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A FRIVOLOUS LAWSUIT MAY DESTROY THE CAREER OF A PROFESSIONAL: IS THERE NO REMEDY?

I. INTRODUCTION

The decade of the 1970's saw an increase of crisis proportions in the number of medical malpractice claims,¹ and this crisis has lingered into the 1980's. Furthermore, lawyers, architects, engineers, accountants, and other professionals² are becoming increasingly aware that malpractice litigation has not been limited to attacks on health care practitioners.³

1. The medical malpractice crisis has been the subject of numerous books and many articles. See, e.g., R. COHEN, *MALPRACTICE* (1979); R. GOTS, *THE TRUTH ABOUT MEDICAL MALPRACTICE* (1975); J. GUINTEH, *THE MALPRACTITIONERS* (1978); J. KING, *THE LAW OF MEDICAL MALPRACTICE* (1977); L. LANDER, *DEFECTIVE MEDICINE: RISK, ANGER, AND THE MALPRACTICE CRISIS* (1978); S. LAW & S. POLAN, *PAIN AND PROFIT: THE POLITICS OF MALPRACTICE* (1978); *THE ECONOMICS OF MEDICAL MALPRACTICE* (S. Rottenberg ed. 1978); *THE INFLUENCE OF LITIGATION ON MEDICAL PRACTICE* (C. Wood ed. 1977); *MEDICAL MALPRACTICE INSURANCE* (T. Lombardi, Jr., ed. 1978); Balliett, *13 Ways to Protect Yourself Against Malpractice Suits*, 20 *RESIDENT & STAFF PHYSICIAN* 70 (1974); Bernstein, *Will No-Fault Insurance End the Medical Malpractice Crisis?*, 1978 *HOSP.* 40; Calabresi, *The Problem of Malpractice: Trying to Round Out the Circle*, 27 *U. TORONTO L.J.* 131 (1977); Gaudineer, *Ethics and Malpractice*, 26 *DRAKE L. REV.* 88 (1976); Schwartz & Komesar, *Doctors, Damages and Deterrence: An Economic View of Medical Malpractice*, 298 *NEW ENG. J. MED.* 1282 (1977); Note, *Comparative Approaches to Liability for Medical Maloccurrences*, 84 *YALE L.J.* 1141 (1975).

The crisis has sparked the introduction of legislation in all fifty states. See generally A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE (D. Warren & R. Merritt eds. 1976); Dunn, *Legislative Efforts to Reform Medical Malpractice: Unconstitutional in Practice?*, 8 *MEDICOLEGAL NEWS* 10 (1980); Ladimer & Solomon, *Medical Malpractice Arbitration: Laws, Programs, Cases*, 1977 *INS. L.J.* 335; Nocas, *Arbitration of Medical Malpractice Claims*, 13 *FORUM* 254 (1977); Schrero, *Patient Compensation Funds: Legislative Responses to the Medical Malpractice Crisis*, 5 *AM. J.L. & MED.* 175 (1979); White & McKenna, *Constitutionality of Recent Malpractice Legislation*, 13 *FORUM* 312 (1977).

The courts also have recognized a medical malpractice crisis. See, e.g., *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977); *Pantone v. Demos*, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); *Bly v. Rhoads*, 216 Va. 645, 222 S.E.2d 783 (1976).

2. See, e.g., Mallen, *Legal Malpractice: The Legacy of the 1970s*, 16 *FORUM* 119, 119 (1980) (1970's experienced fourfold increase over the 1960's in published appellate decisions of legal malpractice cases). See also *Luciani v. High*, 372 So. 2d 530 (Fla. Dist. Ct. App. 1979) (engineer liable to homeowner); *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E.2d 580 (1979) (architect sued by contractor for negligent conduct toward architect's client); *PROFESSIONAL MALPRACTICE* (S. Schreiber ed. 1967) (examining malpractice in several areas, including accounting, architecture, engineering, insurance, and corporate affairs).

Recognizing that professionals are facing increases in malpractice litigation, the Virginia Bar Association addressed this issue at its annual winter meeting in January, 1980. See *PROFESSIONAL LIABILITY: LAWYERS, ARCHITECTS, ENGINEERS, DOCTORS* (Va. State B. & Va. B. Ass'n eds. 1980) [hereinafter cited as *PROFESSIONAL LIABILITY*].

3. See, e.g., *Sawyer v. United States*, 465 F. Supp. 282 (E.D. Va. 1978); *Lyons v. Grether*,

The adverse effects of a malpractice suit on the professional reputation and practice of a defendant are apparent from the very nature of the lawsuit.⁴ The angry and injured professional may respond with a countersuit against an adversary's attorney,⁵ alleging that the malpractice claim was groundless. Although such countersuits have been largely unsuccessful,⁶ there have been some significant recent decisions which held an attorney liable for bringing a frivolous suit against a physician.⁷

This comment will discuss the ethical duties and possible civil liability of a lawyer who brings a non-meritorious suit against a professional⁸ in the framework of the controversy concerning the proposed *Model Rules of Professional Conduct*⁹ and recent appellate decisions.¹⁰

218 Va. 630, 239 S.E.2d 103 (1977); *Little v. Cross*, 217 Va. 71, 225 S.E.2d 387 (1976).

Over the past decade, writers have attempted to explain the overwhelming increase in malpractice claims. "A general increase in consumer litigiousness, heightened expectations of professional performance, especially from the increasing number of specialists, the impersonality of professional service delivery, a breakdown in professional screening and discipline caused by the rapid growth in numbers of professionals, and zealous malpractice lawyers are among the cited reasons." REGULATING THE PROFESSIONS 46 (R. Blair & S. Rubin eds. 1980). See R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 48 (2d ed. 1981) ("[U]nmeritorious suits . . . crowd already congested courts. . . . Suits which are brought for harassment, vexation, vindication, or to coerce an unwarranted settlement are simply not a proper use of the judicial system."). *Id.* at 100. See also GOTS, *supra* note 1, at 200 (money given to plaintiff in settlement of non-meritorious claim in order to avoid costs of litigation).

