Attorneys as Gatekeepers to the Court: The Potential Liability of Attorneys Bringing Suits Based on Recovered Memories of Childhood Sexual Abuse

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ATTORNEYS AS GATEKEEPERS TO THE COURT: THE POTENTIAL LIABILITY OF ATTORNEYS BRINGING SUITS BASED ON RECOVERED MEMORIES OF CHILDHOOD SEXUAL ABUSE

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This Article examines the appropriate role of attorneys as gatekeepers to the courts in suits involving recovered memories of childhood sexual abuse. Lawsuits brought by adults claiming that they had been sexually abused during childhood, but had forgotten the abuse until it emerged sometime later, are a relatively recent phenomenon. They surfaced only after the “discovery” of childhood sexual abuse and its construction as a social problem in the 1970s and 1980s, and became feasible only when the legal system responded by extending the statutes

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of limitations applicable to such cases. Although many highly-publicized cases have involved multiple victims who are young boys (in cases of sexual abuse by clergy, for example), others present the archetypal incest situation, shrouded in silence and involving a single, intra-family victim.

The situation in which a child sues her parent for past abuse is rife with possibilities for tragedy. Whether or not her memories are accurate, it is likely that the family will be brutally disrupted; the monetary and emotional costs of litigation will be incurred; and—if the lawsuit attracts public attention—a stigma may attach to the accused parent that may never be removed. On the other hand, if the memories of abuse are accurate, cutting off avenues of compensation for a victim who has been silenced by traumatic amnesia fulfills the worst threats of a sexual abuser: “Never tell anyone, no one will believe you.”

In discussing these cases, two situations are taken as paradigmatic. In one, an abused child finally speaks up about terrible crimes committed against her; in the other, an innocent person is accused of terrible deeds. The lawsuit filed against Joseph Cardinal Bernardin of Chicago, in which his accuser later recanted, is often taken as an example of the latter situation. Assuming the Cardinal’s innocence, who could have or should have stopped this case from being filed? At a 1994 symposium

2. Because most personal injury lawsuits are subject to a two-year statute of limitations, many childhood sexual abuse survivors are without remedy unless the limitations period is tolled until the injury was discovered by the plaintiff. Reacting to this perceived injustice, the majority of states now provide some form of delayed discovery rule for victims of childhood sexual abuse; at least 25 states now provide, either by statute or common law, for some type of delayed accrual of a sexual abuse action. See Mary R. Williams, Suits by Adults for Childhood Sexual Abuse: Legal Origins of the “Repressed Memory” Controversy, 24 J. PSYCHIATRY & L. 207, 215-18 (1996). Other states provide an extended period of time to sue with no delayed accrual. See, e.g., CONN. GEN. STAT. ANN. § 52-577d (West 1991); GA. CODE ANN. § 9-3-33.1(b) (Supp. 1998); IDAHO CODE § 6-1704 (1998); LA. REV. STAT. ANN. § 9:2800.9(A) (West 1997); TEX. CIV. PRAC. & REM. CODE ANN. § 16.0045(a) (West Supp. 1999).

3. We use the female noun and pronoun throughout because the majority of incest victims are female. See Edward D. Farber et al., The Sexual Abuse of Children: A Comparison of Male and Female Victims, 13 J. CLINICAL CHILD PSYCHOL. 294, 294 (1984); Robert Pierce & Lois Hauck Pierce, The Sexually Abused Child: A Comparison of Male and Female Victims, 9 CHILD ABUSE & NEGLECT 191, 191 (1985).

4. There is a substantial debate surrounding the mechanism by which such “forgetting” occurs. Some have attributed it to a process of amnesia or repression in response to the traumatic character of abuse, and some to dissociation, while others refer simply to forgetting or “lost-and-found” memories. See discussion infra Part II.A. How or why forgetting occurs makes no difference to our argument here; the only germane issue is that it does occur—a proposition that is now well-established in the scientific literature, although, curiously, still debated in other more popular fora. See discussion infra Part II.B.

5. For a discussion of the Joseph Cardinal Bernardin case, see infra pp. 227-29.
about the Bernardin case, some commentators suggested that the accuser's attorney should be held responsible for the damages caused by what proved to be false accusations of abuse. In 1996, a Pennsylvania couple followed out the implications of this suggestion, by suing the lawyer engaged by their daughter to pursue her claims of sexual abuse against them, demanding compensation for the injuries their daughter's lawsuit inflicted upon them.

This suggestion has a certain intuitive appeal. An attorney representing a person claiming childhood sexual abuse has a direct impact on whether a lawsuit is filed. He or she advises the client concerning the law and the probability of success on the claim, then drafts, files, and pursues the complaint on her behalf, counseling the client about or making numerous strategic and tactical decisions along the way. Attorneys are also under a number of specific obligations to the system of justice, encoded in rules of procedure and professional responsibility, to assure that the lawsuit is factually and legally well-grounded. Yet no attorney can guarantee the veracity of his or her client's allegations. Moreover, were suits against attorneys in these circumstances to succeed, they would erect substantial obstacles to sexual abuse survivors seeking redress.

Is placing liability upon the attorney's shoulders in cases of recovered memories of sexual abuse an appropriate allocation of responsibility? What are the effects of doing so? And how does this allocation of responsibility fit into the development of legal doctrine concerning remedies for the harms that may be caused by lawyers? This Article addresses these questions, using the Bernardin and Philadelphia cases as a taking-off point for the discussion. After describing those cases in Part I, in Part II we briefly review the current status of the scientific debate over the existence and reliability of repressed memory, because it forms an important backdrop against which to assess the policy and legal issues involved in these kinds of cases. Part III then evaluates a number of potential legal remedies against an attorney for a lawsuit that has been brought maliciously, frivolously, or without foundation, or in ways that intentionally inflict distress upon the defendants, defame them, or invade their privacy. In light of our assessment of these remedies, we turn in Part IV to the question of what the appropriate legal response is to the

collision of rights and interests in a suit against the alleged abuser of an adult survivor of childhood sexual abuse.

