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MALICIOUS PROSECUTION HANDBOOK©

By

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TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

Out of State Cases

TABLE OF AUTHORITIES

Page

Statutes

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page

1. OVERVIEW

1.1. Disfavored but Valuable.

Malicious prosecution claims have long been recognized as having a chilling effect on an ordinary citizen's willingness to bring a dispute to court, and as a result the tort is often characterized as a "disfavored cause of action." (*Sheldon Appel Co.* v. *Albert & Oliker* (1989) 47 Cal.3d 863, 873; *Crowley* v. *Katleman* (1994) 8 Cal.4th 666; *Jaffe* v. *Stone* (1941) 18 Cal 2d 146.)

It is not simply a matter of a chilling effect on the public – it affects lawyers as well. "[T]here is a basic and important policy that public access to the courts should be unfettered by threats of retaliatory litigation. Access to the courts would be illusory if plaintiffs were denied counsel of their choice, because attorneys feared being held liable as insurers of the quality of their clients' cases. Few attorneys would be willing to prosecute close and difficult matters, and virtually none would dare challenge the propriety of established legal doctrines." (1 Mallen & Smith, *Legal Malpractice* (2014 Ed.) § 6.11, pp. 618-619.)

However, it would be a mistake to think that because it is "disfavored" the tort lurks in the shadows in disgrace. The fact is that at least in the first few years of the past decade, insurance company records reflect showed an alarming increase in the frequency of claims of malicious prosecution against lawyers. Moreover, generally speaking, while a lawyer's professional liability insurance policy may pay the cost of defending the claim, the policies do not contain indemnity obligations with respect to a money judgment against the insured.

As the Supreme Court noted in *Crowley* v. *Katelman,* 8 Cal.4th 666 (echoing its comments in *Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, two decades earlier), "[t]his convenient phrase ["disfavored tort"] should not be employed to defeat a legitimate [claim]. We responded to [such an argument] 30 years ago, reasoning, '…. We should not be led so astray by the notion of a 'disfavored' action as to defeat the established rights of the plaintiff by indirection; for example, by inventing new limitations on the substantive right, which are without support in principle or authority…' (Citations omitted.)" (*Crowley* v. *Katleman,* 8 Cal.4th at 680.)

The tort's value is that it recognizes and protects the right of an individual to be free from unjustifiable litigation or criminal prosecution. (*Vanzant* v. *Daimler/Chrysler Corp.* (2002) 96 Cal.App.4th 1283.)

In the courtroom, experience suggests that while many judges may view the tort with antipathy (*see* C*rowley* v. *Katleman,* 8 Cal.4th 666), if the court finds a lack of probable cause and so advises a jury, and there is evidence of an improper motive for the prior action, juries are apt to react harshly, awarding economic and non-economic damages, as well as punitive damages.

1.2. 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 the malicious prosecution plaintiff's 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,* 47 Cal.3d 863; *Bertero* v. *National General Corp*., 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.)

1.3. Other Issues Relevant to Managing Abusive Litigation.

1.3.1. *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 the favorable termination, finality or probable cause elements of the tort of

malicious prosecution, by labeling the claim "abuse of process" are improper.

1.3.2. *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.* (1998) 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.)

1.3.3. *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.)

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* (1956) 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.* (1987) 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.)

1.4. Proceedings that May Give Rise to Malicious Prosecution Claims.

1.4.1. *Arbitrations*.

Judicial arbitrations give rise to the malicious prosecution remedy, in the same way as with a bench or jury trial or a trial pursuant to a private reference. (*Stanley* v. *Superior Ct.* (1982) 130 Cal.App.3d 460.) Private arbitration agreements that expressly allow for the malicious prosecution remedy are to be honored. (*Law Offices of Ian Herzog* v. *Law Offices of Joseph Fredrics* (1998) 61 Cal.App.4th 672.) However, contractual arbitrations are not the sort of favorable termination needed to support a claim for malicious prosecution. (*Brennan* v. *Tremco, Inc*. (2001) 25 Cal.4th 310.) Thus, the remedy for an unjustified arbitration after *Brennan* is to seek sanctions in the underlying arbitration. (*Id*; *Cedars-Sinai Medical Center* v. *Superior Ct.* (1998) 18 Cal.4th 1; *see also*, *Special Feature: Legal Ethics, Malpractice and Related Issues: Malicious Prosecution and Contractual Arbitration*, 43 Orange County Lawyer 30,

August 2001.) When the parties to an arbitration agreement are unable to pursue malicious prosecution (or alternatively are limited to bringing such claims within the confines of the same or a later arbitration) the prosecuting attorney in the prior arbitration is disabled from pursuing malicious prosecution. According to *Brennan* v. *Tremco, Inc*., 25 Cal.4th 325. "[I]t is the nature of the termination that matters, not exactly how it came about or who agreed to it." (Citations omitted.)

1.4.2. *Probate Proceedings.*

Will contests and other probate proceedings constitute a civil proceeding, for which the remedy of malicious prosecution is available, if all other elements are established. (*Crowley* v. *Katleman,* 8 Cal.4th 666 (*citing MacDonald* v. *Joslyn* (1969) 275 Cal.App.2d 282)*; Fairchild* v. *Adams* (1959) 170 Cal.App.2d 10.)

1.4.3. *Declaratory Relief Claims.*

A complaint or cause of action for declaratory relief is treated like any other cause of action that is brought maliciously and without probable cause. (*Camarena* v. *Sequoia Ins. Co*., 190 Cal.App.3d 1089; *see also*, *Pond* v. *Insurance Co. of North America* (1984) 151 Cal.App.3d 280; *Hillenbrand* v. *Insurance Co. of N.A*. (2002) 104 CalApp.4th 784.) In addition, cross-complaints are treated as a separate action for purposes of a later malicious prosecution action by the prevailing cross-defendant. (*Bertero* v. *National General Corp*., 13 Cal.3d 43*; Bixler* v. *Goulding* (1996) 45 Cal.App.4th 1179.) Similarly, administrative proceedings can be a basis for malicious prosecution. (*Axline* v. *Saint John's Hospital and Health Center* (1998) 63 Cal.App.4th 907 (physicians' application for medical staff membership)*; Nicholson* v. *Lucas* (1994) 21 Cal.App.4th 1657 (denial of dentist's surgery privileges by hospital's judicial review committee); *Hardy* v. *Vial* (1957) 48 Cal.2d 577 (state university employment reinstatement proceeding)*; Brody* v. *Montalbano* (1978) 87 Cal.App.3d 725 (complaint to school board against teacher).)

1.4.4. *OSC Proceedings.*

In addition, Order to Show Cause ("OSC") proceedings, attendant to pending litigation, except in family law proceedings, as discussed below, may support a later malicious prosecution action (*Chauncey* v. *Niems* (1986) 182 Cal.App.3d 967 (dual OSC proceedings in family law court for contempt and modification, though favorable termination was not properly alleged).)

1.5. Proceedings not Properly the Basis for Malicious Prosecution.

1.5.1. *Groundless Defenses.*

There is no authority in California to support a "malicious defense" claim and the California Supreme Court, citing out-of-state authorities, declined to "establish such a tort" in *Bertero* v. *National General Corp,* 13 Cal.3d 43 (even as it recognized that the filing of a cross-complaint based on the same defensive theories would support a later claim of malicious prosecution). The Supreme Court also declined to permit a malicious prosecution action remedy to a prevailing plaintiff against a defendant's insurer for mounting a frivolous appeal from a prior judgment against its insured. (*Coleman* v. *Gulf Ins. Co.* (1986) 41 Cal.3d 782; *Merlet* v. *Rizzo* (1998) 64 Cal.App.4th 53.) However, the New Hampshire Supreme Court ***did*** recognize such a new tort remedy in *Aranson v. Schroeder* (1995) 671 A.2d 1023.

1.5.2. *Small Claims Actions.*

Awards in small claims courts provide no basis for a malicious prosecution claim. (*Pace* v. *Hillcrest Motor Co*. (1980) 101 Cal.App.3d 476; *Black* v. *Hepner* (1984) 156 Cal.App.3d 656; *Cooper* v. *Pirelli Cable Corp*. (1984) 160 Cal.App.3d 294 (the fact that the defendant appealed a judgment in favor of the small claims plaintiff and ultimately prevailed in a trial before a jury does not change the result).)

1.5.3. *State Bar Complaints.*

Informal investigations by the State Bar, not resulting in the issuance of an Order to Show Cause, do not constitute "proceedings" sufficient to give rise to a malicious prosecution remedy on the part of an exonerated attorney. (*Lebbos* v. *State Bar* (1985) 165 Cal.App.3d 656; *Chen* v. *Fleming* (1983) 147 Cal.App.3d 36*; Stanwyck* v. *Horne* (1983) 146 Cal.App.3d 450; *Jacques Interiors* v. *Petrak* (1987) 188 Cal.App.3d 1363.) State Bar complaints are privileged, as discussed below at section 6.5.2. Moreover, if the State Bar does eventually instigate proceedings against the attorney, it is the superseding act of the agency that commences the proceedings (based on its own independent investigation), not the complaining party. (*Werner* v. *Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667.) The same is true for Board of Medical Quality Assurance proceedings (*Hogen* v. *Valley Hospital* (1983) 147 Cal.App.3d 119) and proceedings under the aegis of the California Board of Psychology and the Board of Behavioral Science Examiners. (*Johnson* v. *Superior Ct.* (2000) 80 Cal.App.4th 1050.)

1.5.4. *Subsidiary Procedural Actions.*

Various procedural actions such as applications for writ of sale following a determination of liability and damages (*Merlet* v. *Rizzo,* 64 Cal.App.4th 53), post-judgment discovery (*Twyford* v. *Twyford* (1976) 63 Cal.App.3d 916), departmental investigations not resulting in formal proceedings (*Imig* v. *Ferrar* (1977) 70 Cal.App.3d 48), motions to disqualify counsel (*Silver* v. *Gold* (1989) 211 Cal.App.3d 17), applications to the Federal Communications Commission (*Stolz* v. *Wong* (1994) 25 Cal.App.4th 1811), applications for Order to Show Cause (c*ompare*, *Lossing* v. *Superior Ct.* (1989) 207 Cal.App.3d 635, so holding, with *Chauncey* v. *Niems*, 182 Cal.App.3d 967, which allows malicious prosecution following post-judgment Order to Show Cause proceedings; *see* discussion below re: family law proceedings) also have been found insufficient.

1.5.4.1. Bankruptcy Dischargeability Petitions.

Malicious prosecution arising out of the filing of a petition or complaint to determine dischargeability of debt in bankruptcy court does not lie, whether viewed as defensive in nature (*Idell* v. *Goodman* (1990) 224 Cal.App.3d 262), or, in what is probably the better approach, federal preemption of state law remedies for bankruptcy abuses, as was done in *Ross* v. *Universal Studios Credit Union* (2002) 95 Cal.App.4th 537, *Pauletto* v. *Reliance Ins. Co*. (1998) 64 Cal.App.4th 597, and *Saks* v. *Hubbard, Militzok & Parilla* (1998) 67 Cal.App.4th 565 (and cases cited therein), given the existence of sanctions and other remedies provided for under federal bankruptcy laws.

1.5.4.2. Family Law Proceedings.

Though cases are historically inconsistent, the clear weight of the contemporaneous authority is to completely preclude malicious prosecution as a remedy in connection with orders to show cause, motions or any other proceedings in family law court. (*See* extensive and scholarly discussion by the 4th District's Justice Sills in *Bidna* v. *Rosen,* 19 Cal.App.4th 27, analyzing *Twyford* v. *Twyford,* 63 Cal App 3d 916*; Chauncey* v. *Niems,* 182 Cal App 3d 967; *Lossing* v. *Superior Ct.,* 207 Cal.App.3d 635 and *Green* v. *Uccelli* (1989) 207 Cal.App.3d 1112. *Bidna* was followed in 1st District in *Begier* v. *Strom* (1996) 46 Cal.App.4th 877, in the context of child abuse allegations.) Similarly, no malicious prosecution flows from frivolous appeals by a losing defendant (*Coleman* v. *Gulf Ins. Co.,* 41 Cal.3d 782) for which the exclusive remedy is sanctions sought from the reviewing court under *Code of Civil Procedure* section 907. The *Coleman c*ourt also rejected an alternative claim of abuse of process. (*Coleman* v. *Gulf Ins. Co.*, 41 Cal.3d 793.)

1.6. Other Issues.

Government Claims Not Authorized. Government entities are not allowed to pursue malicious prosecution claims against citizens, regardless of the nature of the underlying action. (*City of Long Beach* v. *Bozek* (1982) 31 Cal.3d 527.) However, remedies are available, including prevailing party attorney fees where an action is found to be frivolous. (Code Civ. Proc. § 1038; *Kobzoff* v. *Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851; *Curtis* v. *County of Los Angeles* (2004) 123 Cal.App.4th 1405.)

1.7. Malicious Prosecution of Separate, Individual Claims.

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,* 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,* 61 Cal.App.4th 581.)

Both *Singleton* v. *Perry,* 45 Cal.2d 489, and *Bertero* v. *National General Corp*, 13 Cal.3d 43, also adopt a relaxed standard of proof for the plaintiff to show damages associated with defending those individual causes of action that are the subject of the later malicious prosecution action. *Bertero* did the same with respect to the fact that the same issues raised in the offending cross-complaint were raised in the privileged context of affirmative defenses. Though apportionment of defense costs between proper and improper claims and between improper affirmative claims and privileged defenses is relevant, "the burden of proving such an apportionment must rest with the party whose malicious conduct created the problem." (*Bertero* v. *National General Corp*., 13 Cal.3d 43; *Crowley* v. *Katleman,* 8 Cal.4th 666.)

