"Mount Up": a Self-policing Proposal for the Self-regulating Profession.
By M. Dylan McClelland*

They abound: they file meritless pleadings, perjurious declarations, hide documents in discovery, make threats of criminal or administrative prosecution to coerce civil settlements,[1] conceal insurance coverage, and otherwise flout the Rules of Professional Conduct.

Lawyers are an embarrassment. Any somewhat analytic and objective examination commands such a conclusion. The profession has its moments of beneficence to be sure, but by and large lawyers deserve every bit of contempt which the public and popular culture attributes to them. Worse, the vast majority of attorneys never report unethical conduct because California is a voluntary reporting state. All the while at Bar Association meetings, in courthouse hallways, and across the pages of legal periodicals such as the one you are reading, we lament the profession's poor public standing and implore that the appalling actions of a few bad apples not tarnish the

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[1] California Rule of Professional Conduct 5-100 (A) (2006) states: "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute."

South Carolina Rule of Professional Conduct 4.5, like California, prohibits threats of criminal prosecution to obtain advantage in a civil case. *See* S.C. RULES OF PROF'L CONDUCT R. 4.5 (2005).

The American Bar Association Model Rules of Professional Conduct deleted the specific rule prohibiting threats of criminal prosecution. However, the ABA contends that such conduct may still be prohibited more generally under Model Rules 4.4, 8.4. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4, 8.4 (2003). *See also* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992) (Use of Threats of Prosecution in Connection with a Civil Matter).

Other states disagree, holding that the threat of criminal prosecution to force a civil settlement is ethical conduct. *See, e.g.*, Alaska Bar Ass'n Ethics Cmte., Op. 97-2 (1997). Utah tolerates such threats provided they do not rise to the level of extortion. *See* Utah Ethics Advisory Opinion Cmte., Op. 03-04 (2003). Delaware follows a similar rule. *See* Delaware State Bar Ass'n Cmte. on Prof'l Ethics, Op. 1995-2 (1995).

profession. The current system is unacceptable and it's time the profession either puts up and works for change, or accepts its well-earned image and shuts up. What follows is a concededly aggressive reform. But much like tough love, it is a solution that seeks to save the profession from itself.

RECOGNIZING THE PROBLEM

Ethical transgressions abound in everyday law practice. From the all too common discovery abuses in hiding documents or "shading" sworn responses, to the more severe abuses such as shakedown lawsuits, illegal lis pendens to extort settlements,[2] or subornation of perjury, unethical conduct is very near the norm. But it is not perceived as such. Perhaps it is moral relativism or Machiavellian zealotry, but the lowest common denominator has become an accepted standard of practice, despite the protocols set forth in the Rules of Professional Conduct and the Business and Professions Code.[3]

OTHER SOLUTIONS PROVIDE NO RELIEF

But are there not remedies for unethical and unlawful conduct? Yes, but they fail. Sanctions motions are rarely meted out in state court where judges lack the inherent

[2] The Second District California Court of Appeal in *BGJ Associates* recognized, as have numerous other courts, the potential for serious abuse [of the lis pendens process] by "providing unscrupulous plaintiffs with a powerful lever to force the settlement of groundless or malicious suits." *BGJ Associates v. Superior Court*, 75 Cal. App. 4th 952, 969 (1999) (*citing Malcolm v. Sup. Ct.*, 29 Cal. 3d 518, 524 (1981); *Hilberg v. Sup. Ct.*, 215 Cal. App. 3d 539, 542 (1989)).

[3] The ethical obligations of attorneys in California are set forth in both the California Rules of Professional Conduct and the California Business and Professions Code. *See, e.g.*, Cal. Bus. & Prof. Code § 6068 (2006).

authority to police lawyer conduct.[4] Code of Civil Procedure Section 128.5 limits itself to bad faith filings (complaints, motions), and excludes by implication the entire universe of bad faith conduct which occurs outside of a pleading.[5] Further, courts are all too reluctant to assess sanctions for fear of deterring zealous advocacy. Moreover, judges were once lawyers too and have a natural and understandable inclination toward forgiveness.

