TOPIC 2. OTHER CIVIL LIABILITY

Introductory Note

Section

Introductory Note: In addition to the liabilities discussed in Topic 1 for negligent failure to fulfill their duties as lawyers and for breach of fiduciary duty, lawyers are subject to other civil liabilities and in general to the obligations of general law. This Topic does not catalogue all such other potential liabilities. Rather, it describes certain special liabilities of lawyers and sets forth the applicability of general law to lawyers, covering certain applications of that law most noteworthy in the circumstances of legal practice.

§ 55. Civil Remedies of a Client Other Than for Malpractice

(1) A lawyer is subject to liability to a client for injury caused by breach of contract in the circumstances and to the extent provided by contract law.

(2) A client is entitled to restitutionary, injunctive, or declaratory remedies against a lawyer in the circumstances and to the extent provided by generally applicable law governing such remedies.

Comment:

a. Scope and cross-references. This Section considers certain civil remedies that clients (or former clients with claims arising from a representation) may obtain against lawyers. It does not consider remedies for malpractice, which are set forth in §§ 48–54. Nor does it consider client remedies for conversion, fraudulent misrepresentation, intentional infliction of emotional distress, violation of consumer-protection statutes, and other actionable conduct falling under § 56. Other Chapters of this Restatement consider remedies such as professional discipline (see § 5), a client's remedies against a lawyer who acts without authority (see § 27, Comment *f*), fee forfeiture and reduction (see §§ 34, 37, & 39), litigation sanctions (see § 110), disqualification (see § 6, Comment *i*), and criminal sanctions (see §§ 8 & 30(1)). On a client's obligations to a lawyer, see § 17.

Because rules applied to actions under §§ 48–54 grow out of the special requirements of the client-lawyer relationship, many of them apply also to claims under this Section. Such rules include, where appropriate, § 50, Comment *e* (lawful client objectives) and § 54, Comment *g* (action or inaction required by law or client instruction). The provisions of § 54(2), (3), and (4) concerning prospective limitation of lawyer liability to clients and settlements of claims by clients or former clients against lawyers apply to claims under this Section, with the exception of settlement of attorney-fee disputes as noted in § 54, Comment *c*. Here and in § 56, lawyers are said to be "subject to liability" rather than to be liable because their liability is subject to such other law as causation and damages requirements and defenses. See Restatement Second, Torts § 5.

b. Rationale. The rationale for liability based on a lawyer's negligence set forth in § 48, Comment *b* is generally applicable to this Section. The usual rationales for contract liability and restitutionary, injunctive, and declaratory relief apply respectively to the provisions of this Section considering liability for those remedies (see § 16, Comments *b* & *f*).

c. Contract claims. A client's claims for legal malpractice, as considered in §§ 48–54, can be considered either as tort claims for negligence or breach of fiduciary duty or as contract claims for breach of implied terms in a client-lawyer agreement. Ordinarily, a plaintiff may cast a legal-malpractice claim as a tort claim, a contract claim, or both and often also as a claim for breach of fiduciary duty. The law set forth in §§ 48–54 governs all three kinds of claim. The choice of theory may, however, affect what statute of limitations applies and in some jurisdictions may affect other issues (see § 48, Comment *c*, & § 49, Comments *c*, *d*, & *e*). A client may also assert against a lawyer contractual claims that likewise could be asserted as tort claims or claims of fiduciary breach and are subject to §§ 48–54, such as claims that a lawyer disobeyed the client's valid instruction or an agreement concerning what the lawyer would do (see § 21(1) & (2)).

Other contract claims that a client may assert against a lawyer are more readily distinguishable from claims that the lawyer failed to use the care required by §§ 50 and 52 or violated fiduciary duties. A client may assert a claim under a client-lawyer fee agreement, for example that the lawyer has failed to return unearned fees out of an advance payment (see §§ 18, 38, & 42). A client whose lawyer also served as escrow agent may assert a claim for breach of the escrow agreement (see § 48, Comment *d*). Such claims should ordinarily be treated as contract claims, although if possible they should not be dismissed for mislabeling in the pleadings and although the circum-

stances giving rise to them might also support claims under §§ 48–54 or other law.

A lawyer who warrants to a client that the lawyer will accomplish a specifically described result for the client, knowing that the result has material importance to the client, owes the client a contractual duty to fulfill that warranty. However, a finding of such a warranty may not be based on proof consisting only of general statements of the lawyer expressing an expectation of favorable results. Likewise, such a finding may not be made, absent an unequivocal promise by the lawyer, when it should have been reasonably clear to the client that the result in question depended on factors other than the lawyer's efforts, for example on the actions of another party or a tribunal. Lawyers are thus free to inform clients of the progress and prospects of a representation (see § 20) without incurring the liabilities of a guarantor.

Illustration:

1. Client asks Lawyer to defend Client against serious criminal charges. Lawyer states to Client, "Considering the facts and my 20 years of experience in criminal defense, I believe that I can get you acquitted." Client retains Lawyer, but Client is convicted. Lawyer has not breached a promise to Client to secure an acquittal. In light of the well-known uncertainty of trial outcomes, Lawyer's statement can be reasonably construed only as a prediction, not a promise.

When a client's contract claim against a lawyer is not subject to §§ 48–54, the law of contracts governs such matters as contract construction (subject to § 18), breach, damages, and defenses (see generally Restatement Second, Contracts). That law is construed in the light of the special circumstances involved in client-lawyer relationships and the policies applicable thereto. On remedies and burdens of persuasion in attorney-fee disputes, see § 42.

d. A client's claim against a lawyer for restitutionary, injunctive, or declaratory remedies. Although damages are the usual relief sought by clients from lawyers, restitution is also available in appropriate cases, as allowed by the generally applicable principles governing restitution by a fiduciary. See generally § 6, Comment *e* (rescission of prohibited client-lawyer contract or gift); Restatement Second, Agency §§ 388, 403–404A, and 407. Thus, if under the rules stated in § 37 a lawyer forfeits the right to retain a fee that a client has already paid, the client may obtain restitution of the fee. Similarly, if a lawyer

mistakenly deposits a client's funds in the lawyer's own bank account (see § 44) and proceeds to invest it and make a profit, the client is entitled to restitution of the original sum and the profits from its investment. Restatement Second, Agency § 403; Restatement Second, Trusts § 202. A client may also secure restitution of profits reaped by a lawyer's use of client confidences for the lawyer's benefit (see § 60, Comment *j*). Restitution may be ordered when appropriate in lawyer-disciplinary proceedings (see § 5).

Injunctive and declaratory relief for violations of a lawyer's fiduciary and other duties (see § 16) are also available under the usual principles governing such relief. See § 121, Comment *c(ii)* (disqualification remedy for conflict of interest); Restatement Second, Torts §§ 933–951; Restatement Second, Agency § 399. Such relief has rarely been sought in the past because, when clients sued lawyers, it was usually after the lawyer's alleged misconduct had ceased. Injunctive or declaratory relief are, however, appropriate when warranted by generally applicable legal principles to prevent continuing violations such as misuse of a client's confidences or engagement in representations creating conflicts of interest.

REPORTER'S NOTE

Comment c. *Contract claims.* See Reporter's Notes to § 18 (contract validity and construction); § 21, Comments c and *d* (client instructions and agreements); § 38 (fee agreements); § 42 (fee remedies); § 48, Comment *c* (contract and tort theories and their consequences); see also Saad v. Rodriguez, 506 N.E.2d 1230 (Ohio Ct. App.1986) (client claim against lawyer for breach of escrow agreement).

On warranty of result, see Myers v. Butler, 556 F.2d 398 (8th Cir.), cert. denied, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 314 (1977) (claim that lawyer warranted that, if client pleaded guilty, client would receive no prison sentence was belied by record); Broyles v. Brown Engineering Co., 151 So.2d 767 (Ala.1963) (dictum) (lawyer not ordinarily subject to implied warranty, except perhaps for very simple services); Asphalt Engineers, Inc. v. Galusha, 770 P.2d 1180 (Ariz.Ct.App.1989) (upholding claim for breach of promise to file liens); Kushner v. McLarty, 300 S.E.2d 531 (Ga.Ct.App.1983) (lawyer's assertion to client that contract implemented client's stated wishes was not a warranty); Lundy, Butler & Lundy v. Bierman, 398 N.W.2d 212 (Iowa Ct. App.1986) (lawyer does not guaranty trial result more successful than rejected settlement offer); Cherokee Restaurant, Inc. v. Pierson, 428 So.2d 995 (La.Ct.App.1983) (lawyer's undertaking to prepare lease with longest legally permissible term was not warranty); Corceller v. Brooks, 347 So.2d 274 (La.Ct.App.1977) (lawyer could not warrant favorable result of suit); Gunn v. Mahoney, 408 N.Y.S.2d 896 (N.Y.Sup.Ct.1978) (liability for breach of contract to incorporate client's business); 1 R. Mallen & J. Smith, Legal Malpractice § 8.6 (4th ed.1996). But see Spivack, Shulman & Goldman

v. Foremost Liquor Store, Inc., 465 N.E.2d 500 (Ill.App.Ct.1984) (issue of fact for jury as to whether lawyer guaranteed outcome).