Probable cause is one thing, favorable termination is another. (*Crowley* v. *Katleman,* 8 Cal.4th 666.) Whether a defendant must prevail "across the board" as to each and every claim (and, if so, whether each claim must be resolved on the merits), in order to satisfy the separate element of favorable termination, may be debatable. Supreme Court decisions are

not dispositive of the issue: First, in *Crowley* v. *Katleman*, the defendant prevailed on all claims, but only targeted some of the claims in the later malicious prosecution action. Thus, the issue was not presented. However, the Court seemed to approve the "across-the-board" approach to favorable termination when, in dictum, it alluded to the "rule" that favorable termination must be as to the "entire action" (citing *Friedberg* v. *Cox,* 197 Cal.App.3d 381).

The Supreme Court's earlier decision in *Bertero* v. *National General Corp*., involved a case where the victorious cross-complainant prevailed "in the prior action as a whole" (*citing Jenkins* v. *Pope* (1990) 217 Cal.App.3d 1292).

Finally, though, in *Albertson* v. *Raboff*, 46 Cal.2d 375, the California Supreme Court permitted a malicious prosecution action to proceed (arising out of a wrongfully recorded lis pendens) despite the fact that the former defendant was held liable on the promissory note that was the heart of the underlying action. As interpreted by the *Friedberg* court (cited below), *Albertson* is "distinguishable in that the wrongful institution of ancillary proceedings, such as the recordation of a notice of lis pendens, can itself support an action for malicious prosecution even without a showing the antecedent action was terminated favorably to plaintiff. (Citations omitted.)" (*Friedberg* v. *Cox,* 197 Cal.App.3d 388.) There are several decisions by the Courts of Appeal which support the notion that the former defendant must prevail on the merits entirely, as to all claims: (1) In *Friedberg* v. *Cox*, favorable termination was found lacking when an attorney defendant was held liable for attorney fees on a quantum meruit theory, even as he prevailed on the tort claim of intentional interference with contract and a "joint venture" theory. The court stressed the fact that each of the claims represented a "theory" of liability revolving around a single "primary right", i.e., the right to be paid fees for legal services performed. In that sense each of the claims was related and not distinct and severable. Note, however, that *Friedberg's* reliance on the "primary right" theory was later criticized by the Supreme Court in *Crowley* v. *Katleman,* 8 Cal.4th 666.

Murdock v. *Gerth* (1944) 65 Cal.App.2d 170, was the primary legal support for *Friedberg*. The underlying action involved two different contract claims - the defendant prevailed on one contract and was found liable for only $200 in damages on the other, with the trial Court adopting a theory of liability not even advanced by plaintiff. *Murdock* held that for purposes of the element of favorable termination, the "judgment as a whole" had to be examined. It was irrelevant that liability was for an insubstantial sum of money and that the theory of liability seized upon by the trial court was not advanced by the prevailing plaintiff. The suggestion that *Murdock* was impliedly disavowed by the Supreme Court in *Bertero* v. *National General Corp*., was rejected by the *Friedberg* court, since *Bertero* involved a case where the malicious prosecution plaintiff had prevailed on all claims in the prior action and the Supreme Court enunciated that its decision did not alter the rule that "there was be a favorable termination of the entire action." (*Friedberg* v. *Cox*, 197 Cal.App.3d 381 (quoting from *Bertero* v. *National General Corp*., 13 Cal.3d 43).)

In *Dalany* v. *American Pacific Holding Co*. (1996) 42 Cal.App.4th 822, plaintiff prevailed as to some but not all cross-claims and later entered into a stipulated settlement where the defendant agreed to pay a discounted sum as claimed in the complaint and to allow judgment to be entered against it on the cross-complaint. The Court distinguished *Crowley,* since the partial victory, while it might have been relevant to the issue of whether the dismissed claims were founded upon probable cause, did not suffice for the separate element of favorable termination.

However, in *Paramount Gen. Hosp.* v. *Jay* (1989) 213 Cal App 3d 360, the former defendant prevailed on 15 of 17 claims, each of which was bifurcated and tried separately, and combined those 15 claims consumed most of the discovery and trial time. The two claims upon which the plaintiff prevailed involved equitable relief only. Finding the claims to be "severable", the court found support in *Albertson* v. *Raboff,* 46 Cal.2d 375, and distinguished both *Friedberg* v. *Cox,* 197 Cal.App.3d 388 and *Murdock* v. *Gerth,* Cal.App.2d 170, holding that a malicious prosecution action could be maintained on those "severable" claims as to which the former defendant prevailed. (*See also*, *Sierra Club* v. *Graham* (1999) 72 Cal.App.4th 1135 (individual and representative claims deemed "severable")*; Tabaz* v. *Cal. Fed. Finance* (1994) 27 Cal.App.4th 789 (defendant prevailed on tort and contract claims, but the court awarded restitution as to a single overpayment. Claims were severable for purpose of favorable termination).)

1.8. Those Who May Be Liable for Malicious Prosecution.

1.8.1. *Litigants*.

Most obviously, an individual who unsuccessfully prosecuted an underlying action as an individual party plaintiff may be liable for malicious prosecution. However, the extent of personal liability of directors and officers of a corporate plaintiff is unclear. (*See Puryear* v. *Golden Bear Ins. Co*. (1998) 66 Cal.App.4th 1188.) 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

1.8.2. *Counsel*.

The attorney originally who 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. However, counsel is entitled to rely on the information provided to them by their clients. (*See, e.g. Swat-Fame* v. *Goldstein* (2002) 101 Cal.App.4th 613 (Appellate Court affirmed Summary Judgment as to attorneys because the undisputed facts established that the information was provided to counsel by the client and counsel was entitled to rely on this information and to assert a claim based on the information.), *overruled on other grounds by Zamos* v. *Stroud* (2004) 32 Cal.4th 958, 971 .

2. FAVORABLE AND FINAL TERMINATION

2.1. Commencement.

It is unclear whether a complaint that is filed, but not served constitutes "commencement" for purposes of malicious prosecution. There is no authority directly on point, but, the court in *Adams* v. *Superior Ct.* (1972) 2 Cal.App.4th 521, stated: "The tort of malicious prosecution requires the initiation of a **full-blown** action…." (Emphasis added.) (*Compare, Stroock & Stroock & Lavan LLP* v. *Tendler* (2002) 98 Cal.App.4th 521 (The court implicitly found that a commencement occurred when a defendant voluntarily answered an unserved complaint.).)

One possible analogy comes from former *Code of Civil Procedure* section 128.5(b)(1): "The mere filing of a complaint without service thereof on an opposing party does not constitute 'actions or tactics' for purposes of this section." This provision is not carried over in *Code of Civil Procedure* section 128.7. Likewise by analogy, the mere filing of a complaint (even for an improper purpose), is not a proper basis for the related tort of abuse of process. "The relevant California authorities establish, however, 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 of a lawsuit—even for an improper purpose is not a proper basis for an abuse of process action." (*Oren Royal Oaks Venture* v. *Greenberg, Bernhard, Weiss & Karma, Inc.,* 42 Cal.3d 1157.)

On the other hand, case law dealing with when malicious prosecution occurs for determining which of successive liability insurance policies applies, have settled on the filing date as constituting the occurrence of the tort. (*Harbor Ins. Co.* v. *Central National Ins. Co.* (1985) 165 Cal.App.3d 1029*; Zurich Ins. Co.* v. *Peterson* (1986) 188 Cal.App.3d 438.) Presumably because the issue would normally arise where the action was dismissed prior to service, presumably causing no substantial injury that would justify retaliation by way of malicious prosecution.

Defensive Practice Tip # 1 – To reduce the likelihood that an action that is commenced prematurely (e.g., merely to protect a statute of limitations before a probable cause determination has been made), will provide 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 the strategy employed in filing or serving before probable cause is determined which could be used later as a basis for the client's assertion of the Advice of Counsel Defense.

2.2. Finality.

Generally, the underlying action must be final in the traditional sense of a "final judgment", i.e., after the time to appeal has expired or at the conclusion of an appeal. (*Rich* v. *Siegel* (1970) 7 Cal.App.3d 465; *Murdock* v. *Gerth,* 65 Cal.App.2d 170.) (*See also,* Code Civ. Proc. § 1049 [Action is deemed to be pending from the time of commencement until its final determination upon appeal, or until the time for appeal has passed, unless a judgment is sooner satisfied.].) Where "the action as a whole is still pending, as herein, it is of no consequence whether a single cause of action has been determined in appellant's favor, as an action for malicious prosecution must await a favorable termination of the entire proceeding." (*Jenkins* v. *Pope,* 217 Cal.App.3d 1292; *Friedman* v. *Stadum,* 171 Cal.App.3d 775.) The finality requirement is designed to preclude dueling actions, the potential for inconsistent results, impairing the standing of plaintiff's counsel in the prior action by creating a conflict derived from the targeting of such counsel with a claim for

malicious prosecution. (*Babb* v. *Superior Ct.* (1971) 3 Cal.3d 841.)

However, a prior action that is dismissed absent circumstances of double jeopardy or *res judicata*, is nonetheless deemed final for malicious prosecution purposes—even if not yet time-barred and, thus, can be revived and function as a defense to a precipitous malicious prosecution action. (*Jaffe* v. *Stone,* 18 Cal.2d 146.) In other words, finality for purposes of malicious prosecution does not require a termination that is preclusive of further litigation. (*Rich* v. *Siegel,* 7 Cal.App.3d 465; *Hurgren* v. *Union Mut. Life Ins. Co.* (1904) 141 Cal. 585.)

Pre-trial termination as to one or more, but not all **plaintiffs**, does not give rise to a claim for malicious prosecution since the party against the "partial summary judgment" order was directed could not appeal until a judgment is entered. (*Rich* v. *Siegel,* 7 Cal.App.3d 465.) Further, pre-trial resolution as to one or more, but not all defendants is not final termination. Here, so long as there is a judgment or dismissal in favor of one or more defendants and thus it is appealable, the cause of action of for malicious prosecution accrues—though if an appeal is filed, any claim for malicious prosecution must abide the appeal. (*Gibbs* v. *Haight, Dickson, Brown & Bonesteel* (1986) 183 Cal.App.3d 716.)

Similarly, pre-trial termination, by voluntary dismissal, abandonment or otherwise, as to one or more, but not all **claims** means that any malicious prosecution action is premature until all claims are eliminated. (*Albertson* v. *Raboff,* 46 Cal.2d 375, *Jenkins* v. *Pope,* 217 Cal.App.3d 1292*; Boyer* v. *Corondelet Savings & Loan Assn* (Mo.App. 1982) 633 SW 2d 98.) The same is true of pre-trial termination of a cross-complaint, separate from the complaint (*Bob Baker Enterprises, Inc.* v. *Chrysler Corp.* (1994) 30 Cal.App.4th 678.) However, in the event of a post-trial appeal of some but not all aspects of the judgment, the disposition of a separate and independent claim which is **not** appealed from may be considered final for purposes of malicious prosecution. (*Albertson* v. *Raboff,* 46 Cal.2d 375.)

Defensive Practice Tip # 2 – Be patient. Wait until all causes of action have been resolved, final judgment has been entered, appeals exhausted and remittitur, if any, issued, before filing a malicious prosecution action.

2.3. Favorable Termination.

Favorable termination does not occur merely because the plaintiff has prevailed in the underlying action. (*Lackner* v. *LaCroix* (1979) 25 Cal.3d 747.) A dismissal on technical grounds or "for any other reason not inconsistent with his guilt, does not constitute a favorable termination." (*Chauncey* v. *Niems,* 182 Cal.App.3d 967.) The termination must be "inconsistent with wrongdoing" to constitute a favorable termination. (*Jaffe* v. *Stone,* 18 Cal.2d 146; *Lackner* v. *LaCroix*, 25 Cal.3d 747.) The termination must reflect on the merits of the underlying action. (*Lackner* v. *LaCroix*, 25 Cal.3d 747; *Eells* v. *Rosenblum* (1995) 36 Cal.App.4th 1848; CACI 1501.) Further, a voluntary dismissal with or without prejudice is generally considered favorable termination unless there are circumstances indicating otherwise. (*Zeavin* v. *Lee* (1982) 136 Cal.App.3d 766.) In *Zeavin,* a dismissal as a discovery sanction was held favorable termination for a client that had disappeared, but not for the lawyer who was left holding the bag. (*Ibid.*)

The doctrine of *res judicata*, which is concerned solely with the need for finality, should not be confused with a favorable termination which must necessarily reflect on the malicious prosecution plaintiff's innocence. (*Dalany* v. *American Pacific Holding Corp.*, 42 Cal.App.4th 822.)

