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MALICIOUS PROSECUTION AND PRACTICING DEFENSIVELY

By
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1. Malicious Prosecution

Long referred to as a disfavored tort, malicious prosecution is one of the challenges any lawyer, especially including entertainment and other high profile lawyers involved in high stakes litigation, must consider in advance of planning and executing a litigation strategy. Attempting to approach a dispute from a position of strength where the temptation is to use all available resources in something akin to an aggressive "scorched earth" program, usually results in a predictably vengeful reaction that puts the unsuccessful plaintiff's lawyer squarely within the malicious prosecution cross-hairs.

1.1. Elements.

The elements of a malicious prosecution cause of action are commonly defined as: (a) **Favorable and final termination** (the prior action was commenced by or at the direction of the defendant, and was pursued to a legal termination in its favor); (b) **Lack of probable cause** (the action was commenced or continued to be prosecuted without probable cause as to one or more claims); (c) **Malice** (the action was initiated with malicious intent); and (d) **Damages** (the prosecution of the prior action caused economic and/or non-economic damages). (*Sheldon Appel Co.* v. *Albert & Oliker* (1989) 47 Cal.3d 863; *Bertero* v. *National General Corp*. (1974) 13 Cal.3d 43; *see also Franklin Mint Co.* v. *Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333; *Robbins* v. *Blecher* (1997) 52 Cal.App.4th 886 and California Civil Jury Instructions (CACI) 1501.)

Malicious prosecution is an intentional and therefore uninsurable tort, the risk of which can be minimized with pre-litigation consideration and planning.

1.2. Certain Proceedings that Give Rise to Malicious Prosecution Claims.

Among the various proceedings that give rise to malicious prosecution claims are judicial arbitrations (*Stanley* v. *Superior Ct.* (1982) 130 Cal.App.3d 460.), private arbitration agreements that expressly allow for the malicious prosecution remedy (*Law Offices of Ian Herzog* v. *Law Offices of Joseph Fredrics* (1998) 61 Cal.App.4th 672.), probate proceedings (*Crowley* v. *Katleman* (1994) 8 Cal.4th 666 (*citing MacDonald* v. *Joslyn* (1969) 275 Cal.App.2d 282); *Fairchild* v. *Adams* (1959) 170 Cal.App.2d 10), declaratory relief claims (*Camarena* v. *Sequoia Ins. Co*. (1987) 190 Cal.App.3d 1089; *see also*, *Pond* v. *Insurance Co. of North America* (1984)

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151 Cal.App.3d 280; *Hillenbrand* v. *Insurance Co. of N.A.* (2002) 104 CalApp.4th 784), and Order to Show Cause proceedings, attendant to pending litigation, except in family law proceedings (*Chauncey* v. *Niems* (1986) 182 Cal.App.3d 967).

1.3. Separable Claims Give Rise to Malicious Prosecution.

Where one or more, but less than all, of the claims in the underlying action lacked probable cause, it is permissible to bring a malicious prosecution action targeting only the untenable claims (*Crowley* v. *Katleman,* 8 Cal.4th 666 (rejecting the argument that multiple "theories" of liability all related to a single "primary right"); *Bertero* v. *National General Corp*., 13 Cal.3d 43*; Albertson* v. *Raboff* (1956) 46 Cal.2d 375*; Franklin Mint Co.* v. *Manatt, Phelps & Phillips, LLP,* 184 Cal.App.4th 333; *Singleton* v. *Perry* (1995) 45 Cal.2d 489*; Mabie* v. *Hyatt* (1998) 61 Cal.App.4th 581*; Friedberg* v. *Cox* (1987) 197 Cal.App.3d 381.) The malicious prosecution defendant "must have a reasonable belief in the validity of each of his theories, i.e., one reasonable ground will not excuse others which are without probable cause." (*Mabie* v. *Hyatt* (1998) 61 Cal.App.4th 581.)