Comment d. A client's claim against a lawyer for restitutionary, injunctive, or declaratory remedies. For restitution, see, e.g., FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir.1992), rev'd on other grounds, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (upholding claim for rescission of attorney fees); People v. Morse, 25 Cal.Rptr.2d 816 (Cal.Ct.App.1993) (restitution to clients who retained lawyer as result of false solicitation); Tri–Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 265 Cal.Rptr. 330 (Cal.Ct.App.1989) (constructive trust appropriate if firm bought property using client confidential information); David Welch Co. v. Erskine & Tulley, 250 Cal.Rptr. 339 (Cal.Ct.App. 1988) (lawyers who acquired customers of client's collection business without client's informed consent must disgorge profits; constructive trust imposed); Hamilton v. Allen, 125 N.W. 610 (Neb.1910) (lawyer who bought land from client liable for profits unless lawyer proves transaction was fair); Greene v. Greene, 436 N.E.2d 496 (N.Y.1982) (client may rescind trust agreement giving lawyer unusual powers of which client was not informed); Zeiden v. Oliphant, 54 N.Y.S.2d 27 (N.Y.Sup.Ct.1945) (client may recover lawyer's profits from use of client information even though use did not harm client); Rosebud Sioux Tribe v. Strain, 432 N.W.2d 259 (S.D. 1988) (constructive trust imposed when lawyer received kickback from third party in transaction in which lawyer represented client); Eriks v. Denver, 824 P.2d 1207 (Wash.1992) (restitution of attorney fees); § 127, Reporter's Note (rescission of improper client-lawyer gifts). On restitution in lawyer-disciplinary proceedings, see, e.g., In re Robertson, 612 A.2d 1236 (D.C.1992); Committee on Legal Ethics v. Gallaher, 376 S.E.2d 346 (W.Va.1988); ABA Model Rules for Disciplinary Enforcement, Rule 10(6) (1989); C. Wolfram, Modern Legal Ethics 137–38 (1986); Annot., 75 A.L.R.3d 307 (1977).

For injunctive relief, see X Corp. v. Doe, 805 F.Supp. 1298 (1992), aff'd sub nom. Under Seal v. Under Seal, 17 F.3d 1435 (4th Cir.1994) (preliminary injunction against misuse of confidential information by former house counsel), final injunction granted, 816 F.Supp. 1086 (E.D.Va.1993); American Motors Corp. v. Huffstutler, 575 N.E.2d 116 (Ohio 1991) (similar; final injunctive relief); State ex rel. Bryant v. Ellis, 724 P.2d 811 (Or.1986) (injunction enforcing disqualification for conflict of interest); Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa.1992) (relief against conflict of interest); cf. Williams v. Poulos, 11 F.3d 271 (1st Cir.1993) (nonclient's injunction against wiretapping lawyer); Penguin Books USA Inc. v. Walsh, 756 F.Supp. 770, 783 (S.D.N.Y.), vacated as moot, 929 F.2d 69 (2d Cir.1991) (denying relief for breach of fiduciary duty because information lawyer proposed to publish was not protected under constricted view of what is confidential). On standards for injunctive relief, see generally D. Laycock, The Death of the Irreparable Injury Rule (1991); Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525 (1978).

§ 56. Liability to a Client or Nonclient Under General Law

Except as provided in § 57 and in addition to liability under §§ 48–55, a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances.

Comment:

a. Scope and cross-references. This Section states the general principle regulating the civil liability of lawyers, other than their liability for legal malpractice, which is set forth in §§ 48–54, and the liabilities set forth in § 55. The Section does not consider professional discipline (see § 5), lawyer liability to clients and nonclients for acts beyond a lawyer's authority (see § 27, Comment *f*, & § 30(3)), attorney-fee forfeiture or reduction (see §§ 34, 37, & 39), criminal liability (see §§ 8 & 30(1)), administrative penalties, contempt of court (see § 105, Comment *e*), litigation sanctions (see § 110), or statutes expressly providing for lawyer liability (see § 52, Comment *f*). Certain exceptions to the liability described here appear in § 57, which also considers lawyers' liability for wrongful use of civil proceedings, abuse of process, malicious prosecution, and inducing breach of contract or contractual relations. Client-lawyer agreements restricting or settling a lawyer's liability to a client under this Section are subject to § 54. On a client's liability to a nonclient resulting from a lawyer's activities, see § 26, Comment *d*. On a lawyer's statements to nonclients, see § 98.

b. Rationale; a nonlawyer in similar circumstances. Lawyers are subject to the general law. If activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable or afford the nonlawyer a defense to liability, the same activities by a lawyer in the same circumstances generally render the lawyer liable or afford the lawyer a defense. See Restatement Second, Agency § 343 (acting at principal's command is not a defense for an agent committing a tort unless the principal is privileged). For special defenses of lawyers, see § 57. However, among the circumstances relevant to liability or defense under the general law are some that commonly attend lawyers practicing law, such as the fiduciary duties lawyers owe to clients and the powers, duties, and responsibilities that lawyers have in the legal system. Thus, courts considering the civil liability of lawyers must consider how a ruling that affirms or precludes liability would affect the vigorous representation of clients within the limits of the law, including, for example, the candid expression to clients of the lawyer's views on any matter within the scope of the representation. Courts

must also take care, in construing liability provisions and professional rules, to avoid subjecting lawyers to inconsistent obligations.

c. Advising and assisting acts of clients. When a lawyer advises or assists a client in acts that subject the client to civil liability to others, those others may seek to hold the lawyer liable along with or instead of the client. Whether a lawyer is liable depends on the elements of liability under the law upon which the claim of liability is predicated and may therefore turn on such factors as how the lawyer's acts contributed to the plaintiff's harm, what the lawyer knew or believed as to the relevant facts and law, the lawyer's intent, and how culpable the client's conduct is under the law. On general limitations on advising a client, see § 94.

A lawyer, like other agents, is not as such liable for acts of a client that make the client liable. Thus, a lawyer is not liable to a nonclient for advising a client whether proposed client conduct would be lawful or for counseling a client to break a contract in the client's interest (see § 57, Comment *g*). The social benefit of proper legal advice and assistance often makes it appropriate not to hold lawyers liable for activities in the course of a representation (see § 57). Moreover, a lawyer's liability to a nonclient for legal malpractice is limited to those situations in which the lawyer owes the nonclient a duty of care, as set forth in § 51, and in which the other requirements of Topic 1 have been satisfied.

On the other hand, a lawyer is not always free of liability to a nonclient for assisting a client's act solely because the lawyer was acting in the course of a representation (see Comment *b* hereto). Thus, a lawyer who knowingly helps a client deceive a person may be liable for fraud (see Comment *f* hereto). See generally § 94.

In general, a lawyer is not liable for a client's tort unless the lawyer assisted the client through conduct itself tortious or gave substantial assistance to the client knowing the client's conduct to be tortious. See Restatement Second, Torts § 876 (liability of persons acting in concert). Proper advice to a client does not constitute assistance leading to liability. Whether a more onerous standard applies to a lawyer who assists a client's conduct depends on applicable law, which in general requires negligent or intentional misconduct for civil liability to attach to a principal and often requires a higher level of awareness for a lawyer than for a principal.

When a lawyer is civilly liable to a nonclient for assisting conduct of a client, the lawyer may in some circumstances be entitled to obtain indemnity from the client (see § 17(2); Restatement Second, Agency §§ 438–440). When a client's liability to a nonclient arises from a lawyer's malpractice, the client may seek redress from the lawyer

under §§ 48–54. When both client and lawyer are liable, generally applicable law may allow one of them who pays damages to seek contribution from the other (see § 53, Comment *i*).

d. Breach of contract. A lawyer is generally liable for breach of the lawyer's contract in the same circumstances as a nonlawyer who had entered into a similar contract. On contracts (including fee contracts) and business arrangements between lawyer and client, see §§ 16(4), 18, 19, 55(1), and 126; Chapter 3. On a lawyer's liability on certain contracts entered into by the lawyer on behalf of a client, see § 30. On a lawyer's privilege to advise and assist a client to break the client's contract, see § 57, Comment *g*.

e. Conversion. A lawyer is liable for conversion and trespass to chattels on the same basis as a nonlawyer. See Comment *b* hereto; Restatement Second, Agency § 349; see generally Restatement Second, Torts §§ 216–251. On a lawyer's duties with respect to property of clients and certain nonclients in the lawyer's possession, see §§ 44–45. A lawyer who acquires possession or custody of property as a trustee or escrow agent or in a similar capacity, is subject to the obligations of one acting in that capacity. See, e.g., § 48, Comment *d*; Restatement Second, Trusts §§ 179–182.

f. Fraudulent misrepresentation. Misrepresentation is not part of proper legal assistance; vigorous argument often is. Thus, lawyers are civilly liable to clients and nonclients for fraudulent misrepresentation, but are not liable for such conduct as using legally innocuous hyperbole or proper argument in negotiations (see § 98, Comment *c*) or presenting an argument to a tribunal in litigation. On the liability of an agent for committing or knowingly assisting fraud on behalf of the principal, see Restatement Second, Agency § 348; on professional discipline, see § 5. Such liability may sometimes depend, among other factors, on whether the principal owed the person claiming to have been defrauded any duties of disclosure and on the nature of the lawyer's participation. On the general law of fraudulent misrepresentation, see Restatement Second, Torts §§ 525–551; Restatement Second, Contracts §§ 159–173. On a lawyer's liability to a nonclient for misrepresenting the lawyer's authority, see § 30(3); Restatement Second, Agency § 330. A lawyer is liable for negligent misrepresentation to a nonclient in the course of representing a client only when the lawyer owes the nonclient a duty of care under § 51. See § 51, Comment *e*; Restatement Second, Torts §§ 552–552B. On evaluations undertaken for third persons, see § 95. On a lawyer's duties of honesty and disclosure to a client, see §§ 16(3) and 20; Restatement Second, Torts § 551, Comments *e* and *f*.

g. Intentional infliction of emotional distress. The tort of intentional infliction of emotional distress has been recognized in many jurisdictions (see Restatement Second, Torts §§ 46–48). Liability for this tort requires "extreme and outrageous conduct" that "intentionally or recklessly causes severe emotional distress to another" (id. § 46(1)). On emotional-injury damages in malpractice, see § 53, Comment *g*. Special considerations apply to some claims brought by nonclients. Vigorous advocacy is important in adversary proceedings. Thus, a lawyer's partisanship in presenting evidence and argument, drafting and serving pleadings, and comparably pressing a client's case in such a proceeding is not considered extreme and outrageous and is privileged from such tort liability to the opposing party (see § 57, Comment *c*). On litigation sanctions, see § 110.

h. Breach of a lawyer's or client's fiduciary duty to a nonclient. Lawyers' liability to their clients for breach of fiduciary duties is considered in § 49. Lawyers are also liable to nonclients for knowingly participating in their clients' breach of fiduciary duties owed by clients to nonclients (see Restatement Second, Trusts § 326; see also § 51). A lawyer may also assume fiduciary duties to a nonclient, for example by becoming a trustee or in some jurisdictions by seeking and obtaining a nonclient's trust, and the lawyer is then liable to such a nonclient under the general law on the same basis as other fiduciaries.

i. Federal legislation: antitrust law, securities law, RICO, Civil Rights Act. Federal legislation applies to lawyers and law firms in accordance with its jurisdictional and substantive terms. Only general observations concerning some of that legislation are given here.