A termination by dismissal—short of adjudication of the merits by trial or motion—requires an examination of record to determine the reasons for dismissal. (*Dalany* v. *American Pacific Holding Corp.,* 42 Cal.App.4th 822*; Eells* v. *Rosenblum,* 36 Cal.App.4th 1848*; Oprian* v. *Goldrich, Kest & Assoc.* (1990) 220 Cal.App.3d 337*; Lumpkin* v. *Friedman* (1982) 131 Cal.App.3d 450*; Kennedy* v. *Byrum* (1962) 201 Cal.App.2d 474.) A dismissal is favorable when it reflects the opinion of **either** the trial court **or** the prosecuting party that the action lacked merit or if pursued would result in a decision in favor of the defendant. The focus is not on the malicious prosecution plaintiff's opinion of his innocence, but on the opinion of the dismissing party who is now the target of the malicious prosecution claim. (*Lackner* v. *LaCroix,* 25 Cal.3d 747*; Cantu* v. *Resolution Trust Corp.* (1992) 4 Cal.App.4th 857*; Camarena* v. *Sequoia Ins. Co.,* 190 Cal.App.3d 1089*; Stanley* v. *Superior Ct.* (1982) 130 Cal.App.3d 460.) If the dismissal is on technical grounds or for procedural reasons, it does not constitute a favorable termination. (*Lackner* v. *LaCroix,* 25 Cal.3d 747.)

One looks to the substance of the disposition, not its form. Thus, a party who defends a declaratory relief action and prevails on the substance of the legal issue has prevailed on the merits. It is no answer for the party who instigated the action to say that they succeeded in obtaining the relief sought, a declaration of the parties' rights. (*Camarena* v. *Sequoia Ins. Co.*, 190 Cal.App.3d 1089.) The Second District Court of Appeal explained in *Eells* v. *Rosenblum*, 36 Cal.App.4th at 1855, "[t]he test is whether or not the termination tends to indicate the innocence of the defendant or simply involves technical, procedural or other reasons that are not inconsistent with the defendant's guilt." A dismissal

that does not unambiguously reflect the dismissing party's opinion that the case lacked merit is not a favorable termination. Thus, a "resolution of the underlying litigation that leaves some doubt as to the defendant's innocence or liability is *not* a favorable termination, and bars that party from bringing a malicious prosecution action against the underlying plaintiff." (*Villa* v. *Cole* (1992) 4 Cal.App.4th 1327.)

As the court in *Babb* v. *Superior Ct.,* 3 Cal.3d 841*,* stated*:*

> First there is a certain metaphysical difficulty in permitting a counterclaim for malicious prosecution since theoretically that cause of action does not yet exist…The principle is well established that the cause of action for malicious prosecution first accrues at the conclusion of the litigation in favor of the party allegedly prosecuted maliciously…."
>
> Second, the requirements of practical judicial administration dictate the retention of the "favorable termination" rule. It prevents the inconsistent judgments which may result if a malicious prosecution action were permitted to be filed before the conclusion of the principal suit….The "favorable termination" requirement facilitates speedy and orderly trials because the other elements of the cause of action (malice and probable cause) are substantially easier to determine with the records of the underlying action available as evidence…
>
> Third, the rule of favorable termination is supported by strong policy considerations. Since malicious prosecution is a cause of action not favored by the law…it would be anomalous to sanction a procedural change which not only would encourage more frequent resort to malicious prosecution actions but would facilitate their use as a dilatory and harassing devices… .the introduction of evidence on the issues of malice and probable cause may prejudice the trier of fact in the plaintiff's underlying complaint or enhance the possibility of a compromise verdict."
>
> Finally, as was the case here, the plaintiff and his attorney may be joined as cross-defendants in the malicious prosecution action. This not only places the attorney in a potentially adverse relation to his client, but may well necessitate the hiring of separate counsel to pursue the original claim…" (*Id.* at 847-848.)

The rule in *Babb* is not absolute. If the complaint has been dismissed under circumstances constituting a favorable termination, an amended cross-complaint can serve as a vehicle for pursuing malicious prosecution. (*Loomis* v. *Murphy,* 217 Cal.App.3d 589.) Ironically, the defendant in *Loomis* filed a cross-complaint for abuse of process which was later determined to be unsustainable since filing a complaint without more is not a basis for abuse of process, but then was granted leave to amend the pleading to add a malicious prosecution claim, which did survive. Favorable termination is normally a question of law based on judicial notice of court records from underlying action. (*Cantu* v. *Resolution Trust Corp.,* 4 Cal.App.4th 857.)

Extrinsic evidence to interpret a judgment or order of dismissal ("going behind") is not admissible. (*Freidberg* v. *Cox,* 197 Cal.App.3d 381.) "The criterion... is the decree itself in that action. The court in the action for malicious prosecution will not make a separate investigation and retry each separate allegation without reference to the result of the previous suit as a whole." (*Id.*) The Supreme Court cited *Freidberg* approvingly in *Crowley* v. *Katleman*, 8 Cal.4th 666, and confirmed that whether a prior action terminated favorably would be determined from the face of the judgment and approved *Freidberg's* refusal to permit the malicious prosecution plaintiff to go behind the judgment.

Malicious prosecution cannot be used as a collateral attack on a judgment, even with allegations that the prior judgment, now final, was procured by fraud, perjury and the like. (*Kachig* v. *Boothe* (1971) 22 Cal.App.3d 626.)

2.3.1. *Non-qualifying terminations*.

2.3.1.1. Settlements.

Settlement, stipulated judgment or other consensual or negotiated resolution (*Dalany* v. *American Pacific Holding Corp.,* 42 Cal.App.4th 822; *Webb* v. *Youman* (1967) 248 Cal.App.2d 851; *Coleman* v. *Gulf Ins. Group,* 41 Cal.3d 782; *Villa* v. *Cole,* 4 Cal.App.4th 1327; *Paskle* v. *Williams* (1931) 214 Cal. 482; *Ludwig* v. *Superior Ct.* (1995) 37 Cal.App.4th 8.) In *Dalany* v. *American Pacific Holding Corp*., plaintiff, a former corporate officer, director and shareholder, sued a corporate affiliate to collect a loan and was hit with a cross-complaint alleging breach of fiduciary duty. Summary

adjudication was granted on some but not all of the claims in the cross-complaint, and plaintiff failed to obtain summary judgment on his own complaint. The case was eventually resolved through a stipulated judgment which was the product of lengthy settlement negotiations, where the resulting amount to be paid was substantially less than the face amount of the loans. As to the cross-complaint, the defendant agreed to allow judgment to be entered against it. The court rejected the argument that settlements by way of dismissal (as exemplified in *Pender* v. *Radin* (1994) 23 Cal.App.4th 1807 and *Villa* v. *Cole, supra*) were different from a settlement by way of stipulated judgment, regardless of the *res judicata* effect of the judgment.

In addition there is no favorable termination when a defendant obtains a dismissal from a global settlement even if he fails to contribute or sign. "[T]he dismissal of a party who refuses to participate in a settlement concluded by other parties does not constitute a favorable termination for the nonsettling party." (*Cantu* v. *Resolution Trust Corp.,* 4 Cal.App.4th 857*; see also*, *Oprian* v. *Goldrich, Kest & Assoc.,* 220 Cal.App.3d 337.) Similarly, in *Haight* v. *Handweiler* (1988) 199 Cal.App.3d 85*,* the malicious prosecution plaintiff had been dismissed as a necessary condition to a settlement with other parties to the prior action, an express finding to that effect being found in the court in that action. The fact that the malicious prosecution plaintiff had not agreed to the settlement and declined to participate was irrelevant since his dismissal was mandated by a settlement with the co-defendants. In *Villa* v. *Cole,* 4 Cal.App.4th 1327, and *Pender* v. *Radin,* 23 Cal.App.4th 1807, the same kind of circumstances were revealed in the record below with the same result. In *Villa*, it appeared that the recalcitrant police officer was present in court as the settlement was put on the record, and seemed to acknowledge that defense counsel was representing all defendants in setting forth the terms of the settlement. In *Pender*, there was a settlement agreement that expressly required a dismissal of all defendants, leaving the lack of favorable termination determinable as a matter of law.

In *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, three police officers sued for malicious prosecution arising out of a prior civil rights suit in federal court charging police brutality, targeting the former plaintiff, her husband and sister, and her attorney. The underlying action targeted the City of Alameda, its police chief and three officers who arrested plaintiff following a traffic incident. At first, the trial court granted summary judgment based on lack of favorable termination, relying on the court record, but was reversed to allow plaintiffs to pursue discovery into the issue of favorable termination. Upon remand and after further discovery, a second motion for summary judgment was granted only to be reversed yet again, the Court of Appeal holding that a jury would have to resolve the issue. Unlike *Villa*, the evidence showed that the officers expressly refused to participate, did not appear in court at the time the case settled, and it was not clear that their dismissal was mandated by the settlement with the City and the police chief, inasmuch as the officers were separately dismissed without any indication that it was pursuant to a settlement (in contrast to the City's dismissal). In fact, when the trial court admonished that the settlement with the City would have no impact on the rights of the officers to sue for malicious prosecution, plaintiff acknowledged the risk and accepted the settlement. (*See also, Ferreira* v. *Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409 (A case concluded by a settlement after trial does not constitute favorable termination. While arguably there was a favorable determination by the jury, the litigation terminated as a result of the settlement in which the amount of the five figure verdict was compromised to a nominal sum).)

A voluntary dismissal, given merely in exchange for a waiver of costs, is not a favorable termination. (*Ludwig* v. *Superior Ct.,* 37 Cal.App.4th 8*; Pender* v. *Radin,* 23 Cal.App.4th at 1807.) Under such circumstances, the dismissing plaintiff's motivations for the agreement are irrelevant and the former defendant's claim that it agreed to the exchange as a result of duress was likewise unavailing. (*Ibid*.)

2.3.1.2. Statute of Limitations or Laches.

Though the Supreme Court in *Lackner,* v. *LaCroix,* 25 Cal.3d at 747, left open the question of whether prosecution of a known-to-be stale claim would support favorable termination, in *Warren* v. *Wasserman, Comden & Casselman*, 220 Cal.App.3d 1297, the court applied *Lackner* v. *LaCroix*, 25 Cal.3d 747, and rejected the malicious prosecution plaintiff's attempt to circumvent the procedural ground for the dismissal by alleging that the defendants had prosecuted the underlying action with the certain knowledge that the statute had run. Notwithstanding the allegation of wrongful subjective intent, the court refused to look behind the plain procedural grounds for the dismissal, and affirmed summary judgment for the defendant attorneys. "[I]f a litigant wants to pursue a malicious prosecution action under those circumstances, he must eschew the procedural defense, forego the easy termination, and obtain a favorable judgment on the merits." (*Ibid*; *see also, Robbins* v. *Blecher,* 52 Cal.App.4th 886; *Asia Investment Co.* v. *Borowski* (1982) 133 Cal.App.3d 832.)

The above may be a slight overstatement. In *Ray* v. *First Federal Bank of California* (1998) 61 Cal.App.4th 315, the malicious prosecution plaintiff, an attorney sued by a bank client for malpractice, had prevailed at the trial court level in the underlying action on a motion for summary judgment which argued two separate and independent grounds, the

statute of limitations and lack of a duty owed. The trial court granted the motion, but only on the basis of the statute of limitations. However, on appeal, the reviewing court affirmed on different grounds, finding no duty, thus upholding the alternative, merits-based argument that was eschewed by the trial court. This sufficed to establish probable cause since the underlying action was not final until the Court of Appeal rendered its decision that was, as it turned out, purely merits based.

Ray found support in other cases, in one of which the tables were turned and a merits based trial court resolution ultimately did not survive appellate resolution which was not based on the merits. "That favorable termination may depend on appellate proceedings after initial decision in the trial court has been recognized in other cases. For example, in *Oprian* v. *Goldrich, Kest & Associates*, *supra,* 220 Cal.App.3d 337, the malicious prosecution plaintiff initially obtained a favorable verdict and judgment in the underlying action, including his cross-complaint. On appeal, however, the court reversed the judgment on the cross-complaint, and also directed dismissal of the complaint, based upon the adverse party's representation that it would not be retried. Even though he had prevailed in the trial court, the plaintiff was held not to have obtained a favorable termination, because the appellate dismissal of the complaint against him had not been on the merits. (*Id*. at pp. 344-345; *see also*, *Merron* v. *Title Guarantee & Trust Co*. (1938) 27 Cal.App.2d 119 (appellate court language disapproving underlying proceeding entitled malicious prosecution plaintiff to proceed on issue of favorable termination).]

2.3.1.3. Statute of Frauds.

Although there is no California case that directly addresses the issue, the California Supreme Court has characterized a termination of an action as a result of the failure to comply with the statute of frauds as a "procedural defense," akin to terminations resulting from the application of limitations statutes or lack of personal jurisdiction, neither of which constitute favorable terminations for malicious prosecution purposes. (*Lackner* v. *LaCroix,* 25 Cal.3d 751; *Cf.*, *Lotts* v. *Whitworth* (1946) 76 Cal.App.2nd 601, 605 (analyzing termination of underlying action as a result of application of statute of frauds and advice of counsel defense in connection with element of probable cause).]

2.3.1.4. Lack of Jurisdiction, Mootness and Standing.

At least where there is an intention to pursue the action in another forum, lack of jurisdiction is a valid defense. (*Jaffe* v. *Stone,* 18 Cal.2d 146*; Robbins* v. *Blecher,* 52 Cal.App.4th 886; *Eells* v. *Rosenblum,* 36 Cal.App.4th 1848*; Minasian* v. *Sapse* (1978) 80 Cal.App.3d 823*; Ferraris* v. *Levy* (1963) 223 Cal.App.2d 408.) So is prematurity, for example when there is a pending appeal (*Robbins* v. *Blecher,* 52 Cal.App.4th 886; *Eells* v. *Robinson,* 36 Cal.App.4th 1848*; Rich* v. *Siegel,* 7 Cal.App.3d 465), and mootness (*Robbins* v. *Blecher,* 52 Cal.App.4th 886). Lack of standing is a jurisdictional defect and does not involve the merits of the action and cannot constitute a favorable termination (*Hudis* v. *Crawford* (2005) 125 Cal.App.4th 1586, 1592.)

