Legal Opinion Letter

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LAWYERS BEWARE:
STATE HIGH COURT RULING EXPANDS TORT OF MALICIOUS PROSECUTION

by
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Recently, the California Supreme Court joined the ranks of several other jurisdictions, holding that an attorney may be liable for malicious prosecution for failing to voluntarily dismiss a lawsuit once he or she realizes the case lacks merit. *Zamos v. Stroud*, 32 Cal.4th 958 (2004).

Prior to *Zamos,* California courts had held that the malicious prosecution element of "legal tenability," or whether there was probable cause to sue in the underlying "maliciously prosecuted" action, was determined when the underlying lawsuit was filed. *Swat-Fame, Inc. v. Goldstein*, 101 Cal.App.4th 613, 627-629 (2002); *Vanzant v. DaimlerChrysler Corp.*, 96 Cal.App.4th 1283, 1290-1291 (2002); *Morrison v. Rudolph*, 103 Cal.App.4th 506, 514 (2002). If the attorney had a legally tenable basis for filing the lawsuit in the first place, that was sufficient to defeat a subsequent malicious prosecution claim. *Zamos* extended that principle, requiring lawyers to continuously reevaluate the viability of their lawsuit as the case progresses. In so ruling, the California Supreme Court joined thirteen other jurisdictions, adopting the "continuation rule" advocated by the Second Restatement of Torts.

No one would dispute that some parties ─ and their lawyers ─ take advantage of litigation, using the process as a tool for collateral advantage, to extract unwarranted settlements, or simply to exact revenge. And few would debate that overburdened, budget-conscious courts must come to grips with this problem. Beyond question, the California high court's attempt to stem such abuses is a laudable goal. However, as the saying goes, theory is one thing, practice another.

At first blush, the idea that the same standard should govern liability for initiation and continuation of lawsuits seems innocuous. But upon closer review, allowing malicious prosecution actions for the continuation of a lawsuit that *initially* had merit ─ but which later proved to be unwarranted ─ is not without its problems. When it comes to initiating an action, the lawyer may rely on the client's representation of facts, absent notice at the time that the client had provided false information. *Siebel v. Mittelsteadt* (2004) 118 Cal.App.4th 406, 421; *Morrison, supra,* 103 Cal.App.4th at 512-513. Evaluating tenability at the outset of the lawsuit requires only consideration of evidence available when the action was filed, evidence that is, in most cases, susceptible to straightforward objective analysis.

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But when it comes to deciding whether, when, and how tenability changes in the course of litigation-in-progress, the question becomes more difficult. It requires an evaluation of the entire case, including its ebbs and flows in the course of discovery, on a continuous and regular basis. By its very nature, litigation is filed because the parties have a factual and/or legal dispute. Discovery, with its many twists and turns, may answer questions, or it may raise more. Where one deposition or document may suggest that the case is a strong one, the next could demonstrate hidden weaknesses, with the balance shifting back and forth. *Zamos* is conspicuously silent on the practical ramifications of its "continuation rule" or how to address them in a real-world setting. How much discovery must be conducted before the attorney should withdraw? How does the lawyer, ethically compelled to put forward the client's position as persuasively as possible, decide the case has become objectively untenable? What are the trigger points that make a case that once could go either way legally untenable? And how do lawyers extricate themselves from such actions without harming the clients' interests? These questions, revolving around whether and when to abandon the case, can be matters of degree, and are often difficult to evaluate except with the benefit of hindsight.

For example, discovery may reveal what appears to be a smoking gun, potentially ruinous of the case. But trials have a way of turning smoking guns into water pistols. Witnesses recant, stories change, recollections fade, and often even the seemingly strongest evidence may be subject to interpretation. In other words, there can be a fine distinction between recognizing that a case has lost whatever legal tenability it may have had versus realizing the case has weaknesses, even serious ones.

Our American legal system is founded on the adversarial principle. The process works best when each lawyer zealously represents the client's interests within the bounds of professional responsibility and ethical rules. *Zamos*, by expanding counsel's liability for malicious prosecution, threatens to undermine that adversarial system, potentially pitting the lawyer's personal interest in avoiding a malicious prosecution suit against his/her duty to vigorously represent the client's interests. In borderline cases, lawyers fearful of personal exposure may be encouraged to abandon the case. Except in the most obvious situations, *Zamos*, though seeking to discourage lawsuits totally lacking in merit, threatens to cut too wide a swath, driving a wedge between attorneys' personal interests and their professional, fiduciary, loyalties, putting them between the proverbial rock and hard place.

The problem, of course, is that "borderline" cases can be difficult to identify except with the benefit of hindsight. Thus, the broadly-stated continuation rule, though commendable, threatens to chill vigorous advocacy and legitimate positions in the underlying case, and creates troubling practical and proof problems to boot. Even the California Supreme Court recognized that "[a]pplying the standard in any given case may be very difficult." *Zamos, supra,* 32 Cal.4th at 970. Nonetheless, *Zamos* quickly rejected defendant's public policy argument, that a "continuation rule" would dissuade lawyers from zealously representing their clients, requiring them to constantly second-guess the action's merits, and discouraging them from making new arguments to extend or change existing law.

The argument about changing or extending existing law is especially troubling. The common law is not a static series of rules, but an evolving set of principles that changes with the times, circumstances and needs of society and litigants. A legal theory that was novel (and scoffed at) yesterday may win the day tomorrow. To be sure, frivolous lawsuits must be discouraged, but the expansive *Zamos* continuation rule gives little guidance on how to separate the wheat from the chaff and, to its credit, the court candidly conceded that application of its principles may be "very difficult." That is the crux of the problem: the broad rule of general application threatens not just the frivolous, preposterous position. It creates a danger of wider, unavoidably chilling effects on lawyers who, in good faith, seek to challenge, question and push the outside of envelope. Until the courts provide more guidance and direction, in real-world situations, extra caution, for all counsel, should be the watchword of the day.