WHEN ATTORNEYS MAY BE LIABLE TO OTHER ATTORNEYS—POSSIBLE THEORIES OF LIABILITY

I. INTRODUCTION

Traditionally, an attorney has owed a duty only to his client. However, recently developed law has established an attorney’s duty owed to non-clients as well. Liability to one particular type of non-client, one’s fellow attorney, has surfaced in several cases. Only a small number of states have discussed this potential liability to other attorneys, most failing to set it apart in treatment from any other action. As a result, there are few established rules in this specific area. However, because such liability could impose grave consequences on attorneys, it is important to be aware of the circumstances out of which these lawsuits arise.

Most cases involving an attorney or firm that sues another attorney fall into one of three categories. The defendant attorney will usually be an adverse attorney, a subsequent attorney of plaintiff’s former client, or an assisting attorney. Upon rare occasion the defendant will be an attorney departing a law firm. However, since such suits are usually based on alleged wrongful solicitation of firm clients, both disciplinary liability and potential civil liability are involved. In addition, in almost all of those cases it is the firm that sues the attorney. Therefore, a discussion of liability for such wrongful solicitation is beyond the scope of this work.

There are various theories of liability under which an attorney may pursue such litigation against a fellow attorney. In some situations a duty arises which, if breached, may lead to liability. In other cases, a cause of action relates to alleged tortious, fraudulent, or malicious conduct. Oftentimes, a suit arises from a prior legal malpractice action. Thus, the growing number of cases by attorneys against attorneys can be at least in part attributed to the increase in malpractice suits.

II. WHEN AN ATTORNEY SUES AN ADVERSE ATTORNEY

Most frequently, the plaintiff attorney sues an adverse attorney from a prior case. In this scenario, the plaintiff usually alleges that conduct of the adverse attorney during a previous case caused him or her some sort
of injury (i.e. loss of the case, damage to his reputation, subjection to potential liability, etc.). The theories of liability most often asserted in these cases are misrepresentation and fraud; these appear to be the most viable, as well.

A. Texas Establishes a General Rule

Texas courts have repeatedly considered lawsuits of this type. In Bradt v. West, the court established a general rule:

[A]n attorney does not have a right of recovery, under any cause of action, against another attorney arising from conduct that the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party.2

There, Bradt, an attorney who had represented the former husband in a divorce action and his professional corporation, sued opposing counsel for their conduct in representing their clients.3 The conduct resulted in Bradt’s being held in contempt during the trial of the previous lawsuit.4 Bradt sued under the following causes of action: conspiracy to maliciously prosecute, malicious prosecution, intentional infliction of emotional distress, tortious interference with contractual relations, and liability for actual damages under the Texas Torts Claims Act.5

Setting forth many policy reasons, the Court of Appeals affirmed the trial court’s decision in favor of the defendant attorneys.6 First, the court recognized a public interest in “‘loyal, faithful, and aggressive representation by the legal profession,’”7 stating that an attorney “‘ha[s] the right to interpose any defense or supposed defense and make use of any right in behalf of such client or clients as [the attorney] deem[s] proper and necessary, without making himself subject to liability in damages . . . .’”8

If an attorney goes into court knowing that he may be sued for something

2. Id. at 71-72.
3. See id. at 65.
4. Id. at 63-64.
5. Id. at 65.
6. Bradt, 892 S.W.2d at 76.
7. Id. at 71 (quoting Maynard v. Caballero, 752 S.W.2d 719, 721 (Tex. Ct. App. 1988)).
8. See id. at 71.
he does in the course of representing his client, the vigor with which attorneys represent their clients will be diluted. Such a policy "would act as a severe and crippling deterrent to the ends of justice." The rule established in Bradt focuses on the kind of conduct in which the attorney is engaged, as opposed to whether the conduct is "meritorious in the context of the underlying lawsuit." Furthermore, an attorney does not owe a duty to the opposing attorney to be correct in his legal arguments. Making motions certainly qualifies as conduct an attorney engages in as part of the discharge of his duties in representing his client. Thus, even if the motion to hold Bradt in contempt was meritless, there still would be no cause of action.

