CALIFORNIA ACADEMY OF APPELLATE LAWYERS

August 25, 1995

Honorable Malcolm Lucas, Chief Justice and
Honorable Associate Justices
California Supreme Court
303-2nd Street, South Tower
San Francisco, California 94107-1317

Re: *Slater v. Durchfort*, 2d Civil No. B083907
Supreme Court No. S048077

Dear Chief Justice Lucas and Associate Justices:

Pursuant to California Rules of Court, rule 14(b), and rule 979, the California Academy of Appellate Lawyers submits this amicus curiae letter urging that the Court either grant review of the opinion of the court of appeal in the above-referenced matter or order that the opinion be depublished.

The California Academy of Appellate Lawyers is a private, non-profit association of California attorneys who either specialize in appellate practice or devote a substantial portion of their practice to appellate law. The Academy is deeply concerned that the substantive and procedural rules governing the practice of law in California permit and encourage the highest quality of appellate representation.

The Academy submits this amicus curiae letter because if the opinion in *Slater v. Durchfort* (1995) 35 Cal.App.4th 1718, is allowed to stand, it would significantly undermine effective appellate practice. The *Slater* opinion holds that an attorney who agrees to represent a client after a lawsuit has commenced owes a duty to the opposing party to "reasonably investigate" the claims against that party; if the opposing party later sues the lawyer for malicious prosecution, the *Slater* opinion holds that breach of the duty of reasonable investigation may satisfy the malice element of the malicious prosecution action. The *Slater* opinion's holdings are particularly ominous for the appellate lawyer, since the appellate lawyer

frequently is called in to assist in the preparation of pre-trial and post-trial motions, or may be required to file the notice of appeal and process it before the decision is made whether to dismiss or proceed.

As we explain, every jurisdiction which has considered whether an attorney owes a duty to reasonably investigate the claims against his or her client's adversary has rejected such a duty as against public policy. These courts--including this Court, in *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 883--have concluded that recognition of such a duty is incompatible with an attorney's duties to his or her own client, would have a significant chilling effect upon the attorney's zealous representation, and is an unnecessarily draconian measure in light of the widespread availability of sanctions for frivolous claims.

As we further explain, the *Slater* opinion's conclusions are based upon a fundamentally flawed analysis of precedent, including most significantly a dictum in the *Sheldon Appel* opinion. The *Slater* opinion takes this Court's observation that "the extent of a defendant attorney's investigation . . . may be relevant" to the malice element in a malicious prosecution action to mean that an attorney owes a "duty of reasonable investigation"--notwithstanding this Court's express rejection of such a duty within the same opinion.

The *Slater* opinion threatens all California litigants and attorneys; but because of its express application to attorneys who become involved in a lawsuit after it has been filed, *Slater* is particularly problematic for appellate attorneys.[1/] Even if the insurmountable public policy objections could be overcome, since the post-judgment process normally focuses on legal rather than factual error, appellate attorneys are peculiarly ill-equipped to perform the sort of factual investigation apparently envisioned by the *Slater* court.

In the following portion of this letter, we first set forth a brief history of the case law in this area to demonstrate just where the *Slater* opinion's analysis goes wrong. Next we explain that recognition of a duty of reasonable investigation owed to a client's adversary is pernicious even in the context of the malice element of a malicious prosecution action. Finally, we explain that existing procedures for obtaining sanctions are more than adequate--and far more efficient--as a means of deterring frivolous actions.

1/ The Academy recognizes that, in *Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 793-794, this Court held that a malicious prosecution action does not lie for a "malicious appeal." However, as noted above, appellate counsel frequently becomes involves in litigation before the appellate process begins, often to represent one of the parties in pre-trial or in post-trial motions.

A. The *Slater* Opinion Erroneously Reinjects Negligence Principles Into The Intentional Tort Of Malicious Prosecution By Incorporating A "Duty Of Reasonable Investigation" In The Malice Element.

As long as fifty years ago, the appellate courts in California recognized that an attorney could not be liable for malicious prosecution for failure to conduct an independent investigation into the facts of the client's case. In *Murdock v. Gerth* (1944) 65 Cal.App.2d 170, the court reversed a malicious prosecution judgment against an attorney, holding that the attorney had every right to rely upon the client's factual assertions without conducting his own investigation:

> "It would be inimical to the administration of justice if an attorney were to be held liable to a malicious prosecution action where, after an honest, industrious search of the authorities, upon facts stated to him by his client, he advises the latter that he has a good cause of action, although the courts upon a trial of such action decide that the attorney's judgment was erroneous. If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court." (*Id.* at 179; emphasis supplied.)

