

lpl Advisory

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The End of Malicious Prosecution Actions?

By Steven R. Yee

Our judicial system is predicated upon there being one winner and one loser. The problem is that when a plaintiff loses a case, the plaintiff's attorney is more likely than ever to be a potential defendant in a malicious prosecution action. In recent years, malicious prosecution actions have become more common even though courts, like the California Supreme Court, have consistently held that they are "disfavored" because of their potential chilling effect on a citizen's right to bring a civil dispute to court. Unfortunately, strong case law alone has not curtailed the number of malicious prosecution actions.

In addition to the substantial litigation costs involved, malicious prosecution actions are problematic for attorneys for several reasons. First, not every state recognizes a self-defense doctrine which permits an attorney to waive the attorney-client privilege in order to defend himself. This is a problem when the sued attorney cannot unilaterally waive the attorney-client privilege in a malicious prosecution action—even though that may be the only effective way to properly defend the case.

Malicious prosecution actions are especially dangerous for sued attorneys because there may be *no* right to indemnity. California Insurance Code §533 bars indemnity for "the willful acts" of an insured. Thus, even though professional liability insurance can cover the defense costs in a malicious prosecution action, indemnity is prohibited. *Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 503. As if this were not enough, a malicious prosecution action can



also lead to a legal malpractice action. It is not uncommon for a defendant in a malicious prosecution action to sue his attorney for negligently advising the defendant to pursue the underlying action. In the current volatile

professional liability insurance market, a malicious prosecution or legal malpractice claim can lead to the sued attorney being non-renewed by his insurer.

Too many headaches? Several states like California are addressing these problems with legislation to combat malicious prosecution actions. In 1992, California enacted its Anti-Strategic Lawsuit Against Public Participation (SLAPP) Statute - California Code of Civil Procedure §425.16 ("Anti-SLAPP Statute"). Through the use of California's Anti-SLAPP Statute, courts are now armed to enforce the proposition that malicious prosecution actions are "disfavored." The Anti-SLAPP Statute is a powerful tool because it enables a defendant to force the plaintiff to establish, through admissible evidence, a reasonable probability of prevailing on each element of each cause of action, and to move to dismiss malicious prosecution actions at the initial pleading stage. The Anti-SLAPP Statute was enacted to allow a court to "dismiss at an early stage non-meritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." *Kashian v. Harriman*

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Malicious Prosecution

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(2002) 98 Cal.App.4th 892, 905.

A special motion to strike brought pursuant to California's Anti-SLAPP Statute is an effective weapon because it triggers an automatic stay on discovery. Accordingly a defendant will not have to incur the significant costs associated with discovery if the malicious prosecution action is determined to be meritless. A stay of discovery does not allow plaintiff to obtain "*admissible evidence*" which proves a favorable termination in the underlying action, initiation of the underlying action without probable cause, and *malice* through the customary means. California's Anti-SLAPP Statute also provides that a prevailing defendant on a special motion to strike "*shall be entitled to recover his or her attorney's fees and costs*" (emphasis added).

California's Anti-SLAPP Statute requires that the court undertake a two-step process in determining whether to grant a special motion to strike. First, the court must decide whether the defendant has made a threshold *prima facie* showing that the defendant's alleged acts were taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. If the court finds that the defendant has made the requisite showing, the second step shifts the burden to the plaintiff to establish a reasonable probability of prevailing on the merits by making a *prima facie* showing of facts that would, if proved, support a judgment in the plaintiff's favor. In other words, California Code of Civil Procedure §425.16 operates like a "summary judgment in reverse"—with the burden on

the plaintiff to demonstrate under oath a "reasonable probability of success." *College Hospital, Inc. v. Superior Court* (1994)

8 Cal.4th 704, 718-719. This is quite a burden—how does a plaintiff prove malice without the benefit of any discovery?

Until recently, the most difficult issue facing a defendant in a malicious prosecution action was whether California's Anti-SLAPP Statute applied. Given its general constitutional language, California's Anti-SLAPP Statute has been found to apply to actions involving First Amendment issues such as libel and slander. Despite the fact that the California legislature specifically intended for the statute to be "construed broadly," some courts consistently ruled that California's Anti-SLAPP Statute did not apply to malicious prosecution actions.

Creative lawyers used decisions like the California Supreme Court's in *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106 to contend that the Anti-SLAPP Statute applied to malicious prosecution actions. In *Briggs*, the California Supreme Court stated: "As pertinent here 'the constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action'." *Id.* at p. 1115. In December 2001, the California Court of Appeal held for the first time that California Code of Civil Procedure §425.16 applies to malicious prosecution actions. *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083. A defendant now bringing a special motion to strike pursuant to California's Anti-SLAPP Statute does not have to first prove that the activity is constitutionally protected as a matter of law. The *Chavez* Court also stated that this analysis is "consistent with the disfavored nature of the malicious prosecution tort, and the view

that such claims are too frequently used as a dilatory and harassing device . . ." *Id.* at p. 1089.