The court's description of protected conduct is seemingly broad. Thus, in subsequent Texas cases, the scale will most likely be tipped in favor of defining the attorney's conduct so that it is protected. On the other hand, the court made one distinction: it noted that when the conduct in which the attorney engaged as part of his duties in representing a party in a lawsuit is wrongfull, the law provides punishment for such acts. However, the law does not provide a cause of action to the adverse attorney for the performance of such acts. In Texas, for an attorney to be liable to an adverse attorney from a prior case, his conduct must be a type other than that engaged in as a part of the discharge of his duties in representing a client.

Because of the broad scope provided in the Bradt rule, it is not surprising that Texas extended the rule to apply in suits against an attorney by an opposing party. The U.S. District Court for the Northern District of Texas in Taco Bell Corporation v. Cracken predicted that the state courts of Texas would agree that the Bradt rule encompasses

9. See id. at 72.
10. See id. at 71.
11. Bradt, 892 S.W.2d at 72.
12. See id. at 73.
13. See id. at 72.
14. See id.
15. Id.
16. Bradt, 892 S.W.2d at 72.
17. Id.
19. Id.
suits brought against an attorney by an opposing party. In *Taco Bell Corporation*, the defendant from a prior wrongful death suit brought an action against the plaintiff’s attorneys “on theories of fraud, abuse of process, conspiracy, and negligent misrepresentation.”20 The defendant from the prior case alleged that plaintiff’s attorneys engaged in collusive conduct that enabled them “to maintain venue in a favorable forum.”21 The court reasoned that “[t]he knowledge of an attorney for one party that he may be sued by the other party would exacerbate the risk of tentative representation to at least the same degree as would knowledge that opposing counsel could sue him.”22 The court held that although *Bradt* addresses the liability of one attorney to an adverse attorney, “its reasoning applies with at least equal force to the liability of an attorney to the opposing party.”23

Less than a year after the *Taco Bell* decision, the Court of Appeals of Texas in *Renfroe v. Jones & Associates*24 affirmed the district court’s prediction. In that case, Renfroe, a judgment debtor, brought a wrongful garnishment action against attorneys and their law firm.25 The court held that the *Bradt* rule applies because plaintiff’s claim arose from the defendants’ “actions taken as attorneys representing their clients . . . .”26 Therefore, the defendant attorneys owed no duty to the plaintiff.27

B. Indiana Finds Constructive Fraud

Claim Viable

Other states have not established such general rules as Texas. Indiana is one example. In *Mullen v. Cogdell*,28 the Indiana Court of Appeals held that agency law places the attorneys in a relationship which results in the attorneys owing a duty to one another.29 In *Mullen*, the seller signed a listing agreement with a real estate agent, which provided for the payment of a brokerage fee if the property was sold within the

20. *Id.* at 529.
21. *Id.*
22. *Id.* at 532.
25. *Id.* at 286.
26. *Id.* at 288.
27. *Id.*
29. *Id.* at 401.
listing period or if sold within 120 days after the listing period to anyone who was shown the property prior to termination of the agreement.\textsuperscript{30} John Mullen, the buyer, first made an offer to the real estate agent during the listing period, and the agent told him the offer was too low.\textsuperscript{31} Mullen then called the seller directly, identifying himself as Philip Harvey, who was actually his wife’s brother-in-law.\textsuperscript{32} He said he had seen the property before the listing period had begun and wanted to wait until the listing period was over to buy the property to avoid paying the commission.\textsuperscript{33}

The buyer’s attorney was told to name the buyer in the agreement as Philip Harvey, which he did.\textsuperscript{34} Immediately prior to the transaction, buyer’s attorney indicated to vendor’s attorney that “Philip Harvey” would be out of the country on the date set for closing and that Harvey wished to take title in the name of Kathleen Mullen, John Mullen’s wife.\textsuperscript{35} The sale went through right after the listing period ended, just as Mullen had planned.

