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THE GROUNDLESS CASE—THE LAWYER'S TORT DUTY TO HIS CLIENT AND TO THE ADVERSE PARTY

E. WAYNE THODE*

This article is about a lawyer's tort duties. The phrase "tort duty" is a shorthand expression for that combination of factors that leads a court to the conclusion that one person is required by law to meet some standard of care concerning his conduct that creates risks of harm to other persons. In the context of this article the focus is on a lawyer's tort duty to his client and his tort duty to the adverse party in a groundless civil case, and on the standard of care that should be imposed on the lawyer with regard to each of those persons.

THE NEED TO CONSIDER THE TWO DUTIES TOGETHER

The scope of the lawyer's tort duty to the adverse party in the groundless civil case cannot properly be defined or evaluated without also considering the scope of the lawyer's duty to his client because the framework of the law within which the lawyer works should not place him in a position of conflict between his duty to his client and his duty to the adverse party.¹ The lawyer who has concluded that either the law or the evidence does not support his client's case should be protected from being confronted with the potential hazard of conflicting duties when making a decision about whether to proceed with the case.² Because it involves a relation-

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1. The American Bar Association's Code of Professional Responsibility, which has been adopted by the appropriate authority in almost all of the states, establishes that a lawyer's loyalty is, within the framework of the law, owed to his client. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canons 5, 7. This obligation is reinforced by a tort duty owed to his client, as will be discussed in detail in this article. Therefore, the tort law should not impose a duty on the lawyer concerning his standard of conduct toward the adverse party that would cause the lawyer, in his own self-interest, to dilute his obligation to his client. Canon 5 of the Code of Professional Responsibility discusses several situations involving conflicts concerning possible interests of the lawyer that may affect his judgment. The interest discussed in this article, the interest involving the personal liability of the lawyer to the adverse party arising out of the breach of a tort duty owed to the adverse party, is not specifically discussed.

2. I have written extensively on the need to protect the trial lawyer from conflicting duties of loyalty. See Thode, *Canons 6 and 7: The Lawyer-Client Relationship*, 48 TEXAS L. REV. 367 (1970); Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575 (1961).

ship that is personal and highly significant, the duty of the lawyer to his client should be established first. After that duty is established in concrete form, the lawyer's tort duty to the adverse party—a duty arising from the lawyer's risk creating conduct—can then be formulated in a manner that gives the adverse party as much protection as possible without creating the potential for imposing conflicting duties upon the lawyer.

THE LAWYER'S DUTY TO HIS CLIENT IN THE GROUNDLESS CASE

The decision by the Supreme Court of California in *Kirsch v. Duryea*³ properly states the scope of the duty owed by a lawyer to his client when the lawyer is convinced that his client's case is groundless on the facts. The court held that a lawyer is justified in refusing to proceed with his client's case and is justified in withdrawing from the case unless the decision to do so is "so manifestly erroneous that no prudent attorney would have done so."⁴

The lawyer, Duryea, employed by Kirsch only a few days before the statute of limitations would run on Kirsch's malpractice claim against a treating physician, filed the complaint immediately. Thereafter Duryea reviewed the worker's compensation file with its concomitant medical records, talked with physicians, and engaged in medical and legal research on the issues involved but did not depose any of the doctors that had examined or treated his client. Duryea concluded that there was insufficient evidence of malpractice to justify a trial and notified Kirsch of his (Duryea's) decision to withdraw from the case. Duryea suggested that if Kirsch wished to proceed to trial he should obtain another lawyer and stated that he, Duryea, would cooperate with any lawyer that Kirsch selected. Duryea also informed Kirsch in a letter of July 21, 1969, that to avoid a dismissal for failure to proceed, the trial must be commenced before March 23, 1970. Duryea's motion to withdraw was granted in an ex parte hearing on January 27, 1970. Kirsch received the letter of July 21, 1969, but claimed that he did not receive a copy of the notice to withdraw or of the hearing and order permitting withdrawal of Duryea.⁵ Kirsch failed in his attempts to obtain other counsel to represent him and move the case to trial. Kirsch's

3. 578 P.2d 935, 146 Cal. Rptr. 218 (1978) (in bank).

4. *Id.* at 939, 146 Cal. Rptr. at 222.

5. Kirsch's contention that Duryea improperly delayed in securing a court discharge was rejected by the court. *Id.* at 940, 146 Cal. Rptr. at 223.

case was dismissed for failure to comply with California's five-year trial requirement.⁶

Kirsch then filed a malpractice action against his former lawyer, Duryea, and alleged injury by reason of Duryea's failure to prosecute diligently the medical malpractice action. The jury returned a verdict in Kirsch's favor, assessing damages at \$237,100, but also found Kirsch negligent to the extent of 2.5%, thereby reducing the award to \$231,175.50. It is obvious from the verdict that the jury found from the evidence presented that Kirsch had a good cause of action for malpractice against the doctor, that Duryea was negligent, and that the damages were substantial.

The California Supreme Court addressed several issues in its opinion, but the only one of interest for purposes of this article is its holding that there was insufficient evidence to support the jury finding that by refusing to proceed to trial in the medical malpractice case Duryea had breached his tort duty to his client. Before making its determination the court stated, "An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice."⁷ The court's primary interest was the lawyer's competing obligations to his client and to the system of justice.⁸ It could have added, however, that the attorney also has an obligation to respect the legitimate interests of the adverse party.⁹

6. *Id.* at 938, 146 Cal. Rptr. at 221; see CAL. CIV. PROC. § 583 (Deering 1979).

7. *Kirsch v. Duryea*, 578 P.2d 935, 939, 146 Cal. Rptr. 218, 222 (1978) (in bank); see *Bickel v. Mackie*, 447 F. Supp. 1376, 1381 (N.D. Iowa 1978) (lawyer owes general duty to judicial system); ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102 (represent client within bounds of law); Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 CIN. L. REV. 604, 614 (1976) (lawyer has responsibility to judicial system). See generally ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 1 (maintain integrity and competence of profession); *id.* Canon 8 (assist improving legal system); *id.* Canon 9 (avoid even appearance of impropriety).

8. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-10; *The Code of Professional Responsibility*, 23 BAYLOR L. REV. 697, 800 (1972). Compare ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-101 with *id.* DR 7-102.

9. See *Norton v. Hines*, 123 Cal. Rptr. 237, 241 (Ct. App. 1975) (cannot show complete disregard for rights of adverse party); *Tool Research & Eng'r Corp. v. Henigson*, 120 Cal. Rptr. 291, 297 (Ct. App. 1975) (lawyer must avoid unreasonable harm to adverse party); ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-10 (treat all persons involved in legal process with consideration). *But cf.* *Berlin v. Nathan*, 381 N.E.2d 1367, 1376 (Ill. App. Ct. 1978) (no negligence duty to adverse party not to file weak or even frivolous suit). See generally *The Code of Professional Responsibility*, 23 BAYLOR L. REV. 697, 780, 800 (1972); Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 CASE W. RES.

In analyzing the duty problem, an appropriate starting place is the American Bar Association's Code of Professional Responsibility. It requires that the lawyer act competently when representing his client in a legal matter¹⁰ and that the lawyer act zealously on his client's behalf within the framework of the law.¹¹ These duties were made clear by the Supreme Court of California in *Smith v. Lewis*,¹² which undoubtedly furnished the basis for the following jury instructions given by the trial court in *Kirsch*:

In performing legal services for a client, an attorney has the duty to have that degree of learning and skill ordinarily possessed by attorneys of good standing, practicing in the same or similar locality and under similar circumstances.

It is his further duty to use the care and skill ordinarily exercised in like cases by reputable members of his profession practicing in the same or similar locality under similar circumstances, and to use reasonable diligence and his best judgment in the exercise of his skill and the accomplishment of his learning, in an effort to accomplish the best possible result for his client.