The federal antitrust laws apply to some aspects of the practice of law. If state law, such as disciplinary rules promulgated by a state supreme court, requires lawyers to engage in or avoid specified conduct, lawyers who comply are not liable for anticompetitive effects of such compliance. Compare § 54(1) (lawyer not liable under § 48 or § 49 for action or inaction reasonably believed to be required by law). Lawyers and others who participate in promulgating such requirements may be entitled to immunity from antitrust liability under the "state action" doctrine. In the absence of such immunities, professionals are subject to antitrust remedies for such activities as promulgating minimum and maximum fee scales and bans on competitive bidding and participating in boycotts of clients in order to increase payments to lawyers. Scattered authority indicates that lawyers are not subject to civil antitrust liability for advising and implementing client decisions to engage in conduct that is held to violate the antitrust laws, but that lawyers may be liable to those injured by such conduct if they join in making such decisions; the case law does not elucidate the distinction.

Claims against lawyers under the federal-securities acts typically arise from allegations that the lawyers have participated in securities violations by their clients. In general, lawyers are liable on such claims only when they have participated in a violation, having whatever state of mind, such as scienter, may be required for liability under the statutory provision in question. Thus, under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission, a lawyer who provides an opinion letter in connection with a transaction subject to that Act containing material misstatements that are knowing, and in some situations (as to which there is divergent authority) reckless, is liable to certain investors who rely on those misrepresentations and are injured as a result. Some statutory provisions that can be bases of liability impose further requirements, for example that the defendant be a "controlling person" of a securities issuer.

Claims may also be asserted against lawyers under the Racketeer Influenced and Corrupt Organizations Act (RICO). Among the requirements for liability under RICO are that the defendant has participated in operation or management of an enterprise (such as a corporation, partnership, or associated group) through a pattern of "racketeering activity" (as defined in the statute) and to the plaintiff's damage. To establish such a pattern, the plaintiff must prove that the defendants have engaged at least twice in certain predicate offenses such as mail fraud and not simply on an isolated occasion. RICO liability thus presupposes violations of other law.

Lawyers who assist in the violation of constitutional rights may be liable to those injured under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Only those acting under color of state law, such as a lawyer employed by a government, are liable under the statute. Certain immunities exist for prosecutors (see § 57) and other state officials. For the application of antidiscrimination legislation to lawyer employers, see Comment *k* hereto.

j. Consumer-protection statutes. Some state consumer-protection statutes have been held applicable, in whole or in part, to law practice (see § 41, Comment *c*). Typically a successful claim under such a statute may entitle the claimant to multiple damages or recovery of attorney fees. Lawyers may be liable thereunder to clients for damages caused by conduct such as misrepresentations and fee misconduct. With respect to federal legislation, the federal Fair Debt Collection Practices Act includes lawyers among the debt collectors to which it applies.

k. Employees of lawyers. A lawyer who hires a lawyer or nonlawyer as an employee is subject to applicable law governing the

employment relationship, such as contract law, antidiscrimination legislation, unjust-discharge law, and labor relations law. It remains to be decided whether some such laws, for example the National Labor Relations Act, are subject to implied qualifications that accommodate the professional obligations of lawyers. With respect to vicarious liability of a lawyer for the acts of an employee, see § 58(1).

REPORTER'S NOTE

Comment c. Advising and assisting acts of clients. Compare, e.g., Dutton v. Wolpoff & Abramson, 5 F.3d 649 (3d Cir.1993) (firm liable under Fair Debt Collection Practices Act for sending debt-collection letter found misleading); Ackerman v. Schwartz, 947 F.2d 841 (7th Cir.1991) (lawyer would be liable for reckless misrepresentation in tax-shelter opinion letter for client's venture); Rosenthal Toyota, Inc. v. Thorpe, 824 F.2d 897 (11th Cir.1987) (lawyer liable for depositing check to clients in lawyer's trust account, knowing that clients would not deliver goods for which check paid); Auriemma v. Montgomery, 860 F.2d 273 (7th Cir.1988), cert. denied, 492 U.S. 906, 109 S.Ct. 3215, 106 L.Ed.2d 565 (1989) (lawyer not immune from Fair Credit Reporting Act liability for using false pretenses to obtain credit report while investigating case); Faison v. Nationwide Mortgage Corp., 839 F.2d 680 (D.C.Cir.1987), cert. denied, 488 U.S. 823, 109 S.Ct. 70, 102 L.Ed.2d 46 (1988) (lawyer liable for helping clients make fraudulent and unlawful loan by making and helping arrange misrepresentations); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057 (2d Cir.1977), cert. denied, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 782 (1978) (lawyer participated in breach of fiduciary duties clients owed to partners by making bad-faith claims and issuing false opinion letter on legal issue); Norman v. Brown, Todd & Heyburn, 693 F.Supp. 1259 (D.Mass.1988) (lawyer would be liable for substantially assisting client's fraud by providing tax-shelter opinion letter and legal assistance, when lawyer knew or should have known of fraud; relying on Restatement Second, Torts § 876(b)); Kline v. First W. Gov't Secs., 24 F.3d 480 (3d Cir.), cert. denied, 513 U.S. 1032, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994) (firm could be liable under federal-securities law for providing opinion letter based on facts it knew were false, even though letter stated that facts had been provided by client); McElhanon v. Hing, 728 P.2d 256 (Ariz.Ct. App.1985), aff'd in part & rev'd in part on other grounds, 728 P.2d 273 (Ariz.1986) (lawyer not privileged against liability for assisting client by drafting document to execute transfer in fraud of judgment creditor when lawyer had knowledge of facts and intent to defraud); Kimmel v. Goland, 793 P.2d 524 (Cal.1990) (lawyer would be liable for counseling and assisting client's unlawful recording of conversations); Durant Software v. Herman, 257 Cal.Rptr. 200 (Cal.Ct.App.1989), appeal dism'd, 795 P.2d 782 (Cal. 1990) (lawyer would be liable for conspiring with judgment-debtor client to defraud creditor by conveying assets to lawyer's firm), with, e.g., Heffernan v. Hunter, 189 F.3d 405 (3d Cir.1999) (no Civil Rights Act conspiracy liability when lawyer acted within scope of representation); Vec-

tor Research v. Howard & Howard Attorneys P.C., 76 F.3d 692 (6th Cir. 1996) (under Ohio law, lawyer not liable when acting in good faith, without knowledge, with client's knowledge); Engel v. CBS, Inc., 981 F.2d 1076 (9th Cir.1992) (under New York law, lawyer generally not liable for injuries caused to nonclient by services for or advice to client, absent fraud, collusion, or malicious or tortious act); Brown v. Donco Enters., Inc., 783 F.2d 644 (6th Cir.1986) (lawyer not liable for helping client violate antitrust laws by threatening and filing suits to coerce compliance with tying arrangement); City of North Miami v. Berger, 828 F.Supp. 431 (E.D.Va.1993) (corporation's lawyer-officer lacking decisionmaking authority not liable under CERCLA); Sassower v. Field, 752 F.Supp. 1190 (S.D.N.Y.1990) (lawyer who was co-op officer not liable for discrimination by co-op board, when lawyer was not on board); Doctors' Co. v. Superior Court, 775 P.2d 508 (Cal.1989) (lawyer who did not act for financial gain not liable for conspiracy with client-insurer to breach insurer's duty of good faith to insured); Guillebeau v. Jenkins, 355 S.E.2d 453 (Ga.Ct.App. 1987) (buyers' lawyer not liable for fraud of buyers of which lawyer unaware); cf. Ohio–Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 30 (N.D.Ill.1980) (that lawyer, viewing client's chance to prevail in lawsuit as slight, considered how to respond to loss of lawsuit not prima facie proof of fraud waiving attorney-client privilege); see C. Wolfram, Modern Legal Ethics 227–35 (1986); Evans & Dorvee, Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability, 45 S.C. L. Rev. 803 (1994); Hazard, How Far May a Lawyer Go in Assisting a Client in Unlawful Conduct?, 35 Miami L Rev. 669 (1981); Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering, 104 Yale L.J. 1545 (1995); Comments *d*, *f*, and *i* hereto, and Reporter's Notes thereto; § 51, Comment *h*, and Reporter's Note thereto (assisting client's breach of fiduciary duty).

Comment d. Breach of contract. For cases recognizing lawyers' liability under their own contracts, see Westinghouse Elec. Corp. v. Newman & Holtzinger P.C., 992 F.2d 932 (9th Cir.1993) (lawyer assertedly agreed with opposing party not to reveal to third persons documents produced by opposing party); Gunn v. Mahoney, 408 N.Y.S.2d 896 (N.Y.Sup.Ct.1978) (contract to incorporate client's business); Saad v. Rodriguez, 506 N.E.2d 1230 (Ohio Ct.App.1986) (claim for breach of escrow agreement against lawyer-escrowee); Morgan v. Baldwin, 450 N.W.2d 783 (S.D.1990) (claim for breach of partnership agreement by client who entered business partnership with lawyer); § 30, Comment *d*, and Reporter's Note thereto (contracts with court reporters, etc.); § 48, Comment *b* (contractual basis of client's malpractice claim); § 55, Comment *c*.