1.4. Litigants and their Lawyers May Be Liable for Malicious Prosecution.

Any individual who unsuccessfully prosecutes an underlying action as an individual party plaintiff may be liable for malicious prosecution. Moreover, CACI 1501 references those who are "actively involved in bringing [or continuing] the lawsuit," which may include those who become later involved in the continued prosecution of the prior action, as "aiders and abettors." (*Lujan* v. *Gordon* (1977) 70 Cal.App.3d 260.) Any agent who "instigates or procures" and is "actively instrumental" in the pursuit of the prior action by the principal. (*Jacques Interiors* v. *Petrak* (1987) 188 Cal.App.3d 1363) (insurance adjuster's false and fraudulent report concerning a building fire induced insurer to sue tenant in the building) may be individually liable, just as a nominal defendant who later agreed to be bound as if a plaintiff could be held liable as one involved in maintaining the prior action

Importantly, the lawyer who originally initiated the underlying action is clearly potentially liable, though colleagues in the same firm who had only passing involvement may not be personally liable. (*Gerard* v. *Ross* (1988) 204 Cal.App.3d 968.) Successor or later involved counsel who substitute or associate into the underlying action are also subject to liability.

2. THE CRITICAL ELEMENT = PROBABLE CAUSE

"Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed. '[T]he standard of probable cause to bring a civil suit [is] equivalent to that for determining the frivolousness of an appeal [citation omitted], i.e., probable cause exists if 'any reasonable attorney would have thought them tenable.' [citing *Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863] " (*Plumley* v. *Mockett* (2008) 164 Cal.App.4th 1031, 1047.)

2.1. *Investigation Irrelevant.*

The reasonableness of the attorney's research and investigation prior to commencing the prior action is not relevant to probable cause. (*Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863.)

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The duty of care is owed only to the client, not the adversary. However, the failure to conduct a meaningful investigation may be probative on the element of malice. When evaluating a client's case and making an initial assessment of tenability, the attorney is entitled to rely on information provided by the client. (*Swat-Fame, Inc.* v. *Goldstein* (2002) 101 Cal.App.4th 613.) However, an exception to this rule exists where the attorney is on notice of specific factual mistakes in the client's version of events. (*Ibid.*; *Zamos* v. *Stroud* (2004) 32 Cal.4th 958, 971 (an attorney may be liable for malicious prosecution if the attorney continues to prosecute a lawsuit after discovery of facts that establish that the lawsuit has no merit).)

2.2. *Tenability Required*.

Probable cause is measured by "whether a prudent attorney, after such investigation of the facts and research of the law as the circumstances reasonably warrant, would have considered the action to be tenable on the theory advanced." (*See Downey Venture* v. *LMI Ins. Co.* (1998) 66 Cal.App.4th 478.) A case lacks Probable Cause only if "any reasonable attorney would agree that the appeal is totally and completely without merit." (*See also*, *Roberts* v. *Sentry Life Ins. Co.* (1999) 76 Cal.App.4th 375.) The term "tenability" is used to mean "defensible" or "capable of being maintained against argument or objection." (See Webster's Third New International Dictionary (1979).) The implication of the Supreme Court's use of the word in *Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863, is that lack of probable cause should not be found where reasonable minds could differ. In other words, to establish that the underlying lawsuit was instituted without probable cause, the plaintiff in the malicious prosecution suit must prove that based on the facts known to the lawyers when they filed the lawsuit, no reasonable attorney would have thought that the claims in the action were tenable. (*Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863*; Copenbarger* v. *International Ins. Co.* (1996) 46 Cal.App.4th 961; *Leonardini* v. *Shell Oil Co.* (1947) 216 Cal.App.3d 547.)

2.3. *Probable Cause is Required for Each Claim*.

Probable cause must exist as to *element of each claim* and a malicious prosecution action may be maintained even if only one of two theories of liability in the underlying action was asserted without probable cause. (*Sangster* v. *Paetkau* (1998) 68 Cal.App.4th 151; *Wiley* v. *County of San Diego* (1998) 19 Cal.4th 532.) Probable cause is also required as to *each separate party* against whom a claim is made. (*Arcaro* v. *Silva and Silva Ent. Corp.* (1999) 77 Cal.App.4th 152; *Puryear* v. *Golden Bear Ins. Co.* (1998) 66 Cal App 4th 1188.)