The principle set forth by the *Murdock* court was consistently followed and relied upon in subsequent opinions. Thus, in *Masterson v. Pig'n Whistle Corp.* (1958) 161 Cal.App.2d 323, 339, the court, relying upon *Murdock*, stated that ". . . it is of course true that an attorney may not be held liable in damages for malicious prosecution where, upon facts stated to him by his client, he advises the latter erroneously that he has a good cause of action." (Emphasis added; see also *Kassan v. Bledsoe* (1967) 252 Cal.App.2d 810, 816.)

In *Tool Research & Engineering Corp. v. Henigson* (1975) 46 Cal.App.3d 675, 683, the court of appeal relied on the *Murdock* opinion for the above proposition . Ironically, however, it is a dictum from the *Tool Research* opinion upon which the court of appeal below relied for its conclusion that an attorney owes a duty of reasonable investigation to his client's adversary.[2/] In *Tool Research*, the court of appeal affirmed a summary judgment in favor of the defendant attorneys based upon their uncontradicted declaration that before the action was filed, they had conducted an extensive factual investigation which confirmed their client's factual allegations. Holding that the uncontradicted facts showed the attorneys had probable cause to proceed as a matter of law, the *Tool Research* court noted that, "An attorney has probable cause to represent

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2/ The court of appeal's heavy reliance upon *Tool Research* may in part be based upon the fact that the court erroneously attributes the opinion in that case to the "Supreme Court." (*Slater v. Durchfort, supra,* 35 Cal.App.4th at 1722.)

a client in litigation when, after a reasonable investigation and industrious search of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried." (*Id.* at 683-684.)

In the years following the *Tool Research* decision, a number of appellate courts adopted the *Tool Research* dictum, utilizing it to support the conclusion that an attorney's failure to conduct a reasonable investigation into the client's claims could form the basis of a malicious prosecution action. (*Norton v. Hines* (1975) 49 Cal.App.3d 917, 923; *Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 188-190; *Stanley v. Superior Court* (1982) 130 Cal.App.3d 460; *Williams v. Coombs* (1986) 179 Cal.App.3d 626, 640-644.) Strangely, however, several of these opinions at the same time rejected the notion that an attorney owed a duty to his or her client's adversary to conduct a reasonable investigation into the client's case, breach of which could give rise to an action in negligence. Thus, in *Norton v. Hines, supra,* the court held that (1) an attorney owes no duty of due care to a former adversary because the adversary is not an intended beneficiary of the attorney's services (49 Cal.App.3d at 921), and (2) recognition of a cause of action for breach of such a duty would inhibit an attorney's vigorous representation of the client and conflict with public policy favoring free access to the courts (*id.* at 922-923). And in *Weaver v. Superior Court, supra,* the court expressly held an attorney owed "no duty [to an adversary] to conduct a reasonable investigation into the facts and law before filing a complaint. . . ." (95 Cal.App.3d at 192.)[3/]

Of course, there was a latent contradiction at work in these opinions. On the one hand, the cases seemed to accept without question the *Tool Research* language suggesting that an attorney's failure to perform a reasonable investigation could be an element of a malicious prosecution action; at the same time, however, these same opinions rejected the concept of a negligence-type "duty of reasonable investigation" as contrary to public policy. Something had to give.

3/ With these decisions, California has joined every other jurisdiction which has considered the question in rejecting the notion that attorneys owe to an adversary a duty of reasonableness or due care in investigating the facts of their clients' claims. (See, e.g., *Tipton v. Willamette Subscription Television* (1987) 85 Or.App. 79, 83, 735 P.2d 1250, 1252; *Beecy v. Pucciarelli* (1982) 387 Mass. 589, 597, 411 N.E.2d 1035; *Friedman v. Dozorc* (1981) 412 Mich. 1, 312 N.W.2d 585; *Bird v. Rothman* (1981) 128 Ariz. 599, 627 P.2d 1097; *Tappen v. Ager* (10th Cir. 1979) 599 F.2d 376, 378-379; *Berlin v. Nathan* (1978) 64 Ill.App.3d 940, 381 N.E.2d 1367; *Pantone v. Demos* (1978) 59 Ill.App.3d 328, 375 N.E.2d 480; *Bickle v. Mackie* (N.D. Iowa 1978) 447 F.Supp. 1376; *Brody v. Ruby* (Iowa 1978) 267 N.W.2d 902; *Spencer v. Burglass* (La.App. 1976) 337 So.2d 596.)