2.3.2. *Qualifying Terminations*.

2.3.2.1. Voluntary Dismissal.

A voluntary dismissal may be deemed an abandonment and thus an implicit concession that the action lacks merit, even if the dismissal is "without prejudice." (*Fuentes* v. *Berry,* 38 Cal.App.4th 1800; *Robbins* v. *Blecher,* 52 Cal.App.4th 886*; MacDonald* v. *Joslyn,* 275 Cal.App.2d 282.)

> A " 'favorable' termination does not occur merely because a party complained against has prevailed in an underlying action. While the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. If the termination does not relate to the merits-reflecting on neither innocence of nor responsibility for the alleged misconduct-the termination is not favorable in the sense it would support a subsequent action for malicious prosecution."

(*Sycamore Ridge Apartments, LLC* v. *Naumann* (2007) 157 Cal.App.4th 1385, 1399; *Antounian* v. *Louis Vuitton Malletier* 2010 WL 3751500.)

A dismissal to avoid the payment of further attorneys' fees does not necessarily reflect the merits, and simply reflects a practical decision that further litigation will be too expensive to pursue. (*Oprian* v. *Goldrich, Kest & Associates,* 220 Cal.App.3d 337.) "It would be a sad day indeed if a litigant and his or her attorney could not dismiss an action to avoid further fees and costs, simply because they were fearful such a dismissal would result in a malicious prosecution action."

Furthermore, a change in the evidence that results in the voluntary dismissal of an untenable claim should not automatically give rise to a malicious prosecution suit. "[I]f the pleading originally advanced a tenable theory but subsequent research or discovery proves it to be untenable, the pleading should be amended to change or delete it." (*Bertero* v. *National General Corp.,* 13 Cal.3d 43)

Arguably, no liability should attach where a party voluntarily drops a claim because the discovery of additional facts renders it untenable. Such amendment would not seem to constitute a favorable termination, and a malicious prosecution claim based on such amendment is arguably inconsistent with public policy.

> "[T]he law favors the early resolution of disputes, including voluntary dismissal of suits when the plaintiff becomes convinced he cannot prevail or otherwise chooses to forego the action. This policy would be ill-served by a rule which would virtually compel the plaintiff to continue his litigation in order to place himself in the best posture for defense of a malicious prosecution action." (*Leonardini* v. *Shell Oil Co.* (1989) 216 Cal.App.3d 547.)

Similarly, a voluntary dismissal is not a favorable termination where the evidence supports the dismissal as a tactical strategy,

Depending on the circumstances, a voluntary dismissal may reflect ambiguously on the merits or may not reflect a plaintiff's tacit admission that the case lacks merit. Under these circumstances, the issue of favorable termination may be a question of fact. (*Fuentes* v. *Barry,* 38 Cal.App.4th 1800 (dismissal resulting from settlement where no admission of liability)*; Haight* v. *Handweiler,* 199 Cal.App.3d 85 (dismissal resulting from settlement leaving open the question of defendant's guilt or innocence.)

In addition, terminations based on the parol evidence rule are favorable for malicious prosecution purposes. (*Casa Herrera, Inc.* v. *Beydoun* (2004) 32 Cal.4th 97, 107.)

2.3.2.2. Involuntary Dismissals.

Generally, where a proceeding terminates other than on the merits, a court engages in a de novo review of the reasons for the termination to see if the disposition reflects the opinion of the court or the prosecuting party that the action would not have succeeded. If resolution of the underlying action leaves some doubt about the plaintiff's innocence or liability, it is not a favorable termination sufficient to support a cause of action for malicious prosecution. (*Pattiz* v. *Minye* (1998) 61 Cal. App.4th 822, 826-827.)

Relying on *Zeavin* v. *Lee,* 136 Cal.App.3d 766 (discussed above), *Pattiz* v. *Minye*, 61 Cal.App.4th 822, held that dismissal as a discovery sanction, under circumstances of doubt as to the merits of the claims, did not constitute a favorable termination as to plaintiff or her attorney since the refusal of plaintiff's daughter to appear for deposition could not be attributed to plaintiff herself and there was no other evidence of plaintiff's refusal to cooperate with discovery. Thus, the dismissal did not reflect the prevailing defendant's innocence. *Pattiz* distinguished *Lumpkin* v. *Friedman,* 131 Cal.App.3d 450, where plaintiff in the underlying action was deprived of the ability to present critical evidence because of the failure to comply with pre-trial deadlines and thus lost at trial. Defendant sued for malicious prosecution and the Court of Appeal later determined that the judgment in the underlying action was based on the merits. "A plaintiff who neglects to produce essential evidence, subpoena necessary witnesses or present evidence in a proper form and thereby suffers a judgment against him cannot be heard to claim that he lost on purely technical grounds."

California law is not clear whether a dismissal for violating procedural rules, such as mandating plaintiff's personal presence at a mandatory settlement conference, is a sufficient involuntary dismissal to support malicious prosecution. (*See Wroten* v. *Lenske* (1992) 114 Ore App 305, and compare, *Nagy* v. *McBurney* (1978) 120 RI 925 (dismissal for failure to serve of a bill of particulars).)

However, dismissal based on a failure to prosecute clearly is sufficient. (*Fuentes* v. *Berry,* 38 Cal.App.4th 1800*; Minasian* v. *Sapse,* 80 Cal.App.3d 823.) Note, however that *Minasian* was a pleading case and acknowledged that such a dismissal could result from reasons not reflective of the lack of merit and thus could present a jury question on the issue of favorable termination.

Examples of resolutions that <u>do</u> constitute favorable termination, include, acquittal of a criminal defendant or defense judgment for a civil defendant after trial on the merits. In addition, favorable termination is established with dismissal of criminal charges after a preliminary hearing based on a judicial determination of insufficient evidence, despite the fact that the charges could be revived upon discovery of additional evidence and double jeopardy would not apply. If a malicious prosecution action is then brought, despite revival of the charges, the latter constitutes an affirmative defense to be raised by the malicious prosecution defendant. (*Jaffe* v. *Stone,* 18 Cal.2d 146.) Presumably, the same would hold true in the civil context, as where the prior action was dismissed without prejudice but capable of being refiled because the statute of limitations had not yet expired.

The granting of summary judgment on the merits (*Sierra Club Foundation* v. *Graham,* 72 Cal.App.4th 1135) and the successful defense based on the Litigation Privilege, which is a merit based determination (*Berman* v. *RCA* (1986) 177 Cal.App.3d 321) both support favorable termination. Further, no case has yet determined whether a dismissal

pursuant to the SLAPP Statute (Code Civ. Proc. § 425.16) qualifies, though it almost certainly will be so held—since there must be an evaluation of the merits albeit at a relatively low threshold. A court must "determine only if the plaintiff has stated and substantiated a legally sufficient claim" and cannot weigh the evidence presented in the supporting and opposing affidavits. (*Briggs* v. *Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106*; Lafayette Morehouse, Inc.* v. *Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855.) The Anti-SLAPP Motion standard "is much like that used in determining a motion for nonsuit or directed verdict." (*Wilcox* v. *Superior Court* (1984) 27 Cal.App.4th 809.)

Defensive Practice Tip # 3 – When resolving any case, insist on receiving a waiver of costs. That should be enough to nullify favorable termination. (*Ludwig* v. *Superior Ct.,* 37 Cal.App.4th 8.)

3. PROBABLE CAUSE

3.1. **Subjective Standard**.

The standard for determining the probable cause element is objective, not subjective. (*Swat-Fame* v. *Goldstein,* 101 Cal.App.4th 613.) Probable cause is not the same as legal cause. If it were, every plaintiff who loses a case would be liable in a subsequent action for malicious prosecution. (*Lucchesi* v. *Giannini & Uniack* (1984) 158 Cal.App.3d 777*, overruled in part by Wilson* v. *Parker, Covert & Chidester,* 87 Cal.App.4th 1337.) Thus, losing the underlying action does not automatically establish the lack of probable cause (*Nicholson* v. *Lucas* 21 Cal.App.4th 1657*; Klein* v. *Oakland Raiders, Ltd.* (1985) 211 Cal.App.3d 67) or even give rise to an inference that probable cause was lacking. (*Masterson* v. *Pig'N Whistle Corporation* (1958) 161 Cal.App.2d 323.) Similarly, an attorney is not an insurer that his client will prevail in the litigation. His only duty is to avoid prosecuting untenable claims. (*Williams* v. *Coombs* (1986) 179 Cal.App.3d 626.) Put another way, it is not "true charges" that the law seeks to ensure, but merely "legally tenable" claims. Thus, "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 .)

3.1.1. *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.) 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.[1] 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,* 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,* 32 Cal.4th at 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).)

"Mere proof of favorable termination does not create a conflict on the issue of probable cause, nor does proof of the existence of malice." (*Nicholson* v. *Lucas,* 21 Cal.App.4th 1657*; Leonardini* v. *Shell Oil,* 21 Cal.App.4th 1657.) The Supreme Court in *Sheldon Appel Co.* v. *Albert & Oliker*, 47 Cal.3d 863, defined the test for probable cause as follows: "[T]he probable cause element calls on the trial court to make an objective determination of the `reasonableness' of the defendant's conduct, *i.e.*, to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an objective standard to the facts on which the defendant acted."

3.1.2. *Tenability Required*.

In defining the nature of probable cause, the *Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863, Court rejected the suggestion in earlier cases such as *Williams* v. *Coombs,* 179 Cal.App.3d 626, *Weaver* v. *Superior Ct.* (1979) 95 Cal.App.3d 166, and *Tool Research & Engineering Corp* v. *Henigson* (1975) 46 Cal.App.3d 675, that probable cause be 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.,* 66 Cal.App.4th 478.) Instead, the High Court adopted a more liberal test taken from its pronouncement in the leading sanctions case, *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, which held that

[1] In 1995, the California Supreme Court denied review and decertified *Slater* v. *Durchfort* (1995) 35 Cal.App.4th 1718, which so held in the context of finding that malice had been properly plead based on such an allegation.

an appeal would be found frivolous 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 Court explained: "[W]e believe that the less stringent *Flaherty* standard more appropriately reflects the important public policy of avoiding the chilling of novel or debatable legal claims." Therefore, it modified the *Flaherty* standard and announced the new test for probable cause in malicious prosecution cases: "whether any reasonable attorney would have thought the claim **tenable**." (Emphasis added.) Thus, the Supreme Court shifted the focus to the objective tenability and away from the adequacy of the prosecuting attorney's performance and his subjective belief in the merits of the cause. To do anything else, the High Court concluded, would effectively put the issue of probable cause in the hands of a jury. (*Downey Venture* v. *LMI Ins. Co*., 66 Cal.App.4th 478.)

Tenability means "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.,* 216 Cal.App.3d 547.)

Defensive Practice Tip # 4 – 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 not filing, or if already filed, dismissing immediately.

3.1.3. *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.,* 66 Cal App 4th 1188.)

In *Puryear,* whatever the probable cause for prosecuting a claim against an insurance brokerage firm, there was no basis to proceed individually against officer and shareholder (either as alter ego or based on personal wrongdoing), especially when the former plaintiff had the benefit of conducting discovery, first, and then joining the individual as a fictitious defendant under *Code of Civil Procedure* section 474, if the supporting evidence later developed. Under these circumstances it could not be credibly argued that the former plaintiff faced a dilemma of "prosecute or perish." The court rejected a lesser standard for probable cause set forth in Restatement 2nd of Torts §§ 662, 675) (*Puryear* v. *Golden Bear Ins. Co.,* 66 Cal.App.4th 1188.) Similarly, a creditor faced with plausible evidence that a guarantee had been forged, was wrong to prosecute claim against guarantor without first investigating. (*Arcaro* v. *Silva and Silva Ent. Corp.,* 77 Cal.App.4th 152.)

3.1.4. *Lack of Probable Cause Can be Legal or Factual Question*.

Lack of probable cause may stem either from the lack of a factual foundation or the lack of a legal basis. (*Sierra Club Foundation* v. *Graham,* 72 Cal.App.4th 1135; *Sangster* v. *Paetkau,* 68 Cal.App.4th 151; *Arcaro* v. *Silva and Silva Ent. Corp.,* 77 Cal.App.4th 152; *Puryear* v. *Golden Bear Ins. Co.,* 66 Cal.App.4th 1188; *Leonardini* v. *Shell Oil Co.,* 216 Cal.App.3d 547.) The approach to probable cause differs considerably depending on whether the case balanced on a factual or legal fulcrum. In *Puryear*, the Court stated its willingness to sanction probable cause despite the lack of critical facts in hand at the commencement of the action, so long as the defendant possessed "information reasonably warranting an inference that there is such evidence." In *Arcaro*, by contrast, a collection agency was put on notice prior to bringing a collection action that the person identified as the guarantor claimed his signature was a forgery. Faced with that denial, together with information including the identity of the suspected forger and establishing the suspect's motive and access to the document, the collection agency could not reasonably rely on the fact that information on the documents pertaining to the guarantor was accurate. The burden of submitting the questioned documents to an expert rested with the collection agency, not the alleged guarantor. Likewise, it was not the would-be defendant's obligation to offer a pre-forgery handwriting exemplar. It was not enough to "hope for a Perry Mason-style denouement at trial." Nor does a prosecuting attorney gain immunity from malicious prosecution by couching allegations as supported by

"information and belief." (*Mabie* v. *Hyatt,* 61 Cal.App.4th 581.) Rather than suing first, asking questions later, litigants and their counsel should resort to pursuing tenable claims, pursing discovery and later seeking leave to amend the complaint to add new claims justified by evidence gather during discovery. (*Ibid*.)

