2d at 460.

2. See, e.g., Gaar v. North Myrtle Beach Realty Co., 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986) ("In his professional capacity the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities."); see also Mark O’Neill, Privity Defense in Legal Malpractice Cases:
Today, the claimants and the theories are far more wide-ranging.

This article reviews the current status of common law claims against attorneys for breach of fiduciary duty, civil conspiracy, abuse of process, and malicious prosecution. It further addresses possible statutory claims under the South Carolina Unfair Trade Practices Act and the Frivolous Civil Proceedings Sanctions Act. In addition, this article analyzes the differences between the standard of competence required under the South Carolina Rules of Professional Conduct and the standard of care applicable in a legal malpractice action.

II. Breach of the Fiduciary Duty

South Carolina courts have long recognized that attorneys owe a fiduciary duty to their clients. In the early case of Wise v. Hardin, the South Carolina Supreme Court compared the role of an attorney to that of a trustee:

In all matters, either of contract or gift, between attorney and client, from the confidential relation which must necessarily exist between them, the law requires not only proof of fairness on the part of the former, but the influence which their relative position allows him to exercise demands that severe and rigorous fairness which can leave nothing of doubt or uncertainty behind.

The court has also described the fiduciary connection between attorney and client as a "trust relationship." This relationship is not only recognized at common law, but also is incorporated into the Rules of Professional Conduct, thereby exposing an attorney to possible disciplinary action for its breach.

South Carolina is not alone in holding attorneys accountable as fiduciaries to their clients. In one way or another, courts in every jurisdiction have held that attorneys owe a fiduciary obligation to their clients. Like the courts

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6. 5 S.C. 325 (1874).
8. See Royal Crown Bottling Co. v. Chandler, 226 S.C. 94, 105, 83 S.E.2d 745, 750 (1954) ("Attorneys occupy a trust relationship to their clients and agreements between them, as between trustees and cestuis, are examined with utmost care by the courts in order to avoid any improper advantage to the attorney.").
10. See RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 11.1, at 631 (3d

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in South Carolina, other courts cite the client's trust and confidence in the attorney as the basis for the fiduciary obligation.\textsuperscript{11}

The duty of a fiduciary in South Carolina is to act in "good faith" with respect to the interests of the one reposing confidence.\textsuperscript{12} What constitutes good faith has not been fully defined, in large part because the duty is equitable in nature,\textsuperscript{13} and the courts have therefore been unwilling to set any precise description that might limit its application.\textsuperscript{14}

\section*{A. Standard of Conduct v. Standard of Care}

Because the fiduciary duty of attorneys is so loosely defined, at first glance it is difficult to distinguish the fiduciary duty from the general standard of care owed by attorneys in the performance of their professional services.\textsuperscript{15} The general standard of care encompasses a requirement to act in good faith toward the client.\textsuperscript{16} Although both duties require the attorney to act in good faith, the fiduciary duty has been referred to as a standard of "conduct," as opposed to a standard of "care."\textsuperscript{17}

\textsuperscript{ed. 1989 & Supp. 1993).}

\textsuperscript{11} See id.


\textsuperscript{13} Although the fiduciary duty is equitable in nature, a cause of action for damages stemming from a breach of the fiduciary duty is an action at law. Bivens v. Watkins, ___ S.C. ___, 437 S.E.2d 132, 133 (Ct. App. 1993). However, a claim for breach of fiduciary duty may still sound in equity if the relief sought is equitable in nature. Id. at ___ n.3, 437 S.E.2d at 133 n.3. The court's finding in Bivens is consistent with the general rule that the rights asserted and the form of relief sought determine whether an action is one at law or in equity. Dean v. Kilgore, ___ S.C. ___, 437 S.E.2d 154, 155 (Ct. App. 1993); see also RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1977) ("[T]he remedy of a principal against an agent [for breach of a fiduciary duty] is ordinarily at law.").

\textsuperscript{14} See Island Car Wash, Inc., 292 S.C. at 599, 358 S.E.2d at 152 ("Courts of equity have carefully refrained from defining the particular instances of fiduciary relationship in such a manner that other and perhaps new cases might be excluded and have refused to set any bounds to the circumstances out of which a fiduciary relationship may spring.") (quoting 36A C.J.S. FIDUCIARY 385 (1961)).

\textsuperscript{15} The general standard of care in professional negligence actions is set forth in Doe v. American Red Cross Blood Servs., 297 S.C. 430, 377 S.E.2d 323 (1989) (per curiam), where the South Carolina Supreme Court stated: "[I]n a professional negligence cause of action, the standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices in his profession." Id. at 435, 377 S.E.2d at 326.

\textsuperscript{16} See Folkens v. Hunt, 290 S.C. 194, 200, 348 S.E.2d 839, 843 (Ct. App. 1986) ("[P]rofessionals must] 'render their services with that degree of skill, care, knowledge, and judgment usually possessed and exercised by members of that profession . . . in accordance with accepted professional standards and in good faith without fraud or collusion.'") (quoting Russel L. Wald, Annotation, Accountant's Malpractice Liability to Client, 92 A.L.R.3d 396, 400 (1972)).

\textsuperscript{17} MALLEN & SMITH, supra note 10, § 11.1, at 633. See generally Deborah A. DeMott,
In the past, claims for breach of fiduciary duty were seldom made in South Carolina. When such claims were presented, they generally involved allegations against attorneys who had defrauded or taken advantage of their clients for personal gain\textsuperscript{18} or had otherwise failed to show their clients undivided loyalty.\textsuperscript{19} However, in the last few years, plaintiffs in legal malpractice suits have asserted claims for breach of fiduciary duty almost as a matter of course, regardless of the nature of the attorneys’ alleged error or omission.