The real estate agent then discovered the property had been sold to a person who had seen the property during the listing period and sued the buyer and the seller to recover the commission.\textsuperscript{36} That litigation was settled out of court.\textsuperscript{37} The seller then filed a malpractice suit against her lawyer alleging negligence.\textsuperscript{38} Seller’s attorney, in turn, filed a third-party complaint against the buyer and his lawyer alleging constructive fraud and actual fraud.\textsuperscript{39} He also sought indemnity for the amount of judgment against him in the malpractice action, damages for emotional distress and injury to his professional reputation, and punitive damages.\textsuperscript{40}

The court determined that the attorney’s buyer-seller relationship as agents invoked a duty to engage in a course of conduct that represents

\begin{itemize}
\item \textsuperscript{30} \textit{Id.} at 395.
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Mullen}, 643 N.E.2d at 395.
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Mullen}, 643 N.E.2d at 396.
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.}
\end{itemize}
good faith and fair dealing the violation of which could constitute constructive fraud. 41 Since the seller’s attorney relied on the misrepresentation of buyer and buyer’s attorney to his detriment, the buyer’s attorney violated that duty. 42

Although this duty would not apply to all attorneys in all instances, it is important to note that such liability can arise in this frequent circumstance. Such a lawsuit could, in fact, be a common occurrence for the real estate lawyer who is less than careful. Even more frightening is the idea of being sued for malpractice, as the vendor’s attorney was here, and not being able to recover under indemnity. When the court considered whether the vendor’s attorney was entitled to indemnity, it first looked to the general rule that indemnity may not be granted in favor of someone at fault. 43 Some jurisdictions recognize an exception to that rule where there is a disparity in the conduct of the parties. 44 The plaintiff argued that Indiana should recognize such an exception. 45 While the vendor attorney’s actions constituted mere negligence and buyer and buyer attorney’s actions were willful, wanton and reckless, the court refused to make an exception to the Indiana rule barring indemnity where the party claiming indemnity is at fault partly or wholly. 46

In other jurisdictions, the attorney under these facts likely would be entitled to indemnity, and the result there would be far more justifiable than the one here. Even if a seller’s attorney in this situation can recover on a fraud theory, it undermines the entire purpose behind the action— to be compensated for the loss incurred as a result of the buyer attorney’s actions and ultimately, the malpractice suit. If sued for malpractice, it seems only logical and reasonable that, under these circumstances, an attorney would be entitled to indemnity.

As distinguished from the attorneys’ conduct in the previously mentioned Texas cases, 47 the conduct for which the attorney may be held liable in Mullen may not be considered the type engaged in as a part of the discharge of duties in representing a client. The conduct at issue before the Indiana court was misrepresentation by a purchaser and his at-

41. Id. at 401.
42. Mullen, 643 N.E.2d at 401.
43. Id. at 400.
44. Id.
45. See id.
46. See id.
47. See supra notes 1-27 and accompanying text.
torney to the vendor and vendor's attorney as to the identity of the pur-
chaser. In Texas, this type of conduct would probably fall under the
Texas rule, which states that where a lawyer acting for his client partici-
pates in fraudulent activities, his action in so doing is "foreign to the
duties of an attorney." Therefore, the conduct would not be protected
by the Bradt rule, and the attorney would be allowed a cause of action
for fraud. This long-standing proposition has been applied by Texas
courts to hold an attorney liable to a non-client "if he knowingly commits
a fraudulent act that injures a third person, or if he knowingly enters into
a conspiracy to defraud a third person." Stated another way, an attor-
ney "is liable for injuries to third parties when his conduct is fraudulent
or malicious." Although such an exception has not been discussed in
cases where the non-client is another attorney, it most likely would apply
in those situations as well.

