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Attorney's Liability to Client's Adversaries for Instituting Frivolous Lawsuits: A Reassertion of Old Values

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ATTORNEYS' LIABILITY TO CLIENTS' ADVERSARIES FOR INSTITUTING FRIVOLOUS LAWSUITS: A REASSERTION OF OLD VALUES

INTRODUCTION

Rapid expansion of liability¹ and a concomitant rise in the average damage award have characterized recent tort litigation, especially in the area of medical malpractice.² As plaintiffs have been enriched by this development, so too have their attorneys, who frequently are compensated for their services under contingent fee arrangements.³ The potential for considerable financial gain may account for an increased number of apparently frivolous lawsuits,¹ which is evidenced by the growing number of situations where defendants subjected to baseless actions have brought countersuits against their adversaries' attorneys.⁴ Yet, whether brought under traditional or novel tort theories, such countersuits generally have been unsuccessful.

This Note will explore the desirability of holding attorneys liable in tort to their clients' adversaries where frivolous lawsuits have been conducted.⁵ To this end, the theories upon which plaintiffs in

⁵ See cases cited in note 10 infra. See also Lawyers and Doctors Unite to Fight 'Nuisance' Suits, N.Y. Times, Aug. 12, 1979, at 20, col. 6.
⁶ See generally Birmbaum, supra note 4; Tell, Doctors Find No Cure in Countersuits, Nat'l L.J., Feb. 12, 1979, at 1, col. 4; Note, Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?, 26 CASE W. RES. L. REV. 653 (1976); Comment, Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?, 8 PAC. L.J. 897 (1977); Note, Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritorious Medical Malpractice Suits, 45 U. CIN. L. REV. 604 (1976); Comment, Counterclaiming for Malicious Prosecution and Abuse of Process: Washington's Response to Unmeritorious Civil Suits, 14 WILLAMETTE L.J. 401 (1978). While most countersuits against attorneys have followed medical malpractice actions, the views expressed in this Note are intended to apply to all lawsuits alleged to be frivolous.
countersuits commonly rely will be examined, followed by an analysis of the factors militating against and in favor of holding attorneys liable. The Note will conclude by proposing an alternative standard for imposing civil liability upon attorneys who institute baseless suits.

THEORIES OF LIABILITY

Malicious Prosecution

The theory most frequently relied upon by plaintiffs seeking recovery from attorneys for instituting frivolous lawsuits against them is malicious prosecution. To succeed, an individual must prove that there was a prior action instituted by the defendant, an absence of probable cause to believe in the validity of the underlying claim, malice on the part of the defendant, termination of the lawsuit in the plaintiff's favor and injury. While these proof require-
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ments apparently exist in all jurisdictions, they have received divergent judicial interpretation.

Although the "lack of probable cause" requirement12 clearly is not satisfied merely by proving that the earlier suit terminated favorable to the plaintiff,13 it is not necessary for the plaintiff to prove that the defendant's attorney knew that probable cause did not exist. As the Second Restatement of Torts states, an individual has probable cause to institute an action if he "correctly or reasonably believes that under those facts the claim may be valid under the applicable law . . . "14 Consistent with this definition, courts have held that a lack of probable cause may be found where no reasonable attorney would believe a particular claim to be tenable.15 This rule nevertheless affords an attorney considerable latitude,16 since it permits him to advocate a doubtful legal position.17 It is likely, there-

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12 See, e.g., Stewart v. Sonneborn, 98 U.S. 187, 194 (1878); Wilcox v. Gilmore, 320 Mo. 980, 986, 8 S.W.2d 961, 962 (1928); Baird v. Intermountain School Fed. Credit Union, 555 P.2d 877, 878 (Utah 1976); T. Cooley, supra note 11, at 321-28; 3 J. Dooley, supra note 11, § 41.07; 1 F. Harper & F. James, Jr., supra note 11, § 4.5, at 329; R. Mallen & V. Levit, supra note 11, § 45, at 74-76; W. Prosser, supra note 1, § 120, at 854-55.

13 See O'Malley-Kelly Oil & Auto Supply Co. v. Gates Oil Co., 73 Colo. 140, 214 P. 398 (1923); Barton v. Woodward, 32 Idaho 376, 182 P. 916 (1919); Milner v. Hare, 125 Me. 460, 134 A. 628 (1926); Novick v. Becker, 4 Wis. 2d 432, 90 N.W.2d 620 (1958). An unfavorable termination, even if reversed on appeal, conclusively establishes the existence of probable cause. See, e.g., Crescent City Live-Stock Co. v. Butchers' Union Slaughter-House Co., 120 U.S. 141 (1897); Boothby Realty Co. v. Haygood, 269 Ala. 549, 114 So. 2d 555 (1959); Overton v. Combs, 182 N.C. 4, 108 S.E. 357 (1921).

14 Restatement (Second) of Torts § 675, at 458 (1977) (emphasis added).


16 See Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 33, 142 N.W. 930, 936 (1913) (quoting Eickhoff v. Fidelity & Cas. Co., 74 Minn. 139, 142, 76 N.W. 1030, 1031 (1898)).

17 An attorney ethically may urge change in unsettled law. ABA Code of Professional Responsibility EC 7-2.
before, that a court will defer to an attorney's judgment in any instance where the question of probable cause is unclear.\textsuperscript{18} One of the more ambiguous elements of a malicious prosecution claim\textsuperscript{19} is the requirement that the plaintiff prove that malice motivated the defendant to conduct the prior action.\textsuperscript{20} The ambiguity surrounding this requirement emanates from the term "malice."\textsuperscript{21} While malice has been given many definitions,\textsuperscript{22} it appears that impropriety of motive is the most appropriate to malicious prosecution.\textsuperscript{23} Similarly, the Restatement provides that the culpable mental state required for a malicious prosecution action exists when "the proceedings . . . have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based."\textsuperscript{24} Thus, if the individual instituting a suit knows his claim lacks merit, his purpose in bringing it cannot be proper.\textsuperscript{25} While the courts allow juries to infer malice from a lack

\textsuperscript{18} While it may be difficult to demonstrate an absence of probable cause, the plaintiff in a malicious prosecution action has the burden of proving it only by a preponderance of the evidence. Hunter v. Beckley Newspapers Corp., 129 W. Va. 302, 310, 40 S.E.2d 332, 337 (1946).


\textsuperscript{20} See id.; 3 J. Dooley, supra note 11, § 41.08; F. Harper & F. James, Jr., supra note 11, § 4.8, at 328-29; R. Mallen & V. Levrin, supra note 11, § 45, at 76; W. Prosser, supra note 1, § 120, at 855.

\textsuperscript{21} "Malice" may refer to either malice in fact or malice in law. In the context of malicious prosecution actions, malice in fact, or actual malice, refers to "an improper motive . . . and is sufficiently established if it appears that the former suit was commenced in bad faith to vex, annoy or harass the adverse party." Masterson v. Pig'n Whistle Corp., 161 Cal. App. 2d 323, 336, 326 P.2d 918, 928 (1958). In contrast, malice in law, or legal malice, only requires proof of "a wrongful act done intentionally without just cause or excuse . . . ." Griswold v. Horne, 19 Ariz. 56, 69, 165 P. 318, 323 (1917). Although malicious prosecution actions apparently require proof of actual malice, see R. Mallen & V. Levrin, supra note 11, § 45, at 76, such malice may be inferred from a lack of probable cause. Griswold v. Horne, 19 Ariz. 56, 69, 165 P. 318, 323 (1917); see note 26 and accompanying text infra. For a general discussion of the various constructions accorded "malice," see Fridman, Malice in the Law of Torts, 21 Mod. L. Rev. 484 (1958).

\textsuperscript{22} See generally Fridman, supra note 21; W. Prosser, supra note 1, § 120, at 855.

\textsuperscript{23} See, e.g., Kolka v. Jones, 6 N.D. 461, 473, 71 N.W. 555, 562 (1897).

\textsuperscript{24} ReSTATEMENT (SECOND) OF TORTS § 676 (1977).