Comment e. Conversion. For cases recognizing a lawyer's liability to clients for conversion, see, e.g., Avianca, Inc. v. Corriea, 705 F.Supp. 666 (D.D.C.1989), aff'd mem., 70 F.3d 637 (D.C.Cir.1995); Husted v. McCloud, 450 N.E.2d 491 (Ind.1983). On liability to nonclients, see, e.g., Skierkewiecz v. Gonzalez, 711 F.Supp. 931 (N.D.Ill.1989) (trespass to chattels by client acting under authority of court order that lawyer obtained in bad faith through ex parte misrepresentation); Miller v. Rau, 30 Cal.Rptr. 612 (Cal.Ct.App.1963) (lawyer paid funds

to client during pendency of suit in which court later held the funds to be due to another); Bonanza Motors, Inc. v. Webb, 657 P.2d 1102 (Idaho Ct.App.1983) (lawyer paid judgment proceeds to client knowing of client's prior valid assignment to another); Kahn v. Crames, 459 N.Y.S.2d 941 (N.Y.App.Div.1983) (lawyer directed client to take and keep property belonging to client's husband's clients); C. Wolfram, Modern Legal Ethics 227–28 (1986). Compare Sutherland v. O'Malley, 882 F.2d 1196 (7th Cir. 1989) (elements of conversion not established in fee dispute between co-counsel).

Comment f. Fraudulent misrepresentation. For cases recognizing a lawyer's liability for defrauding a client, see, e.g., Boynton v. Lopez, 473 A.2d 375 (D.C.1984) (misrepresenting size of settlement offer); McKinnon v. Tibbetts, 440 A.2d 1028 (Me.1982) (falsely claiming to be pursuing client's claim); Finch v. Hughes Aircraft Co., 469 A.2d 867 (Md.Ct. Spec.App.1984), cert. denied, 469 U.S. 1215, 105 S.Ct. 1190, 84 L.Ed.2d 336 (1985) (false billing); Brown v. Gerstein, 460 N.E.2d 1043 (Mass.App.Ct. 1984) (assuring client foreclosure sale would not take place); Rodriguez v. Horton, 622 P.2d 261 (N.M.Ct.App. 1980) (misleading client about how much of settlement client would get); cf. United States v. Cassiere, 4 F.3d 1006 (1st Cir.1993) (criminal fraud); Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659 (1990).

On liability for defrauding a nonclient, see, e.g., Stochastic Decisions, Inc. v. DiDomenico, 995 F.2d 1158 (2d Cir.), cert. denied, 510 U.S. 945, 114 S.Ct. 385, 126 L.Ed.2d 334 (1993) (liability where lawyer masterminded transfers to lawyer of client assets in fraud of client's creditors, with accompanying fraud); Nolte v. Pearson, 994 F.2d 1311 (8th Cir.1993) (no liability when lawyer's opinion letter was carefully limited); Royal Am. Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011 (2d Cir.1989) (no liability when seller's lawyer gave client, buyer of large block of shares, lawyer's opinion that government approval was not required for sale); Hartford Accident & Indem. Co. v. Sullivan, 846 F.2d 377 (7th Cir.1988), cert. denied, 490 U.S. 1089, 109 S.Ct. 2428, 104 L.Ed.2d 985 (1989) (liability when lawyer helped client obtain bank loan through fraud); Ackerman v. Schwartz, 947 F.2d 841 (7th Cir.1991) (reckless disregard of fraudulent factual assumptions in tax-shelter opinion letter); Bonavire v. Wampler, 779 F.2d 1011 (4th Cir.1985) (liability if lawyer misrepresented client's honesty and experience); Chase Manhattan Bank, N.A. v. Perla, 411 N.Y.S.2d 66 (N.Y.App.Div.1978) (lawyer liable if asserted that client's house was being sold and nonclient would be paid from proceeds, knowing this to be false); Reiner v. Kelley, 457 N.E.2d 946 (Ohio Ct.App.1983) (lawyer obtained check from client's real-estate broker through misrepresentation and converted proceeds); Jeska v. Mulhall, 693 P.2d 1335 (Or.Ct.App. 1985) (statement by seller's lawyer that property was "a lot of property for the money" is fraud if lawyer knew that seller had no transferable interest; lawyer's promise to explain transaction to buyers, if made with intent not to perform promise as part of fraudulent inducement to buyers, is also fraud); General Resources Org., Inc. v. Deadman, 907 S.W.2d 22 (Tex.Ct.App.1995) (lawyer falsely attested to client's ownership of gold that client pretended to sell in order to take down payments); 1

R. Mallen & J. Smith, Legal Malpractice §§ 6.5 & 8.9 (4th ed. 1996); cf. Stewart v. Jackson & Nash, 976 F.2d 86 (2d Cir.1992) (fraud to induce lawyer to join law firm). But see, e.g., Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1256–57 (6th Cir.1997) (lawyer not liable for misrepresentations in opinion letter because recipient was independently represented, could have checked statements, and therefore did not justifiably rely); Schatz v. Rosenberg, 943 F.2d 485 (4th Cir.1991), cert. denied, 503 U.S. 936, 112 S.Ct. 1475, 117 L.Ed.2d 619 (1992) (lawyer not liable for knowingly incorporating client misrepresentations—false financial statements—in documents prepared by lawyer) (for contrary cases, see § 98, Comment c, and Reporter's Note thereto).

For cases recognizing a lawyer would be liable for defrauding an opposing party in litigation, see, e.g., Robinson v. Volkswagenwerk AG, 940 F.2d 1369 (10th Cir.1991), cert. denied, 502 U.S. 1091, 112 S.Ct. 1160, 117 L.Ed.2d 408 (1992) (no absolute immunity for fraudulent discovery and litigation statements); Slotkin v. Citizens Cas. Co., 614 F.2d 301 (2d Cir.1979), cert. denied, 449 U.S. 981, 101 S.Ct. 395, 66 L.Ed.2d 243 (1980) (lawyer obtained settlement by recklessly and falsely stipulating that client had only $200,000 in insurance coverage); Raymark Indus. v. Stemple, 714 F.Supp. 460 (D.Kan.1988) (presenting fraudulent claims under asbestos class-action settlement); Cresswell v. Sullivan & Cromwell, 668 F.Supp. 166 (S.D.N.Y.1987) (investors sufficiently pleaded claim against lawyers for financial firm that lawyers fraudulently withheld documents during discovery), on subsequent review, 922 F.2d 60 (2d Cir.1990), cert. denied, 505 U.S. 1222, 112 S.Ct. 3036, 120 L.Ed.2d 905 (1992) (considering defense of lack of reasonable reliance by investors); Fire Ins. Exchange v. Bell, 643 N.E.2d 310 (Ind.1994) (misrepresenting insurance-policy limits); Malewich v. Zacharias, 482 A.2d 951 (N.J.Super.Ct.App.Div.1984) (misrepresenting trial date). Contra, Silberg v. Anderson, 786 P.2d 365 (Cal.1990) (state statutory privilege precludes fraud liability for statements in connection with litigation).

On the extent of possible liability of a lawyer for negligent misrepresentation in providing an opinion letter, see § 51, Comment e, and Reporter's Note thereto.

Comment g. Intentional infliction of emotional distress. On liability to a client, compare, e.g., McDaniel v. Gile, 281 Cal.Rptr. 242 (Cal.Ct.App. 1991) (claim stated for neglecting client's case because client refused to have sex with lawyer); Singleton v. Stegall, 580 So.2d 1242 (Miss.1991) (imprisoned client may sue lawyer who was paid to file postconviction-relief claim but did not do so and lied to client), with, e.g., Anderson v. Rossman & Baumberger, P.A., 440 So.2d 591 (Fla.Dist.Ct.App.1983) (no claim for refusing to release judgment proceeds to client because of fee dispute); Sherbak v. Doughty, 420 N.Y.S.2d 724 (N.Y.App.Div.1979) (no claim for representing both parties in realty transaction and then suing one).

On the extent of liability to a nonclient for intentional infliction of emotional distress, compare, e.g., Kinnamon v. Staitman & Snyder, 136 Cal. Rptr. 321 (Cal.Ct.App.1977) (claim stated for baselessly threatening prosecution to collect debt); Barnes v. McGough, 623 A.2d 144 (Me.1993), aff'd sub nom. Barnes v Zappia, 658

A.2d 1086 (Me.1995) (claim stated for aiding client in fraudulent scheme), with, e.g., Schick v. Bach, 238 Cal. Rptr. 902 (Cal.Ct.App.1987) (no liability for advising psychotherapist client to disclose patient confidences); Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178 (Iowa 1991) (no liability for negligent infliction of emotional distress when partner committed suicide after law firm said it was delaying decision on whether lawyer could rejoin firm after hospitalization for depression); Kunau v. Pillers, Pillers & Pillers, P.C., 404 N.W.2d 573 (Iowa Ct.App.1987) (negligent litigation not actionable by opposing party); Sullivan v. Birmingham, 416 N.E.2d 528 (Mass.App.Ct.1981) (litigation pleading absolutely privileged); Kirschstein v. Haynes, 788 P.2d 941 (Okla.1990) (litigation communication absolutely privileged); see 1 R. Mallen & J. Smith, Legal Malpractice § 6.25 (4th ed.1996). On the applicability of the federal Fair Debt Collection Practices Act to lawyers, see Reporter's Note to Comment *j* hereto.