One explanation for the increased number of breach of fiduciary duty claims may be the perceived availability of punitive damages under such a theory. Although no state court decisions have been reported in South Carolina, courts in other jurisdictions have held that a client may recover punitive damages if the attorney breaches a fiduciary duty in a willful, wanton, or malicious manner.\textsuperscript{20} However, courts have not allowed punitive damages when the attorney’s breach of the fiduciary duty was not willful or malicious.\textsuperscript{21}

The fact that breach of a fiduciary duty has been regarded as constructive fraud in South Carolina\textsuperscript{22} should not alter the punitive damages analysis because malice or intent is not an element of constructive fraud.\textsuperscript{23} In fact, lack of intent distinguishes constructive fraud from actual fraud.\textsuperscript{24} It has

\begin{footnotesize}
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\item \textbf{Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 DUKE L.J. 879 (1988)} (discussing the general principles of fiduciary obligation).
\item 18. \textit{See}, e.g., Hawley v. Jennings, 148 S.C. 140, 145 S.E. 697 (1928) (holding attorney liable to client when the attorney received $7,000 for selling the client’s land, but told the client he received only $5,500 and kept part of the difference).
\item 19. \textit{See}, e.g., \textit{In re Conway}, 305 S.C. 388, 409 S.E.2d 357 (1991) (per curiam) (holding that disbarment was appropriate sanction for attorney’s misconduct in appropriating funds from corporation that the attorney had formed with a client).
\item 23. In Greene v. Brown, 199 S.C. 218, 19 S.E.2d 114 (1942), the South Carolina Supreme Court defined constructive fraud as “a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud feasar, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.” \textit{Id.} at 223, 19 S.E.2d at 116 (quoting C.J.S. \textit{Fraud} § 4, at 1060 (1921)).
\item 24. Designer Showrooms, 304 S.C. at 480-81, 405 S.E.2d at 419. Punitive damages are available in an action for actual fraud because the tortfeasor was conscious, or chargeable with consciousness, of his wrongdoing. \textit{See} Carter v. Boyd Constr. Co., 255 S.C. 274, 283, 178
\end{itemize}
\end{footnotesize}
generally been held that punitive damages are not available under a constructive fraud theory.\(^\text{25}\)

**B. The Privity Issue**

Unlike an attorney’s legal duty of care, which extends both to the client and to “those in privity with the client,”\(^\text{26}\) the equitable fiduciary duty traditionally extends only to the client.\(^\text{27}\) Under South Carolina law, “[a] person attains the status of a ‘client’ when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice.”\(^\text{28}\) Persons who meet this definition have standing to pursue a claim for an attorney’s breach of the fiduciary duty.

In *Hotz v. Minyard*\(^\text{29}\) the South Carolina Supreme Court apparently created a limited exception to the privity rule. The plaintiff in *Hotz* sued the attorney who prepared her father’s will.\(^\text{30}\) Although the plaintiff was not the attorney’s client with respect to the will, the court held that the attorney owed the plaintiff a fiduciary duty based on the “special confidence” she placed in the attorney.\(^\text{31}\)

Not surprisingly, *Hotz* has encouraged third party actions against attorneys for breach of the fiduciary duty. Third party claimants have argued that *Hotz* represents a departure from the strict privity requirement that would otherwise prevent them from bringing such a claim in attorney malpractice actions. However, a more detailed review of the facts in *Hotz* reveals that the plaintiff was not a traditional third party, but instead had an ongoing attorney-
client relationship with the attorney.\textsuperscript{32} Although the attorney did not represent the plaintiff regarding the specific will that was at issue in the case, he had previously represented the plaintiff in a number of legal matters. In fact, the attorney had prepared the plaintiff’s taxes for over twenty years and had drafted a will for her that she signed only one week before the transaction at issue.\textsuperscript{33} Furthermore, the plaintiff was the vice-president and minority stockholder in one of her father’s businesses.\textsuperscript{34} Thus, the attorney’s continual and current representation of the plaintiff was necessarily interrelated with his representation of her father and the family businesses. The plaintiff considered that the defendant was her attorney, and she had consulted with him on various matters regarding the family businesses. In addition, the plaintiff was a named beneficiary under her father’s will, and the court held that the attorney owed her a limited duty not to “actively misrepresent” the contents of that will.\textsuperscript{35}

Apparently, \textit{Hotz} is a fact-driven decision that represents, at best, a narrow exception to, rather than a departure from, the strict privity requirement. Therefore, it may be concluded that the South Carolina courts will continue to look for the attorney-client relationship as the foundation for a breach of fiduciary duty claim in a legal malpractice action.

\section*{III. Breach of Ethical Rules}

An attorney sued for legal malpractice may also face related disciplinary charges. All records and proceedings concerning the disciplinary charges are strictly confidential\textsuperscript{36} and, therefore, cannot be raised as an issue in a legal malpractice action. It is not uncommon, however, for a claimant in a legal malpractice suit to argue that the South Carolina Rules of Professional Conduct\textsuperscript{37} define an attorney’s duty of care and may be used at trial to establish the attorney’s breach of a legal duty.

\subsection*{A. The Use of the Rules in Malpractice Actions}

The Preamble to the South Carolina Rules of Professional Conduct contains language that calls into serious question a claimant’s attempt to use the Rules in a legal malpractice suit, whether for purposes of pleading or proof:

\begin{quotation}
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\textsuperscript{32} \textit{Hotz}, 304 S.C. at 230, 403 S.E.2d at 637.
\textsuperscript{33} \textit{Id}.
\textsuperscript{34} \textit{Id}. at 227, 403 S.E.2d at 635.
\textsuperscript{35} \textit{Id} at 230, 403 S.E.2d at 637.
\textsuperscript{36} S.C. APP. CT. R. 413, ¶ 20. Violation of Rule 413 is deemed contempt of court, \textit{Id}. ¶ 20(E), and in the case of attorneys, is grounds for disciplinary action. \textit{See In re Cheek}, 303 S.C. 280, 281, 400 S.E.2d 139, 140 (1991) (per curiam).
\textsuperscript{37} S.C. APP. CT. R. 407.
\end{flushright}
\end{quotation}
Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.38

The Preamble specifically states that the Rules are not intended as a basis for civil liability and that a claimant cannot seek to enforce the Rules through a civil suit. Furthermore, the Preamble warns against the danger inherent in invoking the Rules as a procedural weapon in a civil suit and specifies that the Rules do not give rise to a presumption equating violation of a Rule with the breach of a legal duty. Therefore, the clear language of the text leads to the inescapable conclusion that the South Carolina courts should not allow claimants in legal malpractice suits to base their allegations of breach of a legal duty on the Rules or use the Rules as evidence of breach of a legal duty.