A failure to perform any such duty is negligence.¹³

These instructions set the standard of conduct, the "reasonable lawyer" standard, for the handling of a case that has merit in terms of fact and law. They do not, however, in the opinion of the California Supreme Court, adequately prescribe the standard for the groundless case.¹⁴ To impose the "reasonable lawyer" standard in a case that has no support in existing law would chill the continuing development of the common law.¹⁵ To impose it in a case that the

L. REV. 653, 671-72 (1976); see also Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 PAC. L.J. 897 (1977) (discusses whether lawyer can fulfill duty to adverse party without incurring malpractice liability to his client).

10. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6; see RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, Rule 6-101. Although neither the California rules nor the ABA Code was in existence at the time of the conduct involved in the *Kirsch* case, they may reflect long-accepted standards of professional conduct, and they do reflect present standards of conduct that are relevant to a determination of whether the *Kirsch* holding should be applied to present day conduct by lawyers.

11. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7.

12. 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (in bank). In *Smith* the trial court instructed the jury on a lawyer's duty to his client. See *id.* at 592-93 n.3, 118 Cal. Rptr. at 624-25 n.3.

13. See *id.* at 592-93 n.3, 118 Cal. Rptr. at 624-25 n.3. These instructions were not set forth in the *Kirsch* opinion. They were obtained from the record of the case, No. 205201, in the office of the County Clerk, Clerk of the Superior Court, County of Sacramento, Sacramento, California.

14. See *Kirsch v. Duryea*, 578 P.2d 935, 939, 146 Cal. Rptr. 218, 222 (1978) (in bank).

15. See generally Thode, *Canons 6 and 7: The Lawyer-Client Relationship*, 48 TEXAS L.

lawyer believes to be groundless on the facts would force many lawyers to continue with cases that they think are without factual merit. Neither of these positions serves the administration of justice, and they should not set the framework of the law within which the lawyer carries out his obligations.

The Lawyer's Duty Concerning the Law

The court in *Kirsch* pointed out that when the lawyer's doubt concerns the applicable law, the lawyer "shall not accept employment to present 'a claim or defense . . . that is not warranted under existing law and cannot be supported by good faith'¹⁶ argument for an extension, modification, or reversal of existing law.'¹⁷ Additionally, the court noted that one of the grounds for a lawyer's permissive withdrawal is insistence by a client upon presenting a claim that is not warranted under existing law and cannot be supported by a good faith argument for extension, modification, or reversal of the law.¹⁸ "Good faith" is an appropriate standard because of the wide range of possibilities for change in the law by use of analogy, original thought, changes in society and its values, and other grounds that are available to the able and ingenious lawyer.¹⁹ This desirable creativity is encouraged by setting the standard at the level of good faith. It is clear, however, that a lawyer's good faith but mistaken belief about the state of the law is not sufficient to protect a lawyer from a successful malpractice action when he acts in ignorance of the law and the client suffers harm.²⁰ It should be

REV. 367, 369-70 (1970).

16. "Good faith" in this context obviously means that the lawyer honestly believes that his contention has merit. California courts have defined "good faith" in terms of honesty of purpose. See *Placentia Fire Fighters, Local 2147 v. City of Placentia*, 129 Cal. Rptr. 126, 138 (Ct. App. 1976); *Raab v. Casper*, 124 Cal. Rptr. 590, 593 (Ct. App. 1975). The Supreme Court of Wisconsin held in *Williams v. Hofman*, 223 N.W.2d 844, 848 (Wis. 1974), that the term "good faith" is not unconstitutionally vague.

17. *Kirsch v. Duryea*, 578 P.2d 935, 939, 146 Cal. Rptr. 218, 222-23 (1978) (in bank) (footnote added) (quoting RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, Rule 2-110(2)).

18. *Kirsch v. Duryea*, 578 P.2d 935, 939, 146 Cal. Rptr. 218, 223 (1978) (in bank); accord, ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(C)(1)(a); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, Rule 2-111C(1). But see *Umansky v. Urquhart*, 148 Cal. Rptr. 547, 549-50 (Ct. App. 1978) (unclear whether court applied good faith or absolute protection standard to lawyer's contention for change in applicable law).

19. I have long advocated a similar standard for the lawyer concerning his efforts to obtain changes in the law. See Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 595 (1961).

20. See *Smith v. Lewis*, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 627 (1975) (in bank). Of

noted that the previously mentioned good faith requirement concerns not the state of the law *but the potential for obtaining a change in the law*. The lawyer must use reasonable diligence in ascertaining the state of the law,²¹ but is not to be found at fault in pressing his case on a theory inconsistent with existing law if a good faith argument can be made for its extension, modification, or reversal.²²

The Lawyer's Duty Concerning the Facts

The *Kirsch* case concerned lawyer Duryea's conclusion that insufficient evidence of medical malpractice existed rather than a problem of contending for change in the substantive law. Although the same analysis of professional conduct that was made by the court concerning issues of law could have been made concerning the issues of fact, the court in *Kirsch* chose not to apply a good faith standard.²³ There are several relevant sources, but no specific provision authorizing withdrawal from a case that is groundless on the facts. The California Rules of Professional Conduct provide in part:

In presenting a matter to a tribunal, a member of the state bar shall:

(1) Employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law²⁴

The American Bar Association's Code of Professional Responsibility provides additional grounds that should be considered in setting the standard of care for the lawyer when his client has a case that is groundless on the facts. DR 7-102(A) provides as follows:

course, the lawyer is not liable for making the wrong choice when there is reasonable doubt among well-informed lawyers concerning the state of the law. See *Lucas v. Hamm*, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961) (in bank).

21. See, e.g., *Smith v. Lewis*, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 627 (1975) (in bank); *Norton v. Hines*, 123 Cal. Rptr. 237, 242 (Ct. App. 1975); *Tool Research & Eng'r Corp. v. Henigson*, 120 Cal. Rptr. 291, 297 (Ct. App. 1975).

22. See *In re Corace*, 213 N.W.2d 124, 132 (Mich. 1973); ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(2); *id.* EC 7-4. See generally Thode, *Canons 6 and 7: The Lawyer-Client Relationship*, 48 TEXAS L. REV. 367, 369-70 (1970). In *Corace* the court stated that our "adversary system intends, and expects, lawyers to probe the outer limits of the bounds of the law. . . ." *In re Corace*, 213 N.W.2d 124, 132 (Mich. 1973).

23. See *Kirsch v. Duryea*, 578 P.2d 935, 939, 146 Cal. Rptr. 218, 222 (1978) (in bank).

24. RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, Rule 7-105.

In his representation of a client, a lawyer shall not: (1) file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another (5) Knowingly make a false statement of law or fact²⁵

DR 7-106(C) states: "In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence"²⁶ DR 2-110(B) speaks to mandatory withdrawal:

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if (1) he knows or it is obvious that his client is bringing the legal action, conducting the defense or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.²⁷

The above quoted disciplinary standards support the propositions that a lawyer does not have an ethical duty to represent his client in a case that is groundless on the facts and that the system imposes an obligation on him not to represent the client in such a case.²⁸ Of course, as in the case of a substantive law problem, the lawyer must act with due care in gathering the information on which he bases his decision that the case is groundless on the facts.²⁹ The California Supreme Court in *Kirsch* made a wise choice, however, in not applying a good faith test to the lawyer's conclusion that there was insufficient proof of medical malpractice. There is not the same need or range of possibilities for creativity concerning the facts as there is

25. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A).

26. *Id.* DR 7-106(C).

27. *Id.* 2-110(B); see RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, Rules 2-111B(1), 2-111C(1).