The first court to recognize and resolve the problem was the Supreme Court of Michigan. In *Friedman v. Dozorc, supra*, 312 N.W.2d 585, the plaintiff had sued his former adversary's attorney alleging breach of a duty of reasonable investigation as a basis for negligence liability; the plaintiff also argued that the *Tool Research* dictum should be interpreted to mean that the failure of the attorney to conduct a reasonable investigation into his client's claims would satisfy the lack of probable cause element of a malicious prosecution cause of action. After first rejecting the negligence cause of action as contrary to public policy, the Michigan Supreme Court concluded that such a duty was no more compatible with public policy simply because it was incorporated into a malicious prosecution cause of action.[4/]

Expressly rejecting the *Tool Research* formulation, the Michigan Supreme Court held that recognition of a "duty of reasonable investigation" as part of a malicious prosecution action is "inconsistent with the role of the attorney in an adversary system." (*Friedman v. Dozorc, supra*, 1 Mich. at 49-53, 312 N.W.2d at 604-606.) Among other reasons for so holding, the Court cited the following: (1) an independent investigation is not always possible, particularly where the statute of limitations is about to run; (2) an attorney would be inhibited to fully represent the client if every time an adverse fact came to light the attorney had to worry about malicious prosecution liability; (3) the Code of Professional Responsibility does not require an independent investigation, but simply prohibits an attorney from knowingly pursuing a frivolous or vexatious claim; and (4) testing an attorney's "reasonableness" in pursuing an action against what a hypothetical "reasonable" attorney would do in the same circumstances is difficult to reconcile with an attorney's ethical obligation to represent the client "loyally, tenaciously and single-mindedly." (*Ibid.*)

4/ One of the more bizarre aspects of the opinion of the court of appeal opinion below is its failure to mention the Michigan Supreme Court opinion in *Friedman*, while at the same time placing heavy reliance upon the Michigan lower appellate court case of *Schunk v. Zeff & Zeff* (1981) 109 Mich.App. 163, 311 N.W.2d 322. The opinion cites *Schunk* approvingly, stating that the *Schunk* court relied on the *Tool Research* rule to recognize a duty of reasonable investigation as part of a malicious prosecution action. (*Slater v. Durchfort, supra,* 35 Cal.App.4th at 1723.)

In fact, the *Schunk* court expressly rejected any concept of a duty of reasonable investigation. (109 Mich.App. at 167-174, 311 N.W.2d at 323-327.) It was the dissenting judge who unsuccessfully urged that the *Tool Research* dictum should be followed--and only after acknowledging that the majority's contrary conclusion was "in accord with the great weight of present legal authority and that there are strong policy reasons upon which courts have relied in determining that an attorney owes no duty to his client's adversary." (*Id.* at 175, 311, N.W.2d at 327.)

The duty of reasonable investigation was dealt a death blow--or so it appeared, until *Slater*--by this Court in *Sheldon Appel Co. v. Albert & Oliker, supra,* 47 Cal.3d at 883. Expressly disapproving the *Tool Research* dictum (47 Cal.3d at 883, fn. 9), this Court concluded that a duty of reasonable investigation was "at odds with a consistent line of California decisions which have made clear that an attorney's duty of care runs primarily to his own client rather than to the client's adversary, and which--on the basis of important policy considerations--have precluded the adversary from maintaining a negligence cause of action against its opponent's attorney." (47 Cal.3d at 883.) This Court further recognized that to permit what is essentially a negligence duty to form the basis for a malicious prosecution action "would tend to create a conflict of interest between the attorney and client, tempting a cautious attorney to create a record of diligence by performing extensive legal research, not for the benefit of his client, but simply to protect himself from his client's adversaries in the event the initial suit fails." (*Ibid.*) In other words, this Court in *Sheldon Appel* rejected the *Tool Research* duty of reasonable investigation for essentially the same public policy reasons which had motivated the similar holdings of the courts in every other jurisdiction which had considered the issue.

Since this Court made it clear in *Sheldon Appel* that a duty of reasonable investigation has no place in a tort action against an attorney--whether the action is for negligence or for malicious prosecution--it is more than a little surprising to see such a duty resurrected by the *Slater* opinion. However, the opinion below holds that, while this Court in *Sheldon Appel* disapproved the duty of reasonable investigation as part of the probable cause element of malicious prosecution, it also held that such a duty <u>is</u> properly part of the malice element of malicious prosecution. (*Slater v, Durchfort, supra*, 35 Cal.App.4th at 1723.)