The limitation on a claimant's use of the Rules is further suggested in the recent case of *Langford v. State*,39 in which the South Carolina Supreme Court rejected a criminal defendant's argument that his conviction was rendered unconstitutional by virtue of his attorney's possible violation of the South Carolina Rules of Professional Conduct.40 The court stated that the purpose of the Rules is "to regulate and guide the legal profession by defining proper ethical conduct . . . ."41 Therefore, *Langford* implies that the South Carolina courts will not allow the Rules to be used as evidence of a breach of care in a legal malpractice suit.

In *Hizey v. Carpenter*42 the Washington Supreme Court analyzed at length the issue of the use of the Rules of Professional Conduct in a legal

40. Id. at ___ 426 S.E.2d at 795.
42. 830 P.2d 646 (Wash. 1992).
malpractice suit.\textsuperscript{43} The court expressly distinguished between a legal duty of care and breach of an ethical Rule, recognizing that the Rules of Professional Conduct were never intended as a basis for civil liability. The court held that the jury in a legal malpractice case may not be informed of the Rules through either expert testimony or jury instructions, because an ethical violation is not actionable at law and the introduction of the Rules could mislead the jury into concluding that the Rules conclusively establish the legal standard of care.\textsuperscript{44}

The position that the ethical rules do not establish the standard of care in a civil action for legal malpractice is consistent with the fact that the attorney disciplinary system bears limited resemblance to the civil justice system. The ethical rules are designed to guide attorneys in their dealings with both clients and the courts,\textsuperscript{45} whereas the civil justice system is designed to compensate those who suffer injury at the hands of another.\textsuperscript{46}

Procedurally, an attorney's breach of an ethical rule is addressed under special disciplinary rules\textsuperscript{47} established by the South Carolina Supreme Court, which are subject to somewhat relaxed rules of evidence.\textsuperscript{48} Conversely, in

\textsuperscript{43} Id. at 650-54.

\textsuperscript{46} See S.C. APP. CT. R. 407, Preamble ("A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."). It has therefore been suggested that the legal system itself is "the party most involved in and affected by the professional standards of the Model Rules." Jean E. Faure & R. Keith Strong, The Model Rules of Professional Conduct: No Standard For Malpractice, 47 MONT. L. REV. 363, 375 (1986). Faure and Strong argue that allowing use of the ethical rules in a legal malpractice case would cause attorneys to "distance themselves from the court system and consider more important their relationship with clients than their relationship with the legal system." \textit{Id.} at 375.

\textsuperscript{47} Cf. Ex Parte Lewie, 17 S.C. 153, 155 (1882) (describing the Court of Common Pleas as a "general fountain of justice" for citizens whose rights have been invaded).

\textsuperscript{48} S.C. APP. CT. R. 413 (Disciplinary Procedure).
civil cases strict rules of evidence apply, and the cases are conducted as adversarial proceedings. Furthermore, the South Carolina Supreme Court may impose a wide range of sanctions for an ethical violation, depending upon the mitigating and aggravating circumstances involved. A civil fact-finder, on the other hand, may only award money damages as compensation for an injury proximately suffered.

Prohibiting the use of ethical Rules as evidence of the attorney’s duty of care in a legal malpractice case is also consistent with the broad aspirational nature of the Rules. Although some of the Rules prescribe or prohibit

the rules of civil procedure and rules of evidence apply in disciplinary cases.

49. See S.C. R. Civ. P. 43 (Evidence; Conduct of Trial).
50. S.C. App. Ct. R. 413, ¶ 7(A) (Manner of Discipline) states:
   Every member of the Bar found guilty of misconduct shall be disciplined in accordance with the seriousness of such misconduct by:
   1) disbarment;
   2) suspension for an indefinite period . . . , subject to reinstatement only as hereinafter provided;
   3) temporary suspension for a definite period . . . , such period of suspension to be fixed by the Court, not to exceed two years;
   4) public reprimand;
   5) private reprimand.

In addition, the South Carolina Supreme Court has used the disciplinary system as a vehicle for issuing instructive guidelines or warnings to the Bar. See, e.g., In Re Anonymous Member of the S.C. Bar, 297 S.C. 527, 530, 377 S.E.2d 573, 574 (1989) (per curiam) (stating in a private reprimand: “We call to the bar’s attention . . . [that] we will no longer excuse unwitting violations of the rule [requiring confidentiality of grievance proceedings].”).

51. See S.C. App. Ct. R. 407, Scope (“[T]he Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.”). For specific examples of mitigating and aggravating circumstances considered in disciplinary actions, see In re Woodruff, ___ S.C. ___, 438 S.E.2d 227, 228 (1993) (per curiam) (“While substance abuse is not a mitigating factor in attorney discipline matters, it is a factor in determining the appropriate sanction.”); In re Nida, ___ S.C. ___, 432 S.E.2d 462, 463 (1993) (per curiam) (stating that the attorney’s misconduct was exacerbated by his failure or refusal to cooperate with the disciplinary Hearing Panel); In re Dobson, ___ S.C. ___, 427 S.E.2d 166, 169 (1993) (per curiam) (considering the passage of time between the offense and disciplinary proceeding in assessing sanction against attorney).