4. National Sur. Co. v. Page, 58 F.2d 145, 148 (4th Cir. 1932).

5. Malicious prosecution has been the subject of considerable debate. See, e.g., Birnbaum, *Physicians' Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003 (1977); Greenbaum, *Physician Countersuits: A Cause Without Action*, 12 PAC. L.J. 745 (1981); Mallen, *Attorney's Liability for Malicious Prosecution, A Misunderstood Tort*, 45 INS. COUNS. J. 407 (1979); Owen, *Countersuits Against Attorneys—A Preface*, 33 S.C.L. REV. 313 (1981); Wagner, *Screening Medical Malpractice Cases*, 16 TRIAL 67 (1980); Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743 (1980) [hereinafter cited as *Unfounded Litigation*]; Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980) [hereinafter cited as *Duty to Reject*]; Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979) [hereinafter cited as *Groundless Litigation*].

6. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa), *aff'd mem.*, 590 F.2d 341 (8th Cir. 1978); *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828 (1979); *Friedman v. Dozorc*, 412 Mich. 1, 312 N.W.2d 585 (1981); *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977); *Ayyildiz v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980). See generally MALLEN & LEVIT, *supra* note 3, § 45; *Flowers Malicious Prosecution*, 33 S.C.L. REV. 317 (1981).

7. See, e.g., *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980); *Mahaffey v. McMahon*, 630 S.W.2d 68 (Ky. 1982); *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980); *Peerman v. Sidicane*, 605 S.W.2d 242 (Tenn. Ct. App. 1980).

8. The scope of this comment is limited to a discussion of groundless litigation against professionals and does not include an analysis of all forms of malicious prosecution. See *supra* note 5 for a list of articles dealing with malicious prosecution.

9. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981) [hereinafter cited as MODEL RULES]. Self-regulation within the legal profession will be scrutinized to analyze its deterrent effect.

II. IS THERE AN ETHICAL DUTY TO REFRAIN FROM BRINGING A FRIVOLOUS SUIT?

A. *Standards of Conduct Within the Legal Profession*

According to the Preamble to the final draft of the proposed Model Rules, "[a] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."¹¹ Furthermore, several disciplinary rules in the current *Model Code of Professional Responsibility* seem to prohibit groundless litigation.¹² Nevertheless, since the recognition of the medical malpractice crisis in the early 1970's, all fifty states have enacted legislation¹³ to circumvent the effects that malpractice litigation has had on malpractice insurance rates and the cost of health care. The aim of this legislation is to screen out frivolous suits.¹⁴ However, the problem has continued, leading state medical societies to begin proposing their own legislation "in an effort to cure . . . the 'frivolous lawsuit disease.'"¹⁵

Efforts have been made within the American Bar Association to raise the standard for the filing of lawsuits. The ABA's Commission on Evaluation of Professional Standards proposed "a 'reasonable basis' standard for bringing or defending a case"¹⁶ but "was told that its proposed rule on the filing of meritorious claims would leave lawyers open to charges of malicious prosecution."¹⁷ As a result, the proposed rule was changed in a revision of the final draft¹⁸ to "a more liberal 'nonfrivolous' standard instead of the 'reasonable basis' test."¹⁹

Whether lawyers conform their conduct to the Code of Professional Responsibility or to the proposed Model Rules, institution of a frivolous lawsuit is clearly prohibited. The disciplinary rules forbid a lawyer's acceptance or continuance of employment, or the filing of a suit, if the legal

10. See cases cited *supra* note 7.

11. MODEL RULES, *supra* note 9, preamble.

12. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) [hereinafter cited as MODEL CODE]. The specific disciplinary rules are discussed *infra* at notes 20-22 and accompanying text.

13. See cases cited *supra* note 1, para. 3.

14. *Little v. Rosenthal*, 376 Mass. 573, 382 N.E.2d 1037 (1978). See also Leonard, *Medical Negligence: Perspective on the Coming Decade*, 16 FORUM 403, 414 (1980-81) (purpose of pretrial screening or review panel is to weed out "spurious claims").

15. Winter, *Doctors Aim to Cure 'Frivolous' Lawsuits*, 68 A.B.A.J. 660 (1982). The Michigan Medical Society has proposed legislation which "would require a lawyer to post bond ensuring that a lawsuit . . . states a cause of action." Hurley, *Much Ado About Nothing*, 17 DOCKET CALL 14, 15 (1982).

16. Winter, *supra* note 15, at 660. See MODEL RULES, *supra* note 9, Rule 3.1.

17. Winter, *supra* note 15, at 660.

18. See MODEL RULES *supra* note 9, Rule 3.1 (Final Draft as revised through June 30, 1982).

19. Winter, *supra* note 15, at 660.

action is intended merely to harass or for malicious purposes.²⁰ In addition, there are specific rules against handling a legal matter without preparation and competency.²¹ The violation of a disciplinary rule constitutes misconduct which is subject to discipline by the bar.²² Thus, whether a frivolous suit is filed intentionally or negligently due to inadequate prepa-

20. See MODEL CODE, *supra* note 12, DR 2-109. Virginia has adopted this section of the Model Code. See VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109 (1976), reprinted in VA. SUP. CT. R. 6:II, 216 Va. 1064, 1085-86 (1976). The rule provides:

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

- (1) Bring a legal action, conduct a defense, or assert a position in litigation . . . merely for the purpose of harassing or maliciously injuring any person.
- (2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported, by good faith argument for an extension, modification, or reversal of existing law.

Id.

In addition, Virginia has adopted MODEL CODE, *supra* note 12, DR 2-110(B)(1), (2). See VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B)(1), (2) (1976), reprinted in VA. SUP. CT. R. 6:II, 216 Va. 1064, 1086 (1976). The rule provides:

(B) Mandatory withdrawal

A lawyer . . . shall withdraw from employment, if:

- (1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation . . . merely for the purpose of harassing or maliciously injuring any person.
- (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

Id.