Only those malicious prosecution actions where the plaintiff can prove a reasonable probability of prevailing on the merits *at the outset of the case (without any discovery)* will survive. Prior to the filing of malicious prosecution actions, plaintiffs must now have admissible evidence of a favorable termination of the underlying action, initiation of the underlying action without probable cause, and malice in order to successfully oppose a special motion to strike brought.

In actions other than malicious prosecution, it is more likely that a plaintiff may have admissible evidence at the inception of the action to oppose a special motion to strike. For example, in a defamation action, a plaintiff can oppose a special motion to strike with proof of the defamatory statement and a declaration from the plaintiff attesting that the defamatory statement is false. Most importantly, the plaintiff in a defamation action need not obtain evidence from the sued attorney.

However, in a malicious prosecution action, it is much more difficult to prove "malice" by the sued attorney at the initial pleading stage. Evidence of malice is extremely difficult for a plaintiff to obtain without the benefit of discovery.

This issue of whether California's Anti-SLAPP Statute applies to malicious prosecution actions is now pending before the California Supreme Court. Until this issue is resolved by the California Supreme Court, malicious prosecution actions will be much more difficult to maintain in California.

Steven R. Yee is the managing partner of Yee & Belilove, LLP.

Congratulations to the Winner of the 2003 Levit Essay Contest

Davis G. Yee, a 1999 graduate of Northwestern School of Law of Lewis and Clark College at Portland, Oregon, and a member of the California Bar, is the winner of the 2003 Levit Essay Contest. Davis' essay addressed whether a plaintiff must prove "a case within a case" in a matter involving transactional legal malpractice.

Davis is the sixth winner of the Levit Essay contest, and he receives a cash prize of \$5,000.00 and an all-expense paid trip

to the 2003 Spring National Legal Malpractice Conference in New Orleans.

The Levit Essay Contest is named for the late Bert W. Levit, the distinguished co-founder of the San Francisco law firm of Long & Levit, LLP. It is an annual competition open to both Young Lawyers and Law Student Division members, co-sponsored by the Standing Committee on Lawyers' Professional Liability and Long & Levit, LLP.

Risk Management And Technology: Harnessing The Power For Good And Not Evil

By Emily J. Eichenhorn, Director, Law Firm Risk Management, CNA*

When leveraged properly, technology can be a tremendous risk management asset. Lawyers today have access to computerized calendar and docket systems, including software that calculates and tracks various statutory deadlines. We have computerized conflicts checking systems that allow firms to maintain thorough databases and check them quickly and efficiently. We also can store files electronically, allowing us to maintain more records longer. From word processors and case management systems, to e-mail that promotes communication with clients in a written form, technology has improved lawyers' ability to avoid oversights, maintain control and serve clients. The problem is, technology can also exacerbate some risks, or create entirely new ones.

"Conflicts systems" offer a good example of this two-edged sword. The key components of a good conflicts system include ease of use, comprehensiveness, and thoroughness. The more information you can review, the more likely you are to catch potential conflicts and avoid problems. Computers surely enhance everyone's ability to do that. But, those same computers can lull us into a sense of complacency or even a divestiture of responsibility to a certain extent.

We have a tendency to think of the computer as being all-knowing. We speak of "the computer" telling us whether or not we have a conflict. Indeed, even the way we refer to the system belies our attitude: we call it a "conflicts system" or "the conflicts checking" system, and we note when the computer has uncovered a conflict. But, in fact, we should more accurately refer to the "computerized conflicts warning system" or the "conflicts warning database." Because at most, the computer can only warn us of the possibility of a conflict. It is ultimately up to the professionals—the human beings—in the

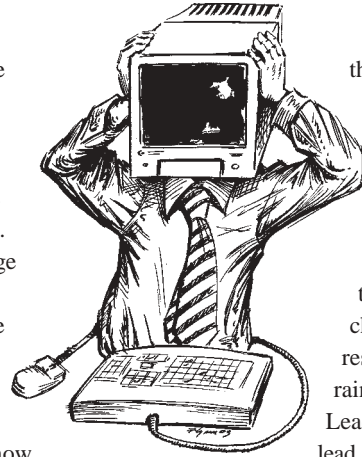
firm to determine whether the conflict truly exists.