53. The Preamble to the South Carolina Rules of Professional Conduct states:
   Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.

certain conduct, the Rules also serve to encourage attorneys to continually strive to achieve the highest standards in both their professional and personal endeavors.\textsuperscript{54} The South Carolina Supreme Court has held that attorneys are subject to discipline for matters that are not strictly related to the practice of law.\textsuperscript{55} Therefore, the Rules serve a purpose that extends far beyond the issue of competence in the practice of law. For this additional reason, the Rules should not be used to define the standard of due care at issue in a civil suit for legal malpractice.\textsuperscript{56}

\section*{IV. Breach of the Unfair Trade Practices Act}

Plaintiffs in legal malpractice actions have sometimes sought to hold attorneys liable under various statutes. One of the statutes most commonly used for this purpose is the South Carolina Unfair Trade Practices Act (SCUTPA).\textsuperscript{57} The SCUTPA provides for the recovery of attorney fees and, in cases involving willful or knowing violations, treble damages.\textsuperscript{58} Consequently, it is not difficult to understand why plaintiffs often include SCUTPA claims in legal malpractice actions. Despite the popularity of SCUTPA claims, however, the viability of such a claim in a legal malpractice case is extremely questionable.

A cause of action under the SCUTPA must allege facts that show unfair or deceptive acts or practices in the conduct of trade or commerce\textsuperscript{59} that adversely affect "the public interest."\textsuperscript{60} An unfair or deceptive act or

\textsuperscript{54} Id. The Preamble further states: "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." \textit{Id.}

\textsuperscript{55} In \textit{re} Tedder, 296 S.C. 500, 503, 374 S.E.2d 294, 296 (1988) (per curiam) (citing \textit{South Carolina Real Estate Comm'n v. Boineau}, 267 S.C. 574, 230 S.E.2d 440 (1976), \textit{cert. denied}, 431 U.S. 954 (1977)). In \textit{Tedder} the court held that the attorney's convictions for, among other things, conspiracy to import marijuana, warranted disbarment. \textit{Id.}

\textsuperscript{56} The Rules may also be viewed as too vague to stand as the basis for the legal standard of care. Robert Dahlquist, \textit{The Code of Professional Responsibility and Civil Damage Actions Against Attorneys}, 9 \textit{Ohio N.U. L. Rev.} 1, 20 (1982).


\textsuperscript{58} \textit{Id.} § 39-5-140(a).

\textsuperscript{59} The SCUTPA defines the terms "trade" and "commerce" as follows: "\textit{Trade}" and "\textit{commerce}" shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State. \textit{Id.} § 39-5-10(b).

\textsuperscript{60} Noack Enters., Inc. \textit{v. Country Corner Interiors, Inc.}, 290 S.C. 475, 479, 351 S.E.2d
practice that affects only the parties to a particular transaction does not involve the public interest and therefore falls outside the scope of the SCUTPA.\(^6\) To affect the public interest, the alleged acts or practices must have the potential for repetition.\(^6\)

To date, only one reported decision in South Carolina has addressed legal services within the context of the SCUTPA. In *Camp v. Springs Mortgage Corp.*\(^6\) the South Carolina Court of Appeals held that there was "no question but what [sic] legal services come within the definition of [the] statute."\(^6\) However, in making this statement the court of appeals appears to have transposed the parties to the case, leaving the statement questionable. Plaintiff Camp, an attorney, sued Springs Mortgage Corporation under the SCUTPA after Springs informed Camp's client that Camp's services as the client's counsel in a loan closing would be unacceptable, and the client obtained new counsel.\(^6\) Springs argued that its business was regulated and, therefore, it was not within the scope of the SCUTPA.\(^6\) However, the court of appeals rejected Spring's argument stating:

> S.C. Code Ann. § 39-5-10 (1976) defines "commerce" as including "the advertising, offering for sale, sale or distribution of any services . . . ." There is no question but what [sic] legal services come within the definition of this statute. We also hold that the alleged act or practice of Springs in this case would have an impact upon the public interest.\(^6\)

The commerce at issue in *Camp* involved the mortgage services offered

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\(^{347, 350}\) (Ct. App. 1986).


\(^{62}\) *Id.* In *Ardis* the South Carolina Supreme Court stated:

> The SCUTPA is unavailable to redress private wrongs if the public interest is unaffected. An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the Act's embrace. Unfair or deceptive acts or practices have the potential for repetition. A deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the SCUTPA. Otherwise, every intentional breach of a contract within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages.

*Id.* (citations omitted).


\(^{64}\) 307 S.C. at 285, 414 S.E.2d at 786.

\(^{65}\) *Id.* at 284, 414 S.E.2d at 785.

\(^{66}\) *Id.* at 285, 414 S.E.2d at 786.

\(^{67}\) *Id.* (citing Noack Enters. Inc. v. Country Corner Interiors, Inc., 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App. 1986)).
by Springs, not the legal services offered by Camp. Although Camp claimed that Springs had interfered with his right to provide legal services,\(^68\) he made no claim that Springs itself had provided any legal services to the client. In fact, the opinion states that the client simply employed another attorney of her choice after Springs rejected Camp as the closing attorney.\(^69\) Therefore, the validity of the court's statement that legal services fall within the SCUTPA is doubtful.

The South Carolina Supreme Court reversed the court of appeals' finding that Camp had properly asserted an unfair trade practices claim.\(^70\) The supreme court rejected the unfair trade practices claim on the grounds that Spring's conduct in precluding Camp from acting as the closing attorney did not describe any action that was unfair or deceptive for purposes of the SCUTPA.\(^71\) Although the supreme court did not expressly address the court of appeals' statement that legal services fall within the scope of the SCUTPA, its reversal of the SCUTPA claim at least implies that the supreme court disagreed with the court of appeals' finding in that regard.

Despite the lack of any substantive case law in South Carolina, some insight into the validity of claims against attorneys under the SCUTPA can be gained by reference to cases interpreting section 5(a)(1) of the Federal Trade Commission Act.\(^72\) Section 39-5-20 of the SCUTPA, which declares unfair trade practices unlawful, was modeled on section 5(a)(1) of the Federal Act.\(^73\) When construing section 39-5-20 of the SCUTPA, the code expressly instructs the South Carolina courts to seek guidance from the Federal Trade Commission and federal court decisions construing section 5(a)(1) of the Federal Act.\(^74\) Nevertheless, there is an important distinction between the SCUTPA and the federal act: no private right of action exists under the federal act; instead, the right to enforce the Federal Act rests solely with the Federal Trade Commission.\(^75\)

There have been very few claims presented against attorneys under the Federal Act, which may indicate that the Federal Trade Commission has determined that the Act, with limited exceptions, does not apply to attorneys. For example, in *Federal Trade Commission v. Superior Court Trial Lawyers*

\(^68\) See Camp v. Springs Mortgage Corp., 307 S.C. 283, 284, 414 S.E.2d at 784, 785.