Some jurisdictions recognize liability for negligent infliction of emotional distress and would presumably hold lawyers liable for that tort in appropriate circumstances, which seem unlikely to occur in the absence of illness or bodily harm accompanying the emotional distress (see generally Restatement Second, Torts § 313). On cases, none of which involves lawyer activities, see, e.g., Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986) (parent bystander at child's injury); Burgess v. Superior Court, 831 P.2d 1197 (Cal. 1992) (mother whose child was injured by physician during delivery); Sullivan v. Boston Gas Co., 605 N.E.2d 805 (Mass.1993) (objectively diagnosable distress from seeing house burn).

Comment h. Breach of a lawyer's or client's fiduciary duty to a nonclient. On a lawyer's knowing assistance of a client's breach of fiduciary duty, see § 51, Comment *h*, and Reporter's Note thereto. Some jurisdictions recognize a claim for breach of fiduciary duty against a lawyer who seeks and obtains the trust of one the lawyer does not represent in the matter in question. E.g., Heine v. Colton, Hartnick, Yamin & Sheresky, 786 F.Supp. 360 (S.D.N.Y.1992) (lawyer defrauded plaintiff in business transactions while representing him in other matters); Riggs Nat'l Bank v. Freeman, 682 F.Supp. 519 (S.D.Fla. 1988); General Resources Org., Inc. v. Deadman, 907 S.W.2d 22 (Tex.Ct. App.1995); Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645 (Mich.Ct.App. 1981); see Westinghouse Elec. Corp. v. Kerr–McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978) (recognizing fiduciary obligation for disqualification purposes).

Comment i. Federal legislation: antitrust law, securities law, RICO, Civil Rights Act. On the applicability of the antitrust laws to the practice of law, see, e.g., Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (liability of bar association for promulgating minimum fee schedule); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990) (boycott by court-appointed criminal-defense lawyers to obtain higher compensation); cf. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (society of engineers' professional rule barring com-

petitive bidding); Arizona v. Maricopa Cty. Medical Soc'y, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) (maximum fee scale for doctors in medical-care arrangement); see generally C. Wolfram, Modern Legal Ethics 38–45 (1986); cf. Professional Real Estate Investors v. Columbia Pictures, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) (bringing litigation cannot subject party to antitrust liability unless it is objectively baseless). On the "state action" exemption, see, e.g., Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); Hoover v. Ronwin, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984).

On possible lawyer civil liability for helping clients violate the antitrust laws, compare Pinhas v. Summit Health, Ltd., 894 F.2d 1024 (9th Cir. 1989), cert. denied, 498 U.S. 817, 111 S.Ct. 61, 112 L.Ed.2d 36 (1990), aff'd, 500 U.S. 322, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991) (claim stated when complaint alleged that lawyers exerted influence over client hospital, resulting in denial of staff privileges to doctor), with Brown v. Donco Enters., Inc., 783 F.2d 644 (6th Cir.1986) (lawyer not liable for threatening and filing suits to coerce compliance with tying arrangement); Tillamook Cheese & Dairy Assoc. v. Tillamook County Creamery Assoc., 358 F.2d 115 (9th Cir.1966) (lawyer not liable for advising client, but would be liable for joining in making policy decision); Invictus Records, Inc. v. American Broadcasting Cos., 98 F.R.D. 419 (E.D.Mich.1982) (lawyers not liable for advising client); Worldwide Marine Trading Corp. v. Marine Transp. Serv., Inc., 527 F.Supp. 581 (E.D.Pa. 1981) (lawyer not liable for advising client and acting on its behalf pursuant to its decisions).

On securities-law liability under Rule 10b–5, the provision most commonly and successfully invoked by claimants against lawyers, compare, e.g., Kline v. First W. Gov't Secs., Inc., 24 F.3d 480 (3d Cir.), cert. denied, 513 U.S. 1032, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994) (liability for knowing misrepresentations in opinion letter, despite letter's statement that lawyer relied on facts stated by client); Breard v. Sachnoff & Weaver, Ltd., 941 F.2d 142 (2d Cir.1991) (lawyer would be liable for recklessly drafting offering memorandum that failed to mention promoter's past fraud conviction and later misrepresenting that promoter's past was immaterial); Ackerman v. Schwartz, 947 F.2d 841 (7th Cir.1991) (lawyer providing tax opinion would be liable to investors for reckless misrepresentations in opinion letter), with, e.g., Camp v. Dema, 948 F.2d 455 (8th Cir.1991) (lawyer for stock buyer not liable for failure to disclose to seller interest of outside party in buying corporation, when buyer and seller had no fiduciary relationship and lawyer had no knowledge of buyer's violation of securities laws); Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991), cert. denied, 503 U.S. 936, 112 S.Ct. 1475, 117 L.Ed.2d 619 (1992) (lawyer not liable for drafting public documents containing client-authored misrepresentations when lawyer did not sign documents) (but see disagreement with *Schatz* decision in § 98, Reporter's Note to Comment *c*); Renovitch v. Kaufman, 905 F.2d 1040 (7th Cir.1990) (lawyer lacking scienter not liable). See generally Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) (no liability for aiding and abetting wrongdoer, but one who makes misstatements or omissions on

which buyers or sellers rely may be liable); M. Steinberg, Corporate and Securities Malpractice (1992); 1 R. Mallen & J. Smith, Legal Malpractice, ch. 10 (4th ed.1996).

On RICO liability, compare, e.g., Crowe v. Henry, 43 F.3d 198 (5th Cir.1995) (business venture of lawyer and client can be RICO enterprise); Ikuno v. Yip, 912 F.2d 306 (9th Cir. 1990) (lawyer who filed 2 fraudulent annual reports for corporation that lawyer controlled would be liable); State Farm Mut. Auto. Ins. Co. v. Rosenfield, 683 F.Supp. 106 (E.D.Pa. 1988) (law-firm associate liable for repeatedly submitting fraudulent claims to insurance companies), with, e.g., Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) (accountants for enterprise not liable when they did not participate in its operation or management); Baumer v. Pachl, 8 F.3d 1341 (9th Cir. 1993) (applying *Reves* to lawyer who allegedly helped limited partnership hide fraud); Nolte v. Pearson, 994 F.2d 1311 (8th Cir.1993) (applying *Reves* to lawyers); In Re Burzynski, 989 F.2d 733 (5th Cir.1993) (insufficient continuity when lawyer associated with others only to conduct one litigation); Hartz v. Friedman, 919 F.2d 469 (7th Cir.1990) (no pattern of racketeering if lawyers committed mail fraud and extortion, but all in connection with one case); cf. United States v. Console, 13 F.3d 641 (3d Cir.1993), cert. denied, 513 U.S. 812, 115 S.Ct. 64, 130 L.Ed.2d 21 (1994) (criminal liability where law firm defrauded insurers by padding medical bills); United States v. Eisen, 974 F.2d 246 (2d Cir.1992) (criminal conviction for conducting law firm's litigation through systematic forging of evidence and bribery of witnesses); United States v. Yonan, 800 F.2d 164 (7th Cir.1986), cert. denied, 479 U.S. 1055, 107 S.Ct. 930, 93 L.Ed.2d 981 (1987) (upholding indictment of defense lawyer for repeatedly bribing prosecutor; prosecutor's office was enterprise). See generally D. Abrams, The Law of Civil RICO (1991); 1 R. Mallen & J. Smith, supra ch. 11.

On liability under the Civil Rights Act of 1871, 42 U.S.C. § 1983, see, e.g., Wyatt v. Cole, 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) (no qualified immunity for private defendants acting under color of state law, including lawyer, but good-faith defense may be available), on remand, 994 F.2d 1113 (5th Cir.), cert. denied, 510 U.S. 977, 114 S.Ct. 470, 126 L.Ed.2d 421 (1993) (upholding defense); Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991) (prosecutor absolutely immune for initiating prosecution and presenting state's case, but not for giving advice to police officer); Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (court-appointed defense lawyer does not ordinarily act under color of state law and hence is not subject to liability); Tower v. Glover, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984) (defense counsel has no absolute immunity and can be liable for conspiring with state officials); 1 R. Mallen & J. Smith, supra § 9.4; cf. Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) (civil plaintiff who obtained prejudgment attachment acted under color of state law), Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (court's implementation of defense counsel's peremptory challenges constitutes state action for purposes of Fourteenth Amendment and apparently also for purposes of civil rights act).

Comment j. Consumer-protection statutes. For decisions on whether state consumer-protection statutes apply to lawyers, see § 41, Reporter's Note to Comment *c*; 1 R. Mallen & J. Smith, Legal Malpractice § 9.5 (4th ed.1996). On the applicability of the Fair Debt Collection Practices Act to lawyers, see P.L. 99-361, 100 Stat. 768 (1986) (amending 15 U.S.C. § 1692a(6) to delete exemption); Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) (lawyers included among those potentially liable). On what conduct is covered under various statutes, see, e.g., Clomon v. Jackson, 988 F.2d 1314 (2d Cir.1993) (lawyer liable under Fair Debt Collection Practice Act for collection letter purporting to come from lawyer when lawyer had no role in deciding to send letter); Duncan v. Handmaker, 149 F.3d 424 (6th Cir. 1998) (discussing when lawyer is liable under Fair Credit Reporting Act for obtaining opposing party's credit report for use in litigation); Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin, 717 A.2d 724 (Ct.1998) (law firm's negligence does not give rise to cause of action under state's unfair-trade-practices act); Reed v. Allison & Perrone, 376 So.2d 1067 (La.Ct.App.1979) (competing lawyer not entitled to injunction against deceptive advertisements); Doucette v. Kwiat, 467 N.E.2d 1374 (Mass.1984) (liability for withholding improper extra fee from suit proceeds); Latham v. Castillo, 972 S.W.2d 66 (Tex.1998) (liability for lawyer's misrepresentation of status of case); Eriks v. Denver, 824 P.2d 1207 (Wash.1992) (entrepreneurial aspects such as fee matters or obtaining clients covered, but not malpractice in practice of law; failure to disclose conflict of interest covered only if for purpose of obtaining client or increasing profit).

