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# 4

## **Attorney Liability to Adversaries and Other Third Parties**

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## I. MALICIOUS PROSECUTION

### A. [4.1] In General/Elements of a Cause of Action

Claims for malicious prosecution and abuse of process are generally disfavored in Illinois because they have the chilling effect of restricting one's free access to the courts for fear of personal liability if one loses the case. Consequently, and due to the strict pleading requirements in Illinois, it is difficult to state a cause of action for malicious prosecution or abuse of process. Claims for malicious prosecution and abuse of process against attorneys in Illinois are not as common as those in other states, such as California. See 1 Ronald E. Mallen and Jeffrey M. Smith, *LEGAL MALPRACTICE* §6:8 (7th ed. 2007).

In order to state a cause of action for malicious prosecution, the plaintiff (former defendant) must allege facts establishing (1) the institution of civil proceedings by the defendant (former plaintiff), (2) termination of these proceedings in favor of the plaintiff (former defendant), (3) lack of probable cause for the proceedings, (4) malice on the part of the defendant (former plaintiff) in bringing the proceedings, and (5) special injury to the plaintiff (former defendant) as a result of the action. *See, e.g., Ross v. Mauro Chevrolet*, 369 Ill.App.3d 794, 861 N.E.2d 313, 308 Ill.Dec. 248 (1st Dist. 2006); *Sutton v. Hofeld*, 118 Ill.App.3d 65, 454 N.E.2d 681, 73 Ill.Dec. 584 (1st Dist. 1983); *Kurek v. Kavanagh, Scully, Sudow, White & Frederick*, 50 Ill.App.3d 1033, 365 N.E.2d 1191, 8 Ill.Dec. 805 (3d Dist. 1977).

In *Doyle v. Shlensky*, 120 Ill.App.3d 807, 458 N.E.2d 1120, 1127, 76 Ill.Dec. 466 (1st Dist. 1983), the court noted that "malicious use of process" is another name for malicious prosecution. In affirming the dismissal of the plaintiff's action, the appellate court concluded that the plaintiff's allegations that the defendant acted "maliciously and without probable cause" were mere conclusions of law, unsupported by specific facts. *Id.*

### B. [4.2] Termination in Plaintiff's Favor

Illinois courts have held that termination of a civil suit in favor of the plaintiff must be a judicial determination that deals with the factual issues. Voluntary dismissals, settlements, or even involuntary dismissals historically were not such terminations. *Sutton v. Hofeld*, 118 Ill.App.3d 65, 454 N.E.2d 681, 683, 73 Ill.Dec. 584 (1st Dist. 1983); *Kurek v. Kavanagh, Scully, Sudow, White & Frederick*, 50 Ill.App.3d 1033, 365 N.E.2d 1191, 1194, 8 Ill.Dec. 805 (3d Dist. 1977). *See also McDorman v. Smith*, 437 F.Supp.2d 768 (N.D.Ill. 2006) (explaining that dismissal by prosecutor does not operate as favorable termination under Illinois law). In *Sutton*, the plaintiff argued that he was dismissed from the underlying medical malpractice suit with prejudice and that such a dismissal was proof that the cause was terminated in his favor. The appellate court concluded that the designation "dismissal with prejudice," standing alone, did not establish a termination in plaintiff's favor. 454 N.E.2d at 683.

In *Savage v Seed*, 81 Ill.App.3d 744, 401 N.E.2d 984, 987, 36 Ill.Dec. 846 (1st Dist. 1980), the court noted that the requirement of a favorable legal termination in a prior action is a longstanding one (citing *Bonney v. King*, 201 Ill. 47, 66 N.E. 377 (1903)) that arises from the policy that "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" (quoting *Schwartz v. Schwartz*, 366 Ill. 247, 8 N.E.2d 668, 670 (1937)). The *Savage* court, citing *March v. Cacioppo*, 37 Ill.App.2d 235, 185 N.E.2d 397, 402 (1st Dist. 1962), stated that there are four principal reasons for requiring a favorable determination in the original action: (1) to show a lack of probable cause for bringing the action; (2) to avoid a collateral attack on a previous judgment; (3) to show that damages were suffered; and (4) to avoid securing recovery for the bringing of an action that another court may eventually find to be well-brought. *Id.*

The *Savage* court concluded that a voluntary dismissal of the original action did not constitute a favorable termination for purposes of establishing a cause of action for malicious prosecution. In doing so, the court concluded that a decision not on the merits of the original case cannot logically indicate a lack of probable cause in initiating the proceeding. The *Savage* court quoted *Siegel v. City of Chicago*, 127 Ill.App.2d 84, 261 N.E.2d 802, 814 (1st Dist. 1970), in which the court stated:

**We believe that the legal termination requirement necessitates a judgment which deals with the factual issues of the case, whether the judgment be rendered after a trial or upon motion for summary judgment. However, it is not sufficient to simply obtain a dismissal of the opponents' complaint, for such dismissal need bear no logical relationship to the legitimacy of the assertions contained therein; therefore, such dismissal lends no credence to the claim that the assertions [in the original complaint] were baseless.** 401 N.E.2d at 988.

In *Kurek, supra*, the court stated:

**Termination of the civil suit in favor of the plaintiff must be a judicial determination which deals with the factual issues. Voluntary dismissal (*Bonney v. King* (1903), 201 Ill. 47, 66 N.E. 377), settlement (*Schwartz v. Schwartz* (1937), 366 Ill. 247, 8 N.E.2d 668), or even involuntary dismissal (*Siegel v. City of Chicago* (1970), 127 Ill.App.2d 84, 261 N.E.2d 802) are not such terminations.** 365 N.E.2d at 1194.

*See Savage, supra; Smith v. Aaron, Aaron, Schimberg & Hess*, 112 Ill.App.3d 653, 445 N.E.2d 67, 70, 67 Ill.Dec. 775 (2d Dist. 1983). *See also Flores v. Dugan*, 91 Ill.2d 108, 435 N.E.2d 480, 61 Ill.Dec. 783 (1982) (dismissal for want of prosecution is not final and appealable order and thus not favorable termination); *Kay v. Boehm*, 32 Ill.App.3d 853, 336 N.E.2d 781 (2d Dist. 1975) (malicious prosecution action held premature because at time plaintiff filed suit, there had been no favorable termination of contempt charges against him).

In *Cult Awareness Network v. Church of Scientology International*, 177 Ill.2d 267, 685 N.E.2d 1347, 226 Ill.Dec. 604 (1997), however, the Illinois Supreme Court modified the standard by which a plaintiff can establish a favorable legal termination in the prior action. In *Cult Awareness Network*, the plaintiff alleged that the defendants conspired with each other to carry on a campaign of malicious prosecution for the express purpose of causing the plaintiff's bankruptcy and eventual disbandment. In particular, the plaintiff alleged that the defendants filed 21 meritless lawsuits against the plaintiff during a 17-month period in several jurisdictions across the country. Each of the underlying suits was alleged to have been terminated in the plaintiff's favor, either by summary judgment or by voluntary or involuntary dismissals.

The court held that a plaintiff could establish that an underlying lawsuit was terminated in his or her favor even if the lawsuit did not deal with the factual issues or end with an adjudication on the merits. In doing so, the Illinois Supreme Court followed the RESTATEMENT (SECOND) OF TORTS view on the issue of favorable termination:

*Termination in favor of the person against whom civil proceedings are brought.*  
Civil proceedings may be terminated in favor of the person against whom they are brought . . . by (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his failure to prosecute them. A favorable adjudication may be by a judgment rendered by a court after trial, or upon demurrer or its equivalent. In either case the adjudication is a sufficient termination of the proceedings, unless an appeal is taken. . . .

Whether a withdrawal or an abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought and whether the withdrawal is evidence of a lack of probable cause for their initiation, depends upon the circumstances under which the proceedings are withdrawn. [Emphasis added by court.] 685 N.E.2d at 1352, quoting RESTATEMENT (SECOND) OF TORTS §674, cmt. j (1977).