Virginia also has adopted MODEL CODE, *supra* note 12, DR 7-102(A)(1), (2). See VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1), (2) (1976), reprinted in VA. SUP. CT. R. 6:II, 216 Va. 1064, 1118 (1976). The rule provides:

(A) In his representation of a client, a lawyer shall not:

- (1) File a suit, assert a position, conduct a defense, . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
- (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

Id.

21. See MODEL CODE, *supra* note 12, DR 6-101(A)(1), (2). Virginia has adopted this section of the Model Code. See VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1), (2) (1976), reprinted in VA. SUP. CT. R. 6:II, 216 Va. 1064, 1106 (1976). The rule provides:

(A) A lawyer shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.

Id. See also Gaudineer, *supra* note 1, at 109-10; *Duty to Reject*, *supra* note 5, at 1590.

22. See MODEL CODE, *supra* note 12, DR 1-102 Virginia has adopted this section of the Model Rules. See VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(1) (1976), reprinted in VA. SUP. CT. R. 6:II, 216 Va. 1064, 1065 (1976). The rule provides: (A) A Lawyer shall not: (1) Violate a Disciplinary Rule. *Id.* See also *Bickel v. Mackie*, 447 F. Supp. 1376, 1383-84 (N.D. Iowa 1978).

ration, the lawyer has violated his ethical standards.

B. *The Duty to Comply with Ethical Standards*

The *Model Code of Professional Responsibility* requires that a lawyer represent his client zealously.²³ However, the lawyer's duty is "both to his client and to the legal system."²⁴ Thus, he must provide zealous representation "within the bounds of the law, which includes [compliance with] Disciplinary Rules"²⁵ A position which is "supported by the law or . . . a good faith argument for an extension, modification, or reversal of the law"²⁶ is permissible, but "a lawyer is not justified in asserting a position in litigation that is frivolous."²⁷ Therefore, the duties owed to the legal profession and to the client encourage a lawyer to "urge any permissible construction of the law favorable to his client,"²⁸ but those duties do not negate the "concurrent obligation . . . to avoid the infliction of needless harm."²⁹

Consistently, courts have held that a lawyer owes no duty of care to avoid inflicting harm on an adversary.³⁰ The rationale for this position is that the presence of such a duty would create an "irreconcilable conflict of interest" for the lawyer.³¹ However, this reasoning applies only to the lawyer's duty as an advocate. Moreover, it does not consider the provisions of the Code which deal with groundless litigation.³²

The preamble to the proposed *Model Rules of Professional Conduct* includes within a lawyer's various functions the roles of advocate, advisor, negotiator, intermediary, spokesman, and evaluator.³³ Depending on the particular issue involved, a lawyer may be directed by his ethical standards to assume the role of evaluator and advise a client *not* to file a lawsuit. Although his duty to the legal system may require that an attor-

23. See MODEL CODE, *supra* note 12, DR 7-101.

24. *Id.*, EC 7-1.

25. *Id.*

26. *Id.*, EC 7-4.

27. *Id.*

28. *Id.*

29. *Id.*, EC 7-10. See also MODEL RULES, *supra* note 9, Rule 4.4.

30. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978) (negligence is not proper standard of liability to adversary); *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980) (attorney liable for malicious prosecution but not for negligence to an adversary); *Friedman v. Dozor*, 412 Mich. 1, 312 N.W.2d 585 (1981) (duty to client's adversary could create conflict of interest); *Ayyildiz v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980) (duty to client's adversary is unacceptable conflict). *But cf.* *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981) (while duty of care by plaintiff's attorney is not owed to the defendant in the same sense as in negligence case, it is relevant in establishing probable cause to bring the action). See generally *Duty to Reject*, *supra* note 5.

31. *Friedman v. Dozor*, 412 Mich. at ___, 312 N.W.2d at 590.

32. See *supra* notes 20-22 and accompanying text.

33. MODEL RULES, *supra* note 9, preamble.

ney advise his client not to take legal action, this evaluative function should not be described as a duty to the adversary.³⁴ The lawyer owes a duty to both the client and the profession³⁵ to evaluate claims only after adequate preparation. This duty requires a lawyer to refuse to file a frivolous lawsuit.³⁶

C. *Self-Regulation as a Deterrent to Frivolous Lawsuits*

By defining law as a profession, lawyers assert that they will regulate the members of their profession in a meaningful way.³⁷ However, the effectiveness of self-regulation within the legal profession is uncertain, as evidenced by "public uneasiness about the ethical conduct of lawyers."³⁸ The preamble to the proposed Model Rules explains the responsibility to self-govern as follows:

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct; a lawyer must also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.³⁹

The scheme of self-regulation in the Code of Professional Responsibility includes both informal peer review and formal review before a disciplinary agency.⁴⁰ One problem with this system is the hesitancy within the profession to file a complaint against a fellow attorney,⁴¹ coupled with the inability of a client or onlooker to recognize unethical conduct or incompetency. As a result, only a few complaints are filed; and most of those are generated by dissatisfied clients.⁴²

Another problem with the formal review system is its focus on egre-

34. See *supra* text accompanying note 31.

35. "The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law." MODEL CODE, *supra* note 12, EC 7-19.

36. See *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981). See generally *Duty to Reject*, *supra* note 5.

37. Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 193 (1974).

38. *Id.* at 194. The current President of the American Bar Association recently stated that "[i]n a host of studies over the years, the public has shown a lack of trust in the legal profession." Harrell, *Public Education About the Law: An Imperative for the 1980's*, 68 A.B.A.J. 1184 (1982).

39. MODEL RULES, *supra* note 9, preamble.

40. Marks & Cathcart, *supra* note 37, at 203-04.

41. *Id.* at 207.