Comment k. Employees of lawyers. On anti-discrimination legislation, see Hishon v. King & Spalding, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (sexual discrimination in decision on election to law-firm partnership actionable under federal civil rights law); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir.1992), cert. denied, 510 U.S. 826, 114 S.Ct. 88, 126 L.Ed.2d 56 (1993) (similar; finding no discrimination); Barnhart v. Pickrel, Schaeffer & Ebeling Co., 12 F.3d 1382 (6th Cir.1993) (rejecting age-discrimination claim on facts); Lucido v. Cravath, Swaine & Moore, 425 F.Supp. 123 (S.D.N.Y.1977) (religion and national-origin discrimination in associate assignment and promotion); cf. Vaughn v. Edel, 918 F.2d 517 (5th Cir.1990) (racial discrimination in discharge of house counsel); Breckinridge v. Bristol-Myers Co., 624 F.Supp. 79 (S.D.Ind.1985) (age discrimination against house counsel). For professional rules subjecting employment discrimination to discipline, see, e.g., D.C. Rules of Prof. Conduct, Rule 9.1; N.J. Rules of Prof. Conduct, Rule 8.4(g) (only after determination by court or agency); N.Y. Code of Prof. Responsibility, DR 1-102(A)(6) (similar); Vt. Code of Prof. Responsibility, DR 1-102(A)(6); cf. Minn. Rules of Prof. Conduct, Rule 8.4(g) (forbidding harassment on basis of sex, race, etc.).

On collective-bargaining legislation, see Foley, Hoag & Eliot, 229 N.L.R.B. 456 (1977) (recognizing NLRB jurisdiction); Camden Regional Legal Servs., Inc., 231 N.L.R.B. 224 (1977) (jurisdiction asserted over firms and legal-assistance programs grossing more than $250,000 annual-

ly); Wayne County Neighborhood Legal Services, Inc., 229 N.L.R.B. 1023 (1977) (composition of bargaining unit); Santa Clara Cty. Counsel Attorneys Ass'n v. Woodside, 869 P.2d 1142 (Cal.1994) (government employees may sue client-employer during employment to enforce collective-bargaining rights). See also Stewart v. Jackson & Nash, 976 F.2d 86 (2d Cir.1992) (recognizing claim by lawyer against firm that fraudulently induced lawyer to join); Brown v. Hammond, 810 F.Supp. 644 (E.D.Pa.1993) (paralegal may sue employer if discharged for refusing to engage in billing fraud); Jacobson v. Knepper & Moga P.C., 706 N.E.2d 491 (Ill.1998) (lawyer may not sue firm when discharged for complaining about unlawful litigation practice); Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178 (Iowa 1991) (rejecting claim against firm that allegedly drove depressed partner to suicide by delaying decision whether partner could rejoin firm after hospitalization); Wieder v. Skala, 609 N.E.2d 105 (N.Y.1992) (recognizing claim against firm that discharged associate for urging firm to report another firm lawyer's misconduct); § 32, Comment *b*, and Reporter's Note thereto (availability of retaliatory-discharge claims to lawyer-employees). For rights of employers against departing lawyers, see R. Hillman, Lawyer Mobility (1994).

§ 57. Nonclient Claims—Certain Defenses and Exceptions to Liability

(1) In addition to other absolute or conditional privileges, a lawyer is absolutely privileged to publish matter concerning a nonclient if:

(a) the publication occurs in communications preliminary to a reasonably anticipated proceeding before a tribunal or in the institution or during the course and as a part of such a proceeding;

(b) the lawyer participates as counsel in that proceeding; and

(c) the matter is published to a person who may be involved in the proceeding, and the publication has some relation to the proceeding.

(2) A lawyer representing a client in a civil proceeding or procuring the institution of criminal proceedings by a client is not liable to a nonclient for wrongful use of civil proceedings or for malicious prosecution if the lawyer has probable cause for acting, or if the lawyer acts primarily to help the client obtain a proper adjudication of the client's claim in that proceeding.

(3) A lawyer who advises or assists a client to make or break a contract, to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not

liable to a nonclient for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client's objectives without using wrongful means.

Comment:

a. Scope and cross-references. This Section sets forth three defenses and exceptions to liability that might otherwise be asserted against a lawyer under § 56. (They are not all "defenses" because the burden of proof for the exception stated in Subsection (2) falls on the plaintiff.) Lawyer defendants may also rely on defenses available under generally applicable law (see § 56). On judicial and quasi-judicial immunity, see § 48, Comment *d*.

b. Rationale. The rules stated in Subsections (1) and (2) protect a lawyer engaging in litigation on behalf of a client from civil actions brought by nonclients. Allowing nonclients to recover for defamation or malicious prosecution or wrongful use of civil proceedings could discourage lawyers from representing clients with proper vigor and thus impede the access of litigants to court. Moreover, the adversary system itself provides some control against improper lawyer conduct in litigation, as does the tribunal's power to govern the conduct of lawyers appearing before it (see § 1, Comment *b*, & § 105, Comment *d*) and the availability of professional discipline (see § 5). This Section thus bars lawyer liability for what would otherwise be defamation in litigation and limits lawyer liability for malicious prosecution and wrongful use of civil proceedings. For the rationale of the privilege set forth by Subsection (3), see Comment *g*.

c. Defamation privileges. As is true of parties to litigation and other participants such as witnesses, a lawyer is absolutely privileged against defamation liability for publishing a defamatory statement relating to civil or criminal litigation before a tribunal exercising a judicial function, even if the lawyer acts maliciously and knows the statement to be false. See Restatement Second, Torts § 586 (lawyers) and §§ 587–588 (parties and witnesses). "Publication" and "publish" for this purpose has the same meaning as in the law of defamation. Such a tribunal may be a court, administrative tribunal, or arbitrator. The defamatory statement may be made, for example, in a pleading, brief, question to a witness (including a question subject to valid objection), or oral argument. The person allegedly defamed may be a party to the litigation, a witness, or someone else.

Statements made before litigation is instituted are protected if related to a proceeding contemplated in good faith and under serious consideration by a client who is a prospective plaintiff or reasonably

anticipated by a client who is a prospective defendant (see id. § 586, Comment *e*). Thus, the privilege covers a statement in a letter to opposing counsel proposing a settlement or in a conversation with a prospective witness even if the contemplated action is never brought or the prospective witness is not called. The privilege is also a defense to other claims where publication or communication is an element of the claim, for example, a claim that a lawyer's statements during a judicial proceeding constituted intentional infliction of emotional distress (see § 56, Comment *g*). (For the different rules applicable to claims of malicious prosecution and the like, see Subsection (2) and Comments *d* and *e* hereto.) The privilege, however, does not protect statements directed to persons not involved in the litigation or statements having no connection with the proceeding (see Restatement Second, Torts § 586, Comment *c*). Thus, a statement to the press is not covered by the privilege, although the distinct privilege for accurate reports of official proceedings covers some such statements (see Restatement Second, Torts § 611). On what constitutes publication of a statement, see Restatement Second, Torts §§ 577–578. On other grounds of liability, see Comments *d* and *f* hereto; § 56, Comment *f* (fraudulent misrepresentation).

In addition to the absolute privilege provided in Subsection (1), a lawyer is entitled to the absolute and conditional privileges available to any defamation defendant in the circumstances in which they apply (see Restatement Second, Torts §§ 583–612). For example, a conditional privilege protects a lawyer's communication to a client or third person when made in a reasonable effort to protect the interest entrusted to the lawyer (see Restatement Second, Torts § 595, Comment *f*). Similarly, a privilege protects against liability for accurate descriptions of judicial and other official proceedings (see Restatement Second, Torts § 611).

d. Wrongful use of civil proceeding; abuse of process; false arrest. A person who takes an active part in the initiation, continuation, or procurement of civil proceedings is liable in tort to the defendant for wrongful use of civil proceedings if the person acts without probable cause and primarily for a purpose other than securing a proper adjudication of the claim and if (except for ex parte proceedings) the proceedings have terminated in favor of the defendant (see Restatement Second, Torts § 674). In many jurisdictions, only those suffering certain kinds of harm known as special injury may recover. The tort is called malicious prosecution in many jurisdictions.

The effect of the rule stated in this Section is that, in a claim for wrongful use of civil proceedings, the existence of probable cause and of an improper purpose are assessed separately for a lawyer and for the client on whose behalf the civil proceeding was brought. A lawyer

is liable only if there was no probable cause for bringing the civil proceeding, the lawyer did not act primarily to aid the client in securing a proper adjudication of the client's claim, and the civil proceeding has terminated in favor of the defending party. Probable cause exists if the lawyer has a reasonable belief that the facts on which the claim is based can be established to the satisfaction of the trier of fact and has a reasonable belief that there is a sound chance that under those facts the claim may be held valid (see Restatement Second, Torts § 675 & Comments *d* & *e* thereto). (On a client's defense of advice of counsel with respect to claims of third persons, see § 29, Comment *c*.) Whether probable cause existed is determined on the basis of the facts known to the lawyer at the time. When there is no dispute as to what facts were so known, the existence of probable cause is an issue of law to be decided by the tribunal, not a jury issue (see Restatement Second, Torts § 681B(1)(c)). A decision by a competent tribunal upholding the client's claim on the merits is ordinarily conclusive evidence of probable cause, even if it is reversed on appeal (see Restatement Second, Torts § 675, Comment *b*).