Given these realities most attorneys are reluctant to seek sanctions based on the low probability of success, cost to the client, professional courtesy, and other time demands. Worse, the proliferation of frivolous sanctions motions tarnishes the remedy. We all know who we are talking about: e.g., attorneys who file sanctions motions over minor and frivolous matters, such as noncompliance with a subpoena, where the movant firm concedes it served the wrong party. Such bullying silliness makes most judges deservedly skeptical of sanctions motions.

For transgressing plaintiffs' counsels, the tort remedies of malicious prosecution and abuse of process are supposed to police the market. For numerous reasons these causes of action are mirages, providing only an illusion of accountability. One, the litigation privilege of Civil Code Section 47 has all but eliminated abuse of process as an

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[4] *See, e.g.*, *Bauguess v. Paine*, 22 Cal. 3d 626, 637-39 (1978). Conversely, federal courts have inherent authority to sanction. *See In re Keegan Management Co. Securities Litigation*, 78 F.3d 431, 433 (9th Cir. 1996).

[5] Further, California Code of Civil Procedure § 128.5 (2006) applies only to conduct or tactics that are frivolous or "solely intended to cause unnecessary delay." Such a standard ignores a plethora of unethical conduct that might not cause delay.

actionable tort.[6] Two, the anti-SLAPP[7] Motion of Code of Civil Procedure Section 425.16 has become the tool of choice for the professional liability bar, and others.[8] SLAPP Motions are now routinely filed in all malicious prosecution and other actions, no matter how egregious the underlying conduct involved.[9] Indeed the brazenness of some parties has resulted in the filing of anti-SLAPP Motions seeking to claim, inter alia, that an insurance company's failure to process a claim is protected as the legitimate exercise of Constitutional speech and petition rights.[10]

The requirements of Code of Civil Procedure Section 425.16 provide a structural impediment to malicious prosecution cases.[11] Because the statute requires a malicious prosecution plaintiff to prove he/she will probably prevail at trial at the pre-Answer stage without benefit of discovery, the anti-SLAPP Motion creates a nearly impenetrable moat around the unethical attorney. It is a rare case where a court may conclude a plaintiff can probably demonstrate all the elements of a malicious prosecution claim without the

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[6] The litigation privilege codified in Civil Code Section 47 "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) which have some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990).

[7] SLAPP is an acronym for Strategic Lawsuit Against Public Participation. *See, e.g.*, *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.*, 86 Cal. App. 4th 280, 282 (2000).

[8] California Code of Civil Procedure Section 425.16 permits a defendant who believes he/she has been sued for exercising his/her Constitutional rights to speech or petition to file a special motion to strike the Complaint.

[9] *See, e.g.*, *People ex rel. 20th Century Ins. Co.*, 86 Cal. App. 4th at 284 (defendant's allegedly created fraudulent insurance documents for homeowners who suffered damage from an earthquake); *Flatley v. Mauro*, 121 Cal. App. 4th 1523 (2004), *rev. grnt'd*, 22 Cal. Rptr. 3d 517 (stating that extortion threats in violation of Cal. R. Prof'l Conduct 5-100 are not protected speech).

[10] *Beach v. Harco National Ins. Co*., 110 Cal. App. 4th 82 (2003).

[11] In reviewing a special motion to strike brought pursuant to Section 425.16, the court engages in a two step process: first, the court decides whether the defendant has made a threshold showing that the causes of action alleged arise from protected activity. The Movant-defendant's burden is to demonstrate that the acts complained of by plaintiff arise from defendant's right of speech or petition under the United States' or the California Constitution. *HMS Capital, Inc. v. Lawyers Title Co*., 118 Cal. App. 4th 204, 211 (2004). Only when Defendant has made such a showing does the court determine whether plaintiff has demonstrated a probability of prevailing on the merits. *Id.*

opportunity to conduct any discovery. Indeed, the malice element of a malicious prosecution prima facie case is particularly vulnerable because that element relies upon a determination of the attorney's subjective intent.[12]

Three, most ethical violations cannot be vindicated because the vast majority of lawsuits settle out of court.[13] Most settlement agreements contain a covenant not to file any further complaints, including administrative proceedings against the releasing parties. "Releasing parties" are always defined to include the litigant, his/her agents, and attorneys. Settlement itself has thus become a weapon. In other words, an offending attorney who gets caught in an ethical violation frequently will settle a case, regardless of its merit, as a way to secure the covenant not to file additional proceedings. The non-offending counsel and their clients typically get a good deal, the offending attorney escapes scrutiny, and everyone goes home happy, except for the profession's reputation and the offending counsel's next victim.