Before proceeding, however, it is important to emphasize what this Article is not about. We are not debating here the general issue of whether to grant redress to victims with belated memories. This issue has been resolved by allowing explicit discovery rule exceptions to state statutes of limitations in sexual abuse cases involving recovered memory.9 Once such causes of action were permitted, the door was opened for attorneys to bring suits based on delayed memories. This Article also does not address the admissibility of “recovered memory” evidence from parties or of expert witness evidence on the subject, which has been the subject of ongoing debate in the courts,10 and has produced substantial law review literature in its own right.11 Had the state courts and legislatures decided that delayed recall was sufficiently problematic that such memories should never be used in court, they could have refused either to entertain any suits based on such memories or to admit evidence based on them. However, once the states permitted these forms of action, attorneys with well-founded cases should not refuse to represent clients seeking redress for childhood sexual abuse. The more difficult issue is whether and how these attorneys should then be held liable if they have failed to discern that their client’s case is unfounded—and how to accomplish this without erecting insuperable obstacles to sexual abuse survivors seeking compensation for their injuries.

I. THE CARDINAL BERNARDIN CASE AND THE PHILADELPHIA CASE

In November 1993, Steven Cook, a young man who was dying of AIDS, filed suit against Joseph Cardinal Bernardin, the late Archbishop of Chicago, alleging that he was sexually abused by Bernardin and another priest from 1975 to 1977, when Cook was a pre-seminary student in Cincinnati.2 The accusations were immediately denied by the Cardi-

9. See Williams, supra note 2, at 215-18.
12. See Patricia Edmonds, Cardinal Combating Abuse Now Target of Charges, USA
nal, but the lawsuit evoked a great deal of publicity. It was public knowledge by that time that a great deal of sexual abuse had been perpetrated by priests and subsequently covered up by the church, and huge damage awards have been imposed on a number of dioceses as a result in recent years. Cardinal Bernardin, however, was universally regarded as a saintly man, and he was extremely popular for the liberal reforms he had carried out in the Chicago Archdiocese. Indeed, Cardinal Bernardin was convinced that a priest who had opposed him politically was responsible for suggesting to Steven Cook that he should sue the Cardinal.

The lawsuit against Cardinal Bernardin was aggressively defended by the law firm handling Archdiocesan legal affairs. The case was dismissed in February 1994 when Steven Cook recanted his accusations against the Cardinal, stating that information obtained since filing the complaint had convinced him that his memories about Cardinal Bernardin were unreliable. Cook did not, however, withdraw his accusations against the other priest he sued, with whom an undisclosed settlement was ultimately reached. Although the Cardinal’s posthumously-published memoirs attest to the agony the lawsuit caused him, Bernardin flew to meet with the dying Steven Cook; and the two men reconciled. Cook died in September 1995, and the Cardinal him-

13. See id.
15. In fact, among the reforms instituted by Cardinal Bernardin was the creation of a special panel to review sexual abuse claims. See Edmonds, supra note 12, at A3.
17. The lawyers representing Cardinal Bernardin claimed that the case should be dismissed based on the statute of limitations and, alternatively, felt that a speedy trial severed from that against the other priest was necessary. See Jan Crawford, Bernardin Seeks a Speedy Trial, Court Filing Lets Cardinal Tell Innocence Under Oath, CHI. TRIB., Nov. 25, 1993, at 1.
19. See id.
20. See Andrew Herrmann, Bernardin’s Accuser Dies, CHI. SUN-TIMES, Sept. 23, 1995, at 3.
22. See id. at 34-41.
23. See Herrmann, supra note 20, at 3.
self succumbed to cancer in November 1996.\textsuperscript{24}

In 1994, a symposium was held at Northwestern University School of Law to discuss the Bernardin case and the journalistic coverage of it.\textsuperscript{25} Among other things, the suggestion was made that the lawsuit had resulted from irresponsible actions by Cook’s lawyer, who had at the last minute added a claim against Bernardin to his client’s complaint against the other priest, and that the lawyer was therefore the person who could, and should, have prevented the tragedy that ensued.\textsuperscript{26}

In 1996, a lawsuit was filed in Philadelphia which followed out this suggestion, seeking to hold the attorney representing a sexual abuse survivor liable for damages resulting from his or her client’s accusations.\textsuperscript{27} In 1990, Amy Feld had sued her parents, Toby and Allen Feld, alleging that both her father and mother sexually abused her throughout her childhood.\textsuperscript{28} The lawsuit had its roots in events of the previous year, when Amy Feld was in her mid-twenties and entered therapy for an eating disorder.\textsuperscript{29} Some months into that therapy, in April 1989, Ms. Feld began to have flashbacks of sexual abuse by her parents; she confronted her parents with these memories in June of 1989 and broke off all relationships with them.\textsuperscript{30}

In May 1990, Ms. Feld consulted Nancy Wasser, a Philadelphia attorney,\textsuperscript{31} to discuss suing her parents for damages; and Ms. Wasser filed suit on her behalf the following November.\textsuperscript{32} Ms. Feld’s lawsuit against her parents alleged that they had sexually assaulted and fondled her between the ages of two and nineteen, shortly after which she left home.\textsuperscript{33} In September 1991, the case attracted attention in the local