42. *Id.*

gious conduct of lawyers rather than on performance standards.⁴³ In order for the process to be productive, both "the task of monitoring conduct *and* the task of maintaining the quality of judgment"⁴⁴ should be involved.⁴⁵ However, the observations of other lawyers made during informal peer review⁴⁶ will not generally stimulate higher levels of performance. Although lawyers do seek the approval of their peers, any "negative observation"⁴⁷ is likely to be communicated "only [for] extremely poor performances."⁴⁸

Thus, except in cases of flagrant misconduct, performance goes essentially unchecked, and there is little incentive for a lawyer to refrain from filing frivolous lawsuits. Even though he never expects the case to reach a court docket, a lawyer may look to the possibility of settlement by an insurance company which is anxious to avoid the costs and inconvenience of litigation.⁴⁹ The attorney may rationalize his actions by the mandate to represent his client zealously.⁵⁰ Thus, until there is a more effective means of regulating the performance of lawyers, frivolous lawsuits will continue to be filed against professionals. The only viable remedy available through the disciplinary channels is for the injured professional to file a complaint with the disciplinary agency itself.⁵¹ This procedure does not provide monetary compensation to the injured professional, but it may deter similar future conduct by the attorney against whom the complaint is filed.

III. POSSIBLE CIVIL LIABILITY

A. *Liability and the Code of Professional Responsibility*

There are numerous legal theories under which a professional who has successfully defended a malpractice suit has been allowed to recover dam-

43. *Id.* at 232. See also REGULATING THE PROFESSIONS, *supra* note 3, at 72. In its attempt to regulate its members "the [legal] profession regulates wrongdoing but not competence. . . . For the profession as a whole the idea of reviewing and regulating performance is not yet favored. The profession prefers a review apparatus that will deal with moral deviance alone." Marks & Cathcart, *supra* note 37, at 230-31.

44. Marks & Cathcart, *supra* note 37, at 195.

45. *Id.* at 194-95.

46. Informal peer review occurs whenever a lawyer performs lawyering functions in the presence of another lawyer. *Id.* at 204.

47. *Id.*

48. *Id.* at 205.

49. See, e.g., Gots, *supra* note 1, at 200 (medical malpractice suit filed by patient with expectation that insurance company will give him something for nothing). *But see* Bull v. McCuskey, 96 Nev. 706, 615 P.2d 957 (1980) (institution of medical malpractice suit to coerce nuisance settlement is abuse of process).

50. See MODEL CODE, *supra* note 12, Canon 7, DR 7-101.

51. See Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978) (successful defendant can be instrumental in bringing disciplinary proceedings against attorney who brought frivolous suit).

ages.⁵² However, no cause of action arises under the Code of Professional Responsibility.⁵³ Thus, while the preliminary statement to the Code indicates that the disciplinary rules are mandatory standards of *conduct* for lawyers, it declines to set forth standards for civil liability.⁵⁴ Therefore, the Code does not recognize liability to an adversary for the attorney's negligent failure to investigate a claim thoroughly.⁵⁵ As a result, non-meritorious claims continue to be filed by lawyers who are either unethical or incompetent, or who simply do not realize that they are violating any rules governing professional conduct. Consequently, all fifty state legislatures have become involved in the process of screening frivolous medical malpractice claims by enacting special statutory measures to deal with the problem.⁵⁶ Although some of the statutes have withstood constitu-

52. See Greenbaum, *supra* note 5 at 755 (citing malicious prosecution, professional negligence, abuse of process, prima facie tort, invasion of privacy, unprofessional conduct by the attorney, defamation and intentional infliction of mental distress as possible theories for recovery). See also Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585 (1981); MALLEN & LEVIT, *supra* note 3, § 45. See generally Birnbaum, *supra* note 5; *Unfounded Litigation*, *supra* note 5.

53. The *Model Code of Professional Responsibility* does not provide a private cause of action against an attorney. See Ayyildiz v. Kidd, 220 Va. 1080, 1085, 266 S.E.2d 108, 112 (1980). However, an injured defendant can make a complaint to the bar. See, e.g., Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); Martin v. Trevino, 590 S.W.2d 543 (Tex. Civ. App. 1979); Ayyildiz v. Kidd, 220 Va. 1080, 266 S.E.2d 108 (1980).

54. The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct.

MODEL CODE, *supra* note 12, preliminary statement. See also Bickel v. Mackie, 447 F. Supp. at 1383-84.

55. See, e.g., Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978) (no cause of action unless alleged that attorney acted maliciously or knew that client did); Wong v. Tabor, ___ Ind. App. ___, 422 N.E.2d 1279 (1981) (liability for instituting a weak case would destroy a lawyer's efficacy as an advocate and would result in the filing of only easy cases). See also Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978) (refusing to expand attorney liability to cover filing suit for medical malpractice without reasonable cause). See also *supra* text accompanying notes 30-31.

56. In Virginia, notice of a malpractice claim must be sent to a defendant before the claim is filed, and either party may then request review by a medical malpractice review panel within 60 days. See VA. CODE ANN. § 8.01-581.2 (Cum. Supp. 1982). If a review is requested, the opinion of the panel is admissible as evidence, but it is not binding at a subsequent malpractice trial. *Id.* § 8.01-581.8. Other states utilize, for example, malpractice screening panels, patient compensation funds, arbitration panels, and limitations on compensation. See generally authorities cited *supra* note 1, para. 2. California requires that the plaintiff obtain a certificate of merit in medical malpractice cases. Greenbaum, *supra* note 5, at 758-60.

tional attacks,⁵⁷ legislation aimed at curbing medical malpractice claims has been struck down on constitutional grounds in several instances.⁵⁸

While the intent of the statutes is to eliminate frivolous claims,⁵⁹ deserving malpractice claimants may suffer because of the time delay and costs of complying with statutory requirements.⁶⁰ Further, the defendant must bear the expenses of obtaining counsel and losing time from professional duties; and may suffer mental anguish even when the claim is found to be frivolous and is never brought to trial.⁶¹ Therefore, the statutory safeguards may eliminate some medical malpractice claims; nevertheless, the number of countersuits against attorneys is still rising.⁶² Moreover, existing statutory protections apply only to claims against health care professionals, leaving the screening of malpractice claims against other professionals to the discretion of lawyers.

B. *Is There an Adequate Remedy for Frivolous Lawsuits Against Professionals?*

In reality, theories under which injured professionals may recover damages⁶³ are seldom successful.⁶⁴ Nevertheless, the injury to a defendant is very real⁶⁵ and does not end with questions concerning his professional ability. The injury is much more extensive and can change his career.