C. Pennsylvania Finds Libel and Slander
Claims Actionable

In Pelagatti v. Cohen, a Pennsylvania court explored the potential
liability of attorneys to another attorney under various causes of action.
The suing attorney, Pelagatti, alleged obstruction of justice, interference
with contractual relationships, libel and slander, negligence, and related
conspiracy counts. Among the defendants were Harvey, the defense
attorney from a prior case in which Pelagatti represented the plaintiff, and
Marion, a defense attorney in an unrelated case. In both of those cases,
the plaintiff's attorneys won multimillion dollar verdicts for their clients
from the same judge, Judge Snyder. In the course of trying to get their
cases reopened, the defendant attorneys called Jill Cohen, Snyder's law

1985).
50. Id.
51. Id.
52. 536 A.2d 1337 (Pa. 1987).
53. Id. at 1340.
54. Id.
55. Id. at 1338-39.
clerk, to testify in support of the judge’s recusal. She was prepared to testify that both Pelagatti and the other plaintiff’s attorney improperly colluded with the judge prior to verdict. The testimony was disallowed in court. Thus, Marion called a press conference in which he gave a detailed accounting of Cohen’s testimony. In addition, Harvey made personal comments to a reporter that Pelagatti’s actions were exactly the conduct described in Cohen’s testimony.

The court found that many of Pelagatti’s claims were not actionable. First, the court affirmed the trial court’s holding that there was no civil cause of action for obstruction of justice. Second, the claim for contractual interference failed because the appellant did not establish any pecuniary loss from the contract itself, and such a claim was needlessly repetitive since any other damages were covered under the libel and slander counts. Third, on the negligence claim, the court restated the privity rule that an attorney may not be held liable for negligence to a person who is not a client.

Conversely, the defamation claim was held actionable. Regarding this claim, the attorneys asserted the rule that communications pertinent to any stage of judicial proceedings are accorded an absolute privilege. However, extra-judicial communications such as newspaper accounts of judicial proceedings or remarks uttered at press conferences are only afforded a qualified immunity. As a result, where the plaintiff is able to show that the communications to the press were made for an improper or malicious motive, that privilege is lost. Consequently, the defendant attorneys in this case could be held liable for libel and slander. However, the affirmative defense of truth is always available in defamation actions, and it will most likely be asserted here.

57. Id.
58. Id.
59. Id.
60. Id.
61. Pelagatti, 536 A.2d at 1342.
62. Id. at 1343-44.
63. Id. at 1347.
64. Id. at 1346.
65. Id. at 1345.
66. Pelagatti, 536 A.2d at 1344.
67. Id. at 1345-46.
68. Id. (This portion of the case is still pending).
count as to the libel and slander claims viable as well.69 All other conspiracy claims were dismissed for lack of a specific overt act.70

A lawsuit such as Pelagatti is not typical. On the other hand, any attorney who suspects a judge of colluding with opposing attorneys may learn from this case how not to go about solving the problem. Anytime an attorney suspects wrongdoing of a fellow attorney, he must be careful what he states publicly.

D. New Jersey Finds a General Duty of Good Faith to an Adverse Attorney

New Jersey courts have explored the situation where an attorney sues an adverse attorney from a prior lawsuit. Malewich v. Zacharias71 involved a claim of misrepresentation against an adverse attorney from a prior matrimonial suit.72 Zacharias, the attorney for the wife in the prior action, alleged that the husband’s attorney, Auty, represented that he would call Zacharias if the case were not adjourned.73 Instead, Auty allegedly represented to the court that Zacharias would not appear, allowing default judgment to be taken against the wife.74 This legal malpractice suit was brought against Zacharias, who, in turn, filed a third-party complaint against Auty seeking damages.75

The court in Malewich stated that as a member of the bar, Auty should know that an adversary might reasonably rely on representations made to him.76 Thus, he owed a duty of good faith.77 The court held that a breach of that duty can render the attorney liable to such an adversary for all or part of a claim advanced by the adversary’s client in a malpractice action.78 The court cited to the Disciplinary Rules in decid-

69. Id. at 1347.
70. Id. at 1346.
72. See id. at 952.
73. Id. at 953.
74. Id.
75. Id. at 951.
76. Malewich, 482 A.2d at 951.
77. Id.
78. Id.
ing that such a misrepresentation to a member of the bar can result in an award of damages. 79