\textsuperscript{25} See DOPPELT, supra note 6, at I.
\textsuperscript{26} See id. at 2-3, 14.
\textsuperscript{29} See id. \S 6; Erin Kennedy, \textit{Suit Accuses Parents of Incest}, PHILA. INQUIRER, Sept. 3, 1991, at I-B.
\textsuperscript{30} See Kennedy, supra note 29, at 1-B.
\textsuperscript{31} Wasser, a former Philadelphia Assistant District Attorney, was a solo practitioner with 14 years of experience in litigation of a variety of sorts, including personal injury cases, and some 10 cases claiming damages for sexual abuse. See id. Most of the abuse cases apparently were settled out of court, but one culminated in a $600,000 verdict in federal district court in 1992. See id.; Lisa Brennan, \textit{Abuse Victim Gets $600,000 32 Years Later}, LEGAL INTELLIGENCER, Nov. 6, 1992, at I.
\textsuperscript{32} See Feld, No. 1374 at \S 13-15; Feld, No. 90-CV-6667.
\textsuperscript{33} See Feld, No. 90-CV-6667 at \S 2-4.
press, and Amy’s attorney appeared on a number of local television talk shows about it.  

During discovery, Ms. Feld’s parents provided medical records from examinations of their daughter when she was ten and again when she was sixteen, stating that her genitalia were “normal” and showed no sign of injuries or trauma. They also required Ms. Feld to undergo psychological testing and a psychiatric evaluation in late 1992; defendants’ experts opined that she was a very disturbed young woman and that her allegations of abuse were not credible. Presumably Ms. Feld’s therapist and/or other experts would have testified to the contrary, had the case ever gone to trial. However, on the eve of trial, without retracting her allegations of abuse, Ms. Feld voluntarily dismissed the lawsuit, with prejudice.

In March 1996, over a year after the case against them had been dismissed, the Felds filed suit in Philadelphia against their daughter’s attorney, alleging, among other things, that she had failed adequately to investigate before filing suit against them, failed to withdraw the suit despite receiving the medical and psychological reports described above, and intentionally or negligently harmed them and attracted publicity for her practice, or for her cause, by generating defamatory media publicity about them. They alleged, as a consequence, counts for the wrongful use of civil proceedings, intentional infliction of emotional distress, negligent infliction of emotional distress, and invasion of privacy. The Felds sought damages for their litigation costs, alleging that they had spent $50,000 on attorneys and expert witnesses, lost earnings, emotional distress, the destruction of their family, and harm to their reputations, as well as punitive damages.

34. See Feld, No. 1374 at ¶ 28-36.
35. See id. at ¶ 20.
37. See Feld, No. 1374 at ¶¶ 39-44.
38. See Feld v. Feld (order stating plaintiff voluntarily dismissed action, Feb. 21, 1995); see also Feld, No. 1374 at ¶ 55 (stating that Ms. Feld voluntarily dismissed, with prejudice, her case against her parents several days before trial).
39. See Feld, No. 1374 at ¶¶ 60.
40. See id. Count I.
41. See id. Count II.
42. See id. Count III.
43. See id. Count IV.
44. See id. at ¶ 56.
45. See id. at ¶¶ 62-70.
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Although the Felds' case against their daughter's lawyer was also voluntarily dismissed prior to trial, it provides a useful case study of the types of circumstances in which similar claims against lawyers might be raised. Without venturing an opinion on the merits of the Feld case per se, we use it to explore the types of legal claims that may be appropriate where the interests of a defendant, a sexual abuse plaintiff, and the plaintiff's attorney come into collision in this manner. Should the attorney be liable for damages in these circumstances? If so, under what legal theories and with what consequences? We also contrast the legal strategy pursued by the Felds with the manner in which the Bernardin case was resolved, and explore what is the best way for the legal system to address the potential tragedies that arise in this type of litigation.

Before addressing these questions, however, it is important to understand the scientific and political context in which they arise: the debate over the existence and reliability of recovered memories of sexual abuse.

II. THE MEMORY WARS: WHAT THE SCIENCE REALLY TELLS US

A threshold question in assessing the appropriate responsibility of an attorney whose client alleges non-continuous memories is whether it is in fact possible for anyone to block out memories of abuse. If delayed recall is truly impossible, then obviously any action brought on the basis of belated memories would be unfounded. However, accurate delayed recall of sexual abuse is now well-documented; a growing number of studies and other documentation have left little doubt on this point. Although the extreme and distorted position—that any discontinuous memory of abuse must be false—still appears in some media reports, most responsible scientists have by now agreed that this position is no longer sustainable in the face of existing evidence and scientific study. Instead, there is growing scientific consensus around a two-part, middle-ground position: that it is possible to forget or block out genuine memories of sexual abuse, and that it is possible to create inaccurate or groundless "memories" of events that never occurred. This middle-

46. We do not consider in any depth the opposite extreme position—that any asserted abuse claim must be true—simply because it does not seem to be seriously entertained in the mass media or the academy in the same way. However, clearly neither extreme, either rejecting or accepting all memories, is a sound or useful way to approach this issue.

47. For a more detailed discussion of this subject, see Cynthia Grant Bowman & Elizabeth Mertz, A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy, 109 Harv. L. Rev. 549, 597-615 (1996) [hereinafter Dangerous Direction]; Cynthia Grant Bowman & Elizabeth Mertz, What Should the Courts Do About Memories of Sexual Abuse?: Toward a Balanced
ground position is no doubt less comfortable than the more extreme alternatives—all delayed memories are false, all delayed memories are true—because acknowledging the complex reality does not generate simple or easy solutions. However, as we show in this section, any careful review of the evidence leads to the conclusion that both accurate delayed recall of sexual abuse and inaccurate memories are possible.