The court noted that the RESTATEMENT approach, which has been expressly adopted by various courts across the nation, allows dispositions that do not reach the merits of the underlying case to satisfy the favorable termination requirement in certain circumstances. The court concluded that under the RESTATEMENT approach, whether the requirement is met is to be determined not by the *form* or *title* given to the disposition of the prior proceeding, but by the circumstances under which that disposition is obtained. As a result, terminations that do not rise to the level of adjudications on the merits may satisfy the favorable termination requirement. For example, the court noted that if the dismissal was merely a formal means of securing a negotiated settlement, it cannot serve as the basis for a malicious prosecution action. 685 N.E.2d at 1353. On the other hand, an involuntary dismissal resulting from the plaintiff's failure to comply with discovery serves as a favorable termination because a party who fails to produce evidence, in essence, fails to prosecute. *Id.*

The Illinois Supreme Court concluded that a favorable termination is limited to only those legal dispositions that can give rise to an inference of lack of probable cause. *Id.* citing 54 C.J.S. *Malicious Prosecution* §54 (1987) (dismissal cannot serve as favorable termination if based solely on technical or procedural grounds). The *Cult Awareness Network* court concluded that the RESTATEMENT position best balances the right of citizens to have free access to our courts and the right of the individual to be free from being haled into court without reason, thereby better serving the interest of justice. Having adopted the RESTATEMENT approach, the court found that the plaintiff satisfied the favorable termination requirement, at least for purposes of the defendants' motion to dismiss under §2-615 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.* See 735 ILCS 5/2-615. The court noted that whether the dispositions of the underlying cases ultimately could be proved by the plaintiff to be indicative of a lack of probable cause remained a question of fact that could not be answered at that stage of the litigation. 685 N.E.2d at 1354.

In *Balthazar v. Dowling*, 65 Ill.App.3d 824, 382 N.E.2d 1257, 22 Ill.Dec. 559 (2d Dist. 1978), the plaintiffs filed suit against attorneys for the alleged negligent filing of a baseless medical malpractice action against them and for malicious prosecution. The appellate court affirmed the trial court's dismissal of the plaintiff's action for negligent filing of a baseless medical malpractice action. The *Balthazar* court noted that Illinois courts have refused to extend tort liability for the wrongful filing of a lawsuit beyond the parameters of an action for malicious prosecution or abuse of process. 382 N.E.2d at 1258 – 1259. See also *Safeway Insurance Co. v. Spinak*, 267 Ill.App.3d 513, 641 N.E.2d 834, 204 Ill.Dec. 404 (1st Dist. 1994); *Withall v. Capitol Federal Savings of America*, 164 Ill.App.3d 851, 518 N.E.2d 328, 115 Ill.Dec. 803 (1st Dist. 1987); *Lyddon v. Shaw*, 56 Ill.App.3d 815, 372 N.E.2d 685, 690, 14 Ill.Dec. 489 (2d Dist. 1978); *Pantone v. Demos*, 59, Ill.App.3d 328, 375 N.E.2d 480, 482, 16 Ill.Dec. 607 (1st Dist 1978); *Berlin v. Nathan*, 64 Ill.App.3d 940, 381 N.E.2d 1367, 1371, 21 Ill.Dec. 682 (1st Dist 1978).

### C. [4.3] Necessity of "Special Injury"

*Berlin v. Nathan*, 64 Ill.App.3d 940, 381 N.E.2d 1367, 21 Ill.Dec. 682 (1st Dist 1978), involved another of the many retaliatory actions that physicians in Illinois and other states who were sued for medical malpractice filed against both the original plaintiff and the original attorney who filed the malpractice suit. In *Berlin*, the plaintiff argued that the defendants owed him a duty to refrain from willfully and wantonly filing suit against him without having reasonable cause to believe that he had been guilty of medical malpractice and that they instituted the suit with reckless disregard as to the truth or falsity of the allegations. The plaintiff alleged that his reputation and his profession had been attacked, he had suffered mental anguish, he had been caused to devote much time to the defense of the malpractice suit, and that because of the suit, he would be required to pay increased premiums for his insurance coverage.

The appellate court in *Berlin* held that the plaintiff failed to state a claim for malicious prosecution against any of the defendants. The *Berlin* court noted that the law does not look with favor on malicious prosecution suits and that there are strict limitations on the availability of these suits. The court concluded that the plaintiff failed to establish the last two elements of the cause of action (*i.e.*, that the prior cause terminated in the plaintiff's favor and special injury not necessarily resulting in any and all suits prosecuted to recover for like causes of action). The court noted that the only damages the plaintiff claimed he suffered were that (1) his reputation and his profession was attacked, (2) he suffered mental anguish, (3) he was forced to spend time on the defense, and (4) he was required to pay increased insurance premiums.

The *Berlin* court found that the first three items of claimed damage were so patently common to all litigation that no discussion was warranted. The court also held that an increase in insurance premiums, while perhaps not a necessary result of the litigation, was an item necessarily incident to all malpractice cases and was not therefore amounting to damages suffered specially by plaintiff as distinct from other physicians who had been sued. 381 N.E.2d at 1371. See also *Schwartz v. Schwartz*, 366 Ill. 247, 8 N.E.2d 668 (1937) (special injury required); *Pantone v. Demos*, 59 Ill.App.3d 328, 375 N.E.2d 480, 16 Ill.Dec. 607 (1st Dist 1978) (same); *Savage v. Seed*, 81 Ill.App.3d 744, 401 N.E.2d 984, 987, 36 Ill.Dec. 846 (1st Dist. 1980) (special injury required is injury "over and above the ordinary expense and trouble attendant upon the defense of an ordinary civil suit"), quoting *Schwartz, supra*, 8 N.E.2d at 671.

In *Lasswell v. Ehrlich*, 92 Ill.App.3d 935, 416 N.E.2d 423, 48 Ill.Dec. 392 (2d Dist. 1981), an attorney filed suit against a former client and others for malicious prosecution of a legal malpractice suit against him. The plaintiff argued that the “special injury” requirement was not applicable since a legal malpractice action is a suit which is itself “unusual in its effect upon the defendant.” 416 N.E.2d at 424, quoting *Norin v. Scheldt Manufacturing Co.*, 297 Ill. 521, 130 N.E. 791, 793 (1921). The appellate court held that an attorney was not excused from the requirement of pleading special injury. The court found no distinguishing features of legal malpractice suits that would make them susceptible to any unique or particular injuries over and above the type of injuries commonly incident to medical malpractice suits. *Compare Burnap v. Marsh*, 13 Ill. 535 (1852) (attorney will be liable for maliciously procuring arrest when attorney knew there was no cause of action).

In *Stopka v. Lesser*, 82 Ill.App.3d 323, 402 N.E.2d 781, 37 Ill.Dec. 779 (1st Dist. 1980), the plaintiff argued that the court should modify the Illinois Supreme Court’s prior decisions by expanding the standard of injury sufficient to support an action for wrongful litigation. In support of this argument, the plaintiff contended that the strict requirements necessary to state a cause of action for malicious prosecution do not afford substantial protection to those who suffer actual damage by the wrongful filing of litigation against them. In support of the plaintiff’s contention, his appellate brief contained a table showing the final resolution of malicious prosecution lawsuits brought to trial in Illinois since 1848. Of the 191 cases tried, the plaintiff claimed that plaintiffs had been successful in only eight actions arising out of an underlying civil suit. As of 1980, not one action had been terminated in a plaintiff’s favor since 1934. 402 N.E.2d at 783 n.3.

The *Stopka* court noted that it was not within its authority to overrule the Illinois Supreme Court or to modify its decisions, and the court was therefore compelled to hold that the plaintiff failed to satisfy the “special injury” requirements. The appellate court did, however, state that it believed a reassessment of the special damages requirement was appropriate. 402 N.E.2d at 783 – 784. To date, however, the Illinois Supreme Court has not modified the special injury requirement.

In *Cult Awareness Network v. Church of Scientology International*, 177 Ill.2d 267, 685 N.E.2d 1347, 226 Ill.Dec. 604 (1997), the Illinois Supreme Court noted that a common theme with respect to the special injury rule that runs throughout all of the court’s opinions on the subject, including *Shedd v. Patterson*, 302 Ill. 355, 134 N.E. 705 (1922), is the Supreme Court’s recognition of its responsibility to maintain a proper balance between the societal interest in preventing harassing suits and in permitting the honest assertion of rights in our courts. The *Cult Awareness Network* court held that it is this balance that lies at the heart of the special injury rule. The court held that the plaintiff satisfied the special injury rule to state a cause of action. In doing so, the court stated:

**The invidiousness of the alleged conspiracy is best reflected in the fact that plaintiff was sued 21 times over the course of a 17-month period in jurisdictions ranging from New York to California. Such a sustained onslaught of litigation can hardly be deemed “ordinary” if plaintiff can prove that the actions were brought without probable cause and with malice.** 685 N.E.2d at 1356.

735 ILCS 5/2-109 was one of a number of provisions added to the Code of Civil Procedure in 1985 by P.A. 84-7 (eff. Aug. 15, 1985), which was passed by the Illinois General Assembly in response to what was perceived to be a crisis in the area of medical malpractice litigation. *See DeLuna v. St. Elizabeth's Hospital*, 147 Ill.2d 57, 588 N.E.2d 1139, 1142, 167 Ill.Dec. 1009 (1992). Section 2-109 provides:

**In all cases alleging malicious prosecution arising out of proceedings which sought damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff need not plead or prove special injury to sustain his or her cause of action. In all such cases alleging malicious prosecution, no exemplary or punitive damages shall be allowed.** 735 ILCS 5/2-109.