This duty of good faith is the same duty invoked in Mullen. 80 However, in Malewich this duty is a general duty that all attorneys owe their adversaries. 81 The rule applied in Mullen, on the other hand, was specific to a vendor's attorney and a buyer's attorney. 82 There, the duty only arises when a buyer-seller relationship is present. 83 Under the New Jersey rule applied in Malewich, the duty of good faith arises in all cases. 84 Since the court did not discuss any other possible causes of action resulting from a breach of good faith, Malewich serves to establish liability only for misrepresentation or another fraud-related claim. 85 Had the Mullen court followed the Malewich rule, the vendor's attorney could have recovered for malpractice under the misrepresentation theory, instead of having to sue for entitlement to indemnity.

II. WHEN AN ATTORNEY SUES A FORMER CLIENT'S SUBSEQUENT ATTORNEY

A second context in which an attorney may be sued by one of his colleagues is when an attorney sues a former client's subsequent attorney. This situation arises primarily where an attorney has been sued for malpractice and then brings an action against the attorney from the malpractice suit. These claims usually allege malicious prosecution or a similar cause of action. However, this type of suit may also arise when a client seeks a second opinion and consults another lawyer. The former attorney may sue the subsequent lawyer for giving the client wrong advice or for interfering with his contract with the client. 86 In these cases, it is rare to find a court that will hold the subsequent attorney liable.

79. See id. at 953-954 (citing New Jersey Code of Professional Responsibility DR 7-102 (A)(2), (5), (7); DR 7-106 (C)(5)).
80. See supra notes 28-48 and accompanying text.
81. See supra notes 77-78 and accompanying text.
82. See supra notes 41-42 and accompanying text.
83. See supra notes 41-42 and accompanying text.
84. See Malewich, 482 A.2d at 951.
85. See id. at 953.
A. New Jersey Finds No Duty Is Owed to a Predecessor Attorney

In addition to the claim mentioned above, Malewich\textsuperscript{87} involved a third-party claim against Chase, the wife’s new attorney.\textsuperscript{88} Zacharias alleged that Chase acted negligently in failing to vacate the judgments entered against his former client and in settling the case for $7,500.\textsuperscript{89} The court, however, found no merit in this claim.\textsuperscript{90} Rather, the court held that, unlike an adverse attorney, a successor attorney does not owe any kind of duty to his predecessor.\textsuperscript{91}

In distinguishing the two situations, the court found that no duty exists to predecessor attorneys.\textsuperscript{92} This ruling indicates a reluctance to subject attorneys to liability for their actions while representing a client. Feeling the necessity to justify the imposition of a duty, the court discussed in much further depth the prior issue concerning the adverse attorney.\textsuperscript{93}

B. Texas Applies the Bradt Rule in a Second Context

In \textit{Ross v. Arkwright Mutual Insurance Company},\textsuperscript{94} attorneys sued twelve other attorneys after a $13 million personal injury judgment was entered against their client in federal court.\textsuperscript{95} The attorneys alleged malicious prosecution, slander, libel, conspiracy, and negligence, all arising out of the conduct from the federal litigation and the following malpractice suits that were filed against them.\textsuperscript{96}

The court in \textit{Ross} held that the attorneys failed to satisfy the “special

\begin{flushleft}
88. Id. at 952.
89. Id.
90. Id. at 953.
91. Malewich, 482 A.2d at 953.
92. Id.
93. \textit{See id}.
95. Id.
96. Id. at 123.
\end{flushleft}
injury" element of the malicious prosecution claim. Under Texas law, a plaintiff may not recover under this cause of action unless he suffered interference with his person or property. Here, attorneys were precluded from recovery because they were never detained, and their property was never seized by legal process.

The attorneys also failed on defamation theories because the statute of limitation had run. Since these claims stemmed from allegations made when the defendant attorneys filed a legal malpractice claim against them, the attorneys' claims accrued no later than the date on which they filed their answer to the malpractice suit. The negligence claim was dismissed as well because the court viewed that claim as merely "re-label([ing)]" other causes of action which were negated.