A. Delayed Recall of Sexual Abuse: The Evidence

We begin with the middle ground that appears to be gaining acceptance among many authorities and courts. While earlier in the debate it might have been important to focus attention on the fact that not all claims are true, at this juncture there has been substantial public acknowledgment of this concern. Indeed, at this point, as we have argued elsewhere, it seems that the pendulum of media coverage and public discussion has swung quite far in the opposite direction—to the point that the many well-founded claims seem at times to be in danger of being ignored. However, if it is possible to document even one case in which a person forgot and then accurately recalled childhood sexual abuse, then we have moved beyond debating whether the phenomenon can happen. And some of the most skeptical of scientists in this area have acknowledged that there are well-documented cases, even without considering the scientific studies on point. One well-known case, for example, involved Father Porter, a priest who molested numerous children in the 1960s. In 1989, a former victim of Porter’s belatedly remembered the abuse, after years of forgetting. This victim, Frank Fitzpatrick, was able to obtain multiple kinds of corroboration of his lost memory—most notably, through a confession by the perpetrator himself, but also through the testimony of other former victims who came forward after the story was made public. A number of these other former victims had never forgotten what happened. In addition, it turned out that there had been complaints and accusations against Porter during the 1960s, complaints that had been quietly acknowledged by the Catholic church to have some basis.

Another firmly-documented case, one that skeptics have difficulty...
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dismissing, involved Brown University Professor Ross Cheit’s belated recall of sexual abuse he suffered over four successive years at his summer camp as a child. As in the Father Porter case, Cheit was able to confirm his memory in multiple ways: through a confession by the perpetrator, through the reports of other victims at his camp, and through contemporaneous reports that had not been heeded at the time.

Thus a number of scientists and writers who have been skeptical about delayed recall of sexual abuse have had to accept the probative value of these documented cases, albeit in some instances grudgingly. For example, Moira Johnston, an outspoken critic of delayed recall, attempts to dismiss these cases as a “handful of apparently corroborated cases of readily explained, lost-and-found memories,” but cannot evade the empirical fact that such documented cases exist. Memory scientist Daniel Schacter, often quoted by critics of “recovered memory,” clearly accepts these documented cases as evidence that the phenomenon can and does happen, and goes on to mention other corroborated cases from a recent scientific study. Indeed, there are multiple sources for further corroborated cases, including scientific studies and clinical cases reported in the published literature. These documented examples

54. See Horn, supra note 53, at 56, 60, 62.
56. Dr. Schacter states:

In addition to the cases of Ross Cheit, Frank Fitzpatrick, and JR, all of whom recovered memories that were corroborated, another case with solid documentation has been reported by the clinical psychologist Michael Nash. He describes a forty-year-old man who entered therapy in part because he was bothered by an intrusive and unwanted mental image of himself at age ten, surrounded by a group of threatening young boys. The patient suspected that the image alluded to a sexual experience and eventually proceeded to recover a traumatic sexual memory involving the boys. He then contacted a cousin whom, he believed, had been present during the episode. The cousin recalled the incident quite clearly and with considerable embarrassment: he had never forgotten that the patient had been unwillingly drawn into the group’s sexual activities.

Daniel L. Schacter, Searching for Memory: The Brain, the Mind, and the Past 265 (1996). We note with concern that so many of the cases that have gained public acceptance as being well-grounded have involved boys rather than girls, raising the question whether female victims of similar abuse have an added burden of proof due to their gender that prevents similar acceptance of their cases.

57. Another example also apparently accepted by Schacter comes from a clinical account by a psychiatrist who helped a young patient recover a memory of his mother’s attempt to strangle the boy, an account that was then substantiated by the mother herself. See id. at 343 n.31. For a discussion of this particular case study, see Nathan M. Szajnberg, Recovering a Repressed Memory, and Representational Shift in an Adolescent, 41 J. AM. PSYCHOANALYTIC ASS’N 711 (1993). There is now a growing list of documented case anecdotes, answering attempts of extremists to
include cases in which ongoing, as well as short-term abuse, were forgotten and subsequently remembered.

One scientific study frequently mentioned in this regard is that carried out by Linda Meyer Williams and her associates at the University of New Hampshire Family Research Laboratory.\textsuperscript{58} Williams began with records that documented sexual abuse which had occurred seventeen years before, among which were included hospital records and records from a study of sexual assault sponsored by the National Institutes of Mental Health.\textsuperscript{59} She then located and interviewed the subjects named in those records. Forty-nine (38\%) of the 129 women in the study did not mention the abuse that was documented in their records; a number of them gave “dramatic indications” that they did not mention the abuse because they did not recall it.\textsuperscript{60} In addition, another twelve women, about 16\% of the women who did remember and report the abuse at the time of Williams’ study, stated that they had at some point in time forgotten the abuse.\textsuperscript{61} When Williams compared the recovered memories of