As we next explain, this Court held no such thing. What this Court did hold was that the "extent" of an attorney's investigation "may be relevant" on the issue of malice--a far cry from recognizing a duty of reasonable investigation. Indeed the approach of the court of appeal below is, as we explain, utterly incompatible with this Court's holding in *Sheldon Appel.*

B. <u>Recognition Of A "Duty Of Reasonable Investigation" Owed By An Attorney To His Or Her Client's Adversary Is Against Public Policy; Transposition Of Such Duty From The Probable Cause Element Of Malicious Prosecution To The Malice Element of Malicious Prosecution Does Not Cure The Problem</u>.

The opinion below finesses this Court's disapproval of the duty of reasonable investigation in *Sheldon Appel* in two ways. First, it simply ignores the substantive objections to such a duty relied upon in *Sheldon Appel*, which are recounted above. Second, the opinion fastens on the following dictum from *Sheldon Appel* to conclude that such a duty may be enforced as part of the malice element of a malicious prosecution action: "[A]s with the question of the defendant's subjective belief in the tenability of the claim, if the trial court determines that the prior action

was not objectively tenable, the extent of a defendant attorney's investigation and research may be relevant to the further question of whether or not the attorney acted with malice." (47 Cal.3d at 883.) But the latter language from *Sheldon Appel* does not mean, as the opinion below asserts, that this Court thereby intended to revive the very duty of reasonable investigation it had laid to rest only paragraphs earlier.

The relevance of the extent of an attorney's investigation to the malice element of a malicious prosecution claim is a function of the fact that there are two prongs to the malice element in such an action: "(1) The attorney must know that there is no probable cause for the prosecution and (2) either the attorney personally acted with an improper motive or the attorney knew that the client was motivated by malice." (1 Mallen & Smith, Legal Malpractice (3d ed. 1989) § 6.19, p. 329.) It is the first of these two prongs to which the extent of the attorney's investigation is relevant. Since the attorney must know there is no probable cause for the action, and since such knowledge may come about through the attorney's investigation into the facts, the extent of that investigation may well be relevant on the malice issue.

The critical issue thus is the extent of the attorney's knowledge, and the evidence of the extent of the attorney's investigation may cut several ways, depending on the facts of the case. Where the evidence shows the attorney did a thorough investigation and uncovered only facts which revealed there was no basis for the client's claims, the extent of the investigation would confirm that the attorney knew there was no probable cause, and thus support a finding of malice. On the other hand, a thorough investigation which revealed some facts supporting each element of the client's cause of action would be relevant to negate a finding of malice. The failure of the attorney to conduct any investigation might also tend to prove malice, at least where the facts related by the client are so outlandish that no reasonable person would accept them as true.

However, the *Slater* opinion's interpretation of this Court's observation in *Sheldon Appel* that the extent of an attorney's investigation is "relevant" to the issue of malice is that breach of a "duty of reasonable investigation" is sufficient in and of itself to prove malice. This conceptualization is clear from the following discussion:

> "When we speak of a duty to investigate we are describing the risk attorneys run if they fail to fulfill that responsibility in contrast to a duty the violation of which inevitably carries consequences. An attorney may file or continue prosecution of a case without conducting any investigation whatsoever, and yet not be liable for malicious prosecution because through luck the case turns out to have enough merit to convince a court there was probable cause to pursue it. But other attorneys who likewise ignore their duty to investigate may not be so fortunate. The trial court will find a lack of probable cause. Thus, the failure to investigate will come back to haunt them as it is used to provide proof they acted in a

> malicious manner in pursuing a meritless claim without bothering to check to law or facts." (*Slater v. Durchfort, supra*, 35 Cal.App.4th a 1726.)

The effect of the *Slater* court's holding is to convert malicious prosecution actions against attorneys into actions for negligent breach of the duty of reasonable investigation. As the above language makes clear, the *Slater* court concludes that if the plaintiff can establish that there was no probable cause, then the plaintiff need only present expert evidence to show the investigation was not "reasonable" to establish malice. Such an action would be indistinguishable from the "breach of a duty of independent investigation" negligence action which has been rejected by every court which has considered the argument. (See fn. 3, *supra*.)

The distortion of the malicious prosecution action wrought by the opinion below was motivated by the court of appeal's concern that any other result would encourage attorneys to file actions without conducting any investigation at all. (*Slater v. Durchfort, supra*, 35 Cal.App.4th at 1725 ["Otherwise we allow . . . attorneys to immunize themselves from a malicious prosecution claim by failing to investigate and thus avoiding the discovery they lack probable cause"].) But in this instance the cure is far worse than the malady. For, as we next explain, both this Court and the Legislature have put into effect potent safeguards to discourage such conduct--safeguards far more efficient than an action for malicious prosecution which do not engender the problems identified above.