\textsuperscript{25} Id., Comment c. According to the Comment, other instances where an individual's purpose in resorting to the courts cannot be justified arise when [(1)] the proceedings are begun primarily because of hostility or ill will . . . [; (2)] the proceedings are initiated solely for the purpose of depriving the person against whom they are brought of a beneficial use of his property . . . [; (3)] the proceedings are initiated for the purpose of forcing a settlement that has no relation to the merits of the claim . . . [; and (4)] a defendant files a counterclaim . . . solely for the purpose of delaying expeditious treatment of the original cause of action.

\textit{Id.}
of probable cause, the converse inference is not permitted.

Another element that must be proved in a malicious prosecution claim is that the prior action terminated in the plaintiff's favor. Thus, failure to allege favorable termination is fatal to the plaintiff's claim, as is an out-of-court settlement. The need for favorable termination eliminates the possibility of malicious prosecution forming the basis of a counterclaim in the original lawsuit. Arguments in favor of the rule against such counterclaims include a desire to prevent expansion of the tort, a fear of inconsistent determinations of the two claims and a fear that the main claim will be prejudiced.

Perhaps the most controversial element of a malicious prosecution action is the injury requirement. The "English" rule, adopted by a substantial minority of jurisdictions, requires proof of interference with person or property or some other special injury that normally does not result from the defense of lawsuits. One reason

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26 R. MALLEN & V. LEVIT, supra note 11, § 45, at 76.
27 Stewart v. Sonneborn, 98 U.S. 187, 194 (1878); Bill Edwards Oldsmobile, Inc. v. Carey, 244 S.E.2d 767, 773 (Va. 1978); W. PROSSER, supra note 1, § 120, at 855.
32 Babb v. Superior Court, 3 Cal. 3d 841, 847, 479 P.2d 379, 382, 92 Cal. Rptr. 179, 182 (1971) (en banc).
33 Id.
34 Id.; see Note, Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?, 26 Case W. Res. L. Rev. 653, 656 (1976).
35 See generally 1 T. COOLEY, supra note 11, at 348-52; 3 J. DOOLEY, supra note 11, §§ 41.03-.04; 1 F. HARPER & F. JAMES, JR., supra note 11, § 4.8, at 326-28; W. PROSSER, supra note 1, § 120, at 855-56.
36 Special damages may be distinguished from general damages as follows:

General damages are those which necessarily and by implication of law result from the injury caused by the wrongful act. Damages for pain and suffering, physical disability, and impairment of future earning capacity are classified as general damages.

. . . Special damages are those that are the natural but not the necessary result of
offered for the existence of this rule is that civil procedure in England generally requires the losing party to pay the costs, including attorney's fees, of the prevailing party. Proof of special injury is necessary, therefore, in order to justify any additional recovery.\textsuperscript{37} In contrast, a showing of general damages is sufficient for recovery under the "American" rule.\textsuperscript{3} Adopted by a majority of jurisdictions, this rule has been considered to be more appropriate to the Ameri-


37 See Birnbaum, supra note 4, at 1022. For a discussion of the difference between the English and American approaches to litigation costs, see Goodhart, Costs, 38 YALE L.J. 849 (1929); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 MINN. L. REV. 619, 619-21 (1931).

can system, which, with few exceptions, requires each party to pay its own litigation costs.\textsuperscript{39}

Notwithstanding the increasing frequency with which malicious prosecution actions are brought against attorneys, instances in which recovery has been allowed are very rare.\textsuperscript{40} This theory is disfavored by the courts,\textsuperscript{41} and, therefore, its elements are strictly construed.\textsuperscript{42} The difficulty imposed by the English injury rule is exemplified by \textit{Pantone v. Demos},\textsuperscript{43} a recent Illinois decision. The malpractice action that gave rise to the countersuit in \textit{Pantone} was brought by the husband of a woman who had died as a result of complications experienced during childbirth and alleged negligence on the part of two physicians, each of whom had seen the decedent on only one occasion for purposes unrelated to her death.\textsuperscript{44} Following summary disposition of the suits in the physicians' favor,\textsuperscript{45} a mali-

\textsuperscript{39} The distinction between the English and American practices regarding litigation costs was decisive to a Vermont court's determination of which injury rule to adopt. The court explained its rationale for selecting the American rule as follows:

The early English cases show very clearly that before the statutes entitling defendants to costs existed, [principally the Statute of Marlbridge, 52 Hen. 3, c.6 (1267),] they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause. It would seem, however, from the more recent decisions, that the present English rule, which restricts or limits the right of action for maliciously prosecuting civil suits without probable cause, stands mainly upon the ground that the costs, which the statute provides the successful defendant shall recover, are an adequate compensation for the damages he sustains . . . .


\textsuperscript{40} See Note, \textit{Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?}, 26 \textit{Case W. Res. L. Rev.} 653, 656 (1976).


\textsuperscript{42} \textit{E.g.}, \textit{Lyddon v. Shaw}, 66 Ill. App. 3d 815, 821-22, 372 N.E.2d 685, 690 (1978). The English damages rule, which has survived in a considerable number of jurisdictions, see note 36 \textit{supra}, exemplifies the strict construction given to the elements of malicious prosecution.

\textsuperscript{43} 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978).

\textsuperscript{44} \textit{Id.} at 330, 375 N.E.2d at 481. One of the physicians, a radiologist, had seen the decedent for the sole purpose of performing a chest x-ray. The other physician had prepared the decedent for childbirth. \textit{Id.}

\textsuperscript{45} \textit{Id.} at 330-31, 375 N.E.2d at 482. In the malpractice action, the radiologist requested an admission that he had only seen the decedent on one occasion and that he was not responsible for her death in any way. \textit{Id.} at 330, 375 N.E.2d at 481-82. The plaintiff, who was the decedent's widower, refused to make any admissions until after the radiologist's deposition was taken. The deposition was never taken, and summary judgment was granted. \textit{Id.}, 375 N.E.2d at 482. Subsequently, the action against the other physician also was summarily dismissed. \textit{Id.}
cious prosecution action was instituted. In seeking recovery, the physicians contended that they had suffered "special injury in the form of damage to their professional reputations and an expectation that they [would] be required to pay increased premiums for medical malpractice insurance" in the future. The trial court dismissed the suit for want of an allegation of special injury.

On appeal, the Pantone court affirmed, viewing the physicians' injury allegations as conclusory, rather than as a statement of particular facts "demonstrating . . . actual or potential harm." The court also rejected the contention that damage to reputation and increased insurance premiums are sufficient to satisfy the special injury requirement, since the injuries allegedly suffered were "such as the law implies and presumes to have accrued from the wrong complained of" and therefore were general in nature.

**Abuse of Process**

Abuse of process may be defined as the malicious misuse of lawfully issued process to attain a collateral objective not counte-

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4 Id. at 336, 375 N.E.2d at 485. While Illinois falls within the minority of jurisdictions that require proof of more than general damages in order to recover in malicious prosecution, proof of special damages, see note 36 supra, is sufficient to warrant recovery. Interference with person or property, which is required in some states adhering to the minority rule, need not be demonstrated. See Schwartz v. Schwartz, 366 Ill. 247, 250, 8 N.E.2d 668, 670 (1937).
5 59 Ill. App. 3d at 336-37, 375 N.E.2d at 485-86.
6 Id. at 336, 375 N.E.2d at 485.
7 Id. at 336-37, 375 N.E.2d at 486. See also 3 L. Frumer, R. Benoit & M. Friedman, PERSONAL INJURY § 3.01 [1] - [2] (1965), quoted in note 36 supra. The plaintiffs in Pantone did not rely solely upon malicious prosecution in seeking redress. Two other theories also were urged upon the court. The first alternative theory did not conform to any of the traditional torts; rather, the plaintiffs sought recovery for the wilful and wanton filing of a civil suit against them. 59 Ill. App. 3d at 331, 375 N.E.2d at 482. This claim was based in part upon a provision in the Illinois Constitution guaranteeing a legal remedy for all injuries. Id. at 332, 375 N.E.2d at 482-83 (quoting ILL. CONST. art. 1, § 12). The court rejected this claim, however, and concluded that it would not create a new cause of action. Id. at 332-35, 375 N.E.2d at 483-85.