Leonardini v. *Shell Oil Co.,* 216 Cal.App.3d 547, carefully analyzes the "factual/legal dichotomy", pointing out that the legal element must be judged by the "fairly debatable" standard, which gives recognition to the right of attorneys and litigants to advance new and untested claims or arguments and to advocate in an uncertain legal climate. (*See also*, *Mabie* v. *Hyatt,* 61 Cal.App.4th 581 (applicable law was in a "state of flux).) Despite the *Sheldon Appel* Court's reformulation of the probable cause standard in objective terms, prior Supreme Court pronouncements (*e.g., Bertero v. National General Corp*., 13 Cal.3d 43) concerning a *subjective* dimension of probable cause remain valid, as the unanimous *Sheldon Appel* decision recognized. No probable cause exists where the prosecuting parties know that the factual basis for the action is false. That issue is for a jury to determine. This is to be distinguished from the prosecuting parties' subjective belief in the *legal* tenability of the claim, according to *Sheldon Appel*. That belief — and the prosecuting parties' motivations — go to the issue of malice. However, "if the court determines that there was probable cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated." (*Sheldon Appel Co.* v. *Albert & Oliker*, 47 Cal.3d 863.)

In judging probable cause, the trial court should construe the former plaintiff's pleadings in the underlying action liberally. By the same token, however, liability for malicious prosecution cannot be avoided by "pointing to some undisclosed and unlitigated, but tenable claim for relief." (*Leonardini* v. *Shell Oil Co*., 216 Cal.App.3d 547.) Thus, for example, where the underlying action sought injunctive relief only—and such was not tenably assertable—it is no defense that a claim for damages must have been properly asserted. (*Ibid*.)

When the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant to suspect the plaintiff had committed a crime. (*Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863*; Ecker* v. *Raging Waters,* 87 Cal.App.4th at 1320.)

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 underlying 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 court 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 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.)

3.2. 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,* 72 Cal.App.4th 1135).)

3.2.1. *Preliminary Facts to be Resolved by a Jury*.

If the facts upon which the defendant acted in bringing the prior action are in dispute, they must be decided by a jury

before the court can determine the issue of probable cause. (*Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863*; Downey Venture* v. *LMI Ins. Co.,* 66 Cal.App.4th 478*; Sosinsky* v. *Grant* (1992) 6 Cal.App.4th 1548*; Leonardini* v. *Shell Oil Co.,* 216 Cal.App.3d 547*; Masterson* v. *Pig'N Whistle Corp.,* 161 Cal.App.2d 323.) "In analyzing the issue of probable cause …, the trial Court must consider both the *factual circumstances* established by the evidence and the *legal theory* upon which relief is sought…. Evidentiary disputes and factual questions may require resolution before the trial court applies the objective standard to the issue of probable cause. For example, there may be factual issues concerning the *information known to the defendant when it brought the underlying action*. Thus, the malicious prosecution plaintiff may claim that the defendant was aware of information that established the lack of truth in the factual allegations of the prior complaint. In such circumstances, the jury must resolve the threshold question of the defendant's prior knowledge…." (*Sangster* v. *Paetkau,* 68 Cal.App.4th 151; emphasis added.)

"A determination of probable cause is an issue of law to be made by a Court once any underlying factual issues are resolved. (citation omitted.) There must be a predicate inquiry, however, to identify facts known to or reasonably discoverable by the instigator of the prior action which are relevant to whether there was a good faith basis for the filing of the action. That inquiry may raise triable issues of fact which must be resolved before a Court may determine whether the filing of the underlying action was objectively reasonable. (citation omitted.)" (*Landaker* v. *Warner Bros., Inc*. (1997) 56 Cal.App.4th 1294.)

3.2.2. *Focus on Facts Known to Defendant*.

However, the only relevant factual issue is which facts were known to the defendant when he filed the prior action-- not whether they were true or their particular significance. Thus, "[w]hen there are no disputed questions of fact about [the defendant's] preparation and knowledge prior to the institution of the proceeding giving rise to the malicious prosecution claim," the probable cause issue is properly determined by the trial court. (*Nicholson* v. *Lucas,* 21 Cal.App.4th 1657.)

If the trial court determines that the prior action was objectively reasonable, the plaintiff has failed to meet the threshold requirement of demonstrating an absence of probable cause and the defendant is entitled to prevail. (*Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863.) It thus appears that the jury's province is limited to deciding whether the facts asserted as the basis for probable cause were known to the defendant at the time the action was commenced or whether the facts were true or known to the prosecuting party to be untrue. (*Sosinsky* v. *Grant,* 6 Cal.App.4th 1548.)

3.2.3. *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.) [2] 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.*)

3.2.4. *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 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.)

Typically the element of probable cause is challenged by way of pretrial motions. Demurrer is appropriate where trial or other evidentiary record exists as to which judicial notice may be taken. Summary judgment is utilized where extrinsic evidence is necessary. (*Tool Research & Engineering Corp* v. *Henigson,* 46 Cal.App.3d 675.) Similarly, in appropriate circumstances, Anti-SLAPP Motions may also be used.

3.3. Rulings which Support Findings of Probable Cause.

3.3.1. *Denial of Summary Judgment*.

Denial of motion for summary judgment in the underlying action is tantamount to a finding of probable cause (*Roberts*

[2] 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.

v. *Sentry Life Ins. Co*., 76 Cal.App.4th 375)[3] There is no case applying a denial of a nonsuit motion but, since the standard is essentially identical to a summary judgment motion, it is likely that denial of a nonsuit would also be deemed the equivalent of a probable cause determination. Indeed, in the prior action giving rise to *Hufstedler, Kaus & Ettinger* v. *Superior Ct.* (1996) 42 Cal.App.4th 55, the trial court denied summary judgment, nonsuit and directed verdict motions which the *Hufstedler* court suggested in dictum were "tantamount to a judicial declaration" of probable cause (but whether individually or collectively is not clear).

3.3.2. *Preliminary Injunction*.

In addition, the issuance of a preliminary injunction conclusively establishes probable cause. (*Fleishman* v. *Superior Ct.* (2002) 102 Cal.App.4th 350.) The *Fleishman* Court held "if the denial of an anti-SLAPP motion based on the action's potential merit conclusively establishes probable cause for the action, the issuance of a preliminary injunction must have the same effect."

3.3.3. *Jury Verdicts*.

Where a jury verdict in favor of the plaintiff in the underlying action is later reversed, the verdict itself constitutes a finding of probable cause. (*Cowles* v. *Carter* (1981) 115 Cal.App.3d 350; s*ee also*, *Crowley* v. *Katleman*, 8 Cal.4th 666, which refers in passing to the "rule" that probable cause is established conclusively by "interim adverse judgment" that is overturned by motion or later appeal (not citing *Cowles*, but citing *Bealmear* v. *Southern California Edison* (1943) 22 Cal.2d 337 and *Fairchild* v. *Adams,* 170 Cal.App.2d 10), in rejecting the argument that denial of a motion for summary judgment on all but one ground constituted a probable cause finding (citing *Lucchesi* v. *Giannini & Uniack,* 158 Cal.App.3d 777.)

Courts applying the precept known as the "Interim Adverse Judgment" rule reason that success in the underlying action in the trial court sufficiently demonstrates the action was legally tenable. (*Vanzant* v. *Dalsimer Chrysler,* 96 Cal.App.4th 1283 (probable cause established by interim rulings involving cross-motions for summary judgment and the issuance of a preliminary injunction, despite later reversal by appellate court; further, malicious prosecution would not lie for continuation of the underlying action following reversal, rather the proper remedy was sanctions.) One exception to this "rule" would be if the malicious prosecution plaintiff could prove that the initial victory at the trial court level was the result of perjury or other obstruction of justice. (*Hydranautics* v. *Filmtec* (2000) 204 F.3d 880.) This applies only where such a judgment was eventually overturned. If it becomes final, perjury will not revive it through the vehicle of a malicious prosecution action. (*Kachig* v. *Boothe,* 22 Cal.App.3d 626.) In a criminal case, where a defendant is bound over for trial after a preliminary hearing and the defendant is eventually acquitted after trial, probable cause is established for purposes of a later malicious prosecution action. (*Ross* v. *O'Brien* (1935) 9 Cal.App.2d 1.) In *Hydranautics* v. *Filmtec,* 204 F.3d 880, a prior determination of the Federal Circuit that the failed patent infringement claim was not "objectively baseless" did not constitute a binding determination of probable cause because there was no indication that the court had considered the issue of whether the patent sought to be enforced had been originally obtained by fraud upon the United States Patent & Trademark Office or whether the reversed judgment in favor of the patent holder had been obtained by perjured testimony.

However, in *Franklin Mint Co.* v. *Manatt, Phelps & Phillips, LLP,* 184 Cal.App.4th 313, *supra*, in reversing a jury verdict dismissing a malicious prosecution claim against the Manatt law firm, the court of appeal found that denial of the plaintiff's motion to dismiss by the federal district court in the underlying action against memorabilia company for false advertising and trademark dilution under the Lanham Act (15 U.S.C.A. § 1125(c)) did not establish probable cause as a matter of law. The court merely accepted the complaint's allegations as true, that "[Princess Diana] had used her name as a trademark and that her name had acquired secondary meaning," and deferred determination of the merits until summary judgment. "In any event, the district court's subsequent determination that the trademark dilution and false advertising claims were groundless and unreasonable negates any inference of probable cause that might arise from the court's earlier denial of Franklin Mint's motion to dismiss. (Citations omitted.)" (*Id.* at 333, fn 19.)

3.3.4. *Punitive Damages Discovery and Anti-SLAPP Motions*.

Another possible ruling that could supply probable cause would be the granting of a motion under *Civil Code* section 3295 permitting discovery into a defendant's financial condition in a case where punitive damages are sought. No case has yet addressed the issue. The same is true in the

[3] *Roberts* distinguished the contrary authority of *Lucchesi* v. *Giannini & Uniack,* 158 Cal.App.3d 777, since it was decided based on the pre-*Sheldon Appel* standard for probable cause which included subjective good faith. The court also held in the alternative that the record in connection with the motion for summary judgment supported an independent determination in favor of probable cause. Note, *Luchessi* has been overruled, in part, by *Wilson* v. *Parker, Covert & Chidester,* 28 Cal.4th 811.

event that a plaintiff satisfies the burdens imposed by the SLAPP Statute on an Anti-SLAPP Motion; the denial of an Anti-SLAPP Motion raises a presumption that the plaintiff in the underlying action had probable cause to sue. *Zamos* v. *Stroud,* 32 Cal.4th 958; *Wilson* v. *Parker, Covert & Chidester,* 28 Cal.4th 811.)

3.4. 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.,* 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.)

"There can be no doubt that the continuation of a malicious prosecution action beyond the initial act of instigation may inflict additional damage upon the victim… [citation omitted]… 'The term 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination…' (*Lujan* v. *Gordon,* 70 Cal.App.3d 260.) The entry of summary judgment for a defendant on an underlying claim on the ground of insufficient evidence does not establish as a matter of law that the litigant can substantiate a subsequent malicious prosecution claim. (*Jarrow Formulas* v. *La Marche* (2003) 31 Cal.4th 728.) Parties and counsel have a right to present issues that are arguably correct even if extremely unlikely that they will prevail on such issues. Probable cause may be present even where a suit lacks merit. (*Ibid.*)

Though probable cause is normally determined by the defendants' knowledge at the commencement of the underlying action (and certainly probable cause must exist every step of the way), where the case is eventually tried, one court has held that probable cause may be *determined* by reference to the evidentiary record from the trial, essentially by-passing the date of commencement inquiry (*Hufstedler, Kaus & Ettinger* v. *Superior Ct.,* 42 Cal.App.4th 55.) 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.,* 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."

The *Hufstedler* holding received a boost in another recent decision by the Second District Court of Appeal which suggested that evidence discovered after the underlying action was filed may furnish a defense to a subsequent malicious prosecution lawsuit. (*Roberts* v. *Sentry Life Ins. Co*., 76 Cal.App.4th at 375; *Wilson* v. *Parker, Covert & Chidester,* 28 Cal.4th 811*; Fleishman* v. *Superior Ct.,* 102 Cal.App.4th at 350.) In *Fleishman, supra*, the Court of Appeal issued a writ of mandate directing the trial court to grant a motion for judgment on the pleadings. In the underlying case, the trial court granted a preliminary injunction. The party who obtained the injunction then voluntarily dismissed its action without prejudice. The Court of Appeal in *Fleishman*, citing *Wilson* v. *Parker, Covert & Chidester*, held that the issuance of the preliminary injunction reasonably related to all of the six causes of action in the underlying case (there was no evidence of fraud or perjury), it conclusively established that the underlying action was brought with probable cause. The court held that the denial of a motion for summary judgment in the prior action "normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit." Denial of summary judgment is a reliable indicator of probable cause, the court reasoned, because summary judgment motions usually are heard only after full discovery develops the evidence relevant to the claim, and the judge denying the motion is impartial and "thus, likely will agree with some hypothetical `reasonable lawyers.'" (*Id.* at 383-384.) Thus, without acknowledging the controversial implications of its conclusion, the court assumed that evidence developed during discovery is relevant and admissible in determining the existence of probable cause. It also assumed that the trial court's denial of summary judgment indicates probable cause to sue, a debatable assumption given the myriad reasons such motions may be denied, and ignored that even an impartial trial judge may be reversed on a writ by the court of appeal. Certainly, this decision exemplifies the kind of antipathy to malicious prosecution claims that is often exhibited by the judiciary.