\begin{itemize}
\item claim that it is simply impossible to forget extensive sexual abuse. To give just a few examples, one journal article reports four cases in which women belatedly remembered sexual abuse by their fathers and the fathers, when confronted, confessed and apologized. See Katy Butler, \textit{Caught in the Cross Fire}, \textit{FAM. THERAPY NETWORKER}, Mar./Apr. 1995, at 24, 77-78. Former Miss America Marilyn Van Derbur belatedly remembered being sexually abused by her father; when she told her sister of these memories, the sister disclosed that she had never forgotten similar abuse perpetrated on her by their father. See Lenore Terr, \textit{Unchained Memories: True Stories of Traumatic Memories, Lost and Found} 120-51 (1994). Psychiatrist Richard Kluft reports on five cases in which patients who had not remembered abuse later received confirmation, either through confessions or records of the perpetrators, or through a contemporaneous witness. See Richard P. Kluft, \textit{The Argument for the Reality of Delayed Recall of Trauma}, in \textit{Trauma and Memory: Clinical and Legal Controversies} 25, 26-29 (Paul S. Appelbaum et al. eds., 1997). In addition, the studies that are emerging on this topic contain numerous individual instances of documented delayed recall of childhood sexual abuse. See sources cited infra notes 60-62. There is also now a database available on the Internet, supervised by Brown University political science professor Ross Cheit, listing documented cases of belatedly remembered sexual abuse; there is a stringent set of requirements for corroboration of these cases. The database may be accessed at <http://www.brown.edu/Departments/Taubman_Center/Recovmem/Archivex.html>.
\item 59. See Williams, 1994, supra note 58, at 1169.
\item 60. See id. at 1170. For example, one woman insisted repeatedly that “she was never sexually abused as a child.” \textit{Id.} Given these examples, it is not possible to conclude that all of the subjects actually remembered the abuse but simply failed to report it. See Schacter, supra note 56, at 260 (“Several critics have enumerated reasons why this figure might overestimate amnesia for the [abuse] episode. Even if it does, the study shows convincingly that a significant proportion of women forgot about it.”) (footnote omitted)).
\item 61. See Williams, 1995, supra note 58, at 669. Even among these women, who were accu-
\end{itemize}
these women with the continuous memories of other subjects in the study, she found that the memories retrieved after a period of forgetting were just as accurate as the continuous memories. She also recounts a number of specific examples of accurate memory retrieval after a period of forgetting.

There are numerous other studies demonstrating that people can, and do, forget traumatic events—whether they are ongoing or single occurrences—and also that they can subsequently retrieve the memories with accuracy. Some involve collected clinical reports, interviews, and/or surveys in which subjects are asked whether they were able to obtain independent verification of "lost-and-found" memories. Recent thorough reviews of the scientific literature have pointed to at least thirty existing studies documenting the possibility of accurate memory retrieval following a period of forgetting childhood sexual abuse. Moreover, scientific study of the biology of the brain has indicated visible differences in the parts of the brain that are active in processing particular kinds of memory in survivors of sexual abuse and veterans of active combat.

With all this documentation that shows it is possible to forget and then remember childhood sexual abuse, how is it that any debate or doubt persists? There is an intriguing contrast between more careful scientific work, which leaves little doubt that accurate delayed recall of sexual abuse is possible, and popular conceptions of the issue. We have elsewhere argued that this disparity results in part from culturally-based
tendencies to avoid discussions of this taboo subject, but also, importantly, from organized lobbying efforts. A key player in those efforts has been the False Memory Syndrome Foundation ("FMSF") of Philadelphia, a lobbying group formed in 1992 by parents who had been accused of sexual abuse by their children. Although the FMSF and its sympathizers have at times acknowledged that there are well-documented cases of accurate delayed recall of sexual abuse, they have at other times attempted to cast doubt on any belatedly-recalled memory of abuse.

Interestingly, those who dispute the existence of accurate delayed recall have insisted on standards of proof which they themselves cannot meet in documenting their own assertions about the existence of false memories. Even scientists sympathetic to the FMSF position have acknowledged that "there is no conclusive scientific evidence from controlled research that false memories of sexual abuse can be created," although they point to other kinds of evidence tending to suggest that this is possible. One study frequently cited in this regard, conducted by psychologist Elizabeth Loftus and her colleagues, involved attempts to plant inaccurate memories in study subjects. As instructed by the re-

68. See id. The False Memory Syndrome Foundation ("FMSF") was founded by Peter and Pamela Freyd, who reportedly had been accused by their daughter Jennifer of sexual abuse. See MOIRA JOHNSTON, SPECTRAL EVIDENCE: THE RAMONA CASE: INCEST, MEMORY, AND TRUTH ON TRIAL IN NAPA VALLEY 200 (1997). The organization functions as both a support network for accused individuals and their families and as an advocacy organization, promoting research, holding conferences, and providing litigation support in cases concerning recovered memories of childhood sexual abuse. See id. at 383-84.

The FMSF monthly newsletter publicizes litigation strategies to counter survivor claims and advertises pleading and brief banks that are available for a modest fee, presumably to encourage the filing of lawsuits in other states based upon these models. See, e.g., FMSF Amicus Brief, FMS FOUND. NEWSL., April 1995, available at <http://advicom.net/~fitz/fmsf/articles/newsl4_04.html>. Thus, for example, soon after the verdict in Ramona v. Isabella, No. 61898 (Cal. Super. Ct. May 13, 1994), FMSF newsletter readers were able to obtain for $50 the complaint, motions, and legal arguments pertaining to duty to a third party, expert testimony, and verdict forms from the case and were instructed how to obtain trial transcripts as well. A recent newsletter summarizes 19 cases for which motions and unpublished decisions are available from the FMSF Brief Bank. See FMSF Staff, Legal Corner, FMS FOUND. NEWSL., Jan.-Feb. 1998, available at <http://advicom.net/~fitz/fmsf/fmsf-news/0131.html>.