\(^69\) Id.


\(^71\) Id. at ___, 426 S.E.2d at 306.


\(^75\) E.g., Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973).
Ass'n\textsuperscript{76} the United States Supreme Court held that a group of approximately one hundred attorneys who had entered into an agreement not to accept court appointments to represent indigent criminal defendants because of an ongoing fee dispute with the government had violated both the Sherman Antitrust Act and section 5 of the Federal Trade Commission Act.\textsuperscript{77} In so doing, the Court stated that the actions of the attorneys "was unquestionably a naked restraint on [trade]."\textsuperscript{78} In an earlier case, \textit{In re Wilson Chemical Co.},\textsuperscript{79} the Federal Trade Commission determined that an attorney who participated with a manufacturer in a scheme to recruit children as sales agents had violated section 5 of the Federal Trade Practices Act by allowing the manufacturer to send out collection letters on the attorney's letterhead to both children and adults who had failed either to pay for or return the manufacturer's products.\textsuperscript{80}

The facts involved in both \textit{Superior Court Trial Lawyer's Ass'n} and \textit{Wilson Chemical} are unusual. Therefore, it is unlikely that either of these decisions would have any application to cases brought under the SCUTPA.

A review of case law from other jurisdictions with unfair trade practices acts similar to the SCUTPA indicates that courts in those jurisdictions have generally allowed plaintiffs to pursue unfair trade practice claims against attorneys only if the allegations involve either the "commercial" or "entrepreneurial"\textsuperscript{81} aspects of an attorney's practice, such as advertising\textsuperscript{82} and fee setting.\textsuperscript{83} Such claims have been allowed because those activities are seen as constituting "trade" or "commerce" for purposes of unfair trade practices liability.\textsuperscript{84} Outside of the commercial setting, most state courts have declined to allow unfair trade practices claims against attorneys.\textsuperscript{85}

\begin{flushleft}
77. See id. at 422-23.
78. Id. at 423.
79. 64 F.T.C. 168 (1964).
80. Id. at 186-87.
82. Reed v. Allison & Perrone, 376 So. 2d 1067, 1068-69 (La. Ct. App. 1979) (noting that advertising of legal services is clearly a "trade" or "commerce" subject to the provisions of the Louisiana Unfair Trade Practices and Consumer Protection Law).
83. Short v. Demopolis, 691 P.2d 163, 168 (Wash. 1984) (en banc) (holding that business aspects of the legal profession such as setting, billing, and collecting legal fees are subject to the state's consumer protection act).
84. Id.
85. See, e.g., Frahm v. Urkovich, 447 N.E.2d 1007, 1011 (Ill. Ct. App. 1983) (holding the Illinois Consumer Fraud and Deceptive Business Practices Act does not include the actual practice of law and is not available as an additional remedy to redress a purely private wrong), \textit{superseded by statute}, ILL. REV. STAT. ch. 121 1/2, para. 270(a) (Supp. 1992). Indeed, some courts have
\end{flushleft}
In South Carolina most malpractice claims do not involve facts sufficient to satisfy the statutory requirements of the SCUTPA. Allegations of mere attorney negligence appear to fall outside of the Act. In Clarkson v. Orkin Exterminating Co., the Fourth Circuit stated "there is no support in South Carolina law for the proposition that a service person violates the unfair trade practice statute if he performs his job poorly or overlooks something which should have attracted his attention." In addition, most transactions involving substantive legal services are limited in scope, and any error or omission by the attorney in the performance of those services is unlikely to have the potential for repetition as required by the SCUTPA. Only in rare instances could a good faith argument be made that an attorney's actions in a particular case affected the public interest. Consequently, there appears to be no legal basis for sustaining an unfair trade practices act claim in most legal malpractice suits.

V. CIVIL CONSPIRACY

Civil conspiracy is emerging as one of the most frequently used and most commonly abused theories in legal malpractice cases. The recent decision by the South Carolina Court of Appeals in Mendelsohn v. Whitfield provides an illustration of how conspiracy claims are often inappropriately alleged in attorney malpractice actions.

In Mendelsohn the defendant attorney sued his client in contract to collect attorney's fees arising from his representation of the client in a divorce action. The client counter-claimed, alleging in part that the attorney had committed professional malpractice while representing him and included in the

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86. 761 F.2d 189 (4th Cir. 1985).
87. Id. at 191.
88. Examples of limited legal practice areas include: real estate, plaintiff's personal injury, estate, and family law, which collectively generate approximately 63% of malpractice claims presented against attorneys nationwide. See ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMINATIVE CHARACTERISTICS OF CLAIMS ASSERTED AGAINST ATTORNEYS 8 (1986). The data reported in this profile was a compilation of 29,227 claims reported to the National Legal Malpractice Data Center of American Bar Association from January 1, 1983 through September 30, 1985. Id. at 3.
90. Id. at ___, 430 S.E.2d at 526.
counter-claim a cause of action for conspiracy.91

In the conspiracy cause of action, the client alleged that his attorney had agreed, without authority, to allow the client’s former wife to have temporary child custody and that the attorney had committed a number of strategic and procedural errors at trial.92 The trial court directed a verdict against the client on the conspiracy claim, and the court of appeals affirmed, stating:

Even if [the alleged] facts could be proven, they merely show Mendelsohn, individually, did or did not do certain things that arguably prejudiced Whitfield’s divorce case. They do not give rise to a reasonable inference that Mendelsohn combined with other persons for the purpose of injuring Whitfield. Neither do they support a reasonable inference, standing by themselves, that the acts and omissions were designed “wilfully to injure” Whitfield. Whitfield suggests no other evidence from which either a combination or wilfulness could be inferred, nor are we aware of any from our review of the record.93