The harm to the defendant in a groundless suit can indeed be very great, involving considerable time, expense, anguish, embarrassment, damage to reputation and professional standing, loss of business, increase in insurance premiums, and sometimes loss of employment. Even if the defendant in the

57. See, e.g., *DiAntonio v. Northampton-Accomack Memorial Hosp.*, 628 F.2d 287 (4th Cir. 1980) (holding the Virginia state to be constitutional); *Butler v. Flint-Goodridge Hosp.*, 354 So. 2d 1070 (La. Ct. App. 1978) (holding the Louisiana statute to be constitutional); *Attorney Gen. v. Johnson*, 282 Md. 274, 385 A.2d 57 (1978) (holding the Maryland statute to be constitutional); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978) (holding the Wisconsin statute to be constitutional).

58. See, e.g., *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (holding that the entire New Hampshire medical malpractice statute, which *inter alia* limited damages recoverable for non-economic loss, was unconstitutional); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (holding provision of statute giving health care arbitration panels original jurisdiction over medical malpractice claims unconstitutional); *Arneson v. Olsen*, 270 N.W.2d 125 (N.D. 1978) (holding statute unconstitutional because of limitation of recovery and deprivation of right to jury trial); *Wright v. Central Du Page Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (holding provision of Illinois statute which limited amount of recovery unconstitutional). See generally, White & McKenna, *supra* note 1.

59. See Gots, *supra* note 1, at 205.

60. Leonard, *supra* note 14, at 414.

61. Gots, *supra* note 1, at 200.

62. Owen, *supra* note 5, at 315. Taub, *Malpractice Countersuits: Succeeding at Last?*, 1981 L. MED. & HEALTH CARE 11 (1981).

63. See *supra* note 52 and accompanying text.

64. Greenbaum, *supra* note 5, at 746-47. See also MALLEN & LEVIT, *supra* note 3, § 45.

65. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 120 (4th ed. 1971).

groundless suit prevails (and there is always some risk of losing even a "groundless" action), his victory in the first action alone often cannot fully remedy many of his losses. It is no wonder, then, that the defendant in a frivolous suit looks to the courts to give him satisfaction.⁶⁶

Part of the problem lies with the lawyer who often "forgets the awesome power under his control that he can at will turn loose upon another person—whose life may be seriously and irreparably altered as a result"⁶⁷ Doctors, for example, have been forced to relocate in order to continue practicing, to switch to an area of medicine which has less risk, to practice "defensive medicine,"⁶⁸ and even to retire early.⁶⁹

A substantial minority of jurisdictions follow the English common law rule requiring arrest of the person, seizure of his property, or some other "special injury" to sustain a malicious prosecution action.⁷⁰ However, the majority of American jurisdictions do not require an injured professional to allege "special injury" in a subsequent action for malicious prosecution.⁷¹ Nonetheless, there is a relatively small number of appellate decisions in favor of injured professionals,⁷² since courts generally adhere to the requirements of malice or lack of probable cause⁷³ to prevent recovery from an attorney who has brought a malpractice action in good faith.⁷⁴

66. Owen, *supra* note 5, at 314.

67. *Id.*

No man sued for malpractice ever wins completely. . . . You can't know what it's like to go through such an ordeal—until you do it. One day you're a respected confident professional man. The next day your ability is being debated in court, with all your friends and patients looking on—and wondering.

Balliett, *supra* note 1, at 73.

68. Gots, *supra* note 1, at 175.

69. See generally *id.* at 175-79.

70. "The requirement of special injury, or so-called 'English rule,' traces to the enactment of the Statute of Marlbridge in 1269." MALLEN & LEVIT, *supra* note 3, § 60 (citing Statute of Marlbridge, 52 Hen. 3 (1269)). See generally *Groundless Litigation*, *supra* note 5.

The "special injury" restriction requires allegation and proof of a special loss or unusual hardship resulting from the malicious prosecution of the original action, and "[s]pecial injury" in this procedural sense excludes the kind of secondary consequences that are a common and often unavoidable burden on defendants in 'all similar cases.' . . ."

Ayyildiz v. Kidd, 220 Va. 1080, 1084, 266 S.E.2d 108, 111 (1980) (quoting O'Toole v. Franklin, 279 Or. 513, 517, 569 P.2d 561, 563 (1977)).

71. See MALLEN & LEVIT, *supra* note 3, § 60; *Unfounded Litigation*, *supra* note 5, at 749-50.

72. See cases cited *supra* note 7.

73. See Raine v. Drasin, 621 S.W.2d 895, 900 (Ky. 1981); Friedman v. Dozorc, 412 Mich. 1, —, 312 N.W.2d 585, 611 (1981) (Coleman, C.J., concurring in part, dissenting in part). See also *Unfounded Litigation*, *supra* note 5, at 750.

74. There has, however, been a recent increase in the number of countersuit settlements by attorneys, Taub, *supra* note 62, at 20, which indicates that at least some attorneys are recognizing the real injury which can be caused by frivolous suits against professionals. See *supra* text accompanying notes 65-66.

1. Malicious Prosecution Actions in Virginia

It has been suggested that the most appropriate avenue by which the injured professional may seek recovery is a malicious prosecution counter-suit.⁷⁵ However, there are strict requirements for success in such a cause of action;⁷⁶ and the Virginia Supreme Court has specifically stated that malicious prosecution claims are not favored.⁷⁷ The decision which limited the viability of the action in Virginia was the 1980 case of *Ayyildiz v. Kidd*.⁷⁸

In *Kidd* the Virginia Supreme Court observed:

[A] lawyer is subject to the Disciplinary Rules of this Court, particularly Rule 6:II:DR 7-102(A)(1) which forbids him to "[f]ile suit, assert a position . . . or take other action on behalf of his client when he knows or it is obvious that such action would serve merely to harass or maliciously injure another." This rule covers substantially the acts which are the foundation for an action for malicious prosecution.⁷⁹

Nevertheless, the court denied recovery because of the inability of the plaintiff physician to prove "special injury." The allegations of damages had included "costs to defend the malpractice action, injury to . . . professional reputation and good name, plus the loss of present and future earnings and profits."⁸⁰ However, the court ruled that these were ordinary expenses rather than "special grievance or damage."⁸¹

With this decision, Virginia joined the minority⁸² of American jurisdictions which require pleading of "special injury" in an action for malicious prosecution. The Virginia Supreme Court justified its decision with the reasoning that "there should be no restraint upon the suitor through fear of liability resulting from failure of his action. Also disputes should not be tried a second time under the guise of actions for malicious prosecution."⁸³ In adopting this rationale, the court's opinion noted that "Dean

75. Greenbaum, *supra* note 5, at 746. See also Flowers, *supra* note 6, at 327.

76. See MALLEN & LEVIT, *supra* note 3, §§ 54-60; Wald, *Attorney's Malicious Prosecution of Client's Action*, 30 P.O.F.2d 197 (1982); *Duty to Reject*, *supra* note 5, at 1562 n.8.