28. I am aware that the Preliminary Statement to the Code of Professional Responsibility asserts that the Code does not "undertake to define standards for civil liability of lawyers for professional conduct." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement. It is, nevertheless, an important source of standards for courts to look to in legal malpractice cases. See Thode, *Canons 6 and 7: The Lawyer-Client Relationship*, 48 TEXAS L. REV. 367, 376-77 (1970).

29. See notes 20-21 *supra* and accompanying text. In *Kirsch* the plaintiff's contention that Duryea had breached his duty of reasonable investigation was rejected. Plaintiff produced no expert evidence that an attorney, in the exercise of due care, would have done more than Duryea did, and the court stated that the matter was not one of common knowledge. See *Kirsch v. Duryea*, 578 P.2d 935, 940, 146 Cal. Rptr. 218, 224 (1978) (in bank).

with regard to the law. The client is entitled to more protection than that afforded by a subjective standard based on the lawyer's good faith belief concerning evidence of medical malpractice. The standard should be an objective one that protects the legitimate interests of the lawyer, the public, and the adverse party.³⁰ Upon making a reasonable investigation, the lawyer should, without fear of tort liability, be able to make a decision against proceeding to trial in what he believes to be a case that is groundless on the facts unless the client can establish that the lawyer's decision is *so manifestly erroneous that no prudent lawyer would refuse to proceed in the same or similar circumstances*. The California Supreme Court in *Kirsch* established this new standard of care for the case that is groundless on the facts.³¹ It then held that the evidence was insufficient to support a finding of breach of this new standard.³² This standard provides the framework of the law within which the lawyer must act in a zealous and competent manner.³³ Any standard more stringent on the lawyer would require that he continue to prosecute a claim or defense that he believes, on the basis of a proper investigation, is groundless in fact. Forcing the lawyer to proceed to trial under these circumstances would not be in the interest of clients generally or of the proper administration of justice. Continued representation of a client under these circumstances should not be required by either the competence or zealous representation obligations owed by the lawyer to his client.³⁴

30. Cf. *Bickel v. Mackie*, 447 F. Supp. 1376, 1381 (N.D. Iowa 1978) (duty to both client and to judicial system); *Ammerman v. Newman*, 384 A.2d 637, 641 (D.C. 1978) (balance between free access to courts and undue exercise of access); *Berlin v. Nathan*, 381 N.E.2d 1367, 1375 (Ill. App. Ct. 1978) (allow assertion of rights without permitting unconscionable suits).

See generally *Pantone v. Demos*, 375 N.E.2d 480, 482-84 (Ill. App. Ct. 1978). Ethical Consideration 7-10 of the ABA CODE OF PROFESSIONAL RESPONSIBILITY states: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."

31. *See Kirsch v. Duryea*, 578 P.2d 935, 939, 146 Cal. Rptr. 218, 222 (1978) (in bank).

32. *Id.* at 939-40, 146 Cal. Rptr. at 223. One of the surprising aspects of this case relates to the procedural posture of the instructions to the jury. There is no indication in the opinion that defendant Duryea challenged the instructions given on the lawyer's standard of care.

33. Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6 (should represent client competently); *id.* Canon 7 (should represent client zealously).

34. *See id.*, Canons 6, 7. Because the policy considerations are quite different, I would not make the same statement concerning a lawyer representing a defendant in a criminal case. *See Norton v. Hines*, 123 Cal. Rptr. 237, 241 n.7 (Ct. App. 1975); RESTATEMENT (SECOND) OF TORTS § 675, Comment d (1976).

THE OPPOSING LAWYER'S DUTY TO THE ADVERSE PARTY

Actions by adverse parties³⁵ against opposing lawyers³⁶ based on complaints of having been subjected to allegedly groundless lawsuits arise in many different subject matter contexts.³⁷ In the last few years there has been a marked upswing in interest in this type of lawsuit, an interest fueled primarily by the many suits initiated by doctors against opposing lawyers who represented the doctors' patients in prosecuting medical malpractice suits.³⁸ The various theories of liability proposed by the doctors' lawyers and the theories applied by the courts will be examined.

35. The term "adverse party" will be used throughout the remainder of this article to designate the successful party in the first lawsuit.

36. The term "opposing lawyer" will be used throughout the remainder of this article to designate the lawyer for the party who lost the first lawsuit.

37. See, e.g., Norton v. Hines, 123 Cal. Rptr. 237, 238 (Ct. App. 1975) (first suit breach of contract); Berlin v. Nathan, 381 N.E.2d 1367, 1369-70 (Ill. App. Ct. 1978) (first suit malpractice); Sarvold v. Dodson, 237 N.W.2d 447, 448 (Iowa 1976) (first suit civil commitment proceeding); Friedman v. Dozorc, 268 N.W.2d 673, 674 (Mich. Ct. App. 1978) (first suit malpractice). See generally Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003 (1977); Freedman, *The Counter Suit in Products Liability: Plaintiffs Must Be Made To Stand Up and Be Counted*, 14 *FORUM* 434 (1979).

38. Since 1976, there have been at least eighteen reported opinions on this problem: Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Carroll v. Kalar, 545 P.2d 411 (Ariz. 1976); Umansky v. Urquhart, 148 Cal. Rptr. 547 (Ct. App. 1978); Ammerman v. Newman, 384 A.2d 637 (D.C. 1978); Berlin v. Nathan, 381 N.E.2d 1367 (Ill. App. Ct. 1978); Pantone v. Demos, 375 N.E.2d 480 (Ill. App. Ct. 1978); Lyddon v. Shaw, 372 N.E.2d 685 (Ill. App. Ct. 1978); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Hill v. Willmott, 561 S.W.2d 331 (Ky. 1978); Spencer v. Burglass, 337 So. 2d 596 (La. Ct. of App. 1976); Friedman v. Dozorc, 268 N.W.2d 673 (Mich. Ct. App. 1978); Gasis v. Schwartz, 264 N.W.2d 76 (Mich. Ct. App. 1978); Drago v. Buonagurio, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978) (memorandum opinion); reversing, 402 N.Y.S.2d 250 (App. Div. 1978); Belsky v. Lowenthal, 405 N.Y.S.2d 62 (App. Div. 1978); Hoppenstein v. Zemek, 403 N.Y.S.2d 542 (App. Div. 1978); O'Toole v. Franklin, 569 P.2d 561 (Or. 1977) (in bank); Moiel v. Sandlin, 571 S.W.2d 567 (Tex. Civ. App.—Corpus Christi 1978, no writ); Wolfe v. Arroyo, 543 S.W.2d 11 (Tex. Civ. App.—San Antonio 1976, no writ). Cf. Babb v. Superior Court, 479 P.2d 379, 380, 92 Cal. Rptr. 179, 180 (1971) (in bank) (1971 case); Foster v. McClain, 251 So. 2d 179, 180 (La. Ct. of App. 1971) (1971 case). See generally Adler, *Malicious Prosecution Suits as Counterbalance to Medical Malpractice Suits*, 21 *CLEV. ST. L. REV.* 51 (Jan. 1972); Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003 (1977); Smith, *Medical Malpractice: The Countersuit Fad*, 12 *TRIAL* 44 (Dec. 1976); Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 *CASE W. RES. L. REV.* 653 (1976); Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 *CIN. L. REV.* 604 (1976); Annot., 84 *A.L.R.3d* 555 (1978); see also Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 *PAC. L.J.* 897 (1977). An adverse party doctor has never been ultimately successful in one of these reported suits against the opposing lawyer.