Another theory upon which recovery was sought was professional negligence, which was, essentially, a claim of legal malpractice. Noting that "in a majority of states it is still the rule that an attorney may not be liable for professional negligence to persons other than their [sic] clients . . . .," id. at 335, 375 N.E.2d at 485 (citation omitted), the court opted to follow the majority, feeling that such a course would preserve "free access to the courts." Id. For a discussion of an attorney's liability to nonclients in negligence, see note 100 infra.

nanced by the law, resulting in damage to the person against whom it is used. Thus, the use of process toward a legally permissible end cannot be an abuse of process, notwithstanding an underlying vicious purpose. There apparently is a great similarity between abuse of process and malicious prosecution. Both theories require proof of malice and that the defendant was motivated by an improper purpose. In an abuse of process action, however, malice may be shown by merely demonstrating an improper purpose. The elements common to abuse of process and malicious prosecution have caused many courts to confuse the two theories and upon occasion to equate them. Important differences nevertheless exist, making them applicable to different types of situations.

One significant difference is that the plaintiff in an abuse of process suit need not prove that there was no probable cause for the

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References:
5. See notes 12-18, 50-51 and accompanying text supra.
6. See Baker v. Oklahoma Tire & Supply Co., 344 F. Supp. 780, 784 (W.D. Ark. 1972). While some courts have found the malice requirement satisfied by the mere demonstration of wilful abuse, see Clikos v. Long, 231 Ala. 424, 428, 165 So. 394, 397 (1938); Coplea v. Bybee, 290 Ill. App. 117, 125-26, 8 N.E.2d 55, 59-60 (1937), other courts have held that a finding of wilful abuse justifies an inference of malice. See, e.g., Tranchina v. Arcinas, 78 Cal. App. 2d 522, 526, 178 P.2d 65, 68 (1947). Indeed, the elements of abuse of process sometimes are stated in the terms "improper purpose," without any mention of a malice requirement at all. See, e.g., Baker v. Oklahoma Tire & Supply Co., 344 F. Supp. 780, 784 (W.D. Ark. 1972); 1 T. Cooley, supra note 11, at 355-56. Since malice apparently does not have to be proved as a discrete element, the differences in treatment may be viewed as primarily semantic. An analogous inference of malice is permitted in malicious prosecution actions. See note 26 and accompanying text supra.
9. See Birnbaum, supra note 4, at 1034.
issuance of process. Indeed, abuse of process is appropriate in situations where probable cause exists for the issuance of process, but its subsequent use is wrongful. Another distinction between the two actions is that the plaintiff in an abuse of process action need not show that he was able to prevail against the prior abuse. The essential difference between the two torts, therefore, relates to the point at which the improper purpose is effectuated. In abuse of process, the tortfeasor's vicious intent is carried out after the rightful issue of process. In contrast, vicious intent in a malicious prosecution action is manifested in the resort to the judicial process itself.

Abuse of process generally will not be available to an individual claiming to have been wrongfully sued, because the gravamen of the complaint is that the prior action was initiated without legal justifi-

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60 Voytko v. Ramada Inn, 445 F. Supp. 315, 324-25 (D.N.J. 1978); Moore v. Michigan Nat'l Bank, 368 Mich. 71, 75, 117 N.W.2d 105, 106 (1962); W. Prosser, supra note 1, § 121, at 855. The Restatement (Second) of Torts distinguishes abuse of process from malicious prosecution as follows:

The gravamen of the misconduct for which . . . liability . . . is imposed is not the wrongful procurement or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting . . . them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which . . . liability is imposed . . . .

RESTATEMENT (SECOND) OF TORTS § 682, Comment a (1977).

61 For an example of a case that emphasizes the appropriateness of abuse of process in instances where legally issued process is used subsequently to achieve an improper end, see Sachs v. Levy, 216 F. Supp. 44, 46 (E.D. Pa. 1963). See also note 72 infra. An abuse of process action founded upon a prior civil suit might arise where an individual who was sued brought an independent action against his adversary in order to force a settlement of the original suit. See Spellens v. Spellens, 49 Cal. 2d 210, 229-30, 317 P.2d 613, 625 (1957) (en banc).


64 See note 53 and accompanying text supra. Occasionally, there may be instances in which both abuse of process and malicious prosecution will lie. See Jennings v. Shuman, 567 F.2d 1213, 1217-19 (3d Cir. 1977); W. Prosser, supra note 1, § 121, at 857. For example, an abuse of process action may be maintained even where the initial resort to the judicial process was wrongful. See, e.g., Ash v. Cohn, 119 N.J.L. 54, 57, 194 A. 174, 176 (1937); RESTATEMENT (SECOND) OF TORTS § 682, Comment a (1977), quoted in note 60 supra. The torts nevertheless redress different abuses.
cation. These facts constitute a malicious prosecution claim, and recovery in abuse of process has been denied for this reason. An abuse of process claim recently met such a fate in *Bickel v. Mackie*, wherein a physician brought an action against a patient and her attorney following the summary dismissal of a medical malpractice suit that the patient had brought against him. The physician claimed that an abuse of process had occurred in the form of the baseless action itself, which allegedly had been brought for the ulterior motive of forcing an out-of-court settlement. The defendant-attorney moved for a judgment on the pleadings, contending that the abuse of process claim merged with an alternative claim in malicious prosecution. In granting this motion, the court stated that "abuse of process has been held to require a purpose to secure a collateral benefit not directly related to the process." The court noted that the prior action, "even if frivolous as pleaded, [had] the purpose of settlement which is includable in the goals of proper process." On the facts presented, relief would be available, if at all, only in malicious prosecution.

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67 447 F. Supp. 1376 (N.D. Iowa), aff'd mem., 590 F.2d 341 (8th Cir. 1978).

68 Id. at 1383.

69 Id. at 1379.

70 Id. at 1383.

71 Id.

72 Id. The plaintiff in *Bickel* relied upon several tort theories in addition to abuse of process, a practice often seen in countersuits against attorneys. See, e.g., Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977) (en banc). Great reliance was placed upon malicious prosecution, the essence of the plaintiff's claim being that "the malpractice suit [had been] filed and prosecuted recklessly and with heedless disregard for or indifference to [his] rights . . . ." 447 F. Supp. at 1378. Unfortunately, the plaintiff's complaint failed to allege special injury as required in Iowa, which follows the "English" injury rule. See notes 35-39 and accompanying text *supra*. The plaintiff, while aware of Iowa's adherence to the English rule, claimed it to be outmoded and urged the court to reconsider the rule in light of the fact that it is followed by only a minority of jurisdictions. 447 F. Supp. at 1379-80. Noting the absence of Iowa precedent to suggest such a change, the reluctance of other jurisdictions to change and the capacity of the legislature to institute reforms, the court rejected the plaintiff's plea. Id. at 1380-81.

Relief also was sought on negligence grounds. The plaintiff's argument was based on the abolition of the privity requirement in Iowa and on the fact that a cause of action in negligence against a professional by a third party previously had been recognized. Id. at 1381 (citing Freese v. Lemon, 210 N.W.2d 576 (Iowa 1973)). Notwithstanding its agreement that a professional can be held liable to third parties in negligence, the court refused to permit any such liability in the case at bar:
Prima Facie Tort

The prima facie tort doctrine, which has experienced its greatest development in New York, originated in England late in the nineteenth century and gradually has been incorporated into American law as a residuary cause of action. Apparently, the primary purpose of the doctrine is to provide remedies for intentional wrongs that do not fall within any of the traditional tort categories. The principle stated in the leading prima facie tort case has survived to the present largely unchanged:

[Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person’s property or trade, is actionable if done without just cause or excuse.]

447 F. Supp. at 1382 (citation omitted). See also note 100 infra.

Another theory upon which the plaintiff sought recovery was breach of the ABA Code of Professional Responsibility (the Code). The plaintiff maintained the Code’s rules are tantamount “to drivers [sic] rules of the road which if violated constitute negligence per se.” 447 F. Supp. at 1383. The court refused to recognize a cause of action based upon the Code. For a more complete discussion of the Code, see notes 116-125 and accompanying text infra.