69. See, e.g., August Piper, A Call for a More Scientific Approach to "Memories" of Sexual Abuse, JUDGES' J., Summer 1997, at 68, 69.
70. SCHACTER, supra note 56, at 272.
71. See id. at 268-73.
72. See id. at 109-10. For a discussion of the results of Dr. Loftus' study, see Maryanne Garry & Elizabeth F. Loftus, Pseudomemories Without Hypnosis, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 363, 374-75 (1994); Elizabeth F. Loftus, The Reality of Repressed
searchers, family members told relatives that a fictitious event had occurred; in time, several of the subjects actually came to accept the story about their own life as true. In this case, the story involved the subject getting lost in a shopping mall as a child, not sexual abuse. This study demonstrates that family members can be induced to believe inaccurate information about themselves imparted by "normally trustworthy sources who have provided specific information about a seemingly credible experience." These family members were obviously trustworthy sources, who were in fact authorities on family experiences, and who would also have witnessed the events and had no apparent reason to distort what happened. This is obviously somewhat different than having an outsider to the family who never witnessed the event ask whether any such event ever occurred. It is also different from convincing someone that recurrent or ongoing events throughout their childhood—comparable to frequently getting lost in malls—actually happened. But certainly this and other similar studies indicate that it is possible to lead someone to believe and report events that never occurred. Furthermore, a number of recent high-profile cases in which clients have sued therapists for implanting false memories of sexual abuse seem to indicate that such suggestibility can also occur regarding alleged childhood sexual abuse events. Thus, while we would agree that there are now convincing anecdotes suggesting that false memories of sexual abuse can be induced, we reach this conclusion only by violating the stringent standards of proof set by the "false memory" advocates for studies and anecdotes regarding accurate delayed memories. Certainly, if we are to accept on the existing evidence that it is possible to create extensive false memories of sexual abuse, then there is more than enough evidence demonstrating that it is also possible to accurately retrieve a lost-and-found memory of sexual abuse.

Tolerating the ambiguities created when we acknowledge this

Memories, 48 AM. PSYCHOLOGIST 518, 532 (1993).

73. See SCHACTER, supra note 56, at 109-10; Garry & Loftus, supra note 72, at 374-75; Loftus, supra note 72, at 532.

74. SCHACTER, supra note 56, at 110; accord Garry & Loftus, supra note 72, at 374-75; Loftus, supra note 72, at 532.

75. See Loftus, supra note 72, at 532.

76. See, e.g., LAWRENCE WRIGHT, REMEMBERING SATAN (1994) (describing, in detail, the case of a father accused of sexual abuse, who was convinced to confess to a crime fabricated by the questioner, memories of which had supposedly been repressed and then retrieved).

77. See, e.g., Pam Belluck, 'Memory' Therapy Leads to a Lawsuit and Big Settlement, N.Y. TIMES, Nov. 6, 1997, at A1 (describing case in which former psychiatric patient sued her psychiatrist for instilling false memories in her, and settled for $10.6 million in damages).
complex reality is, without question, challenging. Many have erred on the side of a simplistic distortion rather than face the possibility that both accurate and inaccurate accounts of past sexual abuse exist. Indeed, sometimes the same person can produce accurate and inaccurate accounts. Faced with reports of people who have "recovered" memories of alien abduction or of implausible forms of bizarre abuse, some have taken the easy road of branding all delayed recall as fiction. But, as Elizabeth Loftus and Ira Hyman have noted:

For those who argue that bizarre memories are false, one risk is the temptation to make a faulty generalization to all recovered memories. We have heard people argue that since the more bizarre recovered memories are false (e.g., memories from the period following one's conception in the fallopian tubes, of sexual encounters with aliens, of having been Cleopatra), then all other memories recovered with similar techniques are also false. The logic is obviously faulty, as one set of memories could be false while the other is not. ... Put another way, the truth of recovered memories of sexual abuse does not depend on the truth of recovered memories of alien abduction.

Indeed, a number of thoughtful scholars have examined the "false memory" literature and point out the relatively shaky scientific basis of much of the work purporting to cast doubt on the possibility of accurate memory retrieval in cases of childhood sexual abuse. On the other hand, scholars have accepted the notion that false memories can occur.

In short, there is better documentation at this point of the possibility of accurate delayed recall of abuse that actually occurred than there is of the possibility of creating extended false memories about abuse that never occurred. However, given the difficulty of constructing adequate studies in the area, and given the growing evidence of case studies on both sides, it seems most likely that both can, and do, occur. There is no way of knowing how common either is from existing studies, but

78. See Kluft, supra note 57, at 34.
80. For a scholarly examination of "false memory" literature and its flaws, see generally JENNIFER J. FREYD, BETRAYAL TRAUMA: THE LOGIC OF FORGETTING CHILDHOOD ABUSE (1996); KENNETH S. POPE & LAURA S. BROWN, RECOVERED MEMORIES OF ABUSE: ASSESSMENT, THERAPY, FORENSICS (1996); Kenneth S. Pope, Memory, Abuse, and Science: Questioning Claims About the False Memory Syndrome Epidemic, 51 AM. PSYCHOLOGIST 957 (1996).
existing evidence could support arguments that neither is highly rare at this juncture.