In *Miller v. Rosenberg*, 196 Ill.2d 50, 749 N.E.2d 946, 255 Ill.Dec. 464 (2001), a unanimous Illinois Supreme Court, speaking through Justice McMorrow, ruled that §2-109 was constitutional. The court held that the classification contained in the statute was rationally related to a legitimate governmental interest in curtailing frivolous medical malpractice actions and therefore did not violate the prohibition against special legislation, right to equal protection, or guarantee of due process. The court relied heavily on its analysis in *Bernier v. Burris*, 113 Ill.2d 219, 497 N.E.2d 763, 100 Ill.Dec. 585 (1986), in which the court conducted a thorough analysis of challenges to earlier medical malpractice reform legislation, upholding some provisions as bearing a rational relationship to legitimate state interests, while striking down others as unconstitutional. In *Miller*, the Illinois Supreme Court also concluded that an affidavit from a healthcare professional filed pursuant to 735 ILCS 5/2-622 will not insulate the patient-plaintiff from a malicious prosecution claim.

Illinois courts have rejected plaintiffs' attempts to create a new cause of action for the willful filing of an allegedly frivolous action based on the argument that Article I, §12, of the Illinois Constitution requires such an action. Article I, §12, states:

**Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.**

In so rejecting this new cause of action, Illinois courts have noted that Article I, §12 "is 'an expression of a philosophy and not a mandate that a 'certain remedy' be provided in any specific form or that the nature of the proof necessary to the award of a judgment or decree continue without modification.'" *Berlin, supra*, 381 N.E.2d at 1374, quoting *Sullivan v. Midlothian Park District*, 51 Ill.2d 274, 281 N.E.2d 659, 662 (1972). As long as some remedy for the alleged wrong exists, Article I, §12 does not mandate recognition of any new remedy. The *Berlin* court noted that in this type of case, one may file an action for malicious prosecution, or perhaps for abuse of process, and even if these two remedies are not applicable, the plaintiff could recover attorneys' fees under §41 of the Civil Practice Act (Ill.Rev.Stat. (1977), c. 110, ¶41), the predecessor to Illinois Supreme Court Rule 137. The *Berlin* court held, however, that the mere fact that the relief provided by these remedies is limited, or that the plaintiff is unable to meet the burden of proof required, does not dictate the creation of new remedies. *See also Pantone, supra; Lyddon v. Shaw*, 56 Ill.App.3d 815, 372 N.E.2d 685, 690, 14 Ill.Dec. 489 (2d Dist. 1978).

The *Berlin* court also noted that it would be contrary to public policy to hold that an attorney has a duty to an intended defendant not to file a weak or perhaps frivolous lawsuit since it would create an insurmountable conflict of interest between the attorney and the client.

#### D. [4.4] Statute of Limitations

735 ILCS 5/13-202 establishes a two-year statute of limitations for malicious prosecution actions. *Jackson v Edelman*, 281 Ill.App.3d 256, 666 N.E.2d 785, 217 Ill.Dec. 116 (1st Dist 1996); *Withall v Capital Federal Savings of America*, 155 Ill.App.3d 537, 508 N.E.2d 363, 108 Ill.Dec. 202 (1st Dist. 1987) (§13-202 covers any action for tortious use of legal process).

## II. ABUSE OF PROCESS

#### A. [4.5] In General/Elements of a Cause of Action

To establish a cause of action for abuse of process, the plaintiff must plead and prove facts establishing (1) an ulterior purpose by the defendant in the regular use of regular court process and (2) the use of regular judicial process for an improper purpose. *Kumar v. Bornstein*, 354 Ill.App.3d 159, 820 N.E.2d 1167, 290 Ill.Dec. 100 (2d Dist. 2004); *Neurosurgery & Spine Surgery, S.C. v. Goldman*, 339 Ill.App.3d 177, 790 N.E.2d 925, 274 Ill.Dec. 152 (2d Dist. 2003); *Kirchner v. Greene*, 294 Ill.App.3d 672, 691 N.E.2d 107, 229 Ill.Dec. 171 (1st Dist. 1998); *Sutton v. Hofeld*, 118 Ill.App.3d 65, 454 N.E.2d 681, 73 Ill.Dec. 584 (1st Dist. 1983); *Kurek v. Kavanagh, Scully, Sudow, White & Frederick*, 50 Ill.App.3d 1033, 365 N.E.2d 1191, 1195, 8 Ill.Dec. 805 (3d Dist. 1977). Specifically, the defendant must have intended to use the action to accomplish some purpose that could not be accomplished through the suit. *Kurek, supra*, 365 N.E.2d at 1195. The court must determine whether the defendant could have achieved some other purpose by filing an action that could not otherwise be achieved. *Sutton, supra*, 454 N.E.2d at 683.

In *Sutton*, the court agreed with the defendant that an appropriate use of the legal system is to seek money damages for an alleged wrong, and the plaintiff's argument that the sole purpose of the suit was to force payment of damages by his insurance carrier was without merit. Further, the mere filing of a lawsuit, even with a malicious motive, does not constitute an abuse of process. *Kurek, supra*, 365 N.E.2d at 1195.

#### B. [4.6] Use of Process

“Process” is defined as “any means used by the court to acquire or to exercise its jurisdiction over a person or over specific property.” *Doyle v. Shlensky*, 120 Ill.App.3d 807, 458 N.E.2d 1120, 1128, 76 Ill.Dec. 466 (1st Dist. 1983), quoting *Holiday Magic, Inc. v. Scott*, 4 Ill.App.3d 962, 282 N.E.2d 452, 456 (1st Dist. 1972). Process is issued by the court under its official seal and must be distinguished from pleadings, which are created and filed by the litigants. *Doyle, supra*. In *Doyle*, the plaintiff alleged that the defendant-attorney threatened disclosure to the plaintiff's employer of the report of the plaintiff's psychiatric examination unless he accepted the property settlement and divorce decree. The appellate court held that even assuming the truth of the plaintiff's

allegations, the plaintiff alleged no misuse of the court's process. The psychiatric report, even though obtained pursuant to a court order, was not issued by the court and could not be considered a process of the court. The plaintiff failed to allege an improper use of the court order, itself, and neither did he allege that the divorce action was filed for any ulterior purpose.

### C. [4.7] Misuse or Misapplication of Process

The second element regarding the need for misuse or misapplication of process is essential to the maintenance of an abuse of process action. Illinois courts have repeatedly held that the mere institution of proceedings does not, in and of itself, constitute abuse of process. Some act must be alleged whereby there has been a misuse or perversion of the process of the court. It is well-established law in Illinois that the mere institution of a suit or proceeding, even with a malicious intent or motive, does not itself constitute an abuse of process. In *Bonney v. King*, 201 Ill. 47, 66 N.E. 377, 378 (1903), the Illinois Supreme Court stated:

**Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. . . . Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process.** [Citation omitted.]

*See also Kumar v. Bornstein*, 354 Ill.App.3d 159, 820 N.E.2d 1167, 290 Ill.Dec. 100 (2d Dist. 2004); *Neurosurgery & Spine Surgery, S.C. v. Goldman*, 339 Ill.App.3d 177, 790 N.E.2d 925, 274 Ill.Dec. 152 (2d Dist. 2003); *Kirchner v. Greene*, 294 Ill.App.3d 672, 691 N.E.2d 107, 229 Ill.Dec. 171 (1st Dist. 1998); *Holiday Magic, Inc. v. Scott*, 4 Ill.App.3d 962, 282 N.E.2d 452 (1st Dist. 1972). In *Holiday Magic*, the court noted that to constitute an abuse of the process in the legal sense, there must be some act in the use of the process that is not proper in the regular course of the proceedings. This element has been generally defined by Illinois courts as existing only in instances in which the plaintiff has suffered an actual arrest or a seizure of property. 282 N.E.2d at 457.

In *Erlich v. Lopin-Erlich*, 195 Ill.App.3d 537, 553 N.E.2d 21, 142 Ill.Dec. 671 (1st Dist. 1990), a husband engaged in marriage dissolution proceedings filed suit against his wife and her attorneys alleging that a temporary restraining order (TRO) that blocked the disposal of marital assets was abuse of process. The appellate court affirmed the dismissal of the plaintiff's alleged claim, holding that seeking a TRO was not extraneous to the purpose of marriage dissolution proceedings and that the plaintiff therefore failed to state a cause of action, even if representations made to the court to obtain the TRO were false.