77. See *Ayyildiz v. Kidd*, 220 Va. 1080, 1082, 266 S.E.2d 108, 110 (1980).

78. 220 Va. 1080, 266 S.E.2d 108.

79. *Id.* at 1083, 266 S.E.2d at 111.

80. *Id.*

81. *Id.* at 1084, 266 S.E.2d at 112. If the plaintiff had also alleged mental anguish, embarrassment, increased malpractice insurance premiums, loss of time from his practice, and actual loss of livelihood, he may have improved his chances for success. However, it is questionable that it is even possible to meet the requirements for special injury in Virginia or in other jurisdictions following the English rule. See Greenbaum, *supra* note 5, at 752.

82. 220 Va. at 1083, 266 S.E.2d at 111. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376, 1380 & n.1 (N.D. Iowa 1978); *Friedman v. Dozorc*, 412 Mich. 1, —, 312 N.W.2d 585, 596 (1981); *O'Toole v. Franklin*, 279 Or. 513, —, 569 P.2d 561, 564 & n.3 (1977). See also MALLEN & LEVIT *supra* note 3, § 60.

83. 220 Va. at 1083, 266 S.E.2d at 111.

Prosser considered these reasons of 'questionable validity,'⁸⁴ and that the *Restatement (Second) of Torts* had rejected the English rule.⁸⁵

In a much earlier case,⁸⁶ the Fourth Circuit Court of Appeals had recognized that "the courts should be open and free to all who have grievances and seek remedies . . . and that disputes be not tried a second time by the courts under the guise of actions for malicious prosecution."⁸⁷ Despite these considerations the Fourth Circuit held that "the principle upon which the action for malicious prosecution is grounded . . . requires that the law afford a remedy for the wrong sustained by one who has been injured in his person, reputation, property, or business by the institution of groundless proceedings in the courts."⁸⁸ Thus, the Fourth Circuit held that injury to reputation and business is sufficient for special damages.

2. Decisions in Other Jurisdictions

The Court of Appeals of Tennessee handed down one of the first appellate decisions⁸⁹ awarding damages to a physician in a countersuit against a former adversary's attorney.⁹⁰ In the prior malpractice action, the complaint against the physician alleged that he "did not use the care and skill ordinarily used by physicians in medical practice, and [that he] negligently and incorrectly diagnosed [the patient's] condition . . ."⁹¹ The trial court granted a summary judgment to the physician.⁹² In the physician's subsequent malicious prosecution action against the attorney, the record indicated that the attorney had not made an investigation of the prior malpractice claim.⁹³ The Tennessee court held that "an action may

84. *Id.* (citing PROSSER, *supra* note 65, § 120). The Michigan Supreme Court did not accept Prosser's argument "that the heavy burden of proof which the plaintiff bears in [malicious prosecution] actions will safeguard bona fide litigants and prevent an endless chain of countersuits." The court decided instead, that if only a few plaintiffs would recover there is no point in expanding the cause of action. *Friedman v. Dozorc*, 412 Mich. at ___, 312 N.W.2d at 601 (quoting PROSSER, *supra* note 65, § 120).

85. 220 Va. at 1083, 266 S.E.2d at 111 (citing RESTATEMENT (SECOND) OF TORTS § 674 (1977)).

86. *National Sur. Co. v. Page*, 58 F.2d 145 (4th Cir. 1932).

87. 58 F.2d at 148.

88. *Id.* The court specifically stated that "the groundless and malicious institution of even civil suits will furnish a basis of action where accompanied by arrest of the person, seizure of property, *injury to business*, or other special damage." *Id.* (emphasis added).

89. As recently as 1980, the Virginia Bar Association noted at its annual winter meeting that "[s]everal [countersuits] have been considered by the appellate courts in other jurisdictions, but the suing physician has never prevailed." PROFESSIONAL LIABILITY, *supra* note 2, at I-10. See also Taub, *supra* note 62, at 19.

90. See *Peerman v. Sidicane*, 605 S.W.2d 242 (Tenn. Ct. App. 1980).

91. *Id.* at 243. The complaint also alleged that the physician had performed a laboratory test for the sole purpose of receiving a "kickback." *Id.*

92. *Id.* at 244.

93. *Id.* "He did not take [the physician's] or any other person's deposition. And . . . he apparently made no effort to prove or support the allegations with respect to fee-splitting.

be maintained against an attorney for . . . malicious prosecution and abuse of process where the attorney's improper actions consist of the institution and prosecution on behalf of a client of a groundless, spurious and false claim."⁹⁴

In *Raine v. Drasin*⁹⁵ the Kentucky Supreme Court awarded compensatory and punitive damages to two physicians for humiliation, mortification, and loss of reputation which they suffered as a result of an unsuccessful malpractice case.⁹⁶ The court did not require a showing of special injury and stated that the "actions of [the attorney] did not comply with the standard of care for ordinary and prudent lawyers."⁹⁷

The Supreme Court of Nevada⁹⁸ has allowed a physician to recover damages against an attorney for abuse of process where the physician alleged that the attorney instituted the malpractice suit against him "for the ulterior purpose of coercing a nuisance settlement."⁹⁹ The Nevada court found that in bringing the prior malpractice suit the attorney did not examine or obtain medical records, confer with a doctor, or submit the claim to a screening panel. In addition, he did not take the deposition of the defendant physician or of any other physician; and he provided no expert testimony at the trial.¹⁰⁰ Furthermore, during the trial the attorney made "denigrating comments . . . concerning [the physician]."¹⁰¹ The court held that the attorney was privileged "to publish defamatory matter concerning another . . . during the course . . . of a judicial proceeding in which he participates as counsel, if it had some relation to the proceeding."¹⁰² However, the court awarded compensatory and punitive damages

He . . . did not consult any physician with respect to the standard of medical care in this community concerning [the prescribed] type of treatment . . ." *Id.* at 245.