The final bases upon which recovery was sought were conspiracy and “[r]eckless and [h]einous dissend [d]isregard of [d]efendant’s [r]ights.” 447 F. Supp. at 1384. These claims were rejected with minimal discussion. Id. On appeal, the district court’s ruling was affirmed without opinion. 590 F.2d 341 (8th Cir. 1978) (mem.).


It appears that the earliest case in which a court stated the elements of prima facie tort was Mogul S.S. Co. v. McGregor, Gow, & Co., [1889] 23 Q.B.D. 598 (C.A.), aff’d, [1892] A.C. 25 (1891).

One commentator has attributed the emergence of the prima facie tort doctrine in the United States to Mr. Justice Holmes. Brown, supra note 73, at 564. While on the bench of the Supreme Judicial Court of Massachusetts (and later as a Justice on the United States Supreme Court, see note 78 and accompanying text infra), Holmes stated the basic principles of the doctrine. See Moran v. Dunphy, 177 Mass. 485, 487, 59 N.E. 125, 126 (1901); Plant v. Woods, 176 Mass. 492, 504, 57 N.E. 1011, 1016 (1900) (dissenting opinion); Vegelahn v. Gunter, 167 Mass. 92, 105-06, 44 N.E. 1077, 1080 (1896) (dissenting opinion).

See, e.g., Knepp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 172, 148 N.Y.2d 635, 637 (1st Dep’t 1956); Forkosch, supra note 73, at 475-76.

While this statement accurately reflects the essence of prima facie tort, the doctrine’s utility has been restricted by the imposition of two requirements. The plaintiff must prove special damages79 and that the defendant’s conduct was malicious.80 Some courts have construed the malice requirement so strictly as to reject a claim if the defendant had any motive for committing the act other than that of injuring the plaintiff.81 It would appear that adherence to this rule effectively would bar actions against attorneys for instituting baseless suits, because such lawsuits are brought primarily to enrich those bringing them and not maliciously to injure the individuals against whom they are brought.

The residuary nature of the prima facie tort doctrine has led courts to limit its application to wrongs that lie outside the purview of the traditional torts.2 Consistent with this policy, it has been held that the theory cannot be employed to circumvent the stricter requirements of traditional torts in factual settings to which they

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Bowen, L.J.) (citation omitted), aff’d, [1892] A.C. 25 (1891). The prima facie tort doctrine received major recognition in the United States in a Supreme Court opinion authored by Mr. Justice Holmes: “[P]rima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape.” Aikens v. Wisconsin, 195 U.S. 194, 204 (1904); accord, Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946). While the principle stated in Mogul apparently was intended to embrace all intentional misconduct, see Brown, supra note 73, at 563, prima facie tort has developed into a discrete cause of action with its own set of proof requirements. Birnbaum, supra note 4, at 1053. For a discussion of the historical evolution of prima facie tort, see Forkosch, supra note 73.

More recently, prima facie tort has been defined as “the intentional malicious injury to another by otherwise lawful means without economic or social justification, but solely to harm the other . . . .” Morrison v. National Broadcasting Co., 24 App. Div. 2d 284, 287, 266 N.Y.S.2d 406, 409 (1st Dep’t 1965) (citation omitted), modified & aff’d, 19 N.Y.2d 453, 227 N.E.2d 641 (1967); accord, Ruza v. Ruza, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep’t 1955).


82 Forkosch, supra note 73, at 481; Note, The Prima Facie Tort Doctrine, 62 COLUM. L. REV. 503, 505 (1952).
apply. Thus, the prima facie tort doctrine has failed to provide an easier route to recovery in cases that are not redressable in malicious prosecution. This failure was demonstrated in Drago v. Buonagurio, recently decided by the New York Court of Appeals.

In Drago, a physician brought an action against the attorney of a person who had sued him in a medical malpractice action. Although the plaintiff in the malpractice action had alleged that the physician negligently caused the death of her husband, the physician maintained that he had never treated the decedent during the period of illness leading to his death. Contending that the attorney's actions were "malicious, unethical and grossly negligent," the physician sought relief for having "suffered much mental anguish, defamation of character and [for] otherwise [having been] damaged." The trial court dismissed the complaint for failure to state a cause of action. On appeal, the Appellate Division of the New York Supreme Court reversed, holding that the complaint nevertheless stated a valid claim in prima facie tort. The court observed that "[t]he fact that a cause of action is new, novel or nameless should not deprive an injured person of a remedy." Noting the general expansion in the use of the prima facie tort doctrine in New York, the court found that "a clear intentional wrong, causing

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85 61 App. Div. 2d at 284, 402 N.Y.S.2d at 251.
86 Id. The gravamen of the physician's complaint was that he had been named in the earlier action "indiscriminately and as a discovery device in order to ascertain where responsibility could be placed . . . ." Id.
87 Id.
88 89 Misc. 2d 171, 173, 391 N.Y.S.2d 61, 62 (Sup. Ct. Schenectady County 1977). The court found an abuse of process claim inapplicable to the facts of the case, because "[t]he gist of the action . . . lies in the improper use of process after it is issued, and not for its issuance . . . ." Id. (citation omitted). A malicious prosecution claim was denied for failure to allege "interference with plaintiff's person or property" or "that the malpractice action was terminated" in his favor. Id. Prima facie tort was held not to lie "in the absence of any allegation of actual or special damages . . . ." Id. Finally, the court determined that an attorney should not be held liable to third parties in negligence, since it "would operate to discourage free resort to the courts for the resolution of controversies, contrary to public policy . . . ." Id., 391 N.Y.S.2d at 63 (citation omitted).
89 61 App. Div. 2d 282, 286-87, 402 N.Y.S.2d 250, 253 (3d Dep't 1978). The intermediate appellate court affirmed the dismissal of the abuse of process, malicious prosecution and negligence claims for the same reasons as those offered in the opinion of the trial court. Id. at 285, 402 N.Y.S.2d at 251-52.
90 Id. at 286, 402 N.Y.S.2d at 252.
91 Id. (citing Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 343 N.E.2d 278, 360 N.Y.S.2d 635 (1975)). For a discussion of Farmingdale, see note 98 infra.
apparent and foreseeable harm . . . , without just excuse or justification, [had] been alleged” and concluded that the physician had stated a cause of action.92

The New York Court of Appeals unanimously reversed,93 noting that “a ‘new, novel or nameless’ cause of action” would have to be recognized in order to hold the attorney liable.94 The court refused to grant such recognition, exercising what it termed “judicial restraint.”95 It would appear that the Court of Appeals’ reversal was prompted by the intermediate appellate court’s departure from established interpretation of the doctrine. The appellate division did not require the plaintiff to allege special damages, a well-settled prerequisite to maintaining a prima facie tort action in New York,96 nor did it require proof that the infliction of injury was the defendant’s sole reason for bringing the malpractice action.97 In addition, the appellate division’s interpretation permitted the physician to circumvent the more onerous requirements of traditional torts.98

92 61 App. Div. 2d at 286, 402 N.Y.S.2d at 252.
94 Id. at 780, 386 N.Y.S.2d at 822, 413 N.Y.S.2d at 911.
95 Id.
97 See note 81 and accompanying text supra.
98 See note 82 and accompanying text supra. In New York, an individual must prove interference with person or property in order to recover in malicious prosecution. See, e.g., Chappelle v. Gross, 26 App. Div. 2d 340, 274 N.Y.S.2d 555 (1st Dep’t 1966); Metromedia, Inc. v. Mandel, 21 App. Div. 2d 219, 223, 249 N.Y.S.2d 806, 810 (1st Dep’t), aff’d, 15 N.Y.2d 616, 203 N.E.2d 914, 255 N.Y.S.2d 660 (1964). Since recovery in prima facie tort is allowed upon proof of only special damages, see note 79 supra, the doctrine would provide an easier route to redress frivolous litigation if it could be employed in factual settings to which malicious prosecution applied. To permit an individual to rely upon prima facie tort in such a case, however, would violate the policy of reserving this tort for use as a residuary cause of action. See note 82 and accompanying text supra.

