Can Counsel be Liable for Malicious Prosecution for the Conduct of Associated Counsel Who is Primarily Responsible for the Conduct of a Case?

By Jeffrey P. Lewis

Jeffrey P. Lewis is a member in the Philadelphia office of the Pittsburgh-based law firm of Eckert Seamans Cherin & Mellott LLC. He serves on the PBA Professional Liability Committee.

It is common practice for lawyers to associate with lawyers from another firm to represent the same client in the prosecution of a civil action. Sometimes this occurs because one lawyer has special expertise or more experience in the subject matter of the dispute or the forum and sometimes this occurs when a lawyer is retained to act as local counsel. But what duty does a lawyer have to determine for himself or herself, independent of what he or she is informed of by associated counsel, that the action is not frivolous? Or may he or she rely upon the assumed integrity and competence of the other lawyer, just as a lawyer would rely upon his or her client and experts as sole support for the proposition that there is probable cause to prosecute the action? Under Pennsylvania law, the question presented is whether a lawyer can be liable for wrongful use of civil proceedings, which is the statutory version of malicious prosecution found at 42 Pa.C.S. § 8351 *et seq.* (known as the Dragonetti Act), for failure to make inquiry as to the merits of a case independent of associated counsel. In assessing the tort of malicious prosecution under California law, an appellate court in a recent decision has found that a lawyer is under such a duty and cannot rely solely on associated counsel.

Cole v. Patricia A. Meyer & Associates, 142 Cal. Rptr. 3d 646 (Ct. of Appeal Cal. 2012), decided by the Court of Appeal of California (an intermediate appellate court), concerned a claim of malicious prosecution and defamation against lawyers representing plaintiffs in the underlying shareholder action against, among others, the person who would become the plaintiff in this action. In the underlying action the court had made a summary disposition in favor of the defendant, now the plaintiff in this action, which an appellate court later affirmed. The defendant lawyers defended the malicious prosecution claim based upon the premise that although their names "appear on all of the pleadings and papers filed for the plaintiffs in the underlying case," they are not liable because "they took a passive role in that case as standby counsel who would try the case in the event that it went to trial." The trial court agreed with that argument, granting summary disposition in favor of the defendant lawyers on the malicious prosecution claim.

A three-judge panel of the Court of Appeal reversed, finding that plaintiff "has shown the requisite likelihood that he will prevail on his malicious prosecution claims against all defendants." After analyzing the sufficiency of the evidence for each element of malicious prosecution and finding it adequate in each instance, the court addressed the validity of the "passive lawyer defense." It noted that there was no dispute that these lawyers were attorneys of record in the underlying action. Moreover, it was assumed as true for purposes of this appeal that these lawyers "did not sign, draft, prepare, review, serve, approve or discuss the contents of any pleading in [the underlying matter] or participate in the case in any way." But they had entered their appearance, and their names appeared as a counsel of record on every filing on behalf of their clients.

The court recognized that the defendant lawyers "had a duty of care to their clients that encompassed 'both a knowledge of [the] law and an obligation of diligent research and informed judgment.' " The court, however, rejected the argument that this duty was met by a good-faith reliance upon the investigation conducted by counsel with whom they had associated and who had the appearance of having the appropriate competence and expertise to handle the case. In this case, knowledge of such competence and expertise was based upon past associations in other cases with the same lawyers. But even under these circumstances, in the court's view, "competent representation still requires knowing enough about the subject matter to be able to judge the quality of the attorney's work." This requires that counsel "independently investigate and research the validity of these claims."

California law, just as Pennsylvania law, "generally allows an attorney of record to associate with another attorney and to divide the duties of conducting the case." Notwithstanding, in this court's view, this does not mean that he or she "need not know anything about the case with which he or she is associated. Nor should an associated attorney whose name appears on all filings be able to avoid liability by intentionally failing to learn anything about a case that may turn out to have been maliciously prosecuted in whole or in part."

The court refused to draw a distinction based upon whether the defendant lawyers had personally signed the pleadings or that their names merely appeared on the pleadings, which were actually signed by the associated lawyer. By the defendant lawyers lending their names, in the court's view, they supported "an inference that they 'presented' these filings to the court and thus initiated and prosecuted [the underlying matter] along with the [associated counsel]." Moreover, the court found that this practice also supports the inference that it was done to "show more power," which is an improper purpose.

The court did offer a way for lawyers to avoid liability where the intention is not to become truly involved in the case until later: "[R]efrain from formally associating in it until their role is triggered." The court also suggested that lawyers should "refrain from lending their names to pleadings or motions about which they know next to nothing."

If the view expressed in this case is adopted nationwide it could have significant consequences. It could increase the exposure of plaintiffs' lawyers who have agreed to be standby counsel to try the case if needed, not only to claims of malicious prosecution but for legal malpractice as well. This may discourage the practice or at the very least prompt the standby trial counsel to refrain from entering an appearance before they are prepared to participate actively. This could also have potentially staggering consequences for one who is acting as local counsel, whose role generally is to ensure that all submissions generated by lead counsel comply with local practice and not to concentrate on the merits of the case. For now, at least, the principle enunciated by *Cole* only applies under California law.