The fact pattern presented in Mendelsohn is typical of conspiracy claims made against attorneys in South Carolina. In order to successfully plead civil conspiracy, a claimant must allege three elements: “(1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damages.”94 In most cases, however, plaintiffs simply “tack on” a conspiracy claim to their other causes of action without alleging all of the necessary elements. In many cases, the damages caused by the attorney’s alleged tortious act are merely incorporated into the cause of action for conspiracy. Such incorporation fails to satisfy the pleading requirement of special damages.95 In order to recover, the alleged damages must arise from an overt act taken in furtherance of the conspiracy itself.96

A conspiracy claim subjects the conspirators to joint and several liability

91. Id. at __, 430 S.E.2d at 526.
92. Id. at __, 430 S.E.2d at 529.
93. Id. at __, 430 S.E.2d at 529-30 (citations omitted).
95. See, e.g., Vaught v. Waites, 300 S.C. 201, 208-09, 387 S.E.2d 91, 95 (Ct. App. 1989) (holding that the plaintiff’s conspiracy action was barred because no special damages were alleged aside from the damages sought under a breach of contract cause of action); Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) (“Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.”) (quoting 15A C.J.S. Conspiracy § 33, at 719 (1967)), vacated on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1983).
96. Lee, 289 S.C. at 10, 344 S.E.2d at 382 (“The gravamen of the tort is the damage resulting to the plaintiff from an overt act done pursuant to the combination . . . .”).
for damages arising from the conspiracy.97 This joint and several liability may explain why the cause of action is often included in legal malpractice lawsuits. Attorneys become the target defendants because of the presumed presence of professional liability insurance.

Even if properly pleaded, a conspiracy claim against an attorney should fail in most cases. Negligent conduct by an attorney cannot serve as the basis for conspiracy liability because the law does not recognize "conspiracy to commit negligence."98

Given the inherent problems in presenting a conspiracy claim against an attorney, a claimant should carefully consider whether all three elements of conspiracy are present before asserting the claim. To do otherwise may subject the claimant himself to sanctions or civil liability for filing a baseless pleading.

VI. ABUSIVE LITIGATION

Although the privity requirement poses a hurdle to most third-party actions against attorneys, privity is not a bar in abuse of process and malicious prosecution cases. For that reason, third parties often assert abuse of process and malicious prosecution claims in malpractice actions against opposing counsel. Such claims, however, are rarely successful.

A. Abuse of Process

To recover in an action for abuse of process, a plaintiff must show: "(1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings."99 In Huggins v. Winn-Dixie Greenville, Inc.100 the South Carolina Supreme Court explained this cause of action as follows:

Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is

98. Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1012 (D.S.C. 1981) ("There is no such thing as a conspiracy to commit negligence or, more precisely, to fail to exercise due care.").
100. 249 S.C. 206, 153 S.E.2d 693 (1967).
no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance of any formal use of the process itself, which constitutes the tort.\(^{101}\)

Persons who advise or consent to the unlawful acts are liable with the actor as joint tortfeasors.\(^ {102}\) Therefore, an attorney who knowingly participates in or assists a client's efforts to extort or coerce some object not contemplated by the process can be held liable as a joint tortfeasor for any resulting damages. Cases involving such egregious behavior by attorneys are rare, and there are no reported cases in South Carolina involving the successful presentation of an abuse of process claim against an attorney.\(^ {103}\)

B. Malicious Prosecution

To recover in an action for malicious prosecution, a plaintiff must show: "(1) the institution or continuance of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage."\(^ {104}\) The elements of the presence of malice and the absence of probable cause lie at the heart of this cause of action. Malice is "the deliberate intentional doing of a wrongful act without just cause or excuse."\(^ {105}\) A lack of probable cause exists "if the circumstances are such as to satisfy a reasonable man that the defendant had

\(^{101}\) Id. at 209, 153 S.E.2d at 694 (quoting William L. Prosser, Handbook of the Law of Torts § 100, at 668-69 (2d ed. 1955)); see also Ransome v. Mimms, 320 F. Supp. 1110, 1114 (D.S.C. 1971) ("The evil aimed at in the cause of action is the use of the process to gain a collateral advantage not contemplated by the process. The process must be used to coerce or extort some object not within its scope.").

\(^{102}\) See Broadmoor Apartments, 306 S.C. at 486, 413 S.E.2d at 11 ("As a general rule, liability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse.").


no grounds for proceeding but his desire to injure the plaintiff."\textsuperscript{106} However, if a defendant's actions are supported by probable cause, then the defendant cannot be liable for malicious prosecution even if the plaintiff proves malice.\textsuperscript{107}

In \textit{Gaar v. North Myrtle Beach Realty Co.}\textsuperscript{108} the South Carolina Court of Appeals limited the availability of malicious prosecution actions against attorneys.\textsuperscript{109} The plaintiffs in \textit{Gaar} sued two attorneys for malicious prosecution after an action instituted by the attorneys against the plaintiffs terminated in an involuntary nonsuit.\textsuperscript{110} The trial court granted the attorneys' motion for summary judgment because it found no genuine issue of material fact concerning whether the attorneys had probable cause to assert the claim filed on behalf of their client in the underlying lawsuit.\textsuperscript{111} The court of appeals affirmed,\textsuperscript{112} stating:

In our opinion, the better rule is that an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client. Accordingly, an attorney who acts in good faith with the authority of his client is not liable to a third party in an action for malicious prosecution.\textsuperscript{113}

\textsuperscript{106} 52 AM. JUR. 2d Malicious Prosecution § 52 (1970). Conversely, probable cause exists if a reasonable person would have believed and acted the same under the same circumstances. "In determining the existence of probable cause, the facts must be 'regarded from the point of view of the party prosecuting; the question is not what the actual facts were, but what he honestly believed them to be.'" \textit{Eaves}, 277 S.C. at 478, 289 S.E.2d at 416 (quoting 54 C.J.S. Malicious Prosecution § 20 (1948)). While malice may be inferred from a lack of probable cause, a lack of probable cause cannot be inferred from any degree of malice. \textit{Parrott}, 246 S.C. at 322, 143 S.E.2d at 609 (citing Stoddard v. Roland, 31 S.C. 342, 9 S.E. 1027 (1889), and Brown v. Bailey, 215 S.C. 175, 54 S.E.2d 769 (1949)).