It should be noted that the New York Court of Appeals extended the reach of prima facie tort in a case prior to Drago. See Board of Educ. v. Farmingdale Classroom Teachers Ass’n, 38 N.Y.2d 379, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975). In Farmingdale, the Court of Appeals sustained a complaint based on the theories of abuse of process and prima facie tort, noting that “whenever there is an intentional infliction of economic damage, without excuse or justification, we will eschew formalism and recognize the existence of a cause of action.” Id. at 406, 343 N.E.2d at 284, 380 N.Y.S.2d at 644. This ruling has prompted one commentator to suggest that prima facie tort may provide a means of bypassing the rigid injury requirements imposed by New York courts upon plaintiffs in malicious prosecution actions. See Birnbaum, supra note 4, at 1061-62. While the Farmingdale holding clearly broadened the range of cases to which prima facie tort may be applied by permitting reliance upon alternative legal theories, the court did not suggest that the theory might be used in the future to avoid the strict proof requirements of other tort theories. It is submitted that to extrapolate
The preceding review suggests that malicious prosecution is the most appropriate theory for individuals seeking redress from their adversaries' attorneys to rely upon, although abuse of process conceivably may lie in certain circumstances. In contrast, the prima facie tort doctrine, properly applied, can be of little value to a plaintiff, because its requirements should be no less stringent than those of malicious prosecution.

A rule from Farmingdale that would make prima facie tort available to a plaintiff whenever traditional torts failed on their pleadings would tend to consolidate all intentional torts into one universal theory by encouraging the use of prima facie tort. While the prima facie tort doctrine may have been intended to be a universal principle rather than a discrete tort, it has not been so applied. See note 78 supra.

There have been cases in which courts have permitted reliance upon prima facie tort notwithstanding the failure of applicable traditional tort theories. See Munson Line, Inc. v. Green, 6 F.R.D. 14 (S.D.N.Y. 1946), appeal dismissed per curiam, 165 F.2d 321 (2d Cir. 1948); Gillis v. Georges, 225 N.Y.S.2d 164 (Sup. Ct. Kings County 1962). In Munson, the court allowed a prima facie tort claim despite the insufficiency of a malicious prosecution claim, although the court cautioned that the prima facie tort claim would be dismissed if it turned out to be "nothing more than a glorified cause of action for malicious prosecution . . . ." 6 F.R.D. at 18. Interestingly, the Munson court also was faced with a contention that violation of a criminal conspiracy statute should be redressable in a civil action. The court refused to recognize such a cause of action, however, for reasons that appear to militate with equal force against attempts to rely upon prima facie tort in order to escape the procedural burdens of other torts:

[1]It would permit suits for conduct in the nature of malicious prosecution, yet lacking the essential requisites for basing such an action, and thus would approve the bringing and maintaining of an action for malicious prosecution based on facts which under the settled policy of the State could not otherwise be instituted and maintained.

Id. at 19.

See Birnbaum, supra note 4, at 1040 & nn.250-51; note 64 supra.

Claims brought against attorneys for instituting frivolous lawsuits on theories other than malicious prosecution, abuse of process and prima facie tort also have been generally unsuccessful. For example, defamation actions have failed because an absolute privilege is accorded in nearly all jurisdictions to statements made during judicial proceedings by parties, see, e.g., Ginsburg v. Black, 192 F.2d 823, 824 (7th Cir. 1951), cert. denied, 343 U.S. 934 (1952); Carpenter v. Ashley, 148 Cal. 422, 424-25, 83 P. 444, 445 (1906); McDavitt v. Boyer, 169 Ill. 475, 482-85, 48 N.E. 317, 319-20 (1897), and their counsel, see RESTATEMENT (SECOND) OF TORTS § 586 (1977); R. MALES & V. LEVIT, supra note 11, § 50; W. PROSSER, supra note 1, § 114; Birnbaum, supra note 4, at 1042-48. See generally 1 A. HANSON, LIBEL AND RELATED TORTS ¶¶ 108-114 (1969); Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 COLUM. L. REV. 463, 600 (1909). At least one jurisdiction, however, recognizes only a qualified privilege, see Foster v. McClain, 251 So. 2d 179 (La. App. 1971), which protects comments that are "material [and made] with probable cause and without malice," Waldo v. Morrison, 220 La. 1006, 1011, 58 So. 2d 210, 211 (1952). The privilege that attaches to statements made in judicial proceedings, whether absolute or qualified, arises from the public policy favoring free access to the courts. See W. PROSSER, supra note 1, § 114, at 778. See generally Veeder, supra, at 474-83. This privilege has been offered by way of analogy as an argument against creating new remedies for third parties against attorneys. See Lyddon v. Shaw, 56 Ill. App. 3d 815, 822, 372 N.E.2d 685, 690 (1978). The tort of invasion of privacy likewise has failed to prove successful against attorneys by third parties. See Wolfe v. Arroyo,
Recent case law indicates that attorneys appear to be insulated from civil liability to their clients' adversaries. Claims have been dismissed at the pleading stage for failure to satisfy strict proof requirements, the most controversial of which relates to injury. \(^{101}\) Regardless of the theory relied upon, it is clear that any attempt at redress for injuries sustained within the judicial process must over-


Another theory invoked by persons seeking redress against adversaries' attorneys is the intentional infliction of emotional distress, defined in the Second Restatement of Torts as follows:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The strict requirements for establishing liability under this theory thus far have rendered it unsuccessful as against attorneys. See Joseph v. Markovitz, 27 Ariz. App. 122, 551 P.2d 571 (1976). See generally R. Mallen & V. Levy, supra note 11, § 51.


Many plaintiffs who have been denied recovery under recognized causes of action have contended that they have a constitutional right to a remedy, see, e.g., Lyddon v. Shaw, 56 Ill. App. 3d 815, 822, 372 N.E.2d 685, 690-91 (1978), which is grounded in state constitutional provisions such as the following:

Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly. ILL. CONST. art. 1, § 12 (emphasis added); accord, e.g., ALA. CONST. art. 1, § 13; Fla. Const. art. 1, § 21; Md. Const. D.R., art. 19; Mass. Const. Pt. 1, art. XI; Minn. Const. art. 1, § 8; N.D. Const. art. 1, § 22; R.I. Const. art. 1, § 5; Wis. Const. art. 1, § 9. See also Conn. Const. art. 1, § 12; Del. Const. art. 1, § 9; N.C. Const. art. 1, § 18; Pa. Const. art. 1, § 11; S.C. Const. art. 1, § 19; Tex. Const. art. 1, § 13. These claims have proved unsuccessful, because, as stated in Pantone v. Demos, 69 Ill. App. 3d 328, 375 N.E.2d 480 (1978), the constitutional provisions are "expression[s] of a philosophy and not . . . mandate[s] that a 'certain remedy' be provided in any specific form or that the nature of the proof necessary to the award of a judgment or decree continue without modification." Id. at 332, 375 N.E.2d at 483 (quoting Sullivan v. Midlothian Park Dist., 61 Ill. 2d 274, 277, 281 N.E.2d 659, 682 (1972)).

\(^{101}\) See notes 35-39 and accompanying text supra.
come the strong public policy favoring free access to the courts. It would appear, therefore, that the rigid proof requirements are designed to eliminate all claims except those involving the most egregious misconduct. These considerations inevitably raise the question whether an attorney ever should be held civilly liable to an adversary for his conduct as a trial advocate.

ATTORNEY'S LIABILITY: COMPETING CONSIDERATIONS

Factors Militating Against Liability

The relationship of a client to his attorney is governed by principles of agency, which mandate that an attorney be loyal, remain within the boundaries of his authority, obey his client's instructions, exercise due care and account for all money and property entrusted to him. An attorney also must disclose any interests he has or acquires that may be adverse to those of his client. In addition, communications between the client and attor-

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107 See, e.g., Kukla v. Perry, 361 Mich. 311, 326, 105 N.W.2d 176, 183-84 (1960); In re Kennedy, 80 Wash. 2d 222, 228-29, 492 P.2d 1364, 1367 (1972) (en banc); ABA Code of Professional Responsibility DR 9-102 [hereinafter cited as Code]. See generally 1 F. MECHEM, supra note 103, §§ 1327-1352; 2 F. MECHEM, supra note 103, § 2207.