B. The Fuss About "Repression," and Why It Shouldn’t Matter to Lawyers

One source of some confusion in the debate over belatedly remembered abuse is the use of the term "repression" to discuss these kinds of memories. Repression is simply one way of explaining how or why people might not recall having been sexually abused. There is a robust debate in the psychological literature over this possible mechanism for forgetting, with some arguing that it is an unlikely explanation and others strongly urging the plausibility of the evidence that some such process occurs when people forget sexual abuse. For legal purposes, however, the key issue is simply whether or not the forgetting can occur, not the psychological mechanism by which the forgetting happens. As we have seen, there is little sound basis now for denying that such forgetting in fact happens. But using a rhetorical ploy familiar to trial lawyers, some skeptics have focused on the concept of repression itself, arguing that because this particular mechanism for forgetting is not, in their view, adequately documented at this point, then no argument for the credibility of delayed memories should be entertained. Readers unfamiliar with the debate, upon hearing the arguments against repression as a mechanism for forgetting, might be misled into rejecting the concept of delayed recall altogether. But, as we have seen, skeptics, using terms such as "lost-and-found memories," "dissociation," or plain "forgetting," have acknowledged that some kind of delayed recall can occur.

From this vantage, then, it is obfuscation to use debate over the concept of repression to distract a legal audience from the central point—that people can and do forget childhood sexual abuse for periods of time. The exact psychological mechanism by which the forgetting occurs—either in general or in particular cases—is surely a topic of great interest to psychologists. However, it is hard to imagine a way in which these finer distinctions could matter in a legal forum. Here, the salient issues are: (1) whether it is possible that people forget and then remember childhood sexual abuse—relevant to tolling of statutes of

83. See Piper, supra note 69, at 68-69.
84. See id.
limitations; and (2) whether delayed recall can be accurate—relevant to evidentiary issues, and to allowing the cause of action at all. Whether lost-and-found memories are the products of dissociation, repression, or just plain forgetting, the existing science gives more than enough support for an affirmative answer on both counts.

III. EXISTING REMEDIES AGAINST ATTORNEYS IN SEXUAL ABUSE SURVIVOR CASES

Given that both accurate and inaccurate claims of sexual abuse are possible, and that lawsuits concerning them are permitted in most jurisdictions, we return to our examination of the protection available to those who are forced to defend against these suits and, specifically, of potential claims that defendants may bring against an attorney filing a child sex abuse claim against them. Of course, the attorney’s own client will always have the capacity to sue her attorney directly for malpractice, for example, or to file a complaint with the attorney disciplinary board; our concern here is with situations where the client remains convinced that her memories of sexual abuse are accurate and is satisfied with her attorney’s representation.

For a third party to the original litigation to pursue a damage claim against an attorney, something more is required than sheer miscalculation by the attorney of the odds in a particular case. Nonetheless, there are several ways in which a defendant might seek a remedy against the plaintiff’s attorney in a case where a frivolous or malicious lawsuit was filed alleging past abuse, and a number of fora for these actions. Claims may be brought in a collateral lawsuit after the first has been concluded, or for sanctions within the original lawsuit itself, or in attorney disciplinary proceedings. In the sections that follow, we discuss a number of potential remedies: (1) third-party claims for malpractice or negligence against attorneys, (2) suits for malicious prosecution or abuse of civil proceedings, (3) attorney disciplinary proceedings, (4) actions for sanctions, (5) defamation actions, (6) claims based on invasion of privacy, and (7) cases alleging intentional infliction of emotional distress. Concerning each cause of action, we focus both upon the viability of such a claim under current law and the wisdom of imposing such liability where it does not currently exist.

A. Third-Party Suits for Negligence

One possible avenue of redress for a wrongly-sued party would be to extend liability for malpractice from an attorney’s own client to oth-
ers who are harmed by the client's lawsuit. Similar third-party suits have been brought, for example, against therapists when memories of abuse have surfaced during psychotherapy, seeking to hold the therapist liable for damages that ensue when his or her client falsely accuses a parent. This cause of action has succeeded in withstanding motions to dismiss and even proceeded to trial in some jurisdictions. In a previous article, we have discussed the legal coherence and advisability of holding a therapist liable under a variety of theories of third-party liability in tort, concluding that this is a dangerous direction for the courts. A number of state supreme courts and at least two state appellate courts have recently refused to permit third-party liability in such cases, relying largely on these kinds of policy concerns. For similar reasons, we conclude that negligence is neither a particularly promising nor an appropriate avenue for redress against an attorney.

1. Historical Limitations upon Third-Party Liability Against Attorneys

Historically, attorneys were liable for negligence in the performance of their legal services only to their clients and not to any third party with whom the attorney was not in privity of contract. As the Supreme Court held in 1879, refusing to extend an attorney's duty to third parties who relied upon that attorney's certification of title, "[b]eyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party." Since that time, of course, "[t]he assault upon the citadel of privity," in Cardozo's words, has "proceed[ed]... apace" in a variety of areas, beginning with liability for dangerous products, extending to the provision of services, and ultimately to a


86. See generally Dangerous Direction, supra note 47 (describing and criticizing the result in Ramona v. Isabella).


89. Ultramares Corp. v. Touche, 174 N.E. 441, 445 (N.Y. 1931) (refusing to extend duty of accountant for negligent misrepresentation to third parties who relied upon certification of balance sheet).
large variety of negligent acts. The assault reached the legal profession relatively late, even in California, the state that was the forerunner in extending liability to third parties beyond the products liability context and especially in the area of malpractice claims against professionals.

Beginning with Biakanja v. Irving in 1958, the California Supreme Court held that a notary public whose negligence caused the failure of a provision in a will was liable in damages to the beneficiary harmed by his negligence. Soon after, the same court applied this holding in a case involving negligence in preparation of a will by an attorney.