There are four basic tort theories that have been used in an attempt to establish tort liability on the part of the opposing lawyer for the prior prosecution of a groundless suit against the adverse party. The four are: malicious prosecution, or wrongful use of civil proceedings as it is called in section 647 of the *Restatement (Second) of Torts*; a willful and wanton conduct tort; a negligence or legal malpractice tort; and a prima facie tort.³⁹ Each of these theories will in turn be discussed, but the reader should know in advance that, except for the willful and wanton theory, I do not find any of these theories satisfactory. They afford the adverse party either too little or too much protection. My proposal, which will be discussed in detail after examination of the four listed theories, is that the opposing lawyer owes to the adverse party a duty not to prosecute a civil case that he finds to be groundless on the facts if prosecution would be so reckless in creating risks of harm to the adverse party that no prudent attorney would do so.

Malicious Prosecution

The most commonly accepted theory of the tort duty owed by an opposing lawyer to the adverse party in civil litigation is stated in terms of the tort of malicious prosecution.⁴⁰ As distilled from the

39. See, e.g., *Ammerman v. Newman*, 384 A.2d 637, 639 (D.C. 1978) (malicious prosecution); *Hill v. Willmott*, 561 S.W.2d 331, 333 (Ky. 1978) (negligence); *Berlin v. Nathan*, 381 N.E.2d 1367, 1369, 1375 (Ill. App. Ct. 1978) (willful and wanton conduct tort); *Belsky v. Lowenthal*, 405 N.Y.S.2d 62, 64 (App. Div. 1978) (prima facie tort). A few cases allege abuse of process, but this theory has been rejected because the cases do not involve use of process for an end other than that which it was designed to accomplish. See *Bickel v. Mackie*, 447 F. Supp. 1376, 1383 (N.D. Iowa 1978); *Friedman v. Dozorc*, 268 N.W.2d 673, 677 (Mich. Ct. App. 1978). See generally *Sarvold v. Dodson*, 237 N.W.2d 447, 448-49 (Iowa 1976); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 121, at 856-58 (4th ed. 1971); Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003, 1033-42 (1977). Invasion of privacy also has been alleged as a cause of action, but without success. See *Wolfe v. Arroyo*, 543 S.W.2d 11, 13 (Tex. Civ. App.—San Antonio 1976, no writ). The analogy to the "false light" invasion of privacy cases will be discussed later in this article. See pages 80 to 81 *infra*.

40. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376, 1379 (N.D. Iowa 1978); *Norton v. Hines*, 123 Cal. Rptr. 237, 240-41 (Ct. App. 1975); *Pantone v. Demos*, 375 N.E.2d 480, 482 (Ill. App. Ct. 1978). See generally Smith, *Medical Malpractice: The Countersuit Fad*, 12 *TRIAL* 44 (Dec. 1976); Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 *PAC. L.J.* 897, 897-907 (1977); Annot., 27 *A.L.R.3d* 1113, 1127-37 (1969). The *Restatement (Second) of Torts* section 653 limits the term "malicious prosecution" to cases in which the first suit involves a criminal prosecution. Nevertheless, the term is also widely applied by the courts to cases in which the first suit involves civil litigation even though chapter 30 of the *Restatement* denominates the civil litigation tort as "Wrongful Use of Civil Proceedings." See cases and materials cited previously in this footnote.

cases, the elements of this tort, when applied to the opposing lawyer who prosecuted a civil case on behalf of his client, are:

- (1) The opposing lawyer took an active part in the initiation, continuation, or procurement of civil proceedings against the adverse party; and
- (2) Except in ex parte proceedings, the original suit terminated in favor of the adverse party; and
- (3) The suit was prosecuted against the adverse party without probable cause for so doing; and
- (4) The suit against the adverse party was motivated by malice or was instituted for some purpose other than the proper adjudication of the claim on its merits.⁴¹

A large number of state court decisions have added a fifth requirement: that the adverse party must show some special damage arising out of the original lawsuit that is different from the damage that an adverse party would ordinarily sustain in suits on similar causes of action.⁴²

The opposing lawyer's duty, defined exclusively in terms of a duty not to maliciously prosecute a civil lawsuit against an adverse party, affords insufficient protection for the adverse party.⁴³ The reason

41. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376, 1379 (N.D. Iowa 1978); *Carrol v. Kalar*, 545 P.2d 411, 412 (Ariz. 1976); *Lyddon v. Shaw*, 372 N.E.2d 685, 687 (Ill. App. Ct. 1978). See generally *Birnbaum, Physicians Counter-attack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003, 1020-33 (1977); Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 *CASE W. RES. L. REV.* 653, 671-73 (1976).

42. In *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978), the Iowa Supreme Court stated that 17 jurisdictions have a special damage requirement, 23 do not, and the remainder of the jurisdictions have not had to decide the issue. *Id.* at 905; see, e.g., *Lyddon v. Shaw*, 372 N.E.2d 685, 687 (Ill. App. Ct. 1978); *O'Toole v. Franklin*, 569 P.2d 561, 564 nn.3 & 4 (Or. 1977) (in bank) (listing states requiring special damages and those that do not); *Moiel v. Sandlin*, 571 S.W.2d 567, 570-71 (Tex. Civ. App.—Corpus Christi, 1978, no writ). See generally Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 *CASE W. RES. L. REV.* 653, 657-62 (1976). One court has pushed this requirement to the ultimate position—the plaintiff must establish that he has suffered damages that are different from those suffered by other plaintiffs in cases based on unfounded legal charges. *O'Toole v. Franklin*, 569 P.2d 561, 562 (Or. 1977) (in bank); cf. *Ammerman v. Newman*, 384 A.2d 637, 641 (D.C. 1978) (injury that would not normally occur as consequence of malpractice suit).

43. Cf. *Bickel v. Mackie*, 447 F. Supp. 1376, 1384 (N.D. Iowa 1978) (anomalous that adverse party has no remedy for groundless suit that does not constitute malicious prosecution under Iowa law). Adverse party doctors suing opposing lawyers for malicious prosecution have been singularly unsuccessful. See cases and materials cited note 38 *supra*. California courts, however, have apparently lessened the adverse party's burden by applying a negligence standard to determination of the probable cause element. See *Norton v. Hines*, 123 Cal.

most often advanced for adopting this standard is that the courts, as a matter of policy, do not wish to establish a standard that would discourage the litigation of valid disputes.⁴⁴ The policy is a valid one, but the courts do not have to go to this extreme in protecting the opposing lawyer to make the legal forum available for the determination of all legitimate disputes.⁴⁵ The malicious prosecution standard should continue to apply in suits against the layman client,⁴⁶ but his lawyer should be held to a higher standard of conduct concerning the risks he creates toward the adverse party. Why

Rptr. 237, 242 (Ct. App. 1975) (lawyer should not prosecute case that reasonable lawyer would not consider tenable); Tool Research & Eng'r Corp. v. Henigson, 120 Cal. Rptr. 291, 297 (Ct. App. 1975) (should not prosecute case reasonable lawyer would consider untenable). See generally Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 PAC. L.J. 897, 904-05 (1977).

44. In *Lyddon v. Shaw*, 372 N.E.2d 685, 690 (Ill. App. Ct. 1978), the court stated the commonly held view:

While we acknowledge the seriousness of the medical malpractice problem, we believe there is a more basic and important consideration of public policy which prohibits any enlargement of the potential tort liability incurred by those who file even groundless lawsuits. Free access to the courts as a means of settling private claims or disputes is a fundamental component of our judicial system, and ". . . courts should be open to litigants for the settlement of their rights without fear of prosecution for calling upon the courts to determine such rights." [citing authority] . . . [T]he courts of this State have, in general, strictly construed the requirements for this cause of action.

45. The Supreme Court of California has made the rationale of this assertion clear in *Kirsch v. Duryea*, 578 P.2d 935, 939, 146 Cal. Rptr. 218, 222 (1978) (in bank). In *Kirsch* the California court did not recognize any such extreme protection for the lawyer to encourage him to continue in the lawsuit on behalf of his client. Why give the lawyer such extreme protection with regard to the adverse party in order not to discourage the lawyer from bringing that same type of lawsuit?