108 See, e.g., Ishmael v. Millington, 241 Cal. App. 2d 520, 525, 50 Cal. Rptr. 592, 597
ney must be kept confidential pursuant to the attorney-client privilege. Since the attorney generally has control over the procedural aspects of a lawsuit, the client must place great reliance upon his legal expertise. It is essential, therefore, that the client feel free to disclose all relevant information to his attorney. When an attorney's belief in the merit of a case is based upon incomplete or false information obtained from his client, the attorney should not be held liable for bringing the action, because he will lack knowledge sufficient to entertain malicious motives, and his client's acts may not be imputed to him. Agency theory therefore appears to shield the attorney from liability in the overwhelming majority of cases, leaving open the possibility of liability only where he assumes an active role in wrongful conduct.

Relevant ethical considerations similarly militate against the imposition of liability upon attorneys for instituting groundless suits.


See, e.g., State v. Kocolek, 23 N.J. 400, 415-16, 129 A.2d 417, 425 (1957); State Highway Comm'v Earl, 82 S.D. 139, 147, 143 N.W.2d 88, 92 (1966); CODE, supra note 108, EC 4-1; M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 5 (1975); 2 F. MECHEM, supra note 103, § 2297.

As an agent, an attorney has no duty to perform wrongful acts, even if instructed to do so. 1 F. MECHEM, supra note 103, § 1260; W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 157 (1964). Similarly, the Code of Professional Responsibility permits a lawyer “to seek any lawful objective.” CODE, supra note 108, EC 7-1. In this regard, it has been suggested that the institution of a lawsuit is itself wrongful only in rare circumstances. See J. LIEBERMAN, CRISIS AT THE BAR 161-63 (1978).


See notes 141-155 and accompanying text infra. See generally R. MALLEN & V. LEVIT, supra note 11, §§ 41-59.
in any but the most extreme cases. One of the most basic principles of the American legal system is that there should be unrestrained access to the courts. An attorney's ethical duty in this regard is found in the American Bar Association Code of Professional Responsibility (the Code), which states that "[a] lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." The Code suggests that a lawyer carry out this mandate by educating the public as to its legal rights, providing for informed choice of counsel and helping generally to make the judicial process accessible. Of course, in drawing the Code, the American Bar Association did not intend for a lawyer to have unbridled power to press his client's claim. Thus, while a lawyer is under a duty to give his client zealous representation, he must not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or it is obvious that such action would serve solely to harass or maliciously injure another."  

Although the Code clearly indicates when an attorney ethically is prohibited from taking a particular action, the provisions governing withdrawal from representation are obscure. For example, while a lawyer must withdraw where his client's obvious motivation in bringing a suit is malicious, an untenable claim, unsupported by "good faith," merely permits an attorney to withdraw. The diffi-

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118 See generally M. Freedman, supra note 112; J. Lieberman, supra note 113, at 136-75; R. Mallen & V. Levey, supra note 11, § 117.

119 The ABA Code of Professional Responsibility, a replacement to the Canons of Professional Ethics, was adopted by the American Bar Association, effective January 1, 1970. For an historical overview of the Code, see J. Lieberman, supra note 113, at 41-67; Wright, The Code of Professional Responsibility: Its History and Objectives, 24 Ark. L. Rev. 1 (1970). It should be noted that the Code has been criticized as ineffective in regulating lawyers' conduct. See J. Lieberman, supra note 113, at 197-228.

120 Code, supra note 108, Canon 2.

121 Code, supra note 106, EC 2-1. While Canon 2 and Ethical Consideration 2-1 of the Code encourage lawyers to make themselves and the legal system available, this encouragement was mitigated in the original draft of the Code by several Ethical Considerations and Disciplinary Rules that restricted a lawyer's right to advertise. These prohibitions were challenged successfully before the Supreme Court in Bates v. State Bar, 433 U.S. 350 (1977), wherein the Court held that bans against advertising of routine legal services violate the first amendment. Id. at 384. Following Bates, the American Bar Association revised the Ethical Considerations and Disciplinary Rules governing advertising. See ABA House of Delegates, Amendments to Canon 2 of the Code of Professional Responsibility (adopted Aug. 10, 1977). For a discussion of the advertising issue, see M. Freedman, supra note 112, at 113-25.

122 Code, supra note 105, Canon 7, DR 7-101; see id., EC 7-1.

123 Id., DR 7-102(A)(1).

124 Id., DR 2-110(B)(1); see note 153 and accompanying text infra.

125 Id., DR 2-110(C)(1); see note 153 and accompanying text infra.
culty in distinguishing a wholly frivolous claim from one that is unwarranted under the law and not defensible by good faith is exacerbated by the requirement that a lawyer resolve doubtful matters in his client's favor. Accordingly, a lawyer is given great freedom of movement within the judicial system, since his ethical duty is not breached unless he represents a client with a claim that is unquestionably devoid of merit. It is submitted that this ethical duty logically must set a minimum level of culpability needed to be shown for tort liability to be imposed upon an attorney. While the drafters of the Code purported not to define criteria for imposing civil liability, it would seem unreasonable to hold an attorney liable where he has acted within the parameters of the Code.

The adversary trial system followed in common law countries has a significant impact on the range of conduct in which an attorney permissibly may engage. The theory underlying this system is that the presentation of each side of an issue by conflicting parties is most likely to uncover the truth. This goal may be realized only if both parties and their advocates are able to state their positions freely and forcefully. Although this sometimes may make overzealous advocacy difficult to avoid, it is submitted that levying penalties for any but the most flagrant abuses would create the risk that attorneys would argue their clients' positions with less force than is

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124 See id., EC 7-3. While "serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law." Id. The difficulties involved in determining what constitutes a "frivolous" claim are discussed in J. LIBERMAN, supra note 113, at 161-63.

125 See CODE, supra note 108, Preliminary Statement.


127 Adversary adjudication as a theoretical means of finding the truth has been explained in terms of "two linked components":

One is that party presentation will result in the best presentation, because each party is propelled into maximum effort in investigation and presentation by the prospect of victory; in contrast, a judge-interrogator is only interested in getting through the day and through his caseload. The other component of the theory is more complex and has to do with the psychology of decision making. It runs essentially as follows: Proof through evidence requires hypothesis; hypothesis requires a preliminary mind-set; if an active judge-interrogator develops the proof, his preliminary mind-set too easily can become his final decision; therefore, it is better to have conflicting preliminary hypotheses and supporting proofs presented by the parties so that the judge's mind can be kept open until all the evidence is at hand.

Id. at 121.

128 See J. LIBERMAN, supra note 113. Lieberman states that "[b]ecause Americans believe so deeply in the unexamined maxim 'Every person is entitled to his day in court,' the prohibition against provoking or prolonging baseless claims is frequently violated. Most lawyers see their jobs as picking nits on behalf of clients." Id. at 161.
needed in our system.\(^\text{129}\)

The expansion of tort liability in general, which serves to encourage litigation, also militates against the imposition of liability on attorneys who institute baseless lawsuits.\(^\text{130}\) Since persons seeking novel interpretations of law face equivocal results, it would appear that uncertain claims must arise frequently in a legal system that constantly recognizes new causes of action. Although an attorney is encouraged to resolve uncertainties in his client's favor,\(^\text{131}\) he would be hesitant to do so if too readily found liable in tort. Paradoxically, therefore, it appears that the expansion of tort liability requires the restriction of an attorney's liability.

**Factors Militating in Favor of Liability**

While many considerations suggest that attorneys should be immune from civil liability to their clients' adversaries, strong arguments also exist favoring the imposition of liability for certain types of conduct. For example, an attorney's own actions constitute a

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\(^{129}\) As stated by the court in Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975), "our adversarial system cannot function without zealous advocacy." Id. at 404, 343 N.E.2d at 283, 380 N.Y.S.2d at 643.