Franklin Mint Co. v. *Manatt, Phelps & Phillips, LLP,* 184 Cal.App.4th 313, *supra*, is a recent case in which malicious prosecution claims arising from an underlying federal district court action against a memorabilia company for false advertising and trademark dilution under the Lanham Act (15 U.S.C.A. § 1125(c)). In that case, the court of appeal reversed a directed verdict in favor of the law firm defendant. The in a 2-1 decision found the claims legally untenable and that a law firm is "not immune from liability for malicious prosecution simply because the general area of law at issue is complex and there is no case law with the same facts that establishes that the underlying claim was untenable. Lawyers are charged with the responsibility of acquiring a reasonable understanding of the law governing the claim to be alleged." Moreover, the court found that "achieving such an understanding may be more difficult in a specialized field is no defense to alleging an objectively untenable claim. Nor is it a defense

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to say that an attorney is arguing for an extension, modification, or reversal of existing law when that attorney is asserting legal theories that simply ignore fundamental principles on which that law is based." (*Id.* at 346.)

2.4. *A Question of Law for the Court*.

Where the facts relating to probable cause are not in dispute, the existence of probable cause is a question of law for the trial Court to decide, not the jury. This was the second change in the law stemming from the Supreme Court's groundbreaking decision in *Sheldon Appel*. (*See Franklin Mint Co.* v. *Manatt, Phelps & Phillips, LLP,* 184 Cal.App.4th 333; *Plumley* v. Mockett (2008) 164 Cal.App.4th 1031; Morrison v. *Rudolph* (2002) 103 Cal.App.4th 506.) Thus, it is often strategically wise and effective for a defendant to test the issue of probable cause by early motion for summary judgment, and in some instances at the demurrer stage, where the evidence can be derived from the Court records from the prior proceedings, e.g., where the prior action resolved by motion or trial, leaving an evidentiary record that can be gauged by the court in the later malicious prosecution action. (*Bixler* v. *Goulding* (1996) 45 Cal.App.4th 1179.) Just because there are disputed facts relevant to the merits of the underlying action does not preclude summary judgment, so long as those facts not in dispute do independently establish probable cause. (*Sangster* v. *Paetkau* (1998) 68 Cal.App.4th 151.) This also means that typically, once the evidence has been presented, the parties argue probable cause to the judge, and depending on the court's ruling, and then proceed to argue malice and damages to the jury. Under these circumstances, the issue of probable cause is reviewed *de novo* on appeal. (*Arcaro* v. *Silva and Silva Ent. Corp*., 77 Cal.App.4th 152 (citing *Sierra Club* v. *Graham* (1999) 72 Cal.App.4th 1135).)

2.4.1. *Expert Testimony Not Permitted*.

Expert witness testimony is not permitted on the issue of probable cause (*Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863.) Whether expert testimony might be relevant to either malice, reliance on advice of counsel, punitive damages or affirmative defenses is an open question. (*Monia* v. *Parnas* (1991) 227 Cal.App.3d 1349.) [1] Such testimony has been sanctioned on the issue of favorable termination, where the former plaintiff dismissed three days before a critical preliminary injunction hearing, in the face of a dismissal demand by defense counsel who was later called to give what appears to have been a mix of fact and opinion testimony. (*Leonardini* v. *Shell Oil Co*., 216 Cal.App.3d 547.) The same court declined to decide if an independent expert (a retired judge) properly gave opinion testimony supportive of "malice" for punitive damage purposes, since there had been no timely objection and thus the issue was waived. (*Ibid.*)

2.4.2. *Settlement offers are irrelevant.*

Prior settlement offers in the underlying action by the prevailing defendant are irrelevant to whether probable cause existed, as it does not reflect upon the merits of the case (there may be many non-merits based factors that account for settlement offers), much less the state of mind of

[1] In this unpublished decision, the court provides a persuasive rationale for permitting expert testimony on the issue of malice, comparing it to insurance bad faith suits.

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the prosecuting party; indeed, such evidence is not discoverable in a subsequent malicious prosecution action. (*Covell* v. *Superior Ct.* (1984) 159 Cal.App.3d 39.)

2.5. Generally, Probable Cause Must Exist When the Action Commenced.

The longstanding rule in California is that, if probable cause exists at the outset of the action, the party acting with probable cause is insulated from liability from malicious prosecution. Thus, there is generally no liability for malicious prosecution for continuing an action where probable cause existed at the time of filing. (*Swat-Fame, Inc.* v. *Goldstein,* 101 Cal.App.4th 613.) However, continued prosecution of a lawsuit once it becomes evidently untenable is open to challenge by malicious prosecution. (*Pacific Gas & Elec. Co.* v. *Bear Stearns & Co.* (1990) 50 Cal.3d 1118; *Lujan* v. *Gordon,* 70 Cal.App.3d at 260; *Arcaro* v. *Silva and Silva Ent. Corp*., 77 Cal.App.4th 152; *Leonardini* v. *Shell Oil Co.,* 216 Cal.App.3d 547.)