On appeal of the civil conspiracy claim, the court, applying the Bradt rule, determined that the attorneys had no right to recover. By qualifying the defendant attorneys' conduct as that engaged in as part of discharging their duties while representing former clients in a legal malpractice suit against attorneys, the court concluded that the attorneys had no right of recovery against their former clients or their current attorneys.

Ross first came before the Texas Court of Appeals in 1994, before the Bradt decision. However, by the time the issue of civil conspiracy came back to the Court of Appeals in 1996, Bradt was an established rule. Previous causes of action dismissed on other grounds likely could have been dismissed by the application of the Bradt rule alone. On the other hand, the defamation and malicious prosecution claims may have fallen under the probable exception to the Bradt rule for fraudulent or malicious conduct. In which case, the prior reasoning for dismissal of those claims was necessary.

Ross points out the ease with which courts will widen the application of the Bradt rule. Originally, Bradt applied to shield attorneys from

97. Id. at 126-130.
98. Id.
99. Ross, 892 S.W.2d at 126-30.
100. Id. at 131-32.
101. Id.
102. Id.
103. Ross, 933 S.W.2d at 305.
104. Id.
105. See supra notes 1-27 and accompanying text.
liability to adverse attorneys.\textsuperscript{106} Then the \textit{Bradt} rule was expanded to apply with equal force to opposing parties.\textsuperscript{107} Now, we see the court in \textit{Ross} applying the \textit{Bradt} rule to protect an attorney from suit by a former client's subsequent attorney as well.\textsuperscript{108} The reason for this is most likely the fear of depriving the public of a zealous attorney, the primary purpose of the \textit{Bradt} rule.\textsuperscript{109} It would seem sensible to formulate a general rule applicable to attorneys in all situations since the exception never affords the attorney protection for fraudulent or malicious conduct.

\textbf{C. New York Establishes a General Rule}

In \textit{Beatie v. DeLong},\textsuperscript{110} the New York Superior Court examined this issue further. \textit{Beatie} involved an attorney who represented the widow of an inventor who attempted to recover the rights to use and commercialize certain patents in which others had a 50\% interest.\textsuperscript{111} Attorney Beatie and his client had a contingency fee agreement.\textsuperscript{112} The client, after discharging Beatie, consulted another attorney about the enforceability of the agreement.\textsuperscript{113} Acting on the advice of the second attorney that the agreement was unenforceable, the client refused to comply with the agreement.\textsuperscript{114} Plaintiff Beatie brought suit against this second attorney, alleging tortious interference with contract.\textsuperscript{115}

The New York rule states that attorneys should be free to advise their clients without fear of liability to third parties.\textsuperscript{116} As opposed to the New Jersey general rule of no duty in this context,\textsuperscript{117} New York established a more specific rule pertaining to advising clients.\textsuperscript{118} The court

\begin{itemize}
  \item\textsuperscript{106} See supra notes 1-17 and accompanying text.
  \item\textsuperscript{107} See supra notes 18-22 and accompanying text.
  \item\textsuperscript{108} \textit{Ross}, 892 S.W.2d at 126-30.
  \item\textsuperscript{109} See supra notes 6-9 and accompanying text.
  \item\textsuperscript{111} Id. at 449.
  \item\textsuperscript{112} Id.
  \item\textsuperscript{113} Id. at 450.
  \item\textsuperscript{114} Id.
  \item\textsuperscript{115} \textit{Beatie}, 561 N.Y.S.2d at 450.
  \item\textsuperscript{116} Id. at 451.
  \item\textsuperscript{117} See supra notes 85-93 and accompanying text.
  \item\textsuperscript{118} See \textit{Beatie}, 561 N.Y.S.2d at 451.
\end{itemize}
held that the attorney was immune from liability under the shield afforded attorneys in advising their clients, in the absence of fraud, collusion, malice, or bad faith.\textsuperscript{119} This immunity even applied for erroneous advice.\textsuperscript{120} The \textit{Beatie} court, distinguishing mere negligence from bad faith, concluded that there was no evidence of bad faith.\textsuperscript{121}