Likewise unclear is whether the *Hufstedler,* approach can be used in other instances, e.g., where the underlying action was disposed of by way of motion for summary judgment. Arguably the exception created by the *Hufstedler* court is expressly limited to situations where, as the court itself stated, the underlying action had a "fully developed" and "complete" record as a result of a trial on the merits. It should be noted, however, that in the prior action giving rise to *Hufstedler*, the trial court denied summary judgment, nonsuit and directed verdict motions which the Court of Appeal suggested in dictum were "tantamount to a judicial declaration" of probable cause.

Defensive Practice Tip # 5 – 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. 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.)

4.1. Legal Malice.

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.)

Malice may range from open hostility to indifference. (*Bertero* v. *National General Corp.,* 13 Cal.3d 43; *Grindle* v. *Lorbeer* (1987) 196 Cal.App.3d 1461.) Malice is present when proceedings are instituted primarily for an improper purpose. (*Downey Venture* v. *LMI Ins. Co*., 66 Cal.App.4th 478) However, the motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purposes. (*Ibid*., citing 5 Witkin, *Summary of California Law* (9th Ed. 1988), Torts §§ 429, 450 at pp. 511, 534.) The standard for malice is different than that found in the punitive damages statute, *Civil Code* section 3294. (See discussion under punitive damages, below.)

Malice is almost invariably a question of fact to be determined by the trier of fact (*Axline* v. *Saint John's Hospital and Health Center*, 63 Cal.App.4th 907*; Northrup* v. *Baker* (1962) 202 Cal.App.2d 347) and is not normally suitable for resolution by way of a summary judgment.

Malice may be proved directly or indirectly, that is, inferred from the circumstances. (*Weber* v. *Leuschner* (1966) 240 Cal.App.2d 829.) Examples may include declarations of prejudice, ill will or malicious motive (*Jackson* v. *Beckham* (1963) 217 Cal.App.2d 264) or simply a lack of good faith (*Bulkley* v. *Klein* (1962) 206 Cal.App.2d 742) An improper purpose may include: "(1) the person initiating [the suit] does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." (*Albertson* v. *Raboff,* 46 Cal.2d 375.) Malice requires that the former plaintiff have instituted the prior proceedings with the intent of targeting the former defendant's interests, as opposed to those of another. (*Camarena* v. *Sequoia Ins. Co.,* 190 Cal.App.3d 1089 (declaratory relief action by insurer to establish no coverage not aimed at non-insured plaintiff)*; Hogen* v. *Valley Hospital,* 147 Cal.App.3d 119 (BMQA investigation not targeted to plaintiff).)

4.2. Inferences.

Prior law sanctioned an inference of malice where probable cause had a subjective element. (*Singleton* v. *Perry* 45 Cal.2d 489; *Williams* v. *Coombs,* 179 Cal.App.3d 626; *Runo* v. *Williams* (1912) 162 Cal. 444; *Grove* v. *Purity Stores, Ltd.* (1957) 153 Cal.App.2d 234; *Jensen* v. *Leonard* (1947) 82 Cal.App.2d 340; *Pond* v. *Insurance Co. of No. Am.,* 151 Cal.App.3d 280; *Weber* v. *Leuschner,* 240 Cal.App.2d 829; *Masterson* v. *Pig'N Whistle Corp.,*161 Cal.App.2d 323.) This was logical given the then prevailing "reasonable belief" standard enunciated by an earlier Supreme Court in *Albertson* v. *Raboff,* 46 Cal.2d 375. (*See also, Downey Venture* v. *LMI Ins. Co.,* 66 Cal.App.4th 478.) Since *Sheldon Appel's* adoption of an objective probable cause standard, such an inference is no longer viable (*Downey Venture* v. *LMl lns. Co.,* 66 Cal.App.4th 478; *Sangster* v. *Paetkau,* 68 Cal.App.4th 151; *Leonardini* v. *Shell Oil,* 216 Cal.App.3d 547.) In *Downey Venture*, the appellate court followed the logic of the *Sheldon Appel* decision and expressly rejected the legitimacy of inferring malice from an absence of probable cause, stating "The conclusion that probable cause is absent logically tells the trier of fact nothing about the defendant's subjective state of mind." (*Downey Venture* v. *LMI Ins. Co.,* 66 Cal.App.4th 498.) *Sangster* followed suit.

However, cases such as *Sierra Club* v. *Graham,* 72 Cal.App.4th 1135, suggest that the lack of probable cause can

be established either *objectively* (lack of objective tenability based on facts known) or *subjectively* (knowledge of the defendant that facts essential to the existence of probable cause are in fact untrue). It appears that proof that the defendant knew that the foundational facts were false—thus demonstrating the lack of probable cause—should indeed give rise to an inference of malice, using the same rationale as pre-existed *Sheldon Appel*. (See *Downey Venture* v. *LMI Ins. Co.,* 66 Cal.App.4th 478; *Monia* v. *Parnas,* 227 Cal.App.3d 1349 [noting that this is an open issue].)

Even without the legal sanction of an inference of malice stemming from the lack of probable cause, that does not mean that the trial court's prior determination of a lack of probable cause is irrelevant to the jury's task of determining whether the conduct of the defendants was actuated by malice. Thus, arguably the jury can be instructed that it is a "factor" that may be taken into account—without elevating it to the level of a legally sanctioned inference. (*Downey Venture* v. *LMI Ins. Co*., 66 Cal.App.4th 478.)

4.3. Proof.

Evidence of malice on the part of *litigants* may include conduct and motivations prior to, during or subsequent to underlying action. Evidence of malice on the part of *litigation counsel, on the other hand,* must be personal to the attorney defendant and cannot be derived or imputed from the former client's hostility. (*Tool Research & Engineering Corp.* v. *Henigson,* 46 Cal.App.3d 675.) However, proof that the attorney knew of the client's malicious motivation is a relevant factor in assessing his own state of mind. (*Ibid.*; *Tresemer* v. *Barke* (1978) 86 Cal.App.3d 656.)

According to one noted author: "The malice required to support a malicious prosecution action against an attorney differs from that normally required in other torts. The components of malice by an attorney are technically complex and often misunderstood. The common law definition of malice by an attorney has two requirements: (1) the attorney must know there is no probable cause for prosecution; and (2) either the attorney acted with an improper motive or the attorney knew that the client was motivated by malice. The malice must be directed at the claimant, not another." 1 Mallen & Smith, Legal Malpractice (2007 Ed.) § 6.9, pp. 615-616 (citing *Chauncey* v. *Niems,* 182 Cal.App.3d 967 and *Cantu* v. *Resolution Trust Corp*. 4 Cal.App.4th 857.) Conduct prior to instituting the underlying action, like ignoring contrary evidence or arguments offered by the target in an effort to dissuade counsel from bringing the prior action, may also be relevant.

Conduct of the underlying action, such as letters or other communications may demonstrate malice. (*See, e.g.*, *Bertero* v. *National Gen. Corp*., 13 Cal.3d 43, where counsel wrote a letter admitting he had advanced a weak point in a brief he submitted to the Court, "not because of any high hopes of now winning it, but because I wanted to show the Appellate Court what a bastard Bertero was…")

Defensive Practice Tip # 6 – 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.

5. DAMAGES

5.1. Compensatory.

Compensatory Damages available in a malicious prosecution action include economic damage (*Bertero* v. *National General Corp.,* 13 Cal.3d at 43; *Babb* v. *Superior Ct.,* 3 Cal.3d at 841), and attorney fees and costs incurred in the underlying action. Attorney fees awarded to the successful defendant on the grant of an Anti-SLAPP Motion in an underlying are generally not reasonably awarded damages in a subsequent malicious prosecution action based on principles of collateral estoppel, but those *not actually paid* are proper special damages. (*Jackson* v. *Yarbray* (2009) 179 Cal.App.4th 75.)

Where some or all of the defense costs from the underlying action were absorbed by the prevailing defendant's insurer, such insurance constitutes a "collateral source," and those costs are still recoverable as damages; the role such insurance played is irrelevant and should be presented to the jury in the malicious prosecution case. (*See generally*, *Kardly* v. *State Farm Mutual Auto. Ins. Co*. (1989) 207 Cal.App.3d 479.) Lost earnings or profits are also recoverable. Non-economic damages (*Bertero* v. *National General Corp.,* 13 Cal.3d 43; *Babb* v. *Superior Ct.,* 3 Cal.3d at 841; *Brandt* v. *Superior Ct.* (1985) 37 Cal.3d 813; *Buss* v. *Superior Ct.* (1997) 16 Cal.4th 35), including emotional distress, damage to reputation, social standing and credit, as well as bodily injury are also recoverable. A person wrongfully accused and put through the rigors of litigation, especially if the underlying action went to trial, may be expected to have suffered emotional distress—and thus the claim is frequently asserted.

5.2. Punitive.

Exemplary or punitive damages are also recoverable in a malicious prosecution claim. The standard for "malice" for purposes of recovering punitive damages is different, since this element must be proved by clear and convincing evidence (Civ. Code § 3294(a)) and though it has a distinct definition (Civ. Code § 3294(c)(1) ["conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights… of others."]), it is consistent with the legal definition of malice for purposes of malicious prosecution liability. (*Downey Venture* v. *LMI Ins. Co*., 66 Cal.App.4th 478.) Still, it is appropriate for the trial court to admonish jurors to consider the separate definitions. (*See, e.g.*, *Sierra Club* v. *Graham,* 72 Cal.App.4th 1135.) Almost invariably and despite the different legal standard and the higher level of proof required, a jury which finds liability for malicious prosecution awards punitive damages

6. DEFENSES AND DEFENSIVE STRATEGIES

6.1. 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,* 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.)

6.1.1. *Procedural Issues*.

6.1.1.1. Jurisdictional Deadlines.

The statute requires that an Anti-SLAPP Motion be filed within 60 days of the filing of the complaint or cross-complaint, and heard within 30 days after filing. (Code Civ. Proc. § 425.16(f).) That requirement is jurisdictional, and even though the filing of an amendment re-sets the 60 days, and the court has discretion as to whether to extend the deadlines, caution requires that the motion be filed and heard as soon as possible. The primary effect of the *filing* of an Anti-SLAPP Motion is that all discovery proceedings are stayed pending a ruling on the motion. (Code Civ. Proc. § 425.16(g).)

Defensive Practice Tip # 7 – Anti-SLAPP Motions apply to federal diversity claims. (*See Mindy's Cosmetics, Inc.* v. *Sonya Dakar* (9th Cir. 2010) 611 F.3d 590.) However, since neither a discovery stay nor a stay pending appeal is automatic, obtain an early stipulation and order to postpone the filing of the Anti-SLAPP Motion until early motions, pursuant to Fed.R.Civ.P. Rule 12b, are completed.

6.1.1.2. Motion Granted.

The primary effects of an order *granting* an Anti-SLAPP Motion are twofold. First, the action or claim is dismissed (stricken). Court can strike a single cause of action, while allowing other causes of action to remain. (*Shekhter* v. *Financial Ind. Co*. (2001) 89 Cal.App.4th 141.) Second, the moving defendant, is awarded prevailing party attorney fees and costs (Code Civ. Proc. § 425.16(c); *Mann* v. *Quality Old Town Service* (2006) 139 Cal.App.4th 328; *Lafayette Morehouse, Inc.* v. *Chronicle Pub. Co.,* 37 Cal.App.4th 855.) The losing plaintiff has an immediate right of appeal. (Code Civ. Proc. § 425.16(i).) The fact that underlying action was terminated by Summary Judgment does not establish, as a matter of law, that claim has a probability of prevailing. (*Jarrow Formulas* v. *La Marche,* 31 Cal.4th 728.)

6.1.1.3. Motion Denied.

When an Anti-SLAPP Motion is denied, the defendant has an immediate right to appeal. (Code Civ. Proc. § 425.16(j); (*White* v. *Lieberman* (2002) 103 Cal.App.4th 210.) However, a losing defendant is not liable for plaintiff's attorney fees, unless the court finds that the motion is frivolous or is solely intended to cause delay. (Code Civ. Proc. § 425.16(c); *Carpenter* v. *Jack In The Box* (2007) 151 Cal.App.4th 454.)

Further, the denial of an Anti-SLAPP Motion is not admissible into evidence at a later stage of the case. (Code Civ. Proc. § 425.16(b)(3).) Accordingly, a subsequent motion for summary judgment can be made. (*Swat-Fame v. Goldstein,* 101 Cal.App.4th 613 (summary judgment after special motion to strike denied); *but see Stroock & Stroock & Lavan* v. *Tendler* (2002) 98 Cal.App.4th 521 (court suggests that its resolution of probable cause is dispositive).)

6.1.2. Two Tests:

6.1.2.1. Prong One - Establishing that the SLAPP Statute Applies.

A malicious prosecution claim is automatically subject to an Anti-SLAPP Motion (*Jarrow Formulas, Inc.* v. *LaMarche*, 31 Cal.4th at 734-735.) This is consistent with the well defined test for determining whether an action is within the purview of the SLAPP Statute. (*Kajima Engineering and*

Construction v. *City of Los Angeles* (2002) 95 Cal.App.4th 921.) The legislative purpose is to encourage citizen participation in matters of public significance and to prevent the chilling effect of abuses of the litigation process (Code Civ. Proc. § 425.16(a).) "A cause of action against a person arising from *any act of that person in furtherance of the person's right of petition or free speech…* in connection with a *public issue* shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Emphasis added.) (Code Civ. Proc. § 425.16(b).)