\textsuperscript{107} 52 AM. JUR. 2d Malicious Prosecution § 50 (1970).


\textsuperscript{109} \textit{Id.} at 529, 339 S.E.2d at 889; \textit{see also} \textit{Wigg v. Simonton}, 46 S.C.L. (12 Rich.) 583, 592 (1860) ("[I]there is no doubt that an attorney for an act done, \textit{bona fide}, as a professional man, is not responsible to adverse parties.").

\textsuperscript{110} \textit{Gaar}, 287 S.C. at 527, 339 S.E.2d at 888.

\textsuperscript{111} \textit{Id.} at 527-28, 339 S.E.2d at 888.

\textsuperscript{112} The court noted that one of the plaintiffs admitted that no evidence existed that the attorneys acted for any purpose other than to secure compensation they believed was due to their client." \textit{Gaar}, 287 S.C. at 529, 339 S.E.2d at 889. Further, no evidence existed that the attorneys had been "activated by personal or malicious motives." \textit{Id.} Finally, the court found that the attorneys had been acting in their capacity as attorneys in pursuing the underlying action and that they had not become parties to the lawsuit. \textit{Id.}

\textsuperscript{113} \textit{Id.} at 528-29, 339 S.E.2d at 889. The court noted that this rule does not leave plaintiffs without a remedy. \textit{Id.} at 530, 339 S.E.2d at 890. "Such a suit is properly brought against the party to the original action, not the attorney representing him." \textit{Id.} at 529, 339 S.E.2d at 889. However, the attorney might still be indirectly liable because "[a] client subjected to a malicious
The court explained that the policy behind its decision was to allow attorneys to advise their clients freely without the fear of a harassing lawsuit by the opposing party. In support of that position, the court noted that an attorney has an obligation to pursue zealously a client’s lawful claim and may be liable in malpractice for failing properly to assert and protect his client’s rights. The court found that to permit opposing parties to sue an attorney for malicious prosecution “would create a conflict of interest with the attorney’s obligation to properly represent and support his client.” According to the court, the potential exposure to such lawsuits might inhibit the creativity of attorneys in pursuing new causes of action, thereby hindering the development of the common law.

A malicious prosecution claim is still available in cases when an attorney initiates litigation in bad faith. Much like claims for abuse of process and conspiracy, however, the burden of proof for a malicious prosecution is a stringent one. As Gaar illustrates, claims against attorneys for malicious prosecution are not favored in South Carolina, and a malicious prosecution claim should not be brought absent evidence of bad faith by the attorney.

C. Frivolous Civil Proceedings Sanctions Act

The South Carolina Frivolous Civil Proceedings Sanctions Act, passed by the South Carolina legislature in 1988, creates a statutory claim that merges certain elements of the common law causes of action for malicious prosecution and abuse of process. The Act provides:

Any person who takes part in the procurement, initiation, continua-

prosecution suit may be able to sue his attorney for legal malpractice if the attorney negligently files an unwarranted claim.” Id. at 530, 339 S.E.2d at 890.

114. Id. at 529, 339 S.E.2d at 889 (citing Peck v. Chouteau, 3 S.W. 577 (Mo. 1887)).

115. Id. at 529, 339 S.E.2d at 889-90.


117, Garr, 287 S.C. at 530, 339 S.E.2d at 890 (citing Central Florida Mach. Co. v. Williams, 424 So. 2d 201 (Fla. Dist. Ct. App. 1983)). Despite this concern, however, the court noted that this case was the first decision reported in South Carolina addressing an attorney’s liability for malicious prosecution. Id. at 528, 339 S.E.2d at 889.


119. Like an action for malicious prosecution, the Act requires the prior proceeding to terminate in the claimant’s favor. The Act also addresses the use of process for something other than a “proper” purpose, S.C. CODE ANN. § 15-36-40 (Law. Co-op. Supp 1993), which has overtones of an action for abuse of process. It is interesting to note that in 1989, the Georgia legislature created a statutory claim for “abusive litigation” that represents a merger of the torts of malicious prosecution and abuse of process. GA. CODE ANN. §§ 51-7-80 to -85 (Michie Supp. 1993). In fact, the Georgia Act provides the exclusive remedy for “abusive litigation,” replacing the torts of malicious use of civil proceedings (malicious prosecution) and malicious abuse of civil process (abuse of process). Id. § 51-7-85.
ation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney’s fees and court costs of the other party if:

(1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and

(2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.120

The Act applies to any person who takes part in the initiation or maintenance of the frivolous proceeding and specifically addresses the potential liability of an attorney.121 The Act presumes that an attorney has acted for a “proper purpose” whenever the attorney believes in “good faith” that the litigation is not being used to “merely harass or injure the other party.”122

The terms “proper purpose” and “good faith” are not defined in the Act. Both terms, however, do appear in Rule 11 of the Federal Rules of Civil Procedure (“proper purpose” appears in its negative form, “improper purpose”).123 In addition, both the Act and Federal Rule 11 specifically state that the use of litigation to “harass” the opposing party constitutes an

121. Id. § 15-36-20. Section 15-36-20 provides in pertinent part:

Any person who takes part in the procurement, initiation, continuation, or defense of civil proceedings must be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 if he reasonably believes in the existence of the facts upon which his claim is based and

. . . .

. . . .

(3) believes, as an attorney of record, in good faith that his procurement, initiation, continuation, or defense of a civil cause is not intended to merely harass or injure the other party.