46. RESTATEMENT (SECOND) OF TORTS § 675, Comment g (1976) recognizes that legal advice protects the client if the advice is sought in good faith and with full disclosure of all information in the client's possession:

g. Advice of counsel. The advice of counsel gives to one who initiates civil proceedings a protection similar to that which it gives to a private prosecutor of criminal proceedings. There is, however, this difference between the two situations. When the proceedings are criminal, the advice that usually affords protection is that the facts known or reasonably believed by the prosecutor constitute the crime charged. (See Comment b on § 666). When the proceedings are civil the advice of counsel is a protection even though it consists merely of an opinion that the facts so known or believed afford a chance, whether great or small, that the claim asserted in the civil proceedings may be upheld. With this difference, the Comments on § 666 are pertinent to this Section.

The client, therefore, is protected from a malicious prosecution claim because he relies on the advice of a legal expert—his lawyer. When the adverse party brings an action against the expert, however, the adverse party discovers that he also must establish the elements of a malicious prosecution action, including malice and probable cause, against the expert! Catch 22? See *Spencer v. Burglass*, 337 So. 2d 596, 600 (La. Ct. of App. 1976).

should not some minimum level of competency be applied in setting the standard of duty owed by the opposing lawyer to the adverse party? As applied in most jurisdictions, the malicious prosecution standard protects an opposing lawyer whose competency in the particular case may be near or at zero.⁴⁷ Lawyers do not need and do not deserve to be protected at that level. To place on the adverse party the risks of harm arising out of lawyer incompetency or venality in terms of a case that is groundless on the facts or law is improper risk distribution. The requirements of a law school education and passing a bar examination plus the availability of continuing legal education for lawyers are designed to aid in producing lawyers with at least minimum competency in the handling of civil cases. To protect the incompetent opposing lawyer from liability for the risk of harm that he has created toward the adverse party, an obviously foreseeable harm, smacks of fraternalism rather than justice.⁴⁸ The malicious prosecution tort should be rejected as the proper definition of the standard of care owed by the opposing lawyer to the adverse party in a civil case.

The Willful and Wanton Conduct Theory

A theory of the opposing lawyer's duty to the adverse party that falls between malicious prosecution and the ordinary prudent lawyer or negligence standard was adopted by an Illinois trial court in *Berlin v. Nathan*.⁴⁹ The trial court instructed the jury that if the opposing lawyer's conduct in bringing the case against the adverse party was found to be "willful and wanton" the jury could find that the lawyer had breached his duty to the adverse party. The jury in that case determined that the opposing lawyer's conduct was willful and wanton and returned a verdict of \$2,000 compensatory damages and \$6,000 punitive damages against the opposing lawyer. The medical profession's joy over this triumph against an opposing lawyer

47. In each of the following example cases the lawyer obviously failed to investigate to determine if there was any merit to the allegations of the complaint, and in each case it was determined that there was none. *See, e.g.*, *Spencer v. Burglass*, 337 So. 2d 596, 598-99, 601 (La. Ct. of App. 1976); *Pantone v. Demos*, 375 N.E.2d 480, 481-82 (Ill. App. Ct. 1978); *Lyddon v. Shaw*, 372 N.E.2d 685, 686-87 (Ill. App. Ct. 1978).

48. The idea was well stated by the Supreme Court of California in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 491 P.2d 421, 429-30, 98 Cal. Rptr. 837, 845-46 (1971) (in bank): "An immunity from the statute of limitations for practitioners at the bar not enjoyed by other professions is itself suspicious, but when conferred by former practitioners who now sit upon the bench, it is doubly suspicious." (footnote omitted).

49. 381 N.E.2d 1367, 1370 (Ill. App. Ct. 1978).

who prosecuted a groundless case⁵⁰ has been short-lived; an intermediate appellate court in Illinois reversed the case, holding that the malicious prosecution theory properly stated the duty of care owed by the opposing lawyer to the adverse party.⁵¹ Since the standard proposed in this article is not greatly different from this willful and wanton standard, I think that this rejected standard has merit.

The Negligence Theory

Because as a practical matter the long-standing malicious prosecution theory affords an almost impenetrable protection to the opposing lawyer, some lawyers representing adverse party doctors have championed the ordinary negligence theory. Suits under this theory have been singularly unsuccessful.⁵² Courts have stated two main reasons for refusing to hold that the opposing lawyer owes to the adverse party the duty of care of the ordinarily prudent lawyer. First, courts fear the potential chilling effect that application of the negligence standard would have on the bringing of meritorious claims by a patient against his doctor.⁵³ Second, the courts reason

50. See Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 *CIN. L. REV.* 604, 606 (1976).

51. *Berlin v. Nathan*, 381 N.E.2d 1367, 1372, 1375 (Ill. App. Ct. 1978). See generally Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003, 1073-74 (1977). Other Illinois courts have rejected adverse parties' claims based on a willful wanton cause of action. See *Patone v. Demos*, 375 N.E.2d 480, 482 (Ill. App. Ct. 1978); *Lyddon v. Shaw*, 372 N.E.2d 685, 690 (Ill. App. Ct. 1978).

52. See *Berlin v. Nathan*, 381 N.E.2d 1367, 1376 (Ill. App. Ct. 1978); *Lyddon v. Shaw*, 372 N.E.2d 685, 690 (Ill. App. Ct. 1978); *Hill v. Willmott*, 561 S.W.2d 331, 334 (Ky. 1978); *Spencer v. Burglass*, 337 So. 2d 596, 600 (La. Ct. of App. 1976); *Gasis v. Schwartz*, 264 N.W.2d 76, 77-78 (Mich. Ct. App. 1978); *O'Toole v. Franklin*, 569 P.2d 561, 567 (Or. 1977) (in bank); cf. *Norton v. Hines*, 123 Cal. Rptr. 237, 238-40 (Ct. App. 1975) (original suit for breach of contract). See generally Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003, 1066-74 (1977).

53. See, e.g., *Lyddon v. Shaw*, 372 N.E.2d 685, 690 (Ill. App. Ct. 1978) (free access to courts of little value if lawyers rendered fearful of being liable as insurers of merits); *Hill v. Willmott*, 561 S.W.2d 331, 335 (Ky. 1978) (would have chilling effect); *Spencer v. Burglass*, 337 So. 2d 596, 601 (La. Ct. of App. 1976) (chilling effect on right to seek redress in court); *Friedman v. Dozorc*, 268 N.W.2d 673, 676 (Mich. Ct. App. 1978) (would discourage resort to courts); cf. *Umansky v. Urquhart*, 148 Cal. Rptr. 547, 549 (Ct. App. 1978) (abrogation of absolute privilege in judicial proceeding would have chilling effect upon lawyers challenging validity of statutes). Often the very purpose of filing a suit against the opposing lawyer is to discourage malpractice suits. Cf. Adler, *Malicious Prosecution Suits as Counterbalance to Medical Malpractice Suits*, 21 *CLEV. ST. L. REV.* 51, 54 (Jan. 1972) (malicious prosecution suit effective weapon to counter threat of malpractice suit). "The threat of a doctor counterattacking a malpractice suit with a suit for malicious prosecution may cause a disgruntled

that since the adverse party is not an intended beneficiary of the contract between an attorney and his client, the opposing lawyer owes no duty to the adverse party.⁵⁴

The first reason is a sound one; the second reason is specious. Privity of contract as a prerequisite for establishing a tort duty to a third party was struck a death blow by Justice Cardozo in *MacPherson v. Buick Motor Co.*⁵⁵ It is commonplace today for tort duties to arise out of circumstances that do not include contractual relationships. Risk creating conduct is probably the single most important factor in determining the existence of a tort duty.⁵⁶

One argument made by proponents of the negligence standard is that the Code of Professional Responsibility places a standard of care on each lawyer that sounds in negligence and therefore should be adopted as the standard owed to the opposing party. Courts have rejected this Code argument out-of-hand, reasoning that the Code sets standards for disciplinary action, not for tort litigation.⁵⁷ The courts so holding are correct in their statement that the Code standards were not designed for the purpose of tort liability,⁵⁸ but it does

patient and his lawyer to think twice before bringing a frivolous or poorly founded action." *Id.* at 53-54. See also Freedman, *The Counter Suit in Products Liability: Plaintiffs Must Be Made To Stand Up and Be Counted*, 14 FORUM 434 (1979).

54. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376, 1381 (N.D. Iowa 1978); *Pantone v. Demos*, 375 N.E.2d 480, 485 (Ill. App. Ct. 1978); *Brody v. Ruby*, 267 N.W.2d 902, 906 (Iowa 1978); *Drago v. Buonagurio*, 402 N.Y.S.2d 250, 252 (App. Div.), *rev'd on other grounds*, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978) (memorandum opinion). "[A]n adverse party is not an intended beneficiary of the adverse counsel's client." *Norton v. Hines*, 123 Cal. Rptr. 237, 240 (Ct. App. 1975). See generally *Birnbaum, Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003, 1069-72 (1977).

55. 111 N.E. 1050 (N.Y. 1916). The touchstone to the establishment of a duty in *MacPherson* was danger-creating conduct. See generally Comment, *Attorney Malpractice—A "Greenian" Analysis*, 57 NEB. L. REV. 1003, 1007-14 (1978) (discussion of privity requirement).

56. For a discussion of the importance of risk-creating conduct in the establishment of tort duties, see Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 546 (1962), reprinted in, L. GREEN, *THE LITIGATION PROCESS IN TORT LAW* 249, 253 (2d ed. 1977); Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 8.

57. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376, 1383 (N.D. Iowa 1978); *Berlin v. Nathan*, 381 N.E.2d 1367, 1376 (Ill. App. Ct. 1978); *Brody v. Ruby*, 267 N.W.2d 902, 907-08 (Iowa 1978); *Hill v. Willmott*, 561 S.W.2d 331, 334 (Ky. 1978). See generally *Birnbaum, Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003, 1074-77 (1977).

58. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement ("nor does it [the Code] undertake to define standards for civil liability of lawyers for professional conduct").

not follow that the Code's standards are not relevant to the issue of the scope of the duty owed by a lawyer under tort law. Courts often look to standards set for other purposes to aid them in their search for the appropriate tort law standard.⁵⁹ A more insightful response would be that in allocating the risk of harm between the opposing lawyer and the adverse party, the Code's provisions do not provide for the appropriate distribution of risks. Application of a negligence standard based on the Code provisions would create a serious conflict between the opposing lawyer's duty to his client and his duty to the adverse party. A lawyer would continually fear being second-guessed by the trier of fact concerning whether specified conduct breached either his duty of reasonable care to his client or his duty of reasonable care to the adverse party. The potential for conflict between these two duties would make the lawyer a timid champion of his client's interest, at the least. This potential conflict is in itself an overpowering reason for rejecting the negligence standard.

The Prima Facie Tort Theory

The prima facie tort theory had short-lived support from the Appellate Division of the Supreme Court of New York in the case of *Drago v. Buonagurio*.⁶⁰ Plaintiff doctor, the adverse party in the first case, alleged that defendant Brownstein, the opposing lawyer in the first case, had filed a groundless suit against the doctor for medical malpractice. For the purpose of determining whether the complaint stated "facts sufficient to constitute a cause of action" the following allegations, among others, in the doctors petition were accepted as true:

that, in fact, plaintiff never had Francis Buonagurio as a patient during the illness which allegedly caused his death . . . ; that no basis existed for designating plaintiff as a defendant in said action; that it was done indiscriminately and as a discovery device in order to ascertain where responsibility could be placed⁶¹

59. For example, the use of traffic statutes, criminal in nature, to set the standard of care in a tort case is commonplace. See Thode, *Canons 6 and 7: The Lawyer-Client Relationship*, 48 TEXAS L. REV. 367, 377 (1970); cf. *Bickel v. Mackie*, 447 F. Supp. 1376, 1383 (N.D. Iowa 1978) (Code might establish minimal standard below which is negligence per se); *Hill v. Willmott*, 561 S.W.2d 331, 334 (Ky. 1978) (violation of Code does not necessarily give rise to negligence cause of action).

60. 402 N.Y.S.2d 250 (App. Div.), *rev'd*, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978) (memorandum opinion).

61. *Id.* at 251.

The Appellate Division rejected the possibility of either malicious prosecution or abuse of process as a basis for recovery by the adverse party because of lack of pleaded elements required under the New York decisions,⁶² and flatly rejected negligence as a basis of recovery, stating: "Since an attorney is not liable to third parties for negligence in performing services for his client, a cause of action so based on negligence cannot prevail [citing authority]."⁶³ The Appellate Division held, however, that the prima facie tort theory properly defined the lawyer's duty.⁶⁴ The court stated that if the adverse party could establish that the opposing lawyer had intentionally inflicted "harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful [citing authority] and which acts do not fall within the categories of traditional tort," the opposing lawyer would be liable to the adverse party.^{64.1} The order of the trial court, dismissing the adverse party's complaint, was reversed.⁶⁵

In my judgment, the standard adopted by the Appellate Division in *Drago* is at least as burdensome on the opposing lawyer as the negligence standard. There is no great difficulty involved in establishing intent to harm by the prosecution of a groundless case against the adverse party. An intent to harm can be established by showing that the lawyer knew with substantial certainty that his conduct would result in harm to the adverse party.⁶⁶ A lawyer knows that every case, even a meritorious one, that he prosecutes against an adverse party results in some harm to that party—economic,

62. *Id.* at 251. If the court had limited its holding to the plaintiff's failure to plead a successful termination of the medical malpractice action, its reasoning would have been acceptable. Courts should reject the suit against the opposing lawyer unless the adverse party pleads and proves that the original suit was terminated favorably to the adverse party.

63. *Id.* at 252.

64. *Id.* at 252.

64.1. *Id.* at 252. *But see* *Belsky v. Lowenthal*, 405 N.Y.S.2d 62, 65 (App. Div. 1978) (prima facie tort theory rejected). *See generally* Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003, 1051-66 (1977).

65. *Drago v. Buonagurio*, 402 N.Y.S.2d 250, 253 (App. Div.), *rev'd*, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978) (memorandum opinion).

66. In both *Garratt v. Dailey*, 304 P.2d 681, 682 (Wash. 1956) and *Burr v. Adam Eidemiller, Inc.*, 126 A.2d 403, 407-08 (Pa. 1956), it was held that knowledge that a given result was substantially certain to follow from defendant's conduct was a basis for finding that defendant intended the result. The following statement is made in Comment b to *RESTATEMENT (SECOND) OF TORTS* § 8A (1976) (intent): "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."

emotional, and often reputational injury. In *Drago* the alleged justification for the infliction of harm on the adverse party is unacceptable.⁶⁷

The prima facie tort, if generally applied in the adverse party/opposing lawyer situation, would result in great conflict between the opposing lawyer's duty to his client and his duty to the adverse party. The burden to justify the action against the adverse party would always be on the lawyer. Under the facts alleged in *Drago* a jury could find that the opposing lawyer breached his duty to the adverse party, but this duty should not be defined in terms of the prima facie tort.⁶⁸

In a memorandum opinion the New York Court of Appeals reversed the order of the Appellate Division in *Drago* and reinstated the order of Special Term granting defendant Brownstein's motion to dismiss the complaint against him for failure to state a cause of action.⁶⁹ The Court of Appeals agreed with the reasoning of the Appellate Division that the complaint failed to state a cause of action for malicious prosecution, abuse of process, or negligence.⁷⁰ The court then stated:

Nor does it allege a cause of action for what is sometimes labeled a "prima facie tort", i.e., "the intentional malicious injury to another by otherwise lawful means without economic or social justification, but solely to harm the other" [citing authority]. Whatever may be the constraints imposed by the Code of Professional Responsibility with the associated sanctions of professional discipline when baseless legal proceedings are instituted by a lawyer on behalf of a client, the courts have not recognized any liability of the lawyer to third parties therefor where the factual situations have not fallen within one of the acknowledged categories of tort or contract liability. That there are proposals before the Legislature to create new liabilities in such a circumstance . . . is an additional reason for judicial restraint in response to invitations to recognize what is conceded to be perhaps a

67. See *Drago v. Buonagurio*, 402 N.Y.S. 2d 250, 252 (App. Div.), *rev'd*, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978) (memorandum opinion). The alleged justification asserted in the complaint for filing the original malpractice suit against a doctor whose conduct was not involved in the alleged injury to the patient was that the opposing attorney desired to take the doctor's deposition to obtain expert aid in determining who was at fault.