In *Executive Commercial Services, Ltd. v. Daskalakis*, 74 Ill.App.3d 760, 393 N.E.2d 1365, 31 Ill.Dec. 58 (2d Dist. 1979), the court held that an amended counterclaim stated a cause of action for abuse of process. The counter-plaintiff alleged that the holding of her as hostage to extract money from the codefendants was the type of ulterior purpose envisioned by the tort of abuse of process. The court concluded that if she could prove her allegations that a writ ne exeat was obtained for an improper purpose, she was entitled to relief.

#### D. [4.8] Statute of Limitations

735 ILCS 5/13-202 establishes a two-year statute of limitations for abuse of process actions. *Withall v. Capital Federal Savings of America*, 155 Ill.App.3d 537, 508 N.E.2d 363, 108 Ill.Dec. 202 (1st Dist. 1987) (§13-202 covers any action for tortious use of legal process).

### III. UNAUTHORIZED FILING

#### A. [4.9] In General/Elements for a Cause of Action

In very limited situations, Illinois courts have also recognized a cause of action for the unauthorized filing of a lawsuit. *Safeway Insurance Co. v. Spinak*, 267 Ill.App.3d 513, 641 N.E.2d 834, 204 Ill.Dec. 404 (1st Dist. 1994); *Merriman v. Merriman*, 290 Ill.App. 139, 8 N.E.2d 64 (1st Dist. 1937). In *Merriman*, the First District Appellate Court recognized a cause of action in favor of the defendant in a legal proceeding against the attorney who instituted the proceeding without authority from the putative plaintiff. The court distinguished the action from malicious prosecution and abuse of process. Relying on authority from other jurisdictions, the *Merriman* court held:

[I]t is an actionable wrong to bring suit in another's name without authority . . . and if the defendant in such action suffers injury by reason of the prosecution of the unauthorized suit against him, he may maintain an action for the actual damages sustained by him in the loss of time, and for money paid to procure the discontinuance of the suit. [Citations omitted.] 8 N.E.2d at 64.

Similarly, in *Safeway Insurance*, *supra*, the plaintiff filed suit against the defendant attorneys, alleging that they had filed an unauthorized lawsuit against the plaintiff. The trial court dismissed the plaintiff's action on the basis that it was time-barred by the two-year statute of limitations applicable to malicious prosecution and abuse process claims. The plaintiff appealed, and the appellate court reversed. The appellate court recognized a cause of action for unauthorized filing.

The court in *Safeway Insurance* recognized that access to our courts as a vehicle for resolving private disputes is a fundamental component of our judicial system and public policy demands that litigants who, in good faith, present their claims to our courts for determination be free to do so without fear of being sued for seeking to enforce their rights. 641 N.E.2d at 836. Consequently, Illinois courts have resisted attempts to enlarge on the tort liability of litigants beyond the ill-favored actions for malicious prosecution and abuse of process. *Id.*, citing *Lyddon v Shaw*, 56 Ill.App.3d 815, 372 N.E.2d 685, 690, 14 Ill.Dec. 489 (2d Dist. 1978). Ultimately, however, the court in *Safeway Insurance* concluded that the claim asserted by the plaintiff did not impact on the litigants; it sought redress against those who set the judicial system in motion when there was no litigant seeking to enforce a right. The court noted that when an unauthorized action is filed, there is nothing for a court to determine; there are no claims presented to resolve.

## B. [4.10] Statute of Limitations

*Safeway Insurance Co. v Spinak*, 267 Ill.App.3d 513, 641 N.E.2d 834, 204 Ill.Dec. 404 (1st Dist. 1994), concluded that a claim for unauthorized filing is a separate and distinct action from malicious prosecution or abuse of process and that the limitation period for such an action is not specifically provided for. It is therefore governed by the five-year limitations period contained in 735 ILCS 5/13-205.

# IV. DEFAMATION

## A. [4.11] Defamation Per Se

In general, in order to state a cause of action for defamation, the plaintiff must plead facts to show (1) that the defendant made a false statement concerning him or her, (2) that there was an unprivileged publication to a third-party with fault by the defendant, and (3) that the publication caused damage to the plaintiff. *Weber v. Cueto*, 253 Ill.App.3d 509, 624 N.E.2d 442, 191 Ill.Dec. 593 (5th Dist. 1993). A publication is actionable per se, however, if it is "so obviously and naturally harmful to the person to whom it refers that a showing of special damages is unnecessary." *Owen v. Carr*, 113 Ill.2d 273, 497 N.E.2d 1145, 1147, 100 Ill.Dec. 783 (1986).

Words are considered defamatory per se in Illinois only if they (1) impute the commission of a criminal offense, (2) impute infection with a loathsome communicable disease, (3) impute inability to perform or want of integrity in discharge of duties of office or employment, or (4) prejudice a party, or impute lack of ability, in his or her trade. *See, e.g., Mullen v. Solber*, 271 Ill.App.3d 442, 648 N.E.2d 950, 208 Ill.Dec. 28 (1st Dist. 1995) (defamation action against attorney who accused another lawyer in open court of being intoxicated). Whether a statement is defamatory is a question of law for the trial court. *Anderson v. Matz*, 67 Ill.App.3d 175, 384 N.E.2d 759, 761, 23 Ill.Dec. 852 (1st Dist. 1978).

### 1. [4.12] The Innocent Construction Rule

Even if words fall into a per se category, the claim will not be actionable if the words are capable of an innocent construction. *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 672 N.E.2d 1207, 1215, 220 Ill.Dec. 195 (1996). The innocent construction rule, as explained by the Illinois Supreme Court in *Bryson*, requires a court

**to consider a written or oral statement in context, giving the words, and their implications, their natural and obvious meaning. If, so construed, a statement "may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*."** *Id*, quoting *Chapski v. Copley Press*, 92 Ill.2d 344, 442 N.E.2d 195, 199, 65 Ill.Dec. 884 (1982).

*See also Anderson v. Vanden Dorpel*, 172 Ill.2d 399, 667 N.E.2d 1296, 1302, 217 Ill.Dec. 720 (1996), in which the court held that whether a statement is capable of an innocent construction is a question of law. Only the court may determine whether an allegation is capable of an innocent

construction, and this determination can be made from the four corners of the complaint. Illinois courts have held that trial courts may properly apply the innocent construction rule when ruling on motions to dismiss under both 735 ILCS 5/2-615 and 5/2-619. *Becker v. Zellner*, 292 Ill.App.3d 116, 684 N.E.2d 1378, 226 Ill.Dec. 175 (2d Dist. 1997).

The innocent construction rule only applies to actions for defamation per se. *Mittelman v. Witous*, 135 Ill.2d 220, 552 N.E.2d 973, 979, 142 Ill.Dec. 232 (1989). “The rigorous standard of the modified innocent construction rule favors defendants in *per se* actions in that a nondefamatory interpretation must be adopted if it is *reasonable*.<sup>1</sup> [Emphasis in original.] *Anderson, supra*, 667 N.E.2d at 1302, quoting *Mittelman, supra*, 552 N.E.2d at 979. Finally, the innocent construction rule does not allow for the trial court to balance reasonable constructions or to decide which interpretation is more reasonable than the other. *Harte v. Chicago Council of Lawyers*, 220 Ill.App.3d 255, 581 N.E.2d 275, 279, 163 Ill.Dec. 324 (1st Dist. 1991).

Applying the innocent construction rule, Illinois courts have dismissed defamation claims involving some very harsh language. For example, in *Gardner v. Senior Living Systems, Inc.*, 314 Ill.App.3d 114, 731 N.E.2d 350, 352, 246 Ill.Dec. 822 (1st Dist. 2000), the appellate court held that a letter describing the plaintiff’s conduct as “unethical” and “illegal” was subject to an innocent construction and not defamatory. In *Gardner*, the plaintiff alleged that letters published by the defendants to their present and potential customers falsely accused her of being unethical and taking actions that were illegal. The letters stated:

**It has recently come to our attention that one of our former support employees, Lynda Gardner, has in fact been soliciting SLS clients and contracting her services. Lynda’s actions are at a minimum unethical and because she left with [SLS] software, we believe illegal.** 731 N.E.2d at 354.

The *Gardner* court initially noted that standing alone, the word “illegal” may be innocently construed because it does not necessarily connote the commission of a criminal offense. 731 N.E.2d at 355.