The determination that the SLAPP Statute "applies to a malicious prosecution claim [does] not prevent valid malicious prosecution claims, but [requires] a plaintiff bringing this claim to demonstrate early on that the complaint is supported by a sufficient prima facie showing of facts to sustain a favorable judgment." (*Chavez* v. *Mendoza* (2001) 94 Cal.App.4th 1083.) A cross-complaint or lawsuit filed in response to, or in retaliation for, threatened or actual litigation is not subject to the SLAPP Statute simply because it may be viewed as an oppressive litigation tactic. No lawsuit is properly subject to an Anti-SLAPP Motion unless its allegations arise from acts in furtherance of the right of petition or free speech. (*Kajima Engineering and Construction* v. *City of Los Angeles,* 95 Cal.App.4th 921.)

Although there was some early discussion by the Courts of Appeal as to the nature and extent of what constituted a "public issue" (e.g., *Linsco/Private Ledger, Inc.* v. *Investors Arbitration Services* (1996) 50 Cal App 4th 1633*; Zhao* v. *Wong* (1996) 48 Cal.App.4th 1114, both now overruled), the recent amendment to the statute and the California Supreme Court's pronouncement in *Briggs* v. *Eden Council for Hope and Opportunity,* 19 Cal.4th 1106, make it clear that if a statement is made in connection with an official proceeding, it is deemed to be within the purview of the statute, and there is no separate "public issue" requirement.

The classic SLAPP suit usually involves claims of defamation, various business torts (such as interference with economic advantage), nuisance and intentional infliction of emotional distress. (*E.g.*, *Wollersheim* v. *Church of Scientology* (1996) 42 Cal.App.4th 628; *Wilcox* v. *Superior Ct.,* 27 Cal.App.4th 809.) The Legislature, however, did not limit application of the provisions of section 425.16 to such actions and seemingly recognized that all kinds of claims could achieve the improper objective of a SLAPP suit, that is to interfere with and burden the defendant's exercise of his or her rights. (*Wollersheim* v. *Church of Scientology,* 42 Cal.App.4th 628.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability-and whether that activity constitutes protected speech or petitioning." (*Navellier* v. Sletten, 29 Cal.4th 82, 95; *Mindy's Cosmetics, Inc.* v. *Sonya Dakar,* 611 F.3d 590, 598.)

6.1.2.2. Prong Two - Proving Likelihood of Success on the Merits.

In proving likelihood of success, a plaintiff is not required to prove its claim at the motion stage, but only to make a prima facie showing that there is a probability it will prevail. (*Wollersheim* v. *Church of Scientology,* 42 Cal.App.4th 628.) A court must "determine only if the plaintiff has stated and substantiated a legally sufficient claim" and cannot weigh the evidence presented in the supporting and opposing affidavits. (*Briggs* v. *Eden Council for Hope and Opportunity,* 19 Cal.4th 1106*; Lafayette Morehouse, Inc.* v. *Chronicle Publishing Co.,* 37 Cal.App.4th 855.) The standard "is much like that used in determining a motion for nonsuit or directed verdict." (*Wilcox* v. *Superior Ct.,* 27 Cal.App.4th 809.)

Burden Shift. Once the party moving to strike the complaint makes the threshold showing that the alleged actionable conduct is subject to the provisions of *Code of Civil Procedure* section 425.16, the burden shifts to the responding plaintiff to establish a probability of prevailing at trial. (*Dove Audio, Inc.* v. *Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777.)

No Need to Prove Intent Under section 426.15. In a trio of cases, the Supreme Court ruled that a defendant who moves under the SLAPP statute does not have to prove plaintiff's subjective intent. (*Equilon Enterprises* v. *Consumer Cause* (2002) 29 Cal.4th 53*; City of Cotati* v. *Cashman* (2002) 29 Cal.4th 69*; Navellier* v. *Sletter,* 29 Cal. 82.) The Court based its rulings on the plain reading of the statute and public policy concerns. In addition, the Court has ruled that "actual effect of chilling speech" is not required. (*City of Cotati* v. *Cashman,* 29 Cal.4th at 69.)

6.2. Statutes of Limitations.

In general, the two year statute of limitation under *Code of Civil Procedure* section 335.1 governs malicious prosecution claims. However, there is a disagreement among separate panels of the court. The Division Two has held that the one year limitations period for legal malpractice claims, *Code of Civil Procedure* section 340.6, applies to malicious prosecution claims against attorneys. (*Vafi* v. *McCloskey* (2011) 193 Cal.App.4th 874.) While Division Three more recently found the two year statute of limitations applicable

to a claim against a lawyer. (*Roger Cleveland Golf Co., Inc.* v. *Krane & Smith, APC* (2014) 225 Cal.App.4th 660.)

The limitations periods are triggered upon final termination of the underlying action, i.e., upon entry of judgment. (*Stavropoulos* v. *Sup. Ct.* (2006) 141 Cal.App.4th 190, 197; *Feld* v. *Western Land & Dev. Co.* (1992) 2 Cal.App.4th 1328*; Scannell* v. *County of Riverside* (1984) 152 Cal.App.3d 596.) Thus, the statute of limitations clock starts to tick upon entry of judgment, but the statute is then tolled or suspended upon filing of notice of appeal, and remains so until the appeal is finally resolved. (*Bob Baker Enterprises, Inc.* v. *Chrysler Corp.,* 30 Cal.App.4th 678*; Feld* v. *Western Land & Dev. Co.,* 2 Cal.App.4th at 1328*; Gibbs* v. *Haight, Dickson, Brown & Bonesteel,* 183 Cal.App.3d 716*; Bellows* v. *Aliquot Associates, Inc.* (1994) 25 Cal.App.4th 426*; Rare Coin Galleries, Inc.* v. *A-Mark Coin Co., Inc.* (1988) 202 Cal.App.3d 330*; Soble v. Kallman* (1976) 57 Cal.App.3d 719.) As to when an appeal is final for purposes of causing the applicable statute of limitations clock to resume running, one court focused upon the date of the denial of petition for hearing by the California Supreme Court (*Gibbs* v. *Haight, Dickson, Brown & Bonesteel,* 183 Cal.App.3d 716) whereas two other courts favored a rule that the malicious prosecution cause of action is reactivated upon entry on the record of the issuance of the remittitur. (*Bellows* v. *Aliquot Associates, Inc.,* 25 Cal.App.4th at 426; *Rare Coin Galleries, Inc.* v. *A-Mark Coin Co., Inc.,* 202 Cal.App.3d 330.) However, if review is sought before the California Supreme Court after issuance of a remittitur, the statute of limitations continues in suspense. (*Rare Coin Galleries, Inc.* v. *A-Mark Coin Co., Inc*., 202 Cal.App.3d 330.) "[A]s a rule, the statute of limitations for a malicious prosecution action begins to run on the date judgment is entered in the trial court. It is tolled while the case is on appeal. If the judgment is affirmed, the statute begins to run when the Court of Appeal issues its remittitur." (*White* v. *Lieberman,* 103 Cal.App.4th 210.)

Where an order of dismissal as to a cross-complaint was appealable, notwithstanding the pendency of the complaint, such that upon entry of a judgment as to the cross-complaint, the claim of malicious prosecution accrued. (*Bob Baker Enterprises, Inc.* v. *Chrysler Corp.* (1994) 30 Cal.App.4th 678.)

6.3. Reliance on Advice of Counsel.

6.3.1. *May be a Complete Defense.*

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*, 6 Cal.App.4th 1548; *Pond* v. *Insurance Co. of North America,* 151 Cal.App.3d 280; *Kennedy* v. *Byrum,* 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*, 158 Cal.App.3d 777*; Masterson* v. *Pig'N Whistle Corp.,* 161 Cal.App.2d 323.) Reliance on advice of counsel is a complete defense, even if probable cause was otherwise lacking. (*Brinkley* v. *Appleby,* 276 Cal.App.2d 244*; Pond* v. *Insurance Co. of North America,* 151 Cal.App.3d 280.)

6.3.2. *Requires Proof that Client Fully Disclosed Facts.*

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.) Where counsel lacks such knowledge, it is not enough for the client to simply open up its books and records, "unleashing [counsel] on a hunting expedition." Rather, specific disclosures must be made by the client in seeking counsel's advice. (*Bertero v. National General Corp*., 13 Cal.3d 43.)

In assessing the defense, it is irrelevant whether the attorney's analysis or advice is correct or not. "There can be no imputation to a client of his attorney's misconceived legal analysis so as to void the client's good faith reliance on his counsel's advice." (*Brinkley* v. *Appleby,* 276 Cal.App.2d 244.)

"If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court." (*Murdock* v. *Gerth,* 65 Cal.App.2d

170.) "Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win…" (*Sheldon Appel Co.* v. *Albert & Oliker,* 47 Cal.3d 863.) "It is the attorney's reasonable and honest belief that his client has a tenable claim that is the attorney's probable cause for representation…and not the attorney's conviction that his client must prevail. The attorney is not an insurer to his client's adversary that his client will win in litigation. Rather, he has a duty to represent his client zealously… [seeking] any lawful objective through legally permissive means…" (*Tool Research & Engineering Corp.* v. *Henigson,* 46 Cal.App.3d 675.)

As indicated by the cases cited below in connection with whether it is truly an affirmative defense, the courts have exhibited some confusion in acknowledging the distinction between probable cause and reliance on advice of counsel. *Brinkley* v. *Appleby*, *supra,* 276 Cal.App.2d 244 as one example, envisioned reliance on advice of counsel as establishing the client's probable cause. Indeed, this defense should be regarded as separate from the element of malice, as well. That is, no matter whether the overriding motivation for bringing the action is ill will, if the former plaintiff initiated the action only after consulting counsel and acting in good faith reliance on the attorney's advice, after making full disclosure, the existence of malice is irrelevant. (Compare, *Paskle* v. *Williams,* 214 Cal. 482 ("…the motive, even if malicious, of defendants is unimportant if legal ground existed upon which to predicate the suit...").)

6.3.3. *Pleading Options.*

Reliance on counsel may be affirmatively plead as an affirmative defense in the answer. Some cases suggest that reliance on advice of counsel need not be plead as an affirmative defense since it also defeats either of two elements of the tort, malice and lack of probable cause. (*State Farm Mutual Auto. Ins. Co.* v. *Superior Ct.* (2004) 123 Cal.App.4th 1424*; Albertson* v. *Raboff,* 46 Cal.2d 375*; Mabie* v. *Hyatt,* 61 Cal.App.4th 581*; Masterson* v. *Pig'N Whistle Corp.,* 161 Cal.App.2d 323*; Walker* v. *Jensen* (1949) 95 Cal.App.2d 269.) However, others cases appear to treat reliance on advice of counsel as an affirmative defense which must be pleaded in the answer, though such admonitions usually appear by way of dictum. (*Bertero* v. *National General Corp.,* 13 Cal.3d 43.) Strategically, consideration should be given as to the timing of the assertion of the defense; it might be appropriate assert the defense after the Anti-SLAPP Motion and its appeal fails, to put off the waiver of the attorney-client privilege, as discussed below, as long as possible.

In all events, the former client, turned defendant in the malicious prosecution action, has the burden of proof. (*Id*.; *Masterson* v. *Pig'N Whistle Corp*., 161 Cal.App.2d 323.) Typically, the defense can be raised by amending the answer to assert reliance on advice of counsel as an affirmative defense early in the litigation, i.e., before a trial date is set or plaintiff's deposition is taken—indeed, often the malicious prosecution plaintiff welcomes the defendant's decision to raise the issue precisely because it opens up confidential communications with former counsel, without which it is far more difficult to make a case for malice against the attorney defendant.

6.3.4. *Attorney-Client Privilege Waiver.*

Raising the defense waives the attorney-client privilege to the extent such communications are placed at issue. (*Transamerica Title Ins. Co.* v. *Superior Ct.* (1987) 188 Cal.App.3d 1047.) Accordingly, the timing of the raising of the issue is of strategic concern. Where the case may be disposed of by way of challenge to favorable termination or lack of probable cause, it may be preferable to demur or move for summary judgment on these issues, first, before taking a step that opens confidential communications to scrutiny. From the other side of the aisle, a malicious prosecution plaintiff may wish to be proactive on the issue by serving discovery designed to ferret out whether the claim of reliance on advice of counsel is to be raised, moving to force an election if the initial response is evasive.

6.4. Unclean Hands.

Unclean hands has long been available as an affirmative defense to an action for malicious prosecution. Two cases in which summary judgment was upheld based on an unclean hands defense are *DeRosa* v. *Transamerica Title Ins. Co.,* 213 Cal.App.3d 1390 and *Pond* v. *Insurance Co. of North America,* 151 Cal.App.3d 280. The standard is whether the malicious prosecution plaintiff has "engaged in any *unconscientious* conduct directly related to the transaction or matter before the court." (Emphasis added, reflecting the court's determination that it was not necessary to prove fraudulent intent on the part of plaintiff). (*Ibid.*) However, defense has been expanded to take into account actions before and during underlying action. In *Kendall-Jackson Winery* v. *Superior Ct.* (1999) 76 Cal.App.4th 970*,* the court adopted an alternative basis for considering evidence of the malicious prosecution plaintiff's alleged bad acts, even if they were not known to the defendant when it filed the underlying lawsuit. In doing so, it reminded observers that other defenses to the tort exist, i.e. unclean hands. Significantly, the court rejected a narrow interpretation of the doctrine: "[A]ny evidence of plaintiff's unclean hands in relation to the transaction before the court or which affects the equitable relations between the litigants in the matter

before the court should be available to enable the court to affect a fair result in the litigation. The equitable principles underlying the doctrine militate against limiting the unclean hands defense in a malicious prosecution claim to misconduct that bears on the defendant's decision to file the prior action." (*Kendall-Jackson Winery* v. *Superior Ct.*, 76 Cal.App.4th 985.)