68. The opposing lawyer could have been held liable under a "recklessness" standard. I think a trier of fact probably would have found the opposing lawyer's conduct to be so reckless that no prudent lawyer would have done it. See notes 86-93 *infra* and accompanying text.

69. *Drago v. Buonagurio*, 386 N.E.2d 821, 822, 413 N.Y.S.2d 910, 910-11 (1978) (memorandum opinion).

70. *Id.* at 822, 413 N.Y.S.2d at 911.

“new, novel or nameless” cause of action. We conclude that the complaint fails to state a cognizable cause of action.⁷¹

Although I agree that the “prima facie tort” is not the appropriate tort remedy, I regret that the court refused to recognize the possibility that there could be an appropriate standard of care for the opposing lawyer that is not encompassed by malicious prosecution, abuse of process, or negligence. The New York Court of Appeals has often been in the vanguard in developing new standards of care for interests that are ripe for protection. To use consideration by the legislature of bills creating new standards of care for opposing lawyers as an excuse for the status quo is not in the tradition of that court.

The Reckless Prosecution of Civil Proceedings

If the three rejected theories discussed above improperly allocate the risks of harm to the adverse party arising out of the groundless case, then what is the appropriate standard? I believe the California Supreme Court in *Kirsch v. Duryea*⁷² properly defined the duty of the lawyer to his client in the groundless case: refusal of the lawyer to continue in the prosecution of a case that he believes to be groundless on the facts is a breach of duty to his client only if that decision not to prosecute is “so manifestly erroneous that no prudent attorney would have” made that decision.⁷³ The burden of proof is on the client to establish the breach of that standard.⁷⁴

In my judgment the *Kirsch* standard furnishes the key to properly defining the tort duty of the opposing lawyer to the adverse party. For lack of a better term, I denominate this tort “the reckless prosecution of civil proceedings.” The elements of this tort that would have to be proved by the adverse party in establishing liability on the opposing lawyer are:⁷⁵

- (1) The opposing lawyer took an active part in the initiation, continuation, or procurement of civil proceedings against the adverse party; and

71. *Id.* at 822, 413 N.Y.S.2d at 911.

72. 578 P.2d 935, 146 Cal. Rptr. 218 (1978) (in bank).

73. *Id.* at 939, 146 Cal. Rptr. at 222.

74. *See id.* at 939, 146 Cal. Rptr. at 222.

75. Three of the elements of this tort, as I have developed them, have close kinship to RESTATEMENT (SECOND) OF TORTS § 674 (1976). The third element, however, is significantly different from that in § 674.

- (2) The first action terminated in favor of the adverse party,⁷⁶ or was an ex parte proceeding; and
- (3) The opposing lawyer's decision to prosecute the action was so reckless in creating risks of harm to the opposing party that in similar circumstances no prudent lawyer would have made that decision; and
- (4) The adverse party's damages arising out of the first proceeding are based on proof of actual injury.

I reject the position now held by many courts that the adverse party should be required to establish some type of special damage.⁷⁷ Actual injury should be the key. Proof of economic injury, including costs of litigation and attorney's fees,⁷⁸ emotional distress, and damage to reputation could, under appropriate circumstances, be elements of damage.⁷⁹ In this light, I would adopt the approach to damages used by the Supreme Court of the United States in *Gertz v. Robert Welch, Inc.*⁸⁰:

We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the

76. See *Lyddon v. Shaw*, 372 N.E.2d 685, 688-89 (Ill. App. Ct. 1978) (persuasively setting forth reasons for this requirement).

77. See note 42 *supra* and accompanying text. See Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003, 1090 (1977).

78. Straws in the wind that may indicate a growing public policy are legislative enactments that require the taxing of attorney's fees to the losing party in groundless cases. *ILL. ANN. STAT.* ch. 110, § 41 (Smith-Hurd Supp. 1978) was amended in 1976 to provide as follows:

Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal.

According to A. Jenner & A. Martin, supplement to *Historical and Practice Notes*, *ILL. ANN. STAT.* ch. 110, § 41 (Smith-Hurd Supp. 1978), section 41 was amended because of the problem of groundless suits in the medical malpractice area. *Cf.* Utah Consumer Sales Practices Act, *UTAH CODE ANN.* § 13-11-19(5) (Supp. 1977), which provides in pertinent part: "the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if: (a) The consumer complaining of the act or practice that violates this act has brought or maintained an action he knew to be groundless"

79. In California, which does not require special damages in malicious prosecution actions, a successful plaintiff can recover actual damages, including cost of defending the original suit, loss of time, injury to reputation, and mental suffering. *See, e.g., Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 847 (9th Cir. 1976); *Babb v. Superior Court*, 479 P.2d 379, 383 n.4, 92 Cal. Rptr. 179, 183 n.4 (1971) (in bank); *Allard v. Church of Scientology*, 129 Cal. Rptr. 797, 804 (Ct. App. 1976).

80. 418 U.S. 323 (1974).

injury, although there need be no evidence which assigns an actual dollar value to the injury.⁸¹

It is not unreasonable to hold the opposing attorney liable for injuries caused by his reckless conduct.⁸² Risk-creating conduct is one of the important factors to be weighed in determining the scope of one person's duty to another.⁸³ An opposing lawyer knows, or should know, that his conduct towards the adverse party in prosecuting a civil suit is risk-creating. Why should not the law's protection be extended as fully as possible to the adverse party so long as this extension does not place the opposing lawyer in a position of significant conflict regarding his duty to his client? To make the inquiry concrete, why should not the opposing lawyer owe a duty to the adverse party not to prosecute actions when to do so is so reckless in creating risks of harm to the adverse party that no prudent attorney would prosecute the action?

In this context "reckless" is used because it has close kinship to "manifestly erroneous," the term used by the Supreme Court of California to define the standard of care owed by the lawyer to his client in the case that the lawyer believes to be groundless on the facts.⁸⁴ The term "manifestly erroneous" is appropriate in that context because the issue is one of judgment in the fulfillment of a duty arising out of the attorney-client relationship. In the opposing lawyer/adverse party situation, however, the duty arises out of risk-creating conduct. Therefore, I believe "reckless" better describes the appropriate standard of care.⁸⁵

81. *Id.* at 349-50.

82. See Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 *CIN. L. REV.* 604, 621 (1976) (recklessness standard not unreasonably heavy burden). But see Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003, 1089-90 (1977) (traditional remedies of malicious prosecution and abuse of process adequately protect adverse parties from meritless suits without abridging right to prosecute meritorious claims). The solution proposed by one writer is to modify the malicious prosecution cause of action. See Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 *CASE W. RES. L. REV.* 653, 683-85 (1976). That author's third suggested modification was to redefine malice as "reckless disregard for the rights of the defendant." *Id.* at 685.