C. <u>This Court And The Legislature Have Recognized That The Appropriate Means Of Guarding Against Frivolous Actions Is The Imposition Of Sanctions Within The Action Rather Than A Follow-On Lawsuit For Malicious Prosecution</u>.

In *Sheldon Appel, supra*, this Court explained that there was a far preferable means of guarding against frivolous lawsuits than recognizing a duty of reasonable investigation, the breach of which would give rise to tort liability:

> "While the filing of frivolous lawsuits is certainly improper and cannot in any way be condoned, in our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded." (47 Cal.3d at 873.)

This concept was echoed in *Coleman v. Gulf Ins. Group, supra*, 41 Cal.3d at 797, where this Court indicated that the "imposition of sanctions for frivolous and delaying conduct" was a far

preferable tool for combatting frivolous litigation than a follow-on action for malicious prosecution.

A statutory structure exists for obtaining sanctions against an attorney for bringing an action which has no factual basis. Code of Civil Procedure section 128.5 has been held to authorize sanctions against an attorney "'where any reasonable attorney would agree that the action is totally and completely without merit'" because of an absence of evidence supporting the action. (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 12, citation omitted.)[5/] And just last year, the Legislature enacted Code of Civil Procedure section 128.7, effective January 1, 1995. This new statute, modeled on rule 11 of the Federal Rules of Civil Procedure, provides that every pleading or other paper filed in an action must be signed by the attorney who prepared it, thereby certifying that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the claims being made are not frivolous.

There are numerous advantages to controlling frivolous litigation by way of sanctions--particularly sanctions pursued under section 128.7--rather than by means of follow-on tort actions. The use of sanctions permits resolution of the issue within the primary lawsuit itself, thus avoiding a multiplicity of actions. Where sanctions are sought, the matter is heard by the trial judge in the primary action; not only does this save time, but it also tends to improve accuracy of decision-making since the judge in the primary action is usually in the best position to judge the issue of frivolousness. In addition, statutory schemes such as section 128.7 are designed to properly place responsibility for unfounded lawsuits on the attorney who actually files the particular pleading or paper found to be meritless. Moreover, Code of Civil Procedure section 907 and rule 26 of the California Rules of Court expressly authorize sanctions against the appellate lawyer for pursuing a frivolous appeal. Such remedies permit the appellate lawyer to focus on the legal issues, and the appellate lawyer is not forced to perform a factual investigation which would be outside the scope of his or her professional interest in the case, although the appellate lawyer is properly held responsible for frivolous legal arguments.

5/ In the recent case of *Andrus v. Estrada* (August 3, 1995) ___ Cal.App.4th ___, 95 Daily Journal, D.A.R 10335, the court of appeal recognized that under Code of Civil Procedure section 128.5, sanctions could be sought against an attorney for conduct which would otherwise constitute malicious prosecution. The court relied upon *Sheldon Appel* for the proposition that sanctions are "a much more efficient method of addressing the misuse of the legal system" than a follow-on tort action. (*Id.* at 10338.)

D. Conclusion.

The court of appeal's recognition of a "duty of reasonable investigation" is bad public policy, as every court that has examined the concept has concluded. It is particularly bad public policy when applied to the civil appellate practitioner, whose role is limited to arguing legal issues presented by the record on appeal, a role inconsistent with a duty to investigate the facts of the case. The effect of the opinion below is to permit a litigant to sue the opponent's attorney for negligent failure to adequately investigate the case against the litigant; such an action severely undermines the attorney's duty to his or her own client. Moreover, sanctions within the primary lawsuit--a much more effective means of dealing with frivolous litigation--have been provided for by our Legislature. For all of these reasons, the California Academy of Appellate Lawyers strongly urges that review be granted in *Slater v. Durchfort*, or that the opinion of the court of appeal in that matter be depublished.

Respectfully submitted,

CALIFORNIA ACADEMY OF
APPELLATE LAWYERS

Kent L. Richland
President

cc: See Attached Mailing List

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9601 Wilshire Boulevard, Suite 544, Beverly Hills, California 90210.

On August 25, 1995, I served the foregoing document described as **AMICUS CURIAE LETTER TO THE CALIFORNIA SUPREME COURT JUSTICES BY THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS RE: SLATER v. DURCHFORT (S048077)** on the interested parties in this action by placing the true copies thereof in sealed envelopes addressed as stated in the attached mailing list:

-- SEE ATTACHED MAILING LIST --

I caused such envelope to be deposited in the mail at Beverly Hills, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on August 25, 1995, at Beverly Hills, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Beverly A. Sutherlin

Beverly A. Sutherlin

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