The \textit{Beatie} rule not only recognizes a duty to act in good faith, but it also opens the door to liability for behavior constituting fraud. The specificity of the rule, especially in its second provision, indicates the likelihood of liability in this context. Although \textit{Beatie} points to no other cases dealing with this issue, it clearly sets forth the applicable New York rule.\textsuperscript{122}

\textbf{D. Older Cases Explored Different Theories in This Context}

Some older cases have discussed the potential liability of one attorney to another attorney for tortious interference with contract. For example, in \textit{Marcus v. Wilson},\textsuperscript{123} it was determined that the lawyers were not liable for their interference with the attorney-client contract because no proof existed that the defendants had knowledge of the contract.\textsuperscript{124} While not ruling out the possibility of liability under other facts, the court in \textit{Marcus} denied recovery as it would in any other action where the plaintiff is not able to prove all the elements of a cause of action.\textsuperscript{125}

On the other hand, in \textit{Skelly v. Richman},\textsuperscript{126} the California Court of Appeals addressed the issue of impropriety, specifically whether the defendant and his attorney improperly induced plaintiff’s client to breach his contract with the plaintiff through the use of false representations.\textsuperscript{127} The court concluded the claim was viable.\textsuperscript{128} Unlike \textit{Beatie},\textsuperscript{129} \textit{Marcus} and \textit{Skelly} dealt with more aggressive conduct by attorneys. Therefore, it

\begin{itemize}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.} at 452.
\item \textsuperscript{122} \textit{See id.}
\item \textsuperscript{123} 306 N.E.2d 554 (Ill. App. Ct. 1973).
\item \textsuperscript{124} \textit{Id.} at 560.
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} 89 Cal. Rptr. 556 (Cal. Ct. App. 1970).
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{See supra} notes 110-122 and accompanying text.
\end{itemize}
would be likely that even assuming these jurisdictions have a rule like New York’s, the conduct falls outside that which is protected from liability.

In another instance, a California court in *Pearlmutter v. Alexander* \(^{(130)}\) considered an issue related to both subsequent attorneys and adverse attorneys.\(^{(131)}\) The case involved the payment of settlement money by a defense attorney to the subsequent attorney of plaintiff’s former client.\(^{(132)}\) The defense attorney, however, paid this money without regard to the lien of the former attorney, the plaintiff in this case.\(^{(133)}\) Here, it was the adverse defense attorney who was subjected to liability, not the subsequent attorney of plaintiff’s former client.\(^{(134)}\) The court held that the defense attorney had tortiously interfered with the plaintiff’s rights.\(^{(135)}\)

The Superior Court’s decision in *Pearlmutter* has been met with much opposition from the California Court of Appeals.\(^{(136)}\) Therefore, the decision probably would not carry much weight in persuading other states to adopt such liability. Primarily, attorneys ought to be concerned about their conduct in dealing with their adversaries and in obtaining new clientele. Behavior constituting fraud, misrepresentation, or tortious interference with contract will not be protected in most cases.

### III. When an Attorney Sues an Assisting Attorney

A third context in which attorneys may find themselves liable to another attorney is where one serves as an assisting attorney to another on a certain case. Here, a fiduciary duty often arises out of the principal-agent relationship. Two states thus far have addressed this issue: California and Minnesota.

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131. *Id.*
132. *Id.* at 763.
133. *Id.*
134. *Id.*
In the California case of *Pollack v. Lytle*, an attorney brought suit against another attorney whom he had hired to assist in the prosecution of a medical malpractice action. The primary plaintiff attorney sued the assisting attorney for fraud, breach of fiduciary duty, breach of contract, legal malpractice, and declaration of entitlement to indemnity.