The traditional rule that the existence of probable cause is judged solely on the basis of the facts known to the malicious prosecution defendant when it filed the prior lawsuit was rejected in *Hufstedler, Kaus & Ettinger* v. *Superior Ct.* (1996) 42 Cal.App.4th 55*,* where the court of appeal considered evidence of the malicious prosecution plaintiff's actions learned during the course of discovery in the underlying lawsuit, and the fact that all of his motions had been denied by the prior court, to reach its conclusion that the attorneys had probable cause to prosecute the suit. The *Hufstedler* court explained its approach as follows: "[W]here, as here, the record in the underlying action was fully developed, a court can and should decide the question of probable cause by reference to the undisputed facts contained in that record, and where, as here, undisputed evidence establishes an objectively reasonable basis for instituting the underlying action, a 'dispute' about what the attorney knew or did not know at the time she filed the underlying action is irrelevant."

2.6. Other Issues Relevant to Managing Abusive Litigation.

2.6.1. *Abuse of Process*.

Often confused with malicious prosecution claims, abuse of process claims are significantly different. The elements of that tort are: (a) an ulterior purpose; and (b) a willful act in the use of the process not proper in the regular conduct of the proceeding. (*Oren Royal Oaks Venture* v. *Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157.) "The relevant California authorities establish, . . . that while a defendant's act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause of action for malicious prosecution, the mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action." (*Id*.)

There must be some substantial use or misuse of the judicial process **beyond** the mere filing of the prior action. (*Pacific Gas & Electric Co.* v. *Bear Stearns & Co.* (1990) 50 Cal.3d 1118; *Oren Royal Oaks Venture* v. *Greenberg, Bernhard, Weiss & Karma, Inc.,* 42 Cal.3d 1157; *Bidna* v. *Rosen* (1993) 19 Cal.App.4th 27; *Drasin* v. *Jacoby & Meyers* (1984) 150 Cal.App.3d 481; *Loomis* v. *Murphy* (1990) 217 Cal.App.3d 589; *Warren* v. *Wasserman, Comden & Casselman* (1990) 220 Cal.App.3d 1297; *Friedman* v. *Stadum* (1985) 171 Cal.App.3d 775; *Seidner* v. *1551 Greenfield Owners Assn.* (1980) 108 Cal.App.3d 895.) For these reasons, efforts to circumvent

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the favorable termination, finality or probable cause elements of the tort of malicious prosecution, by labeling the claim "abuse of process" are improper.

2.6.2. *Sanctions*.

The availability of sanctions is one reason courts have been reluctant to extend the tort of malicious prosecution. (*Downey Venture* v. *LMI Ins. Co*., 66 Cal.App.4th 478.) Sanctions are not a substitute for malicious prosecution, yet they may be properly invoked to remedy frivolous lawsuits. (*Andrus* v. *Estrada* (1995) 39 Cal.App.4th 1030.) For example, *Code of Civil Procedure* section 128.7 provides for monetary sanctions of fees and costs and does not permit tort-type recovery, e.g., emotional distress damages. (*Bidna* v. *Rosen,* 19 Cal.App.4th 27.) Further, collateral estoppel in favor of defendant on the issue of malice does not arise from denial of a motion for sanctions in the prior proceedings, since such motions involve a summary proceeding. (*Wright* v. *Ripley* (1998) 65 Cal.App.4th 1189.) The admissibility of a sanctions award to establish malice, whether for frivolous litigation, abusive tactics or discovery sanctions is an open question.

Malicious prosecution was available to prevailing defendants in a civil rights actions against police officers who were limited, pursuant to Fed.R.Civ.P. Rule 11, to the one form of relief provided in 42 U.S.C.A. § 1988(b), which provides that prevailing defendants in such an action may recover attorney fees as costs. (*Del Rio* v. *Jetton* (1997) 55 Cal.App.4th 30.)