94. *Id.*

95. 621 S.W.2d 895 (Ky. 1981). In the previous malpractice suit, the two physicians were charged with negligently breaking a patient's shoulder. However, at the time the doctors were joined in the complaint, the patient's attorney had already reviewed the hospital records "which clearly showed that the fracture of the shoulder occurred before [the two doctors] were involved." *Id.* at 898. After the doctors had contacted their insurance company and retained an attorney, the action was voluntarily dismissed against them. Subsequently, they filed a malicious prosecution suit against the patient's attorney. *Id.*

96. *Id.* at 900.

97. *Id.* at 901.

98. *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). After an 86-year old patient developed bedsores while under his care, the physician was dismissed and replaced by another doctor. This second doctor informed the patient's nephew that there had been no malpractice by the previous physician. Nevertheless, the nephew contacted a lawyer who filed the malpractice suit. *Id.* at ___, 615 P.2d at 959.

99. *Id.* at ___, 615 P.2d at 960.

100. *Id.* at ___, 615 P.2d at 959.

101. *Id.* at ___, 615 P.2d at 961. The attorney had called the physician "incompetent, a fumble-fingered fellow, a liar, a scoundrel, a damned idiot. He also said, '[i]t will be a cold day in hell when I let that dum-dum take care of my mother.'" *Id.* at ___, 615 P.2d at 959.

102. *Id.* at ___, 615 P.2d at 961. "[D]enigrating comments . . . alone would not supply a

to the physician on the abuse of process claim.¹⁰³

In *Friedman v. Dozorc*, the Supreme Court of Michigan held that an attorney owed no duty to his adversary and found no special injury to the physician.¹⁰⁴ The court concluded that "the demands of the adversary system distinguish the legal profession from other professions whose members have been held liable to third parties for negligence, and the present case from those in which lawyers have been held liable to third parties."¹⁰⁵ The *Friedman* court did recognize the duty of a lawyer to his *client* to conduct a reasonable investigation before filing a suit,¹⁰⁶ but would allow no cause of action in negligence to the adversary who was injured as a result of the negligent investigation.¹⁰⁷

The *Friedman* decision was accompanied by two well-reasoned dissenting opinions.¹⁰⁸ The majority had required proof of special injury "to limit the circumstances in which an action for malicious prosecution of civil proceedings can be maintained."¹⁰⁹ However, one dissent argued that this "denied free access to the courts for all those who have suffered harm but no 'special injury' from wrongful litigation."¹¹⁰ The dissent reasoned that a better means of protecting lawyers who have brought legitimate malpractice claims "would be to look to the other elements of the malicious prosecution cause of action—such as *no probable cause* and an *improper motive*"¹¹¹

basis of liability in damages, [but] it does not follow that an attorney may so conduct himself without fear of discipline." *Id.* at ___, 615 P.2d at 962.

103. *Id.* at ___, 615 P.2d at 961.

104. 412 Mich. 1, 312 N.W.2d 585 (1981). The original malpractice suit had been filed almost two years after the death of Dr. Friedman's patient. She had died five days after surgery from "a rare and uniformly fatal blood disease, the cause and cure of which are unknown." *Id.* at ___, 312 N.W.2d at 588. The malpractice trial resulted in a directed verdict for Dr. Friedman at the close of the plaintiff's proof. *Id.*

105. *Id.* at ___, 312 N.W.2d at 594.

106. *See id.* at ___, 312 N.W.2d at 591.

107. *Id.* at ___, 312 N.W.2d at 591-92.

108. *Id.* at ___, 312 N.W.2d at 610 (Coleman, C.J., concurring in part and dissenting in part); *id.* at ___, 312 N.W.2d at 613 (Moody, J., dissenting in part).

109. *Id.* at ___, 312 N.W.2d at 600.

110. *Id.* at ___, 312 N.W.2d at 613 (Coleman, C.J., concurring in part and dissenting in part) (emphasis added). In his dissent, Chief Justice Coleman pointed out that "by invoking the special injury requirement on behalf of meritorious litigants, the meritorious and frivolous claims alike are protected when no special injury can be alleged. Neither is protected when a special injury allegation might be alleged." *Id.* at ___, 312 N.W.2d at 611 (Coleman, C.J., concurring in part and dissenting in part).

111. *Id.* at ___, 312 N.W.2d at 611 (Coleman, C.J., concurring in part and dissenting in part) (emphasis in original). Another dissent reasoned "that the elements of lack of probable cause and malice provide the necessary protection to attorneys and litigants seeking access to the judicial system, while, at the same time, they allow proper redress for vexatious litigation." *Id.* at ___, 312 N.W.2d at 616 (Moody, J., dissenting in part).

IV. CONCLUSION

Presently, a competent physician, architect, lawyer or other professional may be subjected to a frivolous lawsuit which may harm his career, as well as affect his personal well being. Whether the filing of frivolous suits results from negligence, incompetence, or malice, it is a form of malpractice.¹¹² At the present time, the injured professional has no redress for this form of malpractice in a substantial minority of jurisdictions if he is unable to prove "special injury" in an action for malicious prosecution.