The plaintiff, Pollack, was engaged in the prosecution of a medical malpractice action when he was approached by defendant, Lytle. Lytle made several representations to Pollack about his ability to help with the case and convinced Pollack of his desire to serve as trial counsel. They agreed that Lytle was to receive one-third of Pollack’s contingency fee. The subsequent turn of events revealed that most of Lytle’s representations were false, including those concerning his skill as an attorney. Lytle eventually induced the client to discharge Pollack as the attorney, and upon losing the case, he induced the client to file a malpractice action against Pollack seeking $3,000,000 in damages.

The court in *Pollack* began its analysis by noting that as a matter of public policy, a successor attorney owes no duty to his predecessor. However, the court stated, “[t]he roles of successor and associate attorneys are decidedly different.” The successor attorney actually replaces his predecessor while “an associate attorney acting as the agent of the principal attorney replaces no one, but acts at the behest of his principal.” Accordingly, public policy does not mandate that an associate attorney remain free from liability for breach of the duty owed to his principal. As a result, the court held that the plaintiff’s claim for breach of fiduciary duty was viable.

In addition, the court in *Pollack* held that plaintiff’s claim of fraud

138. *Id.*
139. *Id.* at 85.
140. *Id.* at 83.
141. *Id.* at 83-84.
142. *Pollack*, 175 Cal. Rptr. at 84.
143. *Id.*
144. *Id.* at 84-85.
145. *Id.* at 86.
146. *Id.* at 87.
147. *Pollack*, 175 Cal. Rptr. at 87.
148. *Id.*
149. *Id.*
was clearly actionable.\textsuperscript{150} An application of agency rules also entitled plaintiff to indemnity as a result of the allegedly tortious conduct of defendant.\textsuperscript{151} However, plaintiff's complaint failed to state claims for breach of contract and legal malpractice.\textsuperscript{152} Since the contract involved a contingency fee, recovery could be sought only upon occurrence of the contingency.\textsuperscript{153} Here, because the contingency did not occur, (i.e., they failed to recover from defendant in the underlying action), plaintiff could not allege that a breach of contract caused any measurable injury.\textsuperscript{154} As to legal malpractice, any duty owed to plaintiff by defendant stemmed from either the fiduciary duty or from the contract. Each of these claims fall into previously discussed theories.\textsuperscript{155}

Not only did Pollack establish a duty specific to this context, but it also indicated that a host of theories exist under which an assisting attorney may be found liable if his conduct fits the description. The court was clear in its refusal to extend any special protection to the attorney from generic causes of action in this context.

IV. CONCLUSION

An attorney being held liable for conduct in his capacity as an attorney is a relatively new phenomenon. Although it is obvious that an attorney who knowingly engages in wrongful conduct may be held liable for the same, an attorney who makes every effort to abide by the law may be surprised to find himself being sued by a fellow attorney. The typical attorney pays close attention to disciplinary rules and is more careful than the normal person to avoid any risk of serious traffic offenses (e.g., excessive speeding tickets, D.U.I., etc.). However, attorneys ought to carefully consider their actions taken in their capacity as attorneys with regard to civil liability as well.

As considered by the cases discussed above, several theories in civil liability may be viable: misrepresentation, fraud, libel, slander, malicious

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{150} Id.
\item\textsuperscript{151} Id.
\item\textsuperscript{152} Pollack, 175 Cal. Rptr. at 88.
\item\textsuperscript{153} Id.
\item\textsuperscript{154} Id.
\item\textsuperscript{155} Id.
\end{enumerate}
\end{footnotesize}
prosecution, indemnity, breach of contract, tortious interference with contractual relations, and breach of fiduciary duty. In addition, duties not previously owed to other attorneys are now being imposed by a few states: duty of good faith and fair dealing among adverse attorneys and in the real estate context, and fiduciary duty. On the other hand, most courts have seemed hesitant to expose the attorney to liability for conduct engaged in while representing a client as long as such behavior is not obviously and intentionally wrongful. The primary reason for this is public policy, which suggests that the imposition of this liability would reduce the enthusiasm of attorneys in representing their clients.

Although few cases have held the attorney liable in these various situations, it remains a concern in the eyes of practicing lawyers and their clients. Until a greater number of states are faced with this issue, attorneys should proceed with caution in representing their clients.

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