Additionally, the court rejected the plaintiff’s claim that the letters falsely accusing her of being unethical based on her solicitation of SLS customers and her refusal to sign a nondisclosure agreement were defamatory per se because they imputed lack of integrity in her employment. The *Gardner* court found that these statements were not reasonably capable of the defamatory meaning ascribed to them by the plaintiff. In particular, the court held that merely calling the plaintiff “unethical” could not be reasonably interpreted as stating actual verifiable facts and, therefore, the statements were constitutionally protected opinion. *Id.* The *Gardner* court ultimately held, however, that the plaintiff pled sufficient facts to state a claim.

In *Chapski, supra*, the Illinois Supreme Court reversed the appellate court, which had held that the defendant’s statement that the plaintiff, an attorney, “skirt[ed] the ethics” and engaged in “shenanigans” had to be innocently construed and need not be read as an accusation of impropriety. See *Chapski v. Copley Press*, 100 Ill.App.3d 1012, 427 N.E.2d 638, 640, 56 Ill.Dec. 443 (2d Dist. 1981). The appellate court in *Chapski* had concluded that although the published articles were highly critical of the court system and the plaintiff’s conduct within the system, they

did not charge the plaintiff with any illegal act and neither did they suggest that he was incompetent. *See also Doherty v. Kahn*, 289 Ill.App.3d 544, 682 N.E.2d 163, 170 – 172, 224 Ill.Dec. 602 (1st Dist. 1997) (defendants' statements to potential customers that plaintiff was "incompetent," "lazy," "dishonest," "cannot manage a business," and "lacks the ability to perform landscaping services" were held to be mere expressions of opinion and non-actionable); *Anderson, supra*, 667 N.E.2d at 1302 (defendant's statement that plaintiff-employee did not follow up on assignments innocently construed); *Harte, supra*, 581 N.E.2d at 276 (defendants' statement that "with regard to disciplining attorneys implicated in Operation Greylord, the Supreme Court has treated less prominent attorneys far more harshly than prominent ones with similar ethical lapses" innocently construed); *Valentine v. North American Company for Life & Health Insurance*, 60 Ill.2d 168, 328 N.E.2d 265, 266 (1974) (defendant's statement that plaintiff was "a lousy agent" innocently construed).

In *L.W.C. Agency, Inc. v. St. Paul Fire & Marine Insurance Co.*, 125 A.D.2d 371, 509 N.Y.S.2d 97 (1986), the plaintiffs filed suit against St. Paul Insurance and its attorney for defamation after they sent a letter that stated St. Paul was denying an insured's claim and rescinding the policy based on misrepresentations in the application. The appellate court affirmed the dismissal of the claim because there was "no characterization in said statement indicating that those misrepresentations were made fraudulently, rather than by inadvertence." 125 A.D.2d at 374. The appellate court agreed with the trial court's conclusion that "in the absence of a characterization in the letter of the alleged misrepresentations as fraudulent, the language of which plaintiffs complain is not viewed by this Court as defamatory [of the plaintiffs]." *Id.*

## 2. [4.13] Constitutionally Protected Opinions

Even if the words used could be considered to fall within one of the defamatory per se categories, they may not be actionable if they are constitutionally protected expressions of opinion. *Mittelman v. Witous*, 135 Ill.2d 220, 552 N.E.2d 973, 142 Ill.Dec. 232 (1989) (general discussion of publication of fact versus opinion). The Illinois Supreme Court in *Mittelman* adopted the four-part analysis set forth in *Ollman v. Evans*, 750 F.2d 970 (D.C.Cir. 1984), *cert. denied*, 105 S.Ct. 2662 (1985), to supplement, rather than replace, the analytical framework of RESTATEMENT (SECOND) OF TORTS §566 (1977). The four-part analysis requires the court to determine (a) whether the statement has a precise core of meaning for which a consensus of understanding exists, or conversely, whether the statement is indefinite and ambiguous; (b) whether the statement is actually verifiable (*i.e.*, capable of being objectively characterized as true or false); (c) whether the literary context of the statement would influence the average reader's readiness to infer that a particular statement has factual content; and (d) whether the broader social context or setting in which the statement appears signals a usage as either fact or opinion. *Mittelman, supra*, 552 N.E.2d at 984.

## 3. [4.14] Truth

If a statement is true, then the publisher of the statement cannot be held liable for defamation, either per se or per quod. *Wynne v. Loyola University of Chicago*, 318 Ill.App.3d 443, 741 N.E.2d 669, 675, 251 Ill.Dec. 782 (1st Dist. 2000). Only "substantial truth" is required for this defense,

and whether a statement is substantially true is properly decided as a matter of law when no reasonable jury could find that substantial truth had not been established. 741 N.E.2d at 675 – 676.

## B. [4.15] Defamation Per Quod

Statements are considered defamatory per quod if the defamatory character of the statement is not apparent on its face and extrinsic facts are required to explain its defamatory meaning. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 607 N.E.2d 201, 206, 180 Ill.Dec. 307 (1992). Statements are actionable per quod if they necessitate extrinsic facts or innuendo to explain their defamatory meaning and require evidence demonstrating that substantial injury resulted to the plaintiff from this use. *Schaffer v. Zekman*, 196 Ill.App.3d 727, 554 N.E.2d 988, 991, 143 Ill.Dec. 916 (1st Dist. 1990). “Illinois courts have consistently stated that general allegations such as damage to one’s health or reputation, economic loss, and emotional distress are insufficient to state a cause of action for defamation *per quod*.” *Kurczaba v. Pollock*, 318 Ill.App.3d 686, 742 N.E.2d 425, 433, 252 Ill.Dec. 175 (1st Dist. 2000). In *Kurczaba*, the court considered whether the plaintiffs’ allegations that they “suffered a loss of business and income” and “suffered great embarrassment, public humiliation, mental anguish and emotional distress” were sufficient allegations of special damages to support their defamation per quod claim. 742 N.E.2d at 434. The *Kurczaba* court noted that “most courts have found allegations to be insufficient to allege special damages.” 742 N.E.2d at 433. The court affirmed the dismissal of the plaintiffs’ defamation per quod claim.

## C. [4.16] Privileges

Whether a defamatory statement is protected by an absolute, qualified, or conditional privilege is a question of law for the court. *Layne v. Builders Plumbing Supply Co.*, 210 Ill.App.3d 966, 569 N.E.2d 1104, 1106, 155 Ill.Dec. 493 (2d Dist. 1991). The issue of privilege may be raised by and determined on a motion to dismiss under 735 ILCS 5/2-619. *O’Donnell v. Field Enterprises, Inc.*, 145 Ill.App.3d 1032, 491 N.E.2d 1212, 1219, 96 Ill.Dec. 752 (1st Dist. 1986).

### 1. [4.17] Absolute Privilege

“An attorney is absolutely privileged to publish defamatory matter concerning another . . . during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.” *Thompson v. Frank*, 313 Ill.App.3d 661, 730 N.E.2d 143, 145, 246 Ill.Dec. 463 (3d Dist. 2000), citing RESTATEMENT (SECOND) OF TORTS §586 (1977). The *Thompson* court stated that the absolute privilege “provides a complete bar to a claim for defamation, regardless of the defendant’s motive or the unreasonableness of his conduct. . . . In light of the complete immunity provided by an absolute privilege, the classification of absolutely privileged communications is necessarily narrow.” [Citation omitted.] *Id.*

The privilege is based on the “public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients.” *Kurczaba v. Pollock*, 318 Ill.App.3d 686, 742 N.E.2d 425, 438, 252 Ill.Dec. 175 (1st Dist. 2000), quoting RESTATEMENT

(SECOND) OF TORTS §586, cmt. a (1977). As a matter of public policy, when an absolute privilege is granted, no cause of action for defamation lies against the person making the statement, even if it is made with malice. *Starnes v. International Harvester Co.*, 141 Ill.App.3d 652, 490 N.E.2d 1062, 1063, 96 Ill.Dec. 26 (4th Dist. 1986). Illinois courts have refused to extend the attorney litigation privilege to third-party communications unrelated to a lawsuit or other judicial proceeding. *Kurczaba, supra*, 742 N.E.2d at 440.

Under Illinois law, however, anything said or written in the course of a legal, judicial, or quasi-judicial proceeding, including out-of-court communications between attorneys and their clients, is protected by an absolute privilege. *Skopp v. First Federal Savings of Wilmette*, 189 Ill.App.3d 440, 545 N.E.2d 356, 136 Ill.Dec. 832 (1st Dist. 1989); *Lipco Corp. v. Adams*, 100 Ill.App.3d 314, 426 N.E.2d 1130, 55 Ill.Dec. 805 (1st Dist. 1981); *Zanders v. Jones*, 680 F.Supp. 1236 (N.D.Ill. 1988), *aff'd*, 872 F.2d 424 (7th Cir. 1989); *Parrillo, Weiss & Moss v. Cashion*, 181 Ill.App.3d 920, 537 N.E.2d 851, 130 Ill.Dec. 522 (1st Dist 1989) (law firm's defamation action against president of trial lawyers association arising from letter defendant sent to Department of Insurance requesting investigation of claims practices dismissed because even assuming statements were defamatory, they were absolutely privileged because letter was preliminary step to quasi-judicial proceeding).