\(^{130}\) An interesting example of the courts' apparent encouragement of individuals to pursue legal remedies for alleged wrongs may be seen in the expansion of the doctrine of res ipsa loquitur, which greatly has enhanced an attorney's ability to name defendants. Res ipsa loquitur, frequently used in medical malpractice cases, is particularly pertinent to an examination of attorneys' liability, because most countersuits against attorneys follow unsuccessful medical malpractice suits. See authorities cited in note 135 infra. The doctrine may be described as follows:

> [Where the instrumentality which produced an injury is within the exclusive possession and control of the person charged with negligence, and such person has exclusive knowledge of the care exercised in the control and management of that instrumentality, evidence of circumstances which show that the accident would not ordinarily have occurred without neglect of some duty owed to the plaintiff is sufficient to justify an inference of negligence and to shift the burden of explanation to the defendant.

Galbraith v. Busch, 267 N.Y. 230, 234, 196 N.E. 36, 38 (1935) (citation omitted). See also 1 S. Speiser, The Negligence Case: Res Ipsa Loquitur § 2:1 (1972). In some jurisdictions, a plaintiff is not required to show that the defendant had exclusive control of the instrumentality at the time of injury. See, e.g., Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (en banc). See generally 2 S. Speiser, supra, §§ 22:1-25. In Ybarra, the plaintiff was permitted to proceed under the res ipsa loquitur theory against all of the hospital personnel who had control of his body for injuries sustained while he was unconscious. 25 Cal. 2d at 493-94, 154 P.2d at 691. Such an expansion of the range of individuals to whom a tort applies necessarily increases the number of claims that are neither clearly tenable nor untenable and must be regarded as encouraging their prosecution.

\(^{131}\) See Code, supra note 108, EC 7-3. For a pre-Code view of ethical restrictions upon a lawyer as advocate, see Thode, The Ethical Standard for the Advocate, 39 Tex. L. Rev. 575 (1961).
misuse of the judicial process when he knowingly serves as his client's vehicle for unjustly suing another. A fear of personal liability might deter an attorney from taking such a case.

Another situation where a lawyer should be held civilly liable is the case where he advises his client, who is ignorant as to the legal merit of his claim, that he has a valid cause of action, when in fact the lawyer knows that he does not. While the law of agency normally imputes the acts of an attorney to his client, the client has a defense if he can demonstrate that, in instituting the lawsuit, he acted in good faith reliance upon his lawyer's advice. Thus, if an attorney were absolutely immune from liability, the individual subjected to a frivolous suit would be denied redress. Additionally, this freedom would encourage lawyers to recommend that their clients sue whenever any possibility of an out-of-court settlement existed.

The impact of frivolous litigation on those who are subjected to it militates strongly in favor of imposing tort liability upon attorneys who encourage it. Not only must much time and money be invested to defend a lawsuit, the fear of harm to one's reputation also may be extreme, particularly in a suit alleging substandard professional performance. While such injuries do not constitute interference with person or property or any other special injury, they must seem no less severe to those who sustain them and may

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122 An instance in which an attorney "knowingly serve[d] as his client's vehicle for unjustly suing another" might arise, for example, in a lawsuit in which both the attorney and client, while fully aware that the client's claim lacked merit, sued the adversary in the hope of obtaining an out-of-court settlement. See Birnbaum, supra note 4, at 1018.

123 See 2 F. MECHEM, supra note 103, § 2227. See also note 114 supra.

124 The good faith reliance upon counsel defense is available where the advice relied upon "is based upon a full and fair statement of the facts by the client . . . ." Masterson v. Fig'n Whistle Corp., 161 Cal. App. 2d 323, 339, 326 P.2d 918, 929 (1958); accord, Liberty Loan Corp. v. Williams, 201 N.W.2d 462, 465 (Iowa 1972); Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139, 172, 83 A.2d 246, 262 (1951), aff'd per curiam, 9 N.J. 605, 89 A.2d 242 (1952). See also RESTATEMENT (SECOND) OF TORTS § 675(b) (1977).

125 Since most countersuits against attorneys are instituted by physicians claiming to have been sued groundlessly for malpractice, see, e.g., Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa), aff'd mem., 590 F.2d 341 (8th Cir. 1978); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Drago v. Buonagurio, 46 N.Y.2d 778, 396 N.E.2d 821, 413 N.Y.S.2d 910 (1978), it seems that wrongful litigation is particularly likely to occur where a judgment or settlement is to be satisfied by an insurance carrier, see Note, Rx for New York's Medical Malpractice Crisis, 11 COLUM. J.L. & SOC. PROB. 467, 480 (1975).

126 See Daughtry, The View of the Medical Profession, 38 INS. COUNSEL J. 534, 535 (1971); Note, Rx for New York's Medical Malpractice Crisis, 11 COLUM. J.L. & SOC. PROB. 467, 476-77 (1975). It should be noted that there is some indication that physicians' reputations have not been damaged by malpractice actions. See id. at 477 n.63.

127 See notes 35-39 and accompanying text supra.
be much longer in duration. A final factor suggesting that attorneys should not be absolutely immune from liability to persons other than their clients is the effect that groundless litigation has on the legal system itself. Surely the legal system will not be held in high regard by the public if it is not perceived as offering a forum for redress of genuine wrongs. From a practical standpoint, moreover, each unjustifiable lawsuit that goes before a court delays the adjudication of a meritorious claim.

Despite the benefits potentially to be reaped by the legal system and individuals unjustly sued if attorneys are held liable in tort, countervailing policy considerations suggest that the more important objective is to ensure open access to the courts. It is submitted, therefore, that an individual who is subjected to a frivolous lawsuit should have a right of action against his adversary's attorney, but this right should be restricted to situations where the attorney's misconduct is clearly egregious. In order for such misconduct to be redressed, however, it is necessary to employ a test that reliably will identify it.

ATTORNEY'S LIABILITY: A PROPOSED STANDARD

While there has been a recent surge in malicious prosecution suits against attorneys, successful actions date back to the nineteenth century. The early courts ruled, however, that an attorney could be held personally liable to his client's adversary only where he knew there was an absence of probable cause and that his client was "actuated by illegal or malicious motives. . . ." The require-

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138 In the case of the medical profession, increased litigation has resulted in higher insurance premiums, which some physicians cannot afford to pay. See Daughtry, supra note 136, at 534. The degree to which the advent of liability insurance has benefited the public is questionable, since its costs have been passed on to patients in the form of higher fees. See Note, Rx for New York's Medical Malpractice Crisis, 11 Colum. J.L. & Soc. Prob. 467, 467 (1975). Moreover, some physicians have begun to practice "defensive medicine" to avoid being sued, resulting in even higher fees to patients. Birnbaum, supra note 4, at 1015.

139 See Birnbaum, supra note 4, at 1016.

140 The emphasis placed upon the judicial disfavor of the tort of malicious prosecution, see note 41 supra, suggests that the interest in free access to the courts is paramount to that of preventing frivolous litigation.

141 See note 10 and accompanying text supra.


143 Burnap v. Marsh, 13 Ill. 535, 538 (1852). Significantly, the Burnap court observed "that in order to render the attorneys liable for suing out a writ . . . something more must be shown than would be required were the action brought against the party in whose behalf the writ was sued out." Id.
ment of subjective knowledge was so strict that one court refused to impose liability on an attorney for failing to exercise reasonable care in determining the existence of probable cause before commencing an action. The current standard of liability in malicious prosecution actions is far more relaxed than that employed in early cases. For example, the probable cause requirement is fulfilled where an attorney believes probable cause exists and this belief is reasonable. Thus, if either the subjective or objective element is missing, probable cause is deemed absent. The modern malicious prosecution action also differs from its earlier counterpart in that it permits an inference of malice from a showing of a lack of probable cause.