122. Id. The use of the modifier “merely” indicates that an incidental intent to harass or injure may not be actionable.

123. Federal Rule 11 provides in pertinent part:

The signature of an attorney or party constitutes a certificate by the signer . . . that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

"improper purpose." The similarity in terms suggests that Federal Rule 11 was the inspiration for the operative provisions of the Act. In fact, the Act may represent an attempt to incorporate into state practice the requirements of Federal Rule 11, which are more stringent than the requirements under Rule 11 of the South Carolina Rules of Civil Procedure. Because many of the terms used in the Act also appear in Federal Rule 11, the South Carolina courts may look to decisions interpreting the Federal Rule to determine what constitutes a proper purpose and good faith with respect to potential liability of attorneys under the Act. The majority of courts addressing the good faith requirement of Federal Rule 11 have applied an objective standard, which requires a showing of "reasonableness under the circum-


125. Rule 11 of the South Carolina Rules of Civil Procedure provides in pertinent part:
The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

... If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

S.C. R. CIV. P. 11(a). At the time the Frivolous Proceedings Act was enacted in 1988, the latter part of Rule 11(a) above read:

If a pleading, motion or other paper is not signed or is signed with intent to defeat the purpose of this Rule, it may be stricken as sham and false and the action may proceed as though the pleading, motion or paper had not been served. For a willful violation of this Rule an attorney may be subject to appropriate disciplinary action. Similar action may be taken if scandalous or indecent material is asserted.

S.C. R. CIV. P. 11(a) (superseded). This language was deleted by a July 1, 1989 amendment to the Rule. The Reporter's Notes to the 1989 amendments state: "The change makes clear that the court may impose sanctions for violations of this Rule and replaces the ambiguous language that 'an attorney may be subject to appropriate disciplinary action.' The change is more consistent with the language on sanctions for discovery abuse."

126. In the context of pleading requirements, the South Carolina courts have traditionally referred to good faith as simply the absence of bad faith. See e.g., Burkhalter v. Townsend, 139 S.C. 324, 331, 138 S.E. 34, 36 (1927). Black's Law Dictionary defines good faith as "an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage..." BLACK'S LAW DICTIONARY 693 (6th ed. 1990).

stances." The improper purpose requirement has also been interpreted under an objective standard.

To date, the Act has been discussed in only one reported decision. In Kilcawley v. Kilcawley the family court granted the husband attorney’s fees against his wife under the Act after she moved to reopen their divorce decree and then attempted to dismiss her motion. The court of appeals affirmed the award, stating that the wife’s attorney had filed the motion to reopen “without conducting any investigation” regarding the wife’s claims and referenced Rule 11(a) of the South Carolina Rules of Civil Procedure. The court also agreed with the family court’s finding that the wife’s primary purpose for initiating the motion was “other than that of securing proper adjudication of the claim.” The court concluded that the facts illustrated the “improvident and unreasonable nature” of the wife’s claims, allowing the trial court to award attorney’s fees under the Act.

The South Carolina Frivolous Civil Proceedings Sanctions Act is a valuable tool that affords direct relief under appropriate circumstances. The Act is not duplicative of malicious prosecution or abuse of process claims. As distinct causes of action, claims for malicious prosecution and abuse of process would normally go to a fact-finder for resolution only after conclusion of the discovery process, with the attendant time and cost borne by the aggrieved party. Under the Act, the aggrieved party may move the court by motion for a determination of liability and damages, saving judicial resources by allowing the trial court to hear and dispose of the motion based on its review of the proceedings.

129. WRIGHT & MILLER, supra note 127, § 1335, at 85.
131. Id. at __, 440 S.E.2d at 893.
132. Id. at __ & n.2, 440 S.E.2d at 893 & n.2.
133. Id. at __, 440 S.E.2d at 894.
134. Id. at __, 440 S.E.2d at 894.
135. Section 15-36-30 states:

When the essential elements of this chapter have been established as provided in Section 15-36-10, a person is entitled to recover his attorney’s fees and court costs reasonably incurred in litigating the proceedings. The entitlement of the aggrieved person must be determined by the trial judge at the conclusion of a trial upon motion of the aggrieved party stating the manner in which the other party is alleged to have acted in violation of this statute. The court shall base its decision upon a review of the proceedings and affidavits submitted by each person affected.

136. Upon appellate review, the court may take its own view of the preponderance of the
for recovery of costs as well as fees.

The South Carolina Frivolous Civil Proceedings Act allows trial courts to put teeth into a fundamental principal of law: the use of the judicial process only for legitimate ends. Although the Act may be used against attorneys as well as litigants, the Act can also be invoked by attorneys in response to unfounded legal malpractice actions.

VII. CONCLUSION

South Carolina law continues to require traditional pleading and proof elements in legal malpractice actions. Therefore, privity serves to define the potential remedies that may be available to a given claimant. Under the rules of privity, a negligence cause of action may be presented by both the client and those in privity with the client, whereas a claim for breach of fiduciary duty may be brought only by the client or by a party satisfying the criteria set forth in *Hotz v. Minyard*.137

Third parties still may pursue common law claims that do not require privity, such as conspiracy, abuse of process, and malicious prosecution. However, those causes of action are difficult to prove and rarely result in an award of damages. The South Carolina Frivolous Civil Proceedings Sanctions Act may provide a more cost effective alternative to abuse of process and malicious prosecution actions.

The validity of an attorney malpractice claim under the South Carolina Unfair Trade Practices Act is suspect. Other jurisdictions have limited attorney liability for unfair trade practices to claims arising out of the commercial or entrepreneurial aspects of the practice of law. The reasoning employed by those courts appears equally sound under the provisions of the South Carolina Unfair Trade Practices Act.

Finally, regardless of the theory of liability chosen, the South Carolina Rules of Professional Conduct should not serve to establish an attorney’s duty of care in a legal malpractice action. The Rules properly apply only to attorney disciplinary matters. An attorney’s actions in a legal malpractice case should be judged according to the standard of care developed for that purpose at common law.

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