

To: Cadmium Q. Eaglefeather  
From: Trixie Argon  
Date: 10 September 2010  
Re: **Elements of malicious prosecution**

Malicious prosecution has three elements that must be pleaded and proven: 1) the defendant commenced a judicial proceeding against the plaintiff; 2) the original proceeding was “initiated with malice” and “without probable cause”; and 3) the proceeding was “pursued to a legal termination in [the plaintiff’s] favor.” *Bertero v. National General Corp.*, 13 Cal. 3d 43, 50 (1974).

**A. Commencement of judicial proceeding**

Any civil proceeding where the plaintiff seeks affirmative relief may be the basis of a malicious-prosecution claim. The original plaintiff does not need to personally sign the complaint; if he is “actively instrumental” or the “proximate and efficient cause” of the action, he may be liable. *Jacques Interiors v. Petrak*, 188 Cal. App. 3d 1363, 1372 (1987).

**B. Initiated without probable cause and with malice**

The malicious-prosecution plaintiff must establish both malice and lack of probable cause by the defendant in the underlying action.

In a malicious-prosecution action against an attorney in a civil suit, the standard for probable cause is whether a reasonable attorney would have thought the underlying claim was tenable at the time the original complaint was filed. See *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 885–86 (1989). An attorney may be liable for continuing to prosecute a claim after she discovers the action lacks probable cause, even if there was probable cause at the outset. See *Zamos v. Stroud*, 32 Cal. 4th 958, 970 (2004).

The adequacy of an attorney’s research is not relevant, because probable cause relies on an objective standard of reasonableness. But if the court finds no probable cause, the thoroughness of the attorney’s research may apply to showing malice. See *Sheldon Appel Co.*, 47 Cal. 3d at 875.

The showing of malice requires evidence of “ill will or some improper purpose,” ranging “anywhere from open hostility to indiffer-