In disciplinary proceedings against a member of the bar "a cloak of secrecy usually remains until the very last stage when punishment is meted out by the highest court in the jurisdiction."¹¹³ This confidentiality is maintained in order to protect "the lawyer involved against adverse publicity which might result from groundless charges."¹¹⁴ Since there is a lesser degree of protection afforded other professionals,¹¹⁵ there appears to be a double standard allowing special consideration only for lawyers. This is especially disturbing since the legal profession is charged with the responsibility of not promulgating its regulations in furtherance of self-interested concerns.¹¹⁶

112. This type of behavior falls below the minimum standards of conduct required by the Code of Professional Responsibility, *see supra* notes 20-22 and accompanying text, and would be equivalent to malpractice, which is defined as "[p]rofessional misconduct or unreasonable lack of skill." BLACK'S LAW DICTIONARY 864 (rev. 5th ed. 1979).

The Fourth Circuit Court of Appeals recognized that these abuses lower the public's opinion of the judicial process. The court stated:

While we must be careful to assure that the courts are always open to complaining parties, we have an equal obligation to see that its processes are not abused by harassing, or by recklessly invoking court action in frivolous causes. . . . Lawyers have an obligation as officers of the court not to indulge in . . . these practices. Vexatious litigation and the law's delays have brought the courts in low repute in many instances, and when the responsibility can be fixed, remedial action should be taken.

Gullo v. Hirst, 332 F.2d 178, 179 (4th Cir. 1964) (per curiam).

113. *Marks & Cathcart*, *supra* note 37, at 233.

114. *Id.*

115. The lack of self-restraint among lawyers in filing frivolous claims and the public nature of malpractice trials does not afford other professionals protection from groundless suits. *See supra* text accompanying notes 43-49.

116. *See supra* text accompanying note 39. Other evidence of self-interest in the legal profession's self-regulation scheme is the lack of lay involvement in disbarment proceedings.

There is no lay involvement in the process [of disbarment proceedings], and none appears to be contemplated. There is a curious inconsistency here. If decisions about guilt or innocence can be made by a lay jury in a criminal trial, or about appropriate compensations in a civil suit, why can a lay group not evaluate evidence concerning a member of the legal profession's behavior? "Diagnosis" by vote in a jury trial is apparently acceptable, whereas the public is not entrusted to "evaluate" by vote in the matter of an attorney's performance.

REGULATING THE PROFESSIONS, *supra* note 3, at 76. Although the lack of lay involvement in disbarment proceedings is beyond the scope of this comment, it is a relevant issue to raise in considering the need for effective self-regulation and self-restraint among lawyers.

In Virginia and the other minority jurisdictions,¹¹⁷ the strongest argument for retaining special injury as an element of malicious prosecution is preservation of access to the courts.¹¹⁸ The minority jurisdictions reason that removing the requirement for special injury will make lawyers afraid to file malpractice claims which are only tenable.¹¹⁹ However, the minority rationale is not supported by the judicial experience of majority states which require only that general damages be proven in malicious prosecution actions.¹²⁰ There have been only a few appellate decisions granting compensation in countersuits against an attorney in majority states,¹²¹ which suggests that the requirement of malice, coupled with lack of probable cause, is sufficient to protect "bona fide malpractice claimants."¹²²

Competent, ethical lawyers do not need to be concerned about malicious prosecution countersuits. If, after adequate preparation, the lawyer believes in good faith that his client does have grounds to file a malpractice claim,¹²³ then he should not be reticent in bringing suit.

Self-restraint within the legal profession would be the ideal solution to the problem of unfounded litigation. However, since neither self-regulation nor special legislation has solved the problem,¹²⁴ it seems to have devolved upon the courts to provide an appropriate remedy.

The Virginia Supreme Court recognized that DR 7-102(A)(1) substantially covers "the acts which are the foundation for an action for malicious prosecution."¹²⁵ Therefore, "[i]f we are to give substance to DR 7-102(A) subds. (1) and (2), which establishes an attorney's duty to the public not to bring frivolous litigation, a viable malicious prosecution ac-

117. See *supra* text accompanying note 82.

118. See *Friedman v. Dozorc*, 412 Mich. 1, ___, 312 N.W.2d 585, 601 (1981); *Ayyildiz v. Kidd*, 220 Va. at 1083, 266 S.E.2d at 111.

119. See *Berlin v. Nathan*, 64 Ill. App. 3d 940, ___, 381 N.E.2d 1365, 1375 (1978). *But cf. Wong v. Tabor*, ___, Ind. App. ___, ___, 422 N.E.2d 1279, 1288 (1981) (belief that client's claim is tenable is sufficient for probable cause).

120. See, e.g., *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980). Although it was concerned with preserving access to the judicial system, the court rejected the requirement for special damages in a malicious prosecution action, which had been the rule in Kansas since *Carbondale Inv. Co. v. Burdick*, 67 Kan. 329, 72 P. 781 (1903). See *Nelson*, 227 Kan. at ___, 607 P.2d at 447.

121. See cases cited *supra* note 7.

122. See *supra* notes 70-71 and accompanying text.

123. See RESTATEMENT (SECOND) OF TORTS § 674 (1977); see also *Friedman*, 412 Mich. at ___, 312 N.W.2d at 616 (Moody, J., dissenting in part) ("[A]n attorney should be prepared to represent clients with doubtful, but tenable claims.").

124. "Preliminary screening panels and legislated upper limits for monetary awards may alleviate some of these problems, but in the final analysis, legal recourse should be reserved for those cases in which fundamental rights have truly been violated." Gors, *supra* note 1, at 216. Furthermore, the legislation only applies to *health care* professionals.

125. *Ayyildiz*, 220 Va. at 1083, 266 S.E.2d at 111. See also *supra* text accompanying note 79.

tion is necessary.”¹²⁶

If Virginia and the other jurisdictions following the English rule continue to require proof of special injury, they may be wise to redefine “special injury” to include the humiliation, mental anguish, embarrassment, damage to reputation, and loss of livelihood suffered by professionals who must defend unfounded lawsuits. Where there is proof of malice on the part of the attorney and lack of probable cause in bringing the suit, to refuse relief for lack of a “special injury” is to deny the injured professional a remedy for malicious prosecution.

Alice T. Meadows

126. *Friedman*, 412 Mich. at ___, 312 N.W.2d at 613 (Coleman, C.J., concurring in part and dissenting in part).