Another open question is whether sanctions awarded and actually paid to the malicious prosecution plaintiff in the prior proceeding should be subject to an offset; however, presumably a double recovery will not be permitted.

For attorneys, such sanctions for frivolous actions or abusive litigation tactics are reportable to the State Bar of California ("State Bar") under *Business & Professions Code* section 6086.7(c) (non-discovery sanctions exceeding $1,000). Note that denial of a motion to strike a strategic lawsuit against public participation (SLAPP) suit ("Anti-SLAPP Motion"), pursuant to *Code of Civil Procedure* section 425.16 (the "SLAPP Statute), discussed below, on the ground that the plaintiff has established the requisite probability of success, establishes probable cause to bring the action, and precludes the maintenance of a subsequent malicious prosecution action, unless the prior ruling is shown to have been obtained by fraud or perjury. (*Wilson* v. *Parker, Covert & Chidester* (2002) 28 Cal.4th 811.)

2.6.3. *The Litigation Privilege*.

The Litigation Privilege, found in *Civil Code* section 47, provides that publications or broadcasts of information "[i]n the proper discharge of an official duty" are absolutely privileged. (Civ. Code § 47(a).) Notably, that absolute Litigation Privilege does not apply to recordation of a lis pendens unless underlying action relates to the right to title to, or possession of realty. Further, while recordation of notice of lis pendens cannot be the subject of an abuse of process action, it may be subject of liability for slander of title. (*Palmer* v. *Zaklama* (2003) 109 Cal.App.4th 1367.)

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The Litigation Privilege also protects the filing of a complaint and a variety of activities relating to the prosecution of litigation that have been the subject of abuse of process claims. (Civ.Code § 47(b)(2); *Merlet* v. *Rizzo* (1998) 64 Cal.App.4th 53.) However, generally, the Litigation Privilege does **not** bar malicious prosecution claims. (*Crowley* v. *Katleman,* 8 Cal.4th 666; *Daniels* v. *Robbins* (2010) 182 Cal.App.4th 204; *Pacific Gas & Electric Co.* v. *Bear Stearns & Co.,* 50 Cal.3d 1118; *Rubin* v. *Green* (1992) 9 Cal.App.4th 986; *Oren Royal Oaks Venture* v. *Greenberg, Bernhard, Weiss & Karma, Inc.,* 42 Cal.3d 1157; *see also, Albertson* v. *Raboff,* 46 Cal.2d 375; *Fremont Compensation Ins. Co.* v. *Superior Ct.* (1996) 44 Cal.App.4th 867; *Abraham* v. *Lancaster Community Hospital* (1990) 217 Cal.App.3d 796; *Camarena* v. *Sequoia Ins. Co.,* 190 Cal.App.3d 1089.) In addition, it does not preclude the use of privileged communications as evidence to prove malice in a malicious prosecution action. (*Albertson* v. *Raboff,* 46 Cal.2d 375*; Block* v. *Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386.)

3. MALICE

The third element of the malicious prosecution cause of action, malice, the chief element of the tort (*Maxon* v. *Security Ins. Co.* (1963) 214 Cal.App.2d 603), goes to the malicious prosecution defendant's intent in initiating the prior action. (*Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863.) The test is *legal* malice, not actual hostility or ill will toward the plaintiff, although the latter also may be present. It is sufficient if it appears that the prior action was instituted in bad faith to vex, annoy, or wrong the adverse party. (*Albertson* v. *Raboff,* 46 Cal.2d 375; *Sierra Club Foundation* v. *Graham,* 72 Cal.App.4th 1135*; Weber* v. *Leuschner* (1966) 240 Cal.App.2d 829*;* CACI 1501.) Pre-trial settlement tactics can and often provide fertile evidence relevant to malice.

4. PRACTICE DEFENSIVELY

4.1. Special Motions to Strike.

The SLAPP Statute (Civ. Proc. Code § 425.16) provides the most common and effective defensive response to malicious prosecution claims. Section 425.16 articulates a two-prong process used in evaluating whether an Anti-SLAPP Motion should be granted, and the claim dismissed. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. That prong is automatically established in connection with malicious prosecution claims. (*Jarrow Formulas* v. *La Marche* (2003) 31 Cal.4th 728, 735.) Second, if the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Navellier* v. *Sletten* (2002) 29 Cal.4th 82.)