The only requirement for the absolute privilege to apply is that the communication pertain to proposed or pending litigation or a quasi-judicial proceeding. *Popp v. O'Neil*, 313 Ill.App.3d 638, 730 N.E.2d 506, 246 Ill.Dec. 481 (2d Dist. 2000) (privilege applied to preliminary legal consultation between attorney and potential client); *Lipco, supra*. Further, the pertinency requirement is liberally applied, and the communication need not be confined to specific issues involved in the litigation. *Skopp, supra*. When the question of pertinency is raised, all doubts will be resolved in favor of a conclusion that the communication is pertinent or relevant. *Weiler v. Stern*, 67 Ill.App.3d 179, 384 N.E.2d 762, 23 Ill.Dec. 855 (1st Dist. 1978).

The absolute privilege reflects Illinois' public policy determination that regardless of how wrongful the statements are, the ends to be served by permitting the statements in the course of a legal proceeding outweigh the harm that may be done to the reputation to others. *Zanders, supra*, 680 F.Supp. at 1238. In *Zanders*, the court dismissed with prejudice an action filed against attorneys for defamation and for alleged violations of the standards of professional responsibility. The court held that the defendant attorneys' statements were absolutely privileged, and stated:

**The issue of privilege is for the court, the only question being whether the alleged defamatory statements were made in the course of a legal proceeding. . . . If they were, they are simply not actionable as a matter of law, even assuming that they are false.**

\* \* \*

**The law in Illinois is clear, however, that the privilege applicable to communications made in the course of a legal proceeding is an absolute one, which leaves no room for qualification. Because any statements made by defendant Jones were made in the course of a legal proceeding, and thus are absolutely privileged, plaintiff's defamation claim in Count I must be dismissed.** 680 F.Supp. at 1338 – 1339.

It is also well-established that all statements, even if defamatory, made during legislative proceedings are absolutely privileged. *Joseph v. Collis*, 272 Ill.App.3d 200, 649 N.E.2d 964, 972, 208 Ill.Dec. 604 (2d Dist. 1995); *Weber v. Cueto*, 209 Ill.App.3d 936, 568 N.E.2d 513, 517, 154 Ill.Dec. 513 (5th Dist. 1991). In *Joseph*, the defendants allegedly stated that the plaintiffs had committed fraud and perjury. The *Joseph* court dismissed the plaintiffs' claims against an individual who made defamatory statements during a city council meeting. The court noted that the classification of absolutely privileged communications includes legislative and judicial proceedings. 649 N.E.2d at 972.

The absolute privilege includes all legislative proceedings, whether federal, state, or municipal. *Larson v. Doner*, 32 Ill.App.2d 471, 178 N.E.2d 399, 401 (2d Dist. 1961). Absolute privilege has been applied to bar actions against public officials for their alleged defamatory statements made during legislative proceedings. See *Loniello v. Fitzgerald*, 42 Ill.App.3d 900, 356 N.E.2d 842 (1st Dist. 1976) (statements by mayor at city council meeting that plaintiff was "thief," "cheat," and "liar" held to be absolutely privileged). The rationale for this protection is to enable public officials to carry out their daily responsibilities free from concern that these actions will result in civil damage suits. 356 N.E.2d at 843.

In *Weber, supra*, the plaintiff filed a defamation action against the defendant, an attorney, based on a five-page letter concerning the conduct of Donald Weber (then the State's Attorney of Madison County) and the plaintiff, an employee of the State's Attorney's office (and Mr. Weber's wife at the time of the suit). The letter was addressed to the Chief Circuit Judge of Madison County and also was sent to the Madison County Board members and the Attorney Registration and Disciplinary Commission (ARDC). The plaintiff also alleged that the defendants caused this letter to be published to various newspapers circulated generally in Madison County.

The defendant claimed he wrote the letter pursuant to the Rules of Professional Conduct and his duty to report unprivileged knowledge of violations of the Rules. The letter described the defendant's knowledge of "alleged violations [of] at least seven indictable offenses" and that the "alleged violations include the theft, fraudulent misuse, or improper use of Madison County funds," and "numerous violations of the Code of Professional Responsibility." 568 N.E.2d at 515. The trial court concluded that the publication of the letter to the ARDC, the Chief Judge, and the Madison County Board members was absolutely privileged. The trial court also concluded that the Madison County Board is "clearly a quasi-judicial/legislative body" to which an absolute privilege attaches. 568 N.E.2d at 516. The trial court therefore granted the defendant's motion and dismissed all counts against him.

The appellate court affirmed that the publication of the letter to the members of the Madison County Board was absolutely privileged. In doing so, the *Weber* court recognized that the board was a legislative body governing the affairs of Madison County. The court noted that a communication is absolutely privileged when its publication is so much in the public interest that the publisher should speak fully and fearlessly. *Id.*, citing *American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n*, 106 Ill.App.3d 626, 435 N.E.2d 1297, 62 Ill.Dec. 325 (1st Dist. 1982).

The *Weber* court noted that the defense of absolute privilege has been described as resting on the idea that conduct that otherwise would be actionable is to escape liability because the

defendant is acting in furtherance of some interest of social importance that is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation. *Id.* The *Weber* court recognized that the class of absolutely privileged communications includes legislative and judicial proceedings and other acts of state, including communications made in the discharge of a duty under express authority of law. 568 N.E.2d at 517. *See also Larson, supra.*

The *Weber* court also recognized that an attorney, as an officer of the court, is duty-bound to uphold the Rules of Professional Conduct. Accordingly, the publication of the letter to the ARDC was proper and privileged. 568 N.E.2d at 519, citing Rule 1-103(a) of the former Code of Professional Responsibility (now Illinois Rule of Professional Conduct 8.3(a)). In reaching this conclusion, the *Weber* court relied on the RESTATEMENT (SECOND) OF TORTS §592A (1977), which provides: "One who is required by law to publish defamatory matter is absolutely privileged to publish it." 568 N.E.2d at 517. Comment b to §592A of the RESTATEMENT states that the rule "will apply whenever the one who publishes the defamatory matter acts under legal compulsion in so doing." *See also Aboufariss v. City of DeKalb*, 305 Ill.App.3d 1054, 713 N.E.2d 804, 239 Ill.Dec. 273 (2d Dist. 1999) (discussing doctrine of public official immunity and noting that prosecutor acting within scope of her prosecutorial duties enjoys immunity from civil liability, which is same immunity afforded to judiciary).

As professionals closely regulated by the Illinois Supreme Court, the conduct of attorneys is governed by state statutes and legal precedent, including the Illinois Rules of Professional Conduct. *See, e.g., In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790, 127 Ill.Dec. 708 (1988). The rules often require attorneys to publish defamatory matter to clients and others in the discharge of their duties. This publication should thus be absolutely privileged.

## **2. [4.18] Conditional Privilege**

In *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill.2d 16, 619 N.E.2d 129, 134, 188 Ill.Dec. 765 (1993), the Illinois Supreme Court adopted the approach taken in RESTATEMENT (SECOND) OF TORTS §§593 – 599 (1977) in determining whether a conditional privilege exists. Under the RESTATEMENT approach, a court looks only to the occasion itself for the communication and determines, as a matter of law and general policy, whether the occasion created some recognized duty or interest to make the communication privileged. 619 N.E.2d at 134. As explained by the Illinois Supreme Court, conditionally privileged occasions are divided into three classes:

- (1) situations in which some interest of the person who publishes the defamatory matter is involved**
- (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved**
- (3) situations in which a recognized interest of the public is concerned.** 619 N.E.2d at 135, quoting Fowler V. Harper et al., THE LAW OF TORTS §5.25, p. 216 (2d ed. 1986).