It is submitted that the standards currently employed by the courts to determine when to hold attorneys liable in malicious prosecution have failed to provide definitive guidelines for attorneys. Rather than balancing an attorney’s conduct against the policy favoring free access to judicial forums, courts have sought to safeguard freedom of access by imposing harsh injury requirements that make recovery extremely difficult. Such requirements, most notably the necessity of proving interference with person or property, may bear very little relation to the essence of a plaintiff’s claim — that he has been sued without justification. If the purpose of holding an attorney liable is to prevent abuses of the judicial system, the action should focus on the attorney’s conduct rather than on an unduly strict injury requirement.

In order for an attorney’s liability to be more dependent upon an attorney’s acts than is the case at present, it is suggested that an actual knowledge standard similar to that employed in early

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14 See Peck v. Chouteau, 91 Mo. 138, 3 S.W. 577 (1887). The Peck court stated: [T]he attorney has the right to advise and act upon such information as the client reveals to him. Nothing short of complete knowledge on the part of the attorney that the action is groundless, and that the client is acting solely through illegal or malicious motives, should make him liable in these actions. Id. at 152, 3 S.W. at 581; accord, Maechtlten v. Clapp, 121 Kan. 777, 781-82, 250 P. 303, 304-05 (1926); Hoppe v. Klapperich, 224 Minn. 224, 240, 28 N.W.2d 780, 792 (1947) (quoting Burnap v. Marsh, 13 Ill. 535, 538 (1852)).


16 See, e.g., National Sur. Co. v. Page, 58 F.2d 145, 149 (4th Cir. 1932); Bill Edwards Oldsmobile, Inc. v. Carey, 244 S.E.2d 767, 773 (Va. 1978); W. PROSSER, supra note 1, § 120, at 855.

17 See note 41 supra.

18 The divergent approaches to the injury requirement in malicious prosecution actions are discussed in notes 35-39 supra.
malicious prosecution actions be adopted. Moreover, the English injury rule should be replaced by a rule wherein general damages would suffice to establish a right to redress. Thus, an attorney who has served as his client’s vehicle for bringing a frivolous lawsuit should be subjected to tort liability only if he knew that his client was motivated by malice and knew that no probable cause existed to believe in the validity of his client’s claim. Where a client has brought a lawsuit without malicious motives, erroneously believing probable cause to exist, an attorney who advised it should be held liable only if he knew that probable cause did not exist and was himself actuated by malice or the desire for personal gain. In such a case, the attorney has acted in his own behalf, effectively becoming a party to the action.

A refusal to impose liability on an attorney except upon showing subjective awareness would strike a balance between the policy favoring free access to the courts and that which places responsibility upon individuals for the proximate consequences of their tortious acts. This standard also would comport with agency rules for the imposition of liability, since no liability could be imposed unless an attorney’s part in a frivolous lawsuit were so great as to render him “a party to his client’s malice.” In effect, the lawyer would be an actor rather than a mere instrumentality. The proposed standard is not inconsistent with the ethical guidelines set forth in the Code, which require an attorney to withdraw from representing a client only where “[h]e knows or it is obvious” that his client’s purpose in bringing suit is to cause malicious injury to the adversary. This language reflects the intent of the American Bar Association to allow an attorney considerable latitude within the judicial process.

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144 See notes 143-44 and accompanying text supra.
150 A litigant is justified in bringing suit only to have the claim upon which it is based properly adjudicated. Restatement (Second) of Torts § 676 (1977), quoted in text accompanying note 24 supra. Thus, where a litigant “realizes that the adjudication will not be in his favor unless the court or jury is misled in some way,” he “is not seeking a proper adjudication of the claim on which the civil proceeding is based.” Restatement (Second) of Torts § 676, Comment c. While the Restatement does not address specifically the liability of attorneys, it is suggested that the comments relating to a litigant’s liability provide support by analogy for the view that an attorney who advises his client to pursue what he knows is a baseless lawsuit should be subject to liability.
151 2 F. Mecham, supra note 103, § 2218. See also id., § 2219.
152 See 1 F. Mecham, supra note 103, § 1462.
153 Code, supra note 108, DR 2-110(B)(1). The Code permits, but does not require, an attorney to withdraw from representing a client who “[i]nsists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.” Id., DR 2-110(C)(1).
even though his judgment may later prove to have been erroneous. Under the liability standard that has been suggested, an attorney would not be held liable in tort unless he exceeded the bounds of ethical conduct.154

The proposed test affords attorneys every reasonable doubt as to the validity of questionable claims, since liability can be imposed only where an attorney’s involvement in a frivolous lawsuit is so personal that he is elevated to the status of a party155 or is himself the intentional tortfeasor. It is submitted that courts should adopt a subjective standard rather than cling to the current objective test of conduct, which relies upon onerous injury requirements to justify denials of recovery.

CONCLUSION

In seeking compensation for damages sustained within the judicial process, individuals increasingly have sought to impose tort liability upon their adversaries’ attorneys. Recovery has been practically impossible to obtain, however, due to the policy favoring free access to the courts. This policy is embodied in traditional tort theories, which provide relief only where rigid proof requirements can be satisfied.156 Attempts to circumvent these requirements by employing theories such as prima facie tort have met with failure,157 suggesting that courts are inclined to hold attorneys immune from liability except for malpractice.158

Under established theories of liability, countersuits very rarely survive the pleading stage due to strict proof of injury requirements. In contrast, a liability standard that eschews such obstacles and instead examines the attorney’s conduct would allow aggrieved persons to present their claims to triers of fact. Although a rule requiring an attorney to have subjective awareness of a lack of probable cause and the malicious intent of his client obviously would continue to make redress against an adversary’s attorney difficult to obtain, it is submitted that this test more accurately would reflect the genuine weakness of a particular claim than do current standards.

A policy of holding an attorney personally liable to his client’s

154 See text accompanying note 125 supra.
155 See note 150 and accompanying text supra.
156 See note 148 and accompanying text supra.
158 See notes 101-102 and accompanying text supra.
adversary for instituting a frivolous claim would run counter to the policy favoring ready access to judicial forums. If these objectives cannot be brought into optimal balance, it would appear best to err on the side of freedom of access. It seems probable, therefore, that lawyers for whom the prospect of personal gain justifies misconduct will continue to engage in such misconduct unchecked. In the end, the integrity of the legal profession must depend upon the integrity of its practitioners.

John H. Beers

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159 Even though the prospects of holding an attorney liable to a client's adversary for misconduct in a lawsuit may be slight, frivolous litigation nevertheless may be discouraged. For example, a groundless suit possibly will give rise to a cause of action in malicious prosecution directly against the individual who brought it, even if, under the proposed standard, lack of subjective awareness protects his attorney from liability. A party may escape liability only where he can demonstrate that, in bringing the action, he relied in good faith upon the advice of his lawyer. See note 135 and accompanying text supra. Some jurisdictions have provided an additional remedy by enacting statutes that allow awards of attorney's fees in limited situations. See, e.g., Ill. Ann. Stat. ch. 110, § 41 (Smith-Hurd Supp. 1979); Md. R. Proc. 604(b); N.D. R. App. Proc. 38. See generally S. Speiser, Attorneys Fees chs. 12-13 (1973 & Supp. 1977). A recent amendment to the Illinois statute was described as "a new law relating to medical malpractice." Ill. Ann. Stat. ch. 110, § 41, Commentary at 17 (Smith-Hurd Supp. 1979). Frivolous lawsuits also may be discouraged by prosecution of attorneys for barratry in states where it is recognized as an offense. See, e.g., Ga. Code Ann. § 9-9901 (1973); id., § 26-2406 (1978); Vt. Stat. Ann. tit. 13, § 701 (1974); Va. Code §§ 18.2-451 to 18.2-456 (1975).

Perhaps the greatest potential for regulating an attorney's conduct is offered by the ABA Code of Professional Responsibility. While the Code has been attacked as ineffective, see J. Lieberman, supra note 113, at 197-228, it is submitted that it must be enforced and, if necessary, revised to fulfill its purpose.

160 The authors of the Code apparently realized that an attorney's conduct is, as a practical matter, incapable of being regulated:

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct.

Code, supra note 108, Preamble.