Any system—whether computerized or housed in a 3 by 5 card box—is only as effective as how well it is used. The old techno-adage, "Garbage In/Garbage Out," is very accurate. If you fail to put the appropriate information into the system in the first place, you won't catch the potential conflicts later on, no matter how powerful or elegant the software may be. Similarly, every system must always include a human failsafe component. The weekly new matter memo, the daily e-mail announcing new files; these non-computerized reviews are the only way to catch the subtle indicators of conflicts that would be missed by simple comparisons of names.

Likewise, the computer cannot by itself make the judgments that the attorneys in a firm must make when presented with close calls. While some conflicts are easily spotted and cut and dried, most are a matter of some interpretation. Are we actually completely prohibited from moving forward, or could we seek waivers from the affected parties? What is the potential downside of that path? Does it fit into our overall practice and firm management philosophy to proceed in a certain way? With respect to all of these questions, the technology available serves as a tool to help us make good decisions quickly and efficiently. But it cannot make the decisions for us.

The potential risks inherent in these technologies can make one wonder whether the benefits are worth it. But, there are effective ways to address these issues and diffuse the various technological landmines lawyers face.

With respect to conflicts warning systems, look for systems that promote



thorough, easy use by all who are required to use it. Systems that double-up on data input are a good example. Important, too, are enforcement mechanisms, as is complete commitment from those at the top of the food chain. No system will be respected if the two biggest rainmakers get to ignore it. Leadership must most definitely lead in this instance. Finally, don't

overlook training. Much of conflicts review is tedious work that falls on staff who may not understand the true importance of the task. Explain to them its importance, both fiscally and because the duties of loyalty it invokes are core values of our profession.

Technology can and should be used to improve office practice, help us avoid mistakes, and generally serve our clients better. New tools are frequently better tools. Efficiency, breadth, thoroughness, speed are all important and welcome in a conflicts system, a word processing system, or myriad other law office tools. But we must be careful not to completely surrender the thinking to the tool. If we believe that once the computerized database is in place, we no longer need to conduct the human review of new matters, for instance, we're falling short of our duties of care and failing to use the technology at its best advantage. Tools are designed to *help* us complete the job, not do the job for us.

Footnote

* This article will be published in the next issue of CNA's PROFESSIONAL COUNSEL, a newsletter distributed to holders of lawyer professional liability insurance policies issued by CNA member companies.

lpl Advisory is a bi-annual newsletter published by the American Bar Association Standing Committee on Lawyers' Professional Liability for the news and information exchange needs of the lawyers' professional liability community.

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Message From the Chair

On behalf of the Standing Committee on Lawyers' Professional Liability, I welcome you to the Spring 2003 National Legal Malpractice Conference. While focusing on the traditional areas of risk management and claims control, the Conference also provides a follow-up to last Fall's "Trial of a Legal Malpractice Case" program. We also are introducing a new feature called Lunch and Learn. At Thursday's lunch, you will be able to discuss with your colleagues a topic you pick from a number of choices. Designated luncheon tables will feature informal discussion groups facilitated by a number of volunteers. We believe this program will provide an opportunity to learn from our peers and participate actively in the Conference. We are grateful to Mike Brown of Kightlinger & Gray for not only suggesting this idea, but also for assisting with its production.



I am pleased to announce that Davis G. Yee is the winner of the 2003 Levit Essay Contest. Davis is a 1999 graduate of Northwestern School of Law of Lewis and Clark College at Portland Oregon and presently a member of the California Bar. His winning essay addressed the question of whether a plaintiff in a transactional legal malpractice case must present a "case within a case" to establish causation, an issue that will be discussed in one of the Conference's breakout sessions. Davis is attending the conference in New Orleans and I ask you to congratulate him on his achievement. We also thank Joe McMonigle and the firm of Long & Levit LLP for the \$5,000 cash prize that is awarded annually to the winning entrant for this competition. This continues to be one of the most generous contributions to any ABA essay contest.

I am also pleased to inform you that John Riddle of Nixon Peabody has been appointed as a member of the Standing Committee to replace Jerrol Crouter who resigned for

personal reasons. John has been a participant in the Committee's programs for a number of years, and I look forward to working with him.



For those of you who have not yet become an Associate Member of the National Legal Malpractice Data Center, I encourage you to stop by the registration desk for additional information on how membership entitles you to substantial savings on regular conference attendance rates. Take advantage of this opportunity as many of your colleagues already have.

Finally, I ask you to mark your calendars for the Fall Conference, which will be held at the Hilton LaJolla Torrey Pines in LaJolla, California on September 3-5, 2003. The Committee is currently planning the program, and we welcome any suggestions you may have on topics that should be covered.

—Edward Mendrzycki

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