### 3. [4.19] Attorneys' Conditional Privilege

In claims for defamation and tortious interference with contract and business relations, Illinois courts have held that because of the special nature of the attorney-client relationship, attorneys are privileged to render candid, independent advice to their clients, even if the attorney advises the client to breach a contract. For example, in *Schott v. Glover*, 109 Ill.App.3d 230, 440 N.E.2d 376, 64 Ill.Dec. 824 (1st Dist. 1982), the appellate court held that a plaintiff's alleged claim for tortious interference with a contractual relationship was properly dismissed because the attorney's acts were justified and privileged. The *Schott* court noted that the purpose of imposing liability on persons who interfere with the contractual relationships of others is to protect one's interests in these relationships against forms of interference that, on balance, the law finds repugnant. 440 N.E.2d at 379, citing *Swager v. Couri*, 77 Ill.2d 173, 395 N.E.2d 921, 32 Ill.Dec. 540 (1979). In affirming the dismissal of the plaintiff's claims against the attorney, the *Schott* court stated:

**The fiduciary duty owed by an attorney to his client is such an interest and under the circumstances here alleged Glover was privileged, in his capacity as the bank's attorney, to perform the acts and give the advice alleged in Count II. We need not decide whether the advice given was correct in every aspect. Although incorrect advice as to a client's contractual obligations might cause that client to become liable to a third party in contract, it does not follow that the attorney would also be liable to that party. To impose such liability on an attorney would have the undesirable effect of creating a duty to third parties which would take precedence over an attorney's fiduciary duty to his client. Public policy requires that an attorney, when acting in his professional capacity, be free to advise his client without fear of personal liability to third persons if the advice later proves to be incorrect.** 440 N.E.2d at 379.

Further, although the *Schott* court noted the privilege accorded an attorney when advising a client is not absolute, a plaintiff can overcome the privilege only if a plaintiff can set forth factual allegations showing that the defendant attorney acted with "actual malice." 440 N.E.2d at 380. See also *Arlington Heights National Bank v. Arlington Heights Federal Savings & Loan Ass'n*, 37 Ill.2d 546, 229 N.E.2d 514, 518 (1967). The term "actual malice" is defined as a positive desire and intention to annoy or to injure another. More than ill will, however, must be shown. The evidence must establish that the defendant had acted with a desire to harm that was unrelated to the interest that the defendant was presumably seeking to protect by bringing about the breach. *Certified Mechanical Contractors, Inc. v. Wight & Co.*, 162 Ill.App.3d 391, 515 N.E.2d 1047, 1054, 113 Ill.Dec. 888 (2d Dist. 1987).

Bare allegations of actual malice, unsupported by facts, are not sufficient to negate the protections of privilege or unjustified conduct. *Genelco, Inc. v. Bowers*, 181 Ill.App.3d 1, 536 N.E.2d 783, 786, 129 Ill.Dec. 733 (1st Dist. 1989). The *Schott* court held that in order to properly plead actual malice to overcome an attorney's privilege, the plaintiff's factual allegations must necessarily include a desire to harm, which is independent of and unrelated to, the attorney's desire to protect his or her client. Because of the attorney's privilege and the plaintiff's failure to allege unjustified conduct (i.e., actual malice), the *Schott* court affirmed the dismissal of the tortious interference with contract claim against the attorney. 440 N.E.2d at 380.

The *Schott* court also affirmed the dismissal of the plaintiff's action based on tortious interference with a valid business relationship and expectancy. In doing so, the court noted that even assuming the existence of such an expectancy, in his capacity as the bank's attorney, the defendant was privileged to perform the acts and give the advice alleged. *Id.* See also *Gold v. Vasileff*, 160 Ill.App.3d 125, 513 N.E.2d 446, 112 Ill.Dec. 32 (5th Dist. 1987) (attorney cannot be subject to liability for tortious interference with contractual relationship based on attorney's advice to his client that client need not perform contractual obligations, even if attorney's advice is incorrect and may subject his client to liability); *Salaymeh v. Interqual, Inc.*, 155 Ill.App.3d 1040, 508 N.E.2d 1155, 1159, 108 Ill.Dec. 578 (5th Dist. 1987) (because of attorneys' fiduciary duties to their clients, they were entitled to dismissal as to all counts based on "attorney good faith advice" privilege recognized in *Schott*).

Also, in defamation actions and in tort actions for intentional interference with contract or other business relationships, our courts consistently recognize a privilege when the defendant was acting to protect an interest that the law deems to be of equal or greater value than the plaintiff's alleged contractual or business expectancy rights. (*Schott, supra*; *Gold, supra*), such as the Illinois Rules of Professional Conduct, which serve to regulate the practice of law and maintain confidence and integrity in the legal system. (Note that the question of a lawyer's duty to existing (or even former) clients is a question of law for the court. *Roberts v. Heilgeist*, 124 Ill.App.3d 1082, 465 N.E.2d 658, 80 Ill.Dec. 546 (2d Dist. 1984) (holding attorney has no duty to file claim that is time-barred, hoping defendant would not raise statute of limitations as defense). See also *Ward v. K Mart Corp.*, 136 Ill.2d 132, 554 N.E.2d 223, 143 Ill.Dec. 288 (1990). The privilege and duties that arise from the attorney-client relationship are questions of law. See, e.g., *Schott, supra*.)

The Preamble to the Illinois Rules of Professional Conduct provides in part as follows:

**The practice of law is a public trust. . . . Lawyers therefore are responsible for the character, competence and integrity of the persons whom they assist in joining their profession [and] for maintaining public confidence in the system of justice by acting competently and with loyalty to the best interests of their clients. . . .**

\* \* \*

**Lawyers also must assist in the policing of lawyer misconduct. The vigilance of the bar in preventing and, where required, reporting misconduct can be a formidable deterrent to such misconduct.**

These rules reflect the sensitive task of striking a balance between making available useful information regarding the availability and merits of lawyers and the need to protect the public against deceptive or overreaching practices. All communications with clients and potential clients should be consistent with these values.

**D. [4.20] Statute of Limitations**

The applicable statute of limitations for defamation actions in Illinois is 735 ILCS 5/13-201, which provides:

**Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.**

**V. [4.21] TORTIOUS INTERFERENCE WITH CONTRACT**

To maintain an action for tortious interference with a contractual relationship, a plaintiff must plead facts establishing (a) the existence of a valid and enforceable contract between the plaintiff and another, (b) the defendant's awareness of the contractual relationship, (c) the defendant's intentional and unjustified inducement of a breach of the contract, (d) a subsequent breach by the other caused by the defendant's wrongful conduct, and (e) damages. *See, e.g., Schott v. Glover*, 109 Ill.App.3d 230, 440 N.E.2d 376, 379, 64 Ill.Dec. 824 (1st Dist. 1982); *Salaymeh v. Interqual, Inc.*, 155 Ill.App.3d 1040, 508 N.E.2d 1155, 1160, 108 Ill.Dec. 578 (5th Dist. 1987).

In order to properly state a cause of action for tortious interference, a plaintiff must first plead that he or she had a valid contract or a valid business expectancy, which requires allegations of business relationships with specific third parties. *DuPage Aviation Corp. v. DuPage Airport Authority*, 229 Ill.App.3d 793, 594 N.E.2d 1334, 1340, 171 Ill.Dec. 814 (2d Dist. 1992); *Suhadolnik v. City of Springfield*, 184 Ill.App.3d 155, 540 N.E.2d 895, 912, 133 Ill.Dec. 29 (4th Dist. 1989) (dismissal of claim affirmed because plaintiff failed to allege contract or potential business relationship with which defendants interfered).

**VI. [4.22] TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIP AND EXPECTANCY**

To state a cause of action for tortious interference with a valid business relationship and expectancy, a plaintiff must plead facts that establish a reasonable expectancy of entering a valid business relationship and an unprivileged interference by the defendant that defeats this expectancy, thereby causing harm to the plaintiff. *Schott v. Glover*, 109 Ill.App.3d 230, 440 N.E.2d 376, 64 Ill.Dec. 824 (1st Dist. 1982); *Salaymeh v. Interqual, Inc.*, 155 Ill.App.3d 1040, 508 N.E.2d 1155, 108 Ill.Dec. 578 (5th Dist. 1987).

**A. [4.23] Attorneys' Conditional Privilege**

Claims against attorneys for tortious interference with contract and tortious interference with business expectancies are also subject to the defense of the attorney's conditional privilege discussed in §4.18 above.

**B. [4.24] Limitations**

There is no specific statute of limitations governing actions for tortious interference, and it is thus governed by the general five-year limitations period set forth in 735 ILCS 5/13-205. *See Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill.App.3d 731, 728 N.E.2d 547, 245 Ill.Dec. 465 (1st Dist. 2000).

**VII. [4.25] AIDING AND ABETTING A BREACH OF A CLIENT'S FIDUCIARY DUTY TO ANOTHER**

The appellate courts have recognized that there is not a per se bar to a claim against an attorney for aiding and abetting a client breach a fiduciary duty to a third party. *Thornwood, Inc., v. Jenner & Block*, 344 Ill.App.3d 15, 799 N.E.2d 756, 278 Ill.Dec. 891 (1st Dist. 2003), *appeal denied*, 207 Ill.2d 630 (2004).