83. See materials cited note 56 *supra*.

84. See *Kirsch v. Duryea*, 578 P.2d 935, 939, 146 Cal. Rptr. 218, 222 (1978) (in bank).

85. *RESTATEMENT (SECOND) OF TORTS* § 500 (1976), defines reckless disregard of the physical safety of another. The definition, however, does not fit intentional conduct that causes only economic, emotional, and reputational harm. In the context of the groundless case, I define "reckless" conduct as intentional conduct that clearly indicates a lack of regard for the consequences inflicted on the other party.

There is another area of tort law that by analogy lends strong support to the use of the "reckless" standard; an area in which, like the area at issue, there is a strong public policy protecting activity from overly burdensome tort duties. The area is defamation of public officials or public figures by the media. The Supreme Court of the United States has held that because of the strong public policy protecting free speech and free press, as evidenced by the first amendment, the media should be protected from tort actions for defamation unless the plaintiff can establish malice. One of the definitions of malice applied by the Supreme Court in determining liability for a defamatory falsehood is "reckless disregard of whether it was false or not."⁸⁶ Public policy strongly encourages the bringing of disputes to court, even factually doubtful ones, but that policy certainly is not any more important than are the freedom of speech and press policies of the first amendment. If the tort duty in defamation cases is properly defined in terms of reckless conduct by the media, then the duty of opposing lawyers to adverse parties also can be properly stated in terms of a reckless conduct standard. I can find no valid justification for a more protective standard.⁸⁷

The "false light" invasion of privacy tort⁸⁸ also is useful by analogy although I do not believe it furnishes the appropriate tort standard for a suit by an adverse party against an opposing lawyer. In

86. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *accord*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

87. An Illinois appellate court, in support of the malicious prosecution standard, used the analogy of the absolute privilege granted to parties, counsel, or witnesses during judicial proceedings when a later defamation action is asserted against them. *See Lyddon v. Shaw*, 372 N.E.2d 685, 690 (Ill. App. Ct. 1978). *See generally* Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORDHAM L. REV.* 1003, 1042-48 (1977); Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 *CIN. L. REV.* 604, 617-18 (1976). That privilege is stated to be absolute so long as the statements are even tangentially relevant to the subject at issue. *See Umansky v. Urquhart*, 148 Cal. Rptr. 547, 549 (Ct. App. 1978). *See generally* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 114, at 777-81 (4th ed. 1971). I do not find this analogy to be persuasive. Even though the likelihood of success of a malicious prosecution action against an opposing lawyer is very slight, the lawyer is not granted an absolute immunity. The problem is one of line drawing in a manner that preserves the public interest in not chilling access to the courts and at the same time giving recognition to the adverse party's legitimate interest in being protected against the harms arising from a lawyer's prosecution of a groundless case. The issue concerns the kinds of actions that a lawyer should prosecute, not the kind of protection that should be given to those who testify in actions that are prosecuted. The analogy to the standard used in determining the extent to which statements are protected under the first amendment appears to me to be much closer in point.

88. *See* RESTATEMENT (SECOND) OF TORTS § 652E (1976).

*Time, Inc. v. Hill*⁸⁹ the Supreme Court of the United States used the malice test of *Sullivan*, which included "recklessness," in defining the duty of the defendant.⁹⁰ In at least one case an adverse party doctor attempted to use this "false light" invasion of privacy tort as an alternative to malicious prosecution; however, the attempt was unsuccessful.⁹¹

The invasion of privacy tort is inappropriate for use in solving the problem at issue for several reasons. A primary emphasis of this tort is on the plaintiff's situation rather than upon the conduct of the defendant, the latter being the place in which the emphasis should be placed when the opposing lawyer is the defendant. The "false light" invasion of privacy tort is broad in its potential sweep; the problem at hand requires that a tort be established that specifically confronts the duty of the opposing lawyer to the adverse party. An additional reason for rejecting the invasion of privacy tort is that it focuses on publicity given to the plaintiff and is therefore closely connected with the protections and limitations of the first amendment. This focus is an unnecessary complication in defining the opposing lawyer's duty to the adverse party when the problem is fundamentally reckless conduct in creating risks of economic, emotional, and relational harms to the adverse party rather than recklessness concerning the truth of the matters stated.⁹² In summary, I find the analogy helpful because this tort recognizes the "reckless" standard, but I do not think a "false light" invasion of privacy tort provides the appropriate vehicle for solution of the problem at issue.

Probably the strongest ground that can be mustered in opposition to the "reckless" standard is that it may chill the lawyer's willingness to prosecute doubtful actions.⁹³ The general concern is a legitimate one. If the concern relates to legal theories, the same test that

89. 385 U.S. 374 (1967).

90. *Id.* at 387, 388. See cases cited note 86 *supra*.

91. See *Wolfe v. Arroyo*, 543 S.W.2d 11, 13 (Tex. Civ. App.—San Antonio 1976, no writ) (court rejected invasion of privacy theory because all statements made in judicial proceedings are absolutely privileged).

92. See generally Green, *Political Freedom of the Press and the Libel Problem*, 56 TEXAS L. REV. 341 (1978). This thought-provoking article is the last in a long series of articles by the late Dean Leon Green, a scholar and teacher who continued to generate new ideas about and insights into tort law at the age of ninety. See also *Ohralik v. Ohio State Bar Ass'n*, ___ U.S. ___, ___, 98 S. Ct. 1912, 1918, 56 L. Ed. 2d 444, 450 (1978) (recognizing propriety of state regulation of conduct even though speech essential but subordinate part of activity).

93. This issue is discussed at length in *Berlin v. Nathan*, 381 N.E.2d 1367, 1375-76 (Ill. Ct. App. 1978). I think the court is guilty of overkill for the reasons expressed in this article's discussion of the malicious prosecution tort. See pages 68-71 *supra*.

defines the lawyer's duty to his client should be applied—a standard requiring that the lawyer have a good faith belief in his argument on behalf of his client for the modification, extension, or reversal of existing law.⁹⁴ Therefore, the “reckless” standard would not be applicable to the opposing lawyer's maintenance of actions against the adverse party on the basis of doubtful legal theories.

On the other hand, if the problem is one of the case being, in the opposing lawyer's opinion, groundless on the facts, I can perceive no public policy of merit in protecting him beyond a standard that provides that the lawyer should not prosecute the action when his decision to do so is so reckless in creating risks of harm to the adverse party that in similar circumstances no prudent lawyer would have prosecuted the action. The opposing lawyer owes no duty to his client to prosecute such an action.⁹⁵ I do not see value in a “no-liability” land between where the lawyer's duty to his client leaves off and the lawyer's duty to the adverse party begins. The competent lawyer who properly fulfills his obligation to his client has nothing to fear from a “reckless” standard; the incompetent, or worse, lawyer has much to fear from that standard. There is no justification for protecting the incompetent or unscrupulous lawyer from liability for his reckless conduct. The risks of harm created by the opposing lawyer's recklessness should not be placed upon the adverse party.

CONCLUSION

The Supreme Court of California has established the proper standard for the lawyer's duty to his client in the groundless case. Using that standard as the springboard, I contend that the opposing lawyer's duty to the adverse party should require greater protection than that presently recognized under the tort of malicious prosecution. I would define the standard of duty owed by the opposing lawyer to the adverse party as follows: the risk of harm is on the opposing lawyer when his prosecution of the case against the adverse party is so reckless in creating risks of harm to the adverse party that no prudent lawyer would have done so under the same or similar circumstances. This standard protects the public's interest in free access to the courts but at the same time affords meaningful protection to the adverse party.

94. See notes 7-22 *supra* and accompanying text.

95. See notes 28-34 *supra* and accompanying text.