Finally, there is the intended arbiter of attorney misconduct, the State Bar. For several reasons the Bar provides no real remedy. First, attorneys are the only self-regulating profession left. Everyone else from accountants, doctors, chiropractors, contractors and physical therapists are governed by professional boards, typically within the State Department of Consumer Affairs.[14] Self-regulation among attorneys fails for

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[12] *See, e.g.*, *HMS Capital*, 118 Cal. App. 4th at 218.
[13] *See* Stephen Hayward, *The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings*, (Pac. Res. Inst. Pub. Pol'y, March 1996), *available at* http://www.pacific.research.org/pub/sab/entrep/punitive1/punitive2.html (last visited May 13, 2006).
[14] *See, e.g.*, CAL. BUS. & PROF. CODE § 5000 et seq. setting forth the obligations of accountants and establishing the Board of Accountancy as that professions regulatory oversight body. Importantly, the

the same reasons commonly associated with police forces - lawyers' "thin blue pinstripe line" cautions against "ratting" on other attorneys. [15]

Second, as noted above most complaints cannot be filed with the State Bar because of broad settlement agreements. Third, the Bar lacks the resources and resolve to actually investigate and adjudicate serious ethical transgressions, much less to catch offenders early.[16] Studies indicate the most common complaint to the State Bar is that "my attorney doesn't call me back." Faced with hundreds of such complaints, bureaucratic inertia effectively strangles well meaning State Bar prosecutors.

The profession is left with a "Broken Windows" dilemma of legal ethics.[17] Smaller lapses are left unchecked, projecting a standard of accepted ethical lawlessness, and emboldening larger ethical violations. The system begs for meaningful reform intended to arrest ethical offenders at an early stage.

Board of Accountancy is comprised of fifteen members, of which a majority are not accountants. CAL. BUS. & PROF. CODE § 5000.

[15] The "thin blue line" of intra-police force loyalty is well documented. *See*, *e.g.*, Al Martinez, *The Thin Blue Line*, L.A. TIMES, Jan. 16, 2000, at A1 (describing the training program for police offered by the Simon Wiesenthal Museum of Tolerance).

[16] *See* California State Bar, "History of the Discipline Process" *at* http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10136&id=1648 (last visited May 13 2006).

[17] Broken Windows theory is a theory of criminal justice most famously propounded by James Q. Wilson and George L. Kelling. *See* James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, March 1982 at 29. The title comes from the following example:

"Consider a building with a few broken windows. If the windows are not repaired, the tendency is for vandals to break a few more windows. Eventually, they may even break into the building, and if it's unoccupied, perhaps become squatters or light fires inside. Or consider a sidewalk. Some litter accumulates. Soon, more litter accumulates. Eventually, people even start leaving bags of trash from take-out restaurants there or breaking into cars."

There is a solution to this debacle. Its details are, however, a secondary concern to the primary question of whether the Bar and its membership possesses the resolve to back up the Rules they have enacted.

A SIMPLE REFORM

The most straightforward solution to the profession's ethical epidemic is to permit self-policing in its most aggressive and arguably mercenary form. The American Bar Association's Model Rules of Professional Conduct require attorney mandatory reporting, a hopeful step, but unfortunately one too late.[18] Further, California does not follow the Model Rules.[19]

In the Old West, lawbreakers were often tracked and brought to justice by an ordinary citizen posse. "Mount up and ride" became a motto for justice. This article proposes enactment of a new cause of action. This article proposes adoption of new Business and Professions Code Section 6239, to state:

Article 16. 6239

(a) This section may be cited as the Legal Ethics Enforcement Act of 2006.

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[18] ABA Model Rule of Professional Conduct 8.3 (a) (2006) states : A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

[19] California attorneys are regulated by the State Bar Act. CAL. BUS. & PROF. CODE §§ 6000, 6076 (providing for the California Rules of Professional Conduct).