Similarly, regardless of the client's purpose, even if a lawyer "has no probable cause and is convinced that his client's claim is unfounded, he is still not liable [for wrongful use of civil proceedings] if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim" (Restatement Second, Torts § 674, Comment *d*; see also id. § 676). A desire to earn a contingent or other fee does not constitute an improper motive. But if a lawyer acts without probable cause "and for an improper purpose, as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid, he is subject to the same liability as any other person" (Restatement Second, Torts § 674, Comment *d*). On limitations against use of threats such as a criminal prosecution in negotiating a settlement, see § 98, Comment *f*. The lawyer's motive is assessed separately from that of the client. However, the client's motives, if known to a lawyer, may constitute evidence bearing on the lawyer's motives.

Lack of probable cause and improper motive are elements of the cause of action for wrongful use of civil proceedings. Thus, the burden of persuading the jury of their existence normally falls on the party seeking recovery (see Restatement Second, Torts § 681A).

Abuse of process is a tort distinct from wrongful use of civil proceedings. A damaged party may recover for abuse of process from one "who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed" (Restatement Second, Torts § 682). Abuse of process may be available

even when, for example, probable cause to initiate the proceedings existed or the main proceeding was terminated favorably to the lawyer's client. The critical element is the use of the particular civil or criminal process in question in order to accomplish an illegitimate purpose. A lawyer is not liable for abuse of process when the lawyer acted for some proper purpose, such as securing adjudication of the client's claim, even though this would also procure the lawyer a fee. However, a lawyer may be liable for acting for an improper purpose, for example if the lawyer causes the opposing party to be arrested in order to coerce that party to settle (id. § 682, Illustration 3). Even one acting with improper intent is ordinarily not liable unless the actor performed some act, such as an arrest without proper grounds, not proper in the regular conduct of the proceedings.

A related tort is false imprisonment (see Restatement Second, Torts §§ 35–45A). Although one instigating or participating in the unlawful confinement of another is civilly liable for this tort, lawyers like other participants are privileged against liability when someone is confined pursuant to a warrant that is valid or fair on its face (see id. § 37, Comment *b*; § 45A, Comment *b*; §§ 122–124). Participants are likewise privileged when someone is arrested upon the oral order of a court acting within its jurisdiction or by a police officer reasonably suspecting that the person arrested has committed a felony (see id. §§ 120–121).

e. Malicious prosecution. A private person who initiates or procures initiation of criminal proceedings against one not guilty is liable for malicious prosecution if the person acts without probable cause and primarily for a purpose other than bringing an offender to justice and the proceedings have terminated in favor of the accused (see Restatement Second, Torts § 653).

A public prosecutor acting in that capacity is absolutely privileged against civil liability for initiating, instituting, or continuing criminal proceedings (see Restatement Second, Torts § 656). Thus, regardless of any improper motive or lack of probable cause, a lawyer acting as a public prosecutor (including a lawyer working for the prosecutor) is not liable for malicious prosecution or false arrest. The privilege is limited to acts in the prosecutor's official capacity.

A private lawyer representing a client, for example a complaining witness, could under certain circumstances be liable for malicious prosecution. To establish such liability, a plaintiff must show that the lawyer procured the initiation of criminal proceedings, for example by advising the client to institute them, as opposed to informing the client of available legal options (see Restatement Second, Torts § 653, Comment *h*). It is also necessary that the lawyer acted without good

cause and primarily for a purpose other than bringing an offender to justice or assisting a client to assert the client's rights. The lack of probable cause and improper purpose of a lawyer are assessed separately from those of a client, and the burden of persuading the trier of fact of their existence rests on the plaintiff in the malicious-prosecution action (see Comment *d* hereto).

f. Lawyer liability for litigation misconduct. Even if not civilly liable for defamation, wrongful use of civil proceedings, or malicious prosecution, a lawyer nevertheless may be subject to professional discipline (see § 5) or procedural sanctions for litigation misconduct (see § 110). For example, a lawyer who brings a factually unsupported civil action primarily with the purpose of aiding a client to secure a proper adjudication of the client's claim, but without reasonably investigating facts necessary to support the claim, might be subject to litigation sanctions imposed by the tribunal as stated in § 110. Likewise, in some jurisdictions a lawyer could be disciplined for threatening to institute a criminal prosecution to gain advantages in an unrelated matter. See § 98, Comment *f*. See also § 56, Comment *f* (intentional misrepresentation); § 118, Comment *c* (spoliation of evidence).

g. Advising or assisting a client to break a contract. As with other advisors to a contracting party, lawyers are protected against liability for interfering with contracts or with prospective contractual relations or business relationships. On such liability, see generally Restatement Second, Torts §§ 766–774A. That protection reflects the need of contracting parties for advice and assistance, the difficulty of knowing in advance whether an arguable refusal to perform will be held to constitute an actionable breach of contract, and the view that even an actionable breach may sometimes be defensible. Thus a lawyer may ordinarily, without civil liability, advise a client not to enter a contract or to breach an existing contract. A lawyer may also assist such a breach, for example by sending a letter stating the client's intention not to perform, or by negotiating and drafting a contract, with someone else that is inconsistent with the client's other contractual obligations. The same principles apply to dissolving relationships such as a marriage or business partnership. They likewise apply to advising or assisting a client to interfere with a contract or a prospective contract or business relationship with one party, for example by entering into a contract or relationship with another, or to interfere with a contract or relationship between nonclients.

A lawyer so advising and acting is not liable if the lawyer does not employ wrongful means and if the lawyer acts to protect the client's welfare (see Restatement Second, Torts § 770(b), Comment *b*, § 772(b)). So long as the lawyer acts or advises with the purpose of

promoting the client's welfare, it is immaterial that the lawyer hopes that the action will increase the lawyer's fees or reputation as a lawyer or takes satisfaction in the consequences to a nonclient. Nor does a lawyer become liable to nonclients for giving with a proper purpose advice that is negligent or harms the client. But a lawyer who acts or advises a client for the lawyer's own benefit, for example so that the client will enter contractual relations with a business in which the lawyer owns an interest, is subject to liability to a nonclient when the lawyer's activities satisfy the other requirements of the tort. A lawyer may also be liable to a nonclient for assisting a client with a proper purpose but by wrongful means, such as threatening the nonclient with an unfounded criminal prosecution in order to induce the nonclient to cancel a contract (see § 98, Comment *f*; Restatement Second, Torts § 770, Comment *d*). On liability for assisting a client to violate that client's fiduciary duties, see § 51(4) and 56.

REPORTER'S NOTE

Comment c. Defamation privileges. Compare, e.g., Ball Corp. v. Xidex Corp., 967 F.2d 1440 (10th Cir.1992) (privilege applies in Patent and Trademark Office proceeding); Arundel Corp. v. Green, 540 A.2d 815 (Md. Spec.Ct.App.1988) (prefiling investigatory letter privileged if related to suit); Kittler v. Eckberg, Lammers, Briggs, Wolff & Vierling, 535 N.W.2d 653 (Minn.Ct.App.1995), cert. denied, 517 U.S. 1221, 116 S.Ct. 1850, 134 L.Ed.2d 950 (1996) (letter soliciting potential plaintiffs privileged against suit by defendant to eventual suit); Surace v. Wuliger, 495 N.E.2d 939 (Ohio 1986) (statement in pleading about nonparty privileged); Odeneal v. Wofford, 668 S.W.2d 819 (Tex.Civ. App.1984) (lawyer's statements before state-bar grievance committee investigating lawyer privileged), with, e.g., Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (no Civil Rights Act privilege for prosecutor's statement at press conference); Scott Fetzer Co. v. Williamson, 101 F.3d 549 (8th Cir. 1996) (author of letter to advertiser protesting advertisement not privileged to send copy to newspapers in which advertisements appeared); Green Acres Trust v. London, 688 P.2d 617 (Ariz.1984) (statements to press not privileged); Nguyen v. Proton Technology Corp., 81 Cal.Rptr.2d 392 (Cal.Ct.App.1999) (no privilege for irrelevant statement about prospective defendant's criminal record in demand letter); Rothman v. Jackson, 57 Cal.Rptr.2d 284 (Cal.Ct.App. 1996) (press-conference statement not privileged); Post v. Mendel, 507 A.2d 351 (Pa.1986) (no privilege when copy of letter to opposing lawyer sent to judge, disciplinary board, and witnesses); compare, e.g., Branca v. Mayesh, 476 N.Y.S.2d 187 (N.Y.App. Div.), aff'd, 473 N.E.2d 261 (N.Y. 1984) (lawyer's distribution of complaint at bar-association seminar privileged as report of judicial proceeding). See generally C. Wolfram, Modern Legal Ethics 230–32 (1986); Annot., 23 A.L.R.4th 932 (1983). On the applicability of the privilege to claims that are similar to defamation claims, see, e.g., Rubin v. Green, 847

P.2d 1044 (Cal.1993) (unlawful solicitation of claim); Silberg v. Anderson, 786 P.2d 365 (Cal.1990) (infliction of emotional distress and breach of contract; discussing other theories); Kirschstein v. Haynes, 788 P.2d 941 (Okla.1990) (intentional infliction of emotional distress); Lee v. Nash, 671 P.2d 703 (Or.Ct.App.1983) (invasion of privacy). Compare Comments *d* and *e* hereto (malicious prosecution and wrongful use of civil proceedings); § 56, Comment *f* and Reporter's Note thereto (fraud).

On a lawyer's privilege against defamation claims in other situations, see, e.g., Sacramento Brewing Co. v. Desmond, 89 Cal.Rptr.2d 760 (Cal.Ct. App.1999) (litigation privilege applied when lawyer mistakenly named stranger as bankruptcy debtor in notice to creditors); Kruse v. Rabe, 79 A. 316 (N.J.Ct.Err. & App.1910) (absolute privilege for advice to client; but if shouted so others can hear, lawyer's malice is jury question); Dano v. Royal Globe Ins. Co., 451 N.E.2d 488 (N.Y.1983) (disclaimer letter from insurer's lawyer to insured and its adjuster and attorneys); Fusco v. D'Agostino, 551 N.Y.S.2d 276 (N.Y.App.Div.1990) (lawyer's letter to police to prevent client's arrest; but privilege does not cover irrelevant abuse of person charging client); Rodgers v. Wise, 7 S.E.2d 517 (S.C. 1940) (letter between co-counsel absolutely privileged and did not constitute publication).