Pursuit of this defense at trial could be hazardous because, if rejected by the jury, the attack itself may be viewed as evidence of malice. It is also possible, that attacking conduct pre-dating the filing of the underlying action may be precluded by collateral estoppel. In *DeRosa* v. *Transamerica Tltle Ins. Co.,* 213 Cal.App.3d 1390, the court declined the address the issue because it had not been raised in the trial court.

6.5. Immunity and Privileges.

6.5.1. *In General.*

Several privileges apply barring malicious prosecution claims against specified categories of potential defendants. For example, government entities and public employees acting within the course of their employment are immune from malicious prosecution suit under *Government Code* section 821.6. (*Tur* v. *City of Los Angeles* (1996) 51 Cal.App.4th 897.) In addition, *Civil Code* section 43.8 provides civil immunity for a person who communicates information "intended to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing or veterinary arts." (*Johnson* v. *Superior Ct.*,80 Cal.App.4th 1050.)

Evidentiary privileges, like the Attorney-Client Privilege (Cal.Evid.Code § 952) or the Attorney Work-Product doctrine (Code Civ. Proc. § 2018.030) from the underlying action, as discussed below, have interesting application in the malicious prosecution context.

6.5.2. *State Bar Complaints.*

It is well established that the filing of a State Bar complaint is the absolute right of any person and the act of doing so is protected against any form of civil liability under *Civil Code* section 47(b)(3). (*Chen* v. *Flemming,* 147 Cal.App.3d 36)) and under *Business & Professions Code* section 6094(a) [("Communications to the disciplinary agency relating to lawyer misconduct or disability or competence, or any communication related to an investigation or proceeding and testimony given in the proceeding are privileged, and no lawsuit predicated thereon may be instituted against any person….").]

6.5.3. *Attorney-Client Privilege.*

Under the Attorney-Client Privilege, the client is the holder of the privilege and, as discussed above, assertion of the reliance on advice of counsel defense waives the privilege. Absent client waiver, the attorney defendant's ability to reveal confidences based on the attorney's "self-defense" privilege remains an open question in California. There is no self-defense exception under the *California Rules of Professional Conduct* for third party claims against attorneys where the client refuses to waive the Attorney-Client Privilege (Los Angeles County Bar Association Opinion 519 (2007), though the inability to defend by resort to confidential communications could be cause for dismissal of the third party's claims. (*See McDermott, Will & Emery* v. *Superior Ct.* (2000) 83 Cal.App.4th 378, 385; *Solin* v. *O'Melveny & Myers* (2001) 89 Cal.App.4th 451.

By contrast, American Bar Association Model Rule 1.6(b)(2) does permit disclosures where (1) the client's conduct is involved and (2) the lawyer reasonably believes such disclosure is necessary to his or her defense. (*See*, *e.g.*, *In re National Mortgage Equity Corp. Litigation* (C.D. Cal. 1988) 120 F.R.D. 687; *First Fed. Sav. & Loan Ass'n of Pittsburgh* v. *Oppenheim, Appel, Dixon & Co*. (S.D.NY 1986) 110 F.R.D. 557; *Meyerhofer* v. *Empire Fire & Marine Insurance Co.,* 497 F.2d 1190 (2d Cir. 1974), *cert. den.*, 419 U.S. 998 (1975); *See*, McMonigle & Mallen, *The Attorney's Dilemma in Defending Third-Party Lawsuits: Disclosure of the Client's Confidences or Personal Liability*, 14 Willamette L.J. 355 (1978).) Thus, in practice, it is recommended that attorneys should seek prior judicial approval, by way of *in camera* review, in order to lay the foundation for assertion of the self-defense privilege and to ensure that the disclosures are limited to those essential to the defense. (*See*, *e.g.*, *United States* v. *Omni Int'l Corp.* (D. Md. 1986) 634 F. Supp. 1414; s*ee*, Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 *Hofstra L. Rev.* 783 (1977).)

There is no doubt, however, that in California no adverse comment is permitted on exercise of the attorney-client privilege at trial. (Cal.Evid. Code § 913.)

6.5.4. *The Attorney Work-Product Doctrine.*

As for the so-called attorney work product doctrine, the attorney is the holder and may assert the privilege in a later malicious prosecution action, despite alleging probable cause as an affirmative defense—since, in reality, it is not a defense but rather part of plaintiff's case in chief as to which plaintiff has the burden of proof. Also, the fact that the attorney defendants answered their client's cross-complaint for malpractice did not effect a waiver. It should be noted that work product cannot be withheld from a client in a

malpractice action. (Code Civ. Proc. § 2018.080.) Arguably, comment on the exercise of the work-product privilege may be permitted notwithstanding the *Evidence Code* section 913 prohibition against disclosure of attorney-client privileged communications, since work product found in the *Code of Civil Procedure and* is not among the privileges recognized in the *Evidence Code*.

6.6. Shifting and Sharing Liability, Loss and Expense.

6.6.1. *Equitable Indemnity and Contribution.*

6.6.1.1. Non-economic Damages.

Civil Code section 1431.2 prevents joint and several liability for *non-economic damages,* "based on principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint…." In this connection, a defendant's proportionate share of liability is measured by reference to the degrees of culpability of all those at fault, whether named as defendants or not. (*DaFonte* v. *Up-Right, Inc.* (1992) 2 Cal.4th 593.)

6.6.1.2. Economic Damages.

As to *economic damages*, the law remains unclear whether equitable indemnity or contribution is permissible, given that malicious prosecution is a willful act. (*See* Code Civ. Proc. § 875(d) ["There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person."].) There are no cases addressing the issue in the context of malicious prosecution. However, there are few cases that have interpreted section 875(d). (*See Martinez* v. *De Los Rios* (1960) 187 Cal.App.2d 28 and *Bartneck* v. *Dunkin* (1969) 1 Cal.App.3d 58; *but see* (*Baird* v. *Jones* (1993) 21 Cal.App.4th 684 (the court distinguished the statutory right of contribution from the judicially fashioned doctrine of equitable indemnity).)

The Supreme Court has not yet spoken on the broader issue of the application of equitable apportionment principles, as first enunciated in *American Motorcycle Assn.* v. *Superior Ct.* (1978) 20 Cal.3d 578, to intentional torts, including those where malice is an element. The Courts of Appeal in California have split on the broader issue. (*Compare*, *Allen* v. *Sundean* (1982) 137 Cal.App.3d 216 (no right of equitable indemnity) *with*, *Baird* v. *Jones*, 21 Cal.App.4th 684 (indemnity permitted where there was a marked difference in the relative culpability of two defendants held jointly liable for fraud and other intentional wrongdoing).)

In the context of a settlement and claims for equitable indemnity, these are limited to economic damages only, which requires allocation of settlement payments as between the two forms of damages. (*Union Pacific Corp.* v. *Wengert* (2000) 79 Cal.App.4th 1444.) Punitive damages are, by definition, awarded on an individual basis, i.e., there is no joint and several liability, but because they are definitionally awarded for willful acts, they may not be the subject of prior contractual indemnification or insurance. (*Butcher* v. *Truck Ins. Exch.* (2000) 77 Cal.App.4th 1442.)

6.6.2. *Contractual Indemnity.*

It is unusual that a claim for indemnity arising out of malicious prosecution will be based on a contract. In any event, there is serious doubt whether contractual indemnity is available, in light of *Civil Code* section 1668, which provides that "[a]ll contracts which have their object, directly or indirectly, to exempt anyone from responsibility for his own… willful injury to the person or property of another… are against the policy of the law."

6.6.3. *Client Malpractice Claims Against Former Counsel.*

Cross-complaints for malpractice (the functional equivalent of equitable indemnity) against a malicious prosecution defendant's former counsel are rare, no doubt because of the importance of putting up a united front and obtaining the cooperation of former counsel, whether as a co-defendant or not. In *Mabie* v. *Hyatt,* 61 Cal.App.4th 581, the former client filed a cross-complaint, but the issue was not addressed. Malpractice claims arising out of a verdict against a former client are of doubtful validity, since proximate cause, including reliance on the lawyer's advice, would seem to be precluded by collateral estoppel, stemming from a jury's verdict that the former client's conduct in the underlying action was actuated by malice. This would be particularly true if the client raised reliance on advice of counsel and the defense was rejected by the jury.

6.6.4. *Insurance.*

By definition, however malicious prosecution is a "willful act", under *Insurance Code* section 533. Accordingly, it is against public policy for an insurer to pay a judgment on behalf of one who is held personally liable for the tort, regardless of the apparent promise of coverage contained in the policy. (*Downey Venture v. LMI Ins. Co*., 66 Cal.App.4th 478; *Butcher* v. *Truck Ins. Exchange*, 77 Cal.App.4th 1442*; Maxon* v. *Security Ins. Co.,* 214 Cal.App.2d 603*; State Farm Fire & Casualty Co.* v. *Drasin,* 152 Cal.App.3d 864*; City Products Corp.* v. *Globe Ind. Co.* (1979) 88 Cal.App.3d 31*; California Casualty Management Co.* v. *Martoccio* (1992) 11 Cal.App.4th 1527.)

However, policies which may provide such coverage are potentially available to cover defense costs for lawyers and litigants targeted in malicious prosecution actions. Policies providing such coverage include (1) personal coverage which contain "personal injury" coverage (which traditionally includes malicious prosecution, among other intentional torts enumerated in the policy definition)—subject to "business pursuits" and similar exclusions, (2) homeowners, (3) personal umbrellas, (4) business policies which contain "personal injury" coverage or otherwise specifically cover malicious prosecution claims, (5) commercial general liability (CGL), and (6) Directors & Officers (D&O) liability, and (7) professional liability or other errors and omissions policies.[4]

Most policies require that a claim should be reported to the insurer upon written demand for money or the filing of a suit, once the attorney becomes aware of the initiation of an action, even the case has not been served. During the course of a one year, claims made policy, reporting of a potential claim is voluntary, most policies requiring a report "as soon as practicable."

If the policy "specifically and expressly" extends coverage to malicious prosecution, there is a duty to defend. (*Downey Venture* v. *LMI Ins. Co*., 66 Cal.App.4th 478; *Butcher* v. *Truck Ins. Exch.,* 77 Cal.App.4th 1442.) However, absent an express grant of coverage, no duty to defend would exist under traditional "occurrence" coverage for bodily injury and property damage. (*See also, State Farm Fire & Casualty Co.* v. *Drasin,* 152 Cal.App.3d 864.) The duty to defend is broader than the duty to indemnify, so broad that an insurer must defend if there is any potential the claim might be covered. (*Hillenbrand* v. *Insurance Company of North America,* 104 CalApp.4th 784.) Invariably the carrier will defend under reservation of rights, disclaiming any indemnity obligation (see below), which may trigger the right to independent, so-called *Cumis* counsel, under *Civil Code* section 2860. However, even absent a reservation of rights, the carrier cannot create coverage for a willful act by silence. (*Downey Venture* v. *LMI Ins. Co.,* 66 Cal.App.4th 478.)

Moreover, a defending insurer which settles such an action may seek reimbursement from the insured, without offset for defense costs saved by virtue of the settlement, at least where the right of recoupment is expressly reserved. (*Downey Venture* v. *LMI Ins. Co*., 66 Cal.App.4th 478.) However, it is not against public policy and express malicious prosecution coverage will protect an "innocent" insured whose liability for malicious prosecution is strictly vicarious, e.g., employer held liable for the act of an employee or partners in a law firm who were not personally involved in prosecuting the underlying action. (*Ibid*.)

There may also be coverage for policies issued to California insureds where the underlying action took place in another jurisdiction that does not hold to California's point of view on the availability of coverage for this tort or employ more relaxed standard for proving malicious prosecution. (*Id*.) Whether a carrier will pay a settlement, and the extent to which a carrier is willing to contribute, varies among insurers and typically turns on the specific circumstances of a case. Relevant factors to be considered include costs of defense, likelihood that the underlying action was properly prosecuted, presence of "innocent" insureds, the amount for which the case can be settled; and the ability to seek reimbursement from one or more insureds for sums paid in settlement.

7. PARTING THOUGHTS

Any attorney involved in claims for malicious prosecution should approach them cautiously. Representing plaintiffs requires care to assure that each element of the cause of action is satisfied, lack of probable cause in particular. The cases can be expensive, protracted and frustrating, due in large part to the delay caused by the filing and pursuit through appeal of Anti-SLAPP Motions. Representing defendants also presents challenges that should not be underestimated. With defendants facing the prospect of punitive damages and plaintiff's required to prove malice by clear and convincing evidence, malicious prosecution is a battleground on which winning and losing are often hard to distinguish.

[4] Other than professional liability and D&O policies, those other kinds of policies that provide "personal injury" coverage do so on an occurrence basis. In other words, coverage is determined by the policy in effect at the commencement of the underlying action.