The litigation in *Thornwood* stemmed from a partnership formed between the plaintiff and the defendant, Thornwood Venture Limited Partnership (TVLP), which was formed in order to develop land as a golf course and residential community. The defendant made recruiting efforts, including discussions with the PGA tour and Potomac Sports Properties. The benefits of this partnering would have been substantial. However, in a letter, the PGA and Potomac advised that they could not work with TVLP unless the developer was willing to start over. The plaintiff received a copy of the letter. After the letter was written, the defendant continued to negotiate with the PGA and Potomac unbeknownst to the plaintiff.

TVLP was consuming significant funds. The plaintiff approached the defendant about liquidating the partnership or selling the plaintiff's interest. The defendant did not disclose the potential value his interest could gain from partnership with the PGA and Potomac. The defendant retained attorneys in order to acquire the plaintiff's interest in TVLP. The defendant and plaintiff then executed a settlement agreement that contained mutual releases. The plaintiff also executed a release purporting to release the defendant's attorneys from "any liability from any and all claims, counterclaims, controversies, actions, causes of action, demands, debts, damages, costs, attorneys fees, or liability of any nature whatsoever in law [or] in equity, whether known or hereinafter discovered, that arose out of events that have occurred from the beginning of time until the date hereof." 799 N.E.2d at 761. When the plaintiff executed the release, he was unaware of the defendant's continued negotiations with the PGA and Potomac.

The appellate court noted that partners have a fiduciary relationship and owe one another a duty to fully disclosure all material facts. 799 N.E.2d at 765 – 766, citing *Golden v. McDermott, Will & Emory*, 299 Ill.App.3d 982, 702 N.E.2d 581, 585, 234 Ill.Dec. 241 (1st Dist. 1998). Specifically, with regard to releases between partners, the court stated:

**A release between fiduciaries is to be evaluated in the context of a fiduciary relationship. . . . In appraising the validity of a release in the context of a fiduciary relationship, the court must regard the defendant as having the burden of showing by clear and convincing evidence that the transaction embodied in the release was**

**just and equitable. . . . In addition, the defendant must show by competent proof that a full, frank disclosure of all the relevant information was made to the other party.** 799 N.E.2d at 766, quoting *Peskin v. Deutsch*, 134 Ill.App.3d 48, 479 N.E.2d 1034, 89 Ill.Dec. 28 (1st Dist. 1985).

The court went on to note that an agreement between partners is voidable if one partner withheld from the other facts that were material to the transaction. The court held that the plaintiff raised issues regarding the validity of the release (*i.e.*, that the releases may have been obtained by fraud because the defendant, as a fiduciary to plaintiff, failed to disclose his continued negotiations with the PGA and Potomac). The court stated that if fraud is found, the releases may not act as a bar to the plaintiff's claims against the defendant's attorneys regardless of whether they had a fiduciary duty to the plaintiff with regard to the partnership. The court stated that because the defendant's actions could invalidate the entire settlement agreement and related releases, the defendant's attorneys could be liable.

The defendant's attorneys were involved in drafting the releases in question and allegedly involved in the acts underlying the defendant's fraud. The court gave weight to the fact that the clause from the settlement agreement that purported to release certain fiduciary duties between the defendant and plaintiff until the date the agreement was signed indicated an awareness that breaches of fiduciary duties may have been occurring during that time. Because the defendant and plaintiff were partners, there was a duty to disclose these acts.

In explaining that there was not a *per se* bar to this cause of action, the court held that in Illinois, to state a claim for aiding and abetting, the following elements must be met: "(1) the party whom the defendant aids must perform a wrongful act which causes an injury; (2) the defendant must be regularly aware of his role as part of the overall or tortious activity at the time he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." 799 N.E.2d at 767, quoting *Wolf v. Liberis*, 153 Ill.App.3d 488, 505 N.E.2d 1202, 1208, 106 Ill.Dec. 411 (1st Dist. 1987). Although Illinois courts have never found an attorney liable for aiding and abetting a client in the commission of a tort, these actions have not been prohibited. Illinois courts recognize that claims for conspiracy may be maintained against attorneys when there is evidence that the attorneys participated in a conspiracy with their clients. 799 N.E.2d at 768, citing *Bosak v. McDonough*, 192 Ill.App.3d 799, 549 N.E.2d 643, 646, 139 Ill.Dec. 917 (1st Dist. 1989). The *Thornwood* court reasoned that an attorney "may not use his license to practice law as a shield to protect himself from the consequences of his participation in an unlawful or illegal conspiracy" and neither should the policy prevent an attorney from escaping liability for knowingly and substantially assisting a client in the commission of a tort. 799 N.E.2d at 768, quoting *Celano v. Frederick*, 54 Ill.App.2d 393, 203 N.E.2d 774, 778 (1st Dist. 1964).

The appellate court held that the plaintiff's alleged claims against the defendant's attorneys should have survived dismissal because he alleged that they aided and abetted by knowingly and substantially assisting the defendant in breaching his fiduciary duties by (a) communicating the competitive advantages available to the partnership from the PGA and Potomac plan to other parties, but specifically not to the plaintiff; (b) expressing the defendant's interest in purchasing the plaintiff's interest in the partnership and negotiating this interest without disclosing to the

plaintiff the continued negotiations with the PGA and Potomac; (c) reviewing and counseling the defendant with regard to the production of investment offerings memoranda, financial projections, and marketing literature that purposely failed to identify the plaintiff as a partner; and (d) drafting, negotiating, reviewing, and executing documents. 799 N.E.2d at 768.

**4S**

## **Attorney Liability to Adversaries and Other Third Parties**

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#### **IV. Defamation**

- C<sub>1</sub>. [4S.19A] The Uniform Single Publication Act (New Section)
- D. [4S.20] Statute of Limitations

## IV. DEFAMATION

### C<sub>1</sub>. [4S.19A] The Uniform Single Publication Act

*New section:*

Some claims for defamation may be barred by the Uniform Single Publication Act, 740 ILCS 165/1, *et seq.* The central purpose of the Act was to “protect publishers and others involved in the communication industry from undue harassment by preventing a multitude of lawsuits based on one tortious act.” *Wathan v. Equitable Life Assurance Society of United States*, 636 F.Supp. 1530, 1532 (C.D.Ill. 1986), citing *Winrod v. Time, Inc.*, 334 Ill.App. 59, 78 N.E.2d 708, 713 – 714 (1948). However, it can be applied to situations in which lawyers are defending defamation actions.

The Act provides:

**No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by plaintiff in all jurisdictions.** 740 ILCS 165/1.

In *Wathan*, the court noted that the test in determining when the subsequent distribution of libelous material gives rise to a new action is whether a defendant consciously republishes the statement. 636 F.Supp. at 1532. The court also explained that the Act was not intended to apply to the causes of action of one plaintiff against two or more separate defendants, each of whom has published the same statement or taken part in the same publication. 636 F.Supp. at 1535. The court found that the common law history of the Act indicated that it was intended to limit a plaintiff to a single cause of action against one defendant who publishes a number of copies of a defamatory item and has no application when someone other than the original publisher commits a separate tort by republishing the same item. *Id.* The *Wathan* court summarized the scope of the Act as follows:

**[The Act] does not bar a separate cause of action arising out of a single defamatory statement when (1) someone other than the original libeler consciously republishes the statement, and (2) the alleged republication is not incidental to a mass distribution of the statement.** 636 F.Supp. at 1536.

*See also Dubinsky v. United Airlines Master Executive Council*, 303 Ill.App.3d 317, 708 N.E.2d 441, 236 Ill.Dec. 855 (1st Dist. 1999).

In *Weber v. Cueto*, 253 Ill.App.3d 509, 624 N.E.2d 442, 452, 191 Ill.Dec. 593 (5th Dist. 1993), the court stated that the Act “prohibits more than one cause of action for the same means of publication, no matter how many times that publication is reproduced.” In *Weber*, the

plaintiff's original complaint involved the publication of an allegedly defamatory letter to prominent state and local officials, such as the chief judge and members of the county board, which the court held was privileged. The plaintiff then filed an amended complaint that alleged defamation when the same letter was republished in newspapers and disseminated to the public. The court held that these constituted separate causes of action because the case did not involve the "same means of publication of the allegedly libelous words." *Id.*

#### D. [4S.20] Statute of Limitations

*Add at the end of the section:*

Courts have been analyzing the issue of whether a republication of a defamatory statement restarts a claim for defamation for those that would otherwise be barred by the statute of limitations in light of the original publication date. *See Davis. v. Mitan (In re Davis)*, 347 B.R. 607 (W.D.Ky. 2006). This issue is of particular importance since the increase in user-driven media such as the Internet.