Comment d. Wrongful use of civil proceeding; abuse of process; false arrest. On variation among jurisdictions in the elements of the cause of action, see 1 F. Harper, F. James & O. Gray, The Law of Torts §§ 4.8–9 (2d ed. 1986). See generally 1 R. Mallen & J. Smith, Legal Malpractice §§ 6.6–.21 (4th ed.1996); Annot., 46 A.L.R.4th 249 (1986). On comparable liability of a defense lawyer, see Aranson v. Schroeder, 671 A.2d 1023 (N.H.1995).

On probable cause to believe that a claim merits litigation, see Wong v. Tabor, 422 N.E.2d 1279 (Ind.Ct.App. 1981); Cottman v. Cottman, 468 A.2d 131 (Md.Spec.Ct.App.1983); Friedman v. Dozorc, 312 N.W.2d 585 (Mich.1981); W. Keeton, et al., Prosser and Keeton on The Law of Torts 893–94 (5th ed.1984); 1 R. Mallen & J. Smith, supra, § 6.14. On the rule that probable cause is appraised on the basis of the information available to the lawyer, without any requirement of investigation, see Lucero v. Stewart, 892 F.2d 52 (9th Cir.1989); Sheldon Appel Co. v. Albert & Oliker, 765 P.2d 498 (Cal.1989) (no legal research required); Wilson v. Hayes, 464 N.W.2d 250 (Iowa 1990); Friedman v. Dozorc, supra; 1 R. Mallen & J. Smith, supra, §§ 6.17–18. Contra, Nelson v. Miller, 607 P.2d 438 (Kan. 1980). On the rule that, when it is undisputed what facts were available to the lawyer, probable cause is an issue of law for the court, see, e.g., Professional Real Estate Investors v. Columbia Pictures, 508 U.S. 49, 63, 113 S.Ct. 1920, 1929–30, 123 L.Ed.2d 611 (1993) (in antitrust context); Bird v. Rothman, 627 P.2d 1097 (Ariz.Ct. App.), cert. denied, 454 U.S. 865, 102 S.Ct. 327, 70 L.Ed.2d 166 (1981); Sheldon Appel Co. v. Albert & Oliker, supra; Badell v. Beeks, 765 P.2d 126 (Idaho 1988); Prewitt v. Sexton, 777 S.W.2d 891 (Ky.1989). On the rule that a party's success at trial on the merits in a contested hearing is conclusive proof of probable cause, even if reversed on appeal, see Colquitt v. Network Rental, Inc., 393 S.E.2d 28 (Ga.Ct.App.1990); Keefe v. Aluminum Co. of America, 519 N.E.2d 955 (Ill. App.Ct.1988); Nagy v. McBurney, 392

A.2d 365 (R.I.1978); Annot., 58 A.L.R.2d 1422 (1958). A few jurisdictions include in their definition of probable cause not only the objective element stated in the Comment, but also the lawyer's good-faith belief that the claim merits litigation. E.g., Wong v. Tabor, 422 N.E.2d 1279 (Ind. Ct.App.1981).

On malice as requiring that the lawyer have an intent other than helping the client obtain a proper adjudication of a claim, see, e.g., Wilson v. Hayes, 464 N.W.2d 250 (Iowa 1990); Nelson v. Miller, 607 P.2d 438 (Kan.1980); Prewitt v. Sexton, 777 S.W.2d 891 (Ky.1989); Gaar v. North Myrtle Beach Realty Co., 339 S.E.2d 887 (S.C.Ct.App.1986); 1 R. Mallen & J. Smith, supra, § 6.20. But see Slater v. Durchfort, 42 Cal.Rptr.2d 186 (Cal.Ct.App.1995) (depublished; not citable as authority) (replacement lawyer's failure to investigate case may sufficiently evidence malice).

On a lawyer's liability for abuse of process, see generally 1 R. Mallen & J. Smith, supra, § 6.22; Annot., 97 A.L.R.3d 688 (1980). On the requirement that the lawyer's primary purpose be to accomplish a purpose for which the process is not designed, compare, e.g., Hewes v. Wolfe, 330 S.E.2d 16 (N.C.Ct.App.1985) (liability for filing lis pendens on property whose ownership was undisputed, with stated intent to "ruin" and"get" plaintiff); Tedards v. Auty, 557 A.2d 1030 (N.J.Super.Ct.App.Div.1989) (liability for using ne exeat writ, obtained by misrepresentation, to coerce settlement); Strid v. Converse, 331 N.W.2d 350 (Wis.1983) (jury question where lawyer allegedly caused client's spouse to be arrested to coerce spouse into granting visiting rights), with, e.g., DeNardo v. Michalski, 811 P.2d 315 (Alaska 1991) (no liability for bringing supplementary proceedings to collect judgment); Mozzochi v. Beck, 529 A.2d 171 (Conn.1987) (not enough to allege that lawyer sought to injure plaintiff and to enrich lawyer and client through meritless suit); Wilson v. Hayes, 464 N.W.2d 250 (Iowa 1990) (no liability where lawyer's primary goal was seeking recovery for client, not securing release of lawyer from opposing party). On the requirement that the lawyer perform some act not proper in the regular conduct of the proceedings, compare, e.g., Goucher v. Dineen, 471 A.2d 688 (Me.1984) (actionable to secure attachment for ulterior purpose by signing writ that falsely asserted that judge had approved attachment); Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 343 N.E.2d 278 (N.Y.1975) (claim stated when lawyer subpoenaed 87 teachers to appear to testify the same day, in order to force board of education to hire substitutes), with, e.g., Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., 728 P.2d 1202 (Cal.1986) (filing environmental suit to coerce financial settlement not sufficient for liability); Scozari v. Barone, 546 So.2d 750 (Fla.Dist.Ct.App.1989) (even if lawyer sought lis pendens to resolve client's custody dispute, no liability if there was reasonable basis in law and fact); see W. Keeton, et al., Prosser and Keeton on the Law of Torts 897–99 (5th ed.1984); cf. 1 F. Harper, F. James & O. Gray, The Law of Torts 481–97 (2d ed.1986).

On a lawyer's liability for false arrest, compare Executive Commercial Servs., Ltd. v. Daskalakis, 393 N.E.2d 1365 (Ill.App.Ct.1979), cert. denied, 446 U.S. 967, 100 S.Ct. 2945, 64 L.Ed.2d 826 (1980) (no liability when plaintiff's liberty restrained by formal

legal process, writ ne exeat); Koury v. John Meyer of Norwich, 261 S.E.2d 217 (N.C.Ct.App.1980) (judge's erroneous but not void arrest order complete defense for lawyer who procured it); Lozano v. Tex–Paint, Inc., 606 S.W.2d 40 (Tex.Civ.App.1980) (no liability for arrest under warrant in valid form issued by proper official), with Havens v. Hardesty, 600 P.2d 116 (Colo.Ct.App.1979) (no immunity for lawyer who mistakenly arranges for arrest of person having same name as person intended to be arrested).

Comment e. Malicious prosecution. On the absolute privilege of prosecutors acting within their official capacity, see, e.g., Kalina v. Fletcher, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (no absolute privilege for prosecutor who acts as complaining witness in obtaining warrant); Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (prosecutor not absolutely privileged for defamatory statements at press conference); Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991) (prosecutor privileged under federal civil rights act for presenting evidence to obtain search warrant, but not for advising police officer); Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (prosecutor privileged under civil rights act for using false evidence and suppressing exculpatory evidence); Gregoire v. Biddle, 177 F.2d 579 (2d Cir.1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950) (privilege covers false arrest); Coleman v. Turpen, 697 F.2d 1341 (10th Cir.1982) (no immunity for depriving defendant of seized property); State ex rel. Dept. of Justice v. District Court, 560 P.2d 1328 (Mont.1976) (privilege covers malicious prosecution); Blanton v. Barrick, 258 N.W.2d 306 (Iowa 1977) (similar); Blake v. Rupe, 651 P.2d 1096 (Wyo.1982), cert. denied, 459 U.S. 1208, 103 S.Ct. 1199, 75 L.Ed.2d 442 (1983) (absolute privilege for statements in instituting prosecution, conducting preliminary investigation, and announcing prosecution to press); Annot., 67 A.L.R. Fed. 640 (1984); cf. Ferri v. Ackerman, 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979) (no similar immunity required by federal law for court-appointed defense counsel). Some jurisdictions grant immunity to public defenders (see § 53, Comment *d*, and Reporter's Note thereto).

There is little authority on the liability of lawyers who represent private parties for malicious prosecution of a criminal proceeding. See Voytko v. Ramada Inn, 445 F.Supp. 315 (D.N.J.1978) (claim stated against lawyer who threatened plaintiff with prosecution, helped file charges, and whose associate acted as prosecutor under rule allowing private lawyers to prosecute); Vehrs v. Piquette, 684 P.2d 476 (Mont.1984) (providing information to prosecutor, who made decision to prosecute, not actionable); Motheral v. Burkhart, 583 A.2d 1180 (Pa.Super.Ct.1990) (not enough that lawyer provided false information to prosecutor, when lawyer did not institute proceedings). On improper threats of criminal prosecution, see § 98, Comment *f*, and Reporter's Note thereto.

Comment f. Lawyer liability for litigation misconduct. See § 56, Comment *f*, and Reporter's Note thereto; § 98, Comment *f*, and Reporter's Note thereto; § 110, Reporter's Note; Wade, On Frivolous Litigation: A Study of Tort Liability and