(b) A cause of action shall exist against any attorney licensed under Chapter 4 of this Title for:

1. Violation of any California Rule of Professional Conduct; or
2. Violation of any Article of Chapter 4 of this Title.

(c) Remedies. A court may award for violation of subdivision (b) of this section:

1. A civil penalty of $2,500 for each violation; and
2. Reasonable attorney's fees and costs in favor of the prevailing plaintiff.

(d) Jurisdiction and Venue. Any cause of action brought pursuant to subdivision (b) shall be brought exclusively in the Superior Courts of California, exclusive of Small Claims courts. Any plaintiff may elect a jury trial. Any agreement purporting to require arbitration of such a claim is voidable.

(e) Civil Code section 47 shall not constitute a defense to any claim brought pursuant to subdivision (b) of this Section.

(f) No cause of action pursuant to subdivision (b) of this section may be dismissed pursuant to a Code of Civil Procedure Section 425.16 Motion.

(g) If the court finds that a claim pursuant to subdivision (b) of this section is frivolous or was brought in bad faith, the court shall award reasonable costs and attorney's fees to a prevailing defendant.

(h) The remedies provided for by this section are cumulative and in addition to any other remedy under law.

(i) In any case brought under this section where penalties are awarded in excess of $5,000, the Superior Court shall forward a copy of the judgment to the State Bar of California.

(j) Any contract, settlement agreement, or part thereof which purports to generally waive any claim under subdivision (b) of this Section shall be void and unenforceable. All severable clauses of such agreements may be enforced.

RESOLVING THE OBJECTIONS

Anticipatorily, there are two chief objections to the proposed Section 6239. First, it is potentially subject to abuse. It is true that a section 6239 claim may favor attorneys and clients with greater resources. More attorneys, more billable hours, and greater resources may favor unwarranted claims brought to harass or brought for tactical purposes. The proposed Act, however, provides its own remedy, permitting the court to award a defendant his attorney's fees and costs for defending an abusive claim. Similarly, the anti-SLAPP Motion is abused frequently, but itself provides an identical remedy for frivolous and dilatory motions.[20]

The second chief objection to the proposed Act is that it will multiply litigation in an already overburdened court system. This is self-evidently true. The creation of a new cause of action will result in more cases alleging the claim than if it did not exist. But the multiplication of proceedings is not itself a substantive objection.

[20] CAL. CODE CIV. P. § 425.16 (C) (2006). The SLAPP motion itself has become a tactic prone to abuse. *Olsen v. Harbison*, 134 Cal. App. 4th 278 (2005).

Malicious prosecution actions likewise weigh the balance between multiplication of proceedings and the right to address a civil wrong.[21] As the California Supreme Court wisely noted in *Zamos v. Stroud*, "Malicious prosecution 'is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice.'"[22] Thus, though the malicious prosecution tort itself multiplies litigation subsequent to the filing of the original frivolous case, the efficient administration of justice counsels in favor of the subsequent suit. Claims under the proposed Act will equally effectuate the efficient administration of justice.

The anti-SLAPP Motion too suggests the multiplicity of proceedings is not itself a wrong. Since its enactment in 1992, Code of Civil Procedure Section 425.16 has unquestionably multiplied motion practice and its concomitant costs.[23] The question, thus, is not whether the proposed Act will multiply proceedings, but whether the harm it seeks to prevent justifies the additional cases.

A Section 6239 claim, though constituting another round of litigation, should be evaluated as to whether it would remedy the unethical practices it seeks to address. Additionally, it is by no means clear, as the *Zamos* Court pointed out in the malicious prosecution context, that the net result would be an increase in the number of cases

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[21] *See Zamos v. Stroud*, 32 Cal. 4th 958, 961 (2004).
[22] *Id*. Similarly, "[T]he essence of the tort 'abuse of process' lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice . . . ." *Meadows v. Bakersfield S. & L. Ass'n.*, 250 Cal. App. 2d 749, 753 (1967).
[23] *See* Stats 1992 ch 726 § 2 (SB 1264). It is self evident that the creation of a new motion in 1992 unquestionably multiplied the number of motions filed under that Section than existed prior to its enactment.

brought. The potentiality of a 6239 claim, like the *Zamos* malicious maintenance tort,[24] will actually deter the abusive and unethical conduct which lengthen and multiply proceedings. Bluntly, sometimes saving the patient requires amputating a limb.