4.2. Reliance on Advice of Counsel.

Reliance on advice of counsel, in good faith and after full disclosure of the facts, is a time honored affirmative defense to a malicious prosecution action**.** (*Mabie* v. *Hyatt,* 61 Cal.App.4th 581*; Sosinsky* v. *Grant* (1992) 6 Cal.App.4th 1548; *Pond* v. *Insurance Co. of North America* (1984) 151 Cal.App.3d 280; *Kennedy* v. *Byrum* (1962) 201 Cal.App.2d 474*; Brinkley* v. *Appleby* (1969) 276 Cal.App.2d 244*; DeRosa* v. *Transamerica Title Ins. Co.* (1989) 213 Cal.App.3d 1390*; Lucchesi* v. *Giannini & Uniack* (1984) 158 Cal.App.3d 777*; Masterson* v. *Pig'N Whistle*

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Corp. (1958) 161 Cal.App.2d 323.) Reliance on advice of counsel is a complete defense, even if probable cause was otherwise lacking. (*Brinkley* v. *Appleby* (1969) 276 Cal.App.2d 244*; Pond* v. *Insurance Co. of North America,* 151 Cal.App.3d 280.)

Advice of counsel can only be established by proving the facts that were stated by a defendant to counsel. In addition, whether a full and fair disclosure of all the facts was made to counsel and whether the attorney provided the advice are questions of fact to be determined by the jury. (*Martin Centers* v. *Dollar Markets* (1950) 99 Cal.App.2d 534*; Graham* v. *Griffin* (1944) 66 Cal.App.2d 116 ("to create a valid defense to a suit for malicious prosecution on the ground of reliance upon the advice of counsel, it is necessary to fairly and fully relate to the lawyer all the facts affecting the guilt or innocence of the accused person").) However, as discussed above, Advice of Counsel cannot be asserted where a party has not fully and faithfully disclosed the relevant facts to counsel and has not acted in good faith. (*Swat-Fame* v. *Goldstein,* 101 Cal.App.4th 613.)

In some instances full disclosure by client to lawyer may be is irrelevant because the advising attorney already has the information, or indeed, personal knowledge of the relevant factual foundation for probable cause (*Melorich Builders, Inc.* v. *Superior Ct.* (1984) 160 Cal.App.3d 931) or is delegated by the client to obtain the information by way of an attorney-conducted investigation (*DeRosa* v. *Transamerica Title Ins. Co.,* 213 Cal.App.3d 1390.)

4.3. Defensive Practice Tips.

4.3.1. Perform a Pre-Service Probable Cause Determination.

To reduce the likelihood that an action is commenced prematurely (e.g., merely to protect a statute of limitations before a probable cause determination has been made), and provides a potential basis for malicious prosecution, whenever an action is filed, complete a probable cause determination before service and, if not, consider (a) inviting the potential target to provide information in response to potential claims, or (b) providing the client with a letter explaining your strategy in filing or serving before probable cause is determined that could be used later as a basis for the client's assertion of the Advice of Counsel Defense.

4.3.2. Get a Waiver of Costs.

When resolving any case to be dismissed on a "walk away" or similar basis, seek mutual releases or, failing that, at least obtain a waiver of costs. That should be enough to nullify favorable termination. (*Ludwig* v. *Superior Ct.* (1995)37 Cal.App.4th 8.)

4.3.3. Get Concurrence of an "Independent" Lawyer.

Consult with and preferably retain, as a consultant, an "independent" lawyer (i.e., employed outside of plaintiff's counsel's firm) who is prepared to vouch for the tenability of the claim (even if such an expert would not be permitted to opine on the legal issue of probable cause [*Sheldon Appel Co.* v. *Albert & Oliker*, 47 Cal.3d 863]). If such a lawyer cannot be located, consider dismissing immediately.

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4.3.4. Dismiss if No Probable Cause.

If possible, dismiss as soon as probable cause is found to no longer exist or risk damages running from the point that determination can be made.

4.3.5. Be Collegial and Circumspect.

In all litigation, attorneys should consider how their communications and tactics will later be portrayed before a jury in a malicious prosecution action. Meritless, illegal or inflammatory accusations, demands or tactics aimed at achieving strategic leverage, even if they have some arguably valid purpose, could, singularly or in the aggregate, demonstrate or be used to establish a pattern relevant to malice.

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