CONCLUSION

This article simply asks the reader a question: how harmful is the perception that the legal profession is rampantly unethical? Has the reader lamented the reputation the profession currently enjoys? Has the reader, as did the ABA, criticized the attacks on judges which are now the political custom?[25] Has the reader, as did the former President of the California Bar Association, decried the prospect of the recall of a superior court judge?[26] Did the Trevor Law Group debacle or the Attorney General's prosecution thereof, raise the reader's ire?[27] That the former Texas Attorney General now sits in

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[24] In *Zamos*, the California Supreme Court approved a cause of action for malicious prosecution where a case is maintained without probable cause, irrespective of the existence of probable cause at the time of filing. *See Zamos*, 32 Cal. 4th at 973.

[25] *See* American Bar Association, YOURABA, *Is the independence of the judiciary at risk?*, September, 2005, *at* http://www.abanet.org/media/youraba/200509/article07.html (last visited May 13, 2006).

[26] John Van de Kamp, *Weighing Two Sides of an Issue*, CALIFORNIA BAR JOURNAL, April 2005. While the author concurs that the attempted recall of Superior Court Judge Loren McMaster was folly, State Bar President Van de Kamp's suggestion that the idea of judicial recall was in all cases unacceptable and a threat to the judiciary and balance of power bespeaks of an imperial judiciary cautioned against by the Founders of the Constitution. *See* Alexander Hamilton, THE FEDERALIST NO. 78 464-74 (Clinton Rossiter ed. 1961); *see also Planned Parenthood of Southeastern Pa v. Casey*, 505 U.S. 833, 994-1002 (1992) (Scalia, J., dissenting).

[27] *See*, *e.g.*, Nancy McCarthy, *Trevor Lawyers Quit Bar*, CALIFORNIA. BAR JOURNAL, August 2003, *available at* http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/August2003&sCatHtmlPath=cbj/08_TH_08_Trevor-Quits.html&sCatHtmlTitle=Top%20Headlines (last visited May 13, 2006). The investigation of the Trevor Law Group was the largest investigation ever undertaken by the State Bar of California. *Id.* The three lawyers comprising the Beverly Hills' Trevor Law Group were accused of using extortionate tactics in lawsuits against small business under the state's broad unfair business practices statute, California Business and Professions Code Section 17200.

prison for his actions in steering that state's tobacco litigation to a handful of law firms even catch your notice?[28]

There are numerous and disputed reasons why the public perceives the profession as greedy, corrupt, arrogant, and unethical. As Manhattan Institute Fellow Walter Olson has suggested, the profession's poor reputation may be attributable to the "dentist theory," according to which people encounter lawyers at painful times in their lives, or the "bartender theory," under which clients actively seek out lawyers' worst attributes.[29] But as Olson points out, it may also have to do with the fact that:

> [T]he profession has swung toward the contrasting ideal of zealous representation, red in tooth and claw, to the point where many authorities, including some legal ethics professors, dismiss as outmoded lawyers' obligation to avoid misleading a judge or jury or inflicting tactical harm on an opponent's pocketbook or reputation.[30]

This article suggests that these flaws are compounded by the public's perception that lawyers are unaccountable. As Olson asked, "[H]ere is a question for the bar associations: Is the current state of your profession misunderstood? Or understood too well?"[31] Many will not like the proposed Act, but if a better alternative is not forthcoming, is there any other choice?

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[28] *See* R. Theodore, *Former Texas Attorney General Dan Morales Surrenders on Fraud Charges, Claims Innocence,* THE LUBBOCK-AVALANCHE JOURNAL, March 8, 2003, *available at* http://lubbockonline.com/stories/030803/sta_030803119.shtml (last visited May 3, 2006). Former Texas Attorney General Daniel Morales was indicted on twelve counts of conspiracy and mail fraud stemming from his role in that State's $17 BB tobacco settlement.

[29] Walter Olson, *Lawyers, Gums, and Rummies Why Do We Hate Attorneys?*, THE REASON FOUNDATION, July 1999, *available at* http://reason.com/9907/co.wo.reasonable.shtml (last visited May 13, 2006).

[30] *Id.*

[31] *Id.*