The remarkable thing about the rule developed in the California cases was that it did not rely upon the status of the will beneficiary as a third-party beneficiary of the attorney-testator contract to draft the will; instead the California court explicitly opened up a new theory of liability in tort for breach of a duty owed directly to the third party. The decision whether to impose such a duty in a particular case rested upon policy considerations, according to the court, and, specifically, upon balancing a number of factors:

1. The extent to which the transaction was intended to affect the plaintiff;
2. The foreseeability of harm;
3. The degree of certainty that the plaintiff suffered injury;
4. The closeness of the connection between the defendant's conduct and the injury suffered;
5. The moral blame attached to the defendant's conduct; and
6. The policy of preventing future harm.

Attorney malpractice liability to third parties under the California factor-balancing approach has been adopted by a number of other states, but is applied primarily in the context of estates or other areas in

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92. 320 P.2d 16 (Cal. 1958).

93. See id. at 19.

94. See Lucas v. Hamm, 364 P.2d 685, 687-88 (Cal. 1961); see also MEISELMAN, supra note 91, § 6:3, at 97-98 (discussing the Lucas decision and that court's reliance on Biakanja).


96. See id. at 164 (quoting Biakanja, 320 P.2d at 19).

97. As of 1988, the California approach was apparently followed in Arizona, Connecticut, Florida, New Jersey, New Mexico, North Carolina, and Wisconsin. See Joan Teshima, Annotation,
which third parties are expected to rely upon an attorney’s representa-
tion.  

Many states have rejected the California factor-balancing approach altogether, but some of them nevertheless hold attorneys liable on a theory of obligation to the third-party beneficiary of a contract. The Pennsylvania Supreme Court addressed this issue in a case in which the defendant attorney had used a will beneficiary to witness the will, with the result that the legacy was voided. While holding the attorney liable to the legatee, the court rejected the California standard as unworkable, pointing out that it had resulted in ad hoc determinations and inconsistent results. Instead, the court adopted the standard for third-party beneficiaries as defined in the Restatement of Contracts, deriving from this a two-part test for determining whether a person is an intended third-party beneficiary. A person is such a beneficiary depending upon whether:

1. the recognition of the beneficiary’s right “appropriate to effec-
tuate the intention of the parties,” and 2. the performance “sat-
is[ies] an obligation . . . to pay money to the beneficiary,” or “the circumstances indicate that the promisee intend[ed] to give the benefi-
 ciary the benefit of the promised performance.”

By defining the obligation in terms of the intent of the contracting parties, the third-party beneficiary standard maintains privity but makes an exception to it under narrowly defined circumstances.

In a leading case, the Illinois Supreme Court adopted a similar ap-
proach, rejecting the California negligence standard and holding that an attorney's liability could *never* extend to an adverse party, unless there were "a clear indication that the representation by the attorney is intended to directly confer a benefit upon the third party."104 Moreover, even in California, the courts deciding these types of cases have emphasized the first in the list of factors they are required to balance—the extent to which the transaction was intended to affect the plaintiff—which the courts interpret as requiring that the plaintiff must essentially be an intended beneficiary of the adverse counsel's client.105 In these cases, the California torts standard and the contracts approach taken in other states appear to converge.

In short, the liability of attorneys to third parties has historically been limited to situations in which the interests of the attorney's client and the third party appear to be congruent and both the attorney and client intend to confer some sort of benefits upon the third party.

2. Policy Reasons for Rejecting Third-Party Liability Against Attorneys

In rejecting the imposition of a more extended third-party liability upon attorneys, the courts have emphasized the important public policies that were at stake. Imposing a duty running from an attorney to the adverse party would interfere with the lawyer's ethical obligations to his or her client—both the duty of undivided loyalty and the duty to represent the client zealously within the bounds of the law.106 Even California courts have cited these concerns in refusing to hold attorneys liable to adverse parties under the California factor-balancing approach, although the injury may have been eminently foreseeable. Thus, an attorney's liability has been held not to extend to parties who dealt with the attorney's client at arm's length, lest this "inject undesirable self-protective reservations into the attorney's... role... 'prevent him from devoting his entire energies to his client's interests'... [and result in] 'an undue

104. Pelham v. Griesheimer, 440 N.E.2d 96, 100 (Ill. 1982) (holding that a divorce attorney had not breached a duty to children to ensure that they were the prime beneficiaries of husband's life insurance as provided in divorce decree). The court described this as also necessary in order to limit the scope of the duty owed by an attorney to nonclients, lest it extend to an unlimited number of potential plaintiffs. See id. at 99-100.

105. See, e.g., Norton v. Hines, 123 Cal. Rptr. 237, 240 (Ct. App. 1975) (holding, inter alia, that action against an adverse party's attorney must be pled as malicious prosecution).

106. See Pelham, 440 N.E.2d at 100; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1986) (stating that a lawyer has a duty to exercise independent professional judgment on behalf of a client); id. Canon 7 (stating that a lawyer has a duty to represent a client zealously within the bounds of the law).
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burden on the profession’ and a diminution in the quality of the legal services received by the client.” In other cases, California courts have very openly weighed the policies involved more generally and concluded that the costs of imposing a duty of care upon an attorney to an adverse party much outweigh the benefits of affording compensation to the plaintiff, and presumably thereby deterring other members of the bar. In reaching this conclusion, the courts have emphasized that the possible conflict in which the lawyer would be placed—between a duty to an adverse party and the duty to protect his client’s interests—would jeopardize the client’s right to effective assistance of counsel; they have also decried the impact such a duty might have upon the right of free access to the courts. If attorneys could be sued for negligence by adverse parties, as one court has stated, “lawsuits now justifiably commenced will be refused by attorneys, and the client, in most cases, will be denied his day in court.” Hence, the client would not only be deprived of effective representation, but might also be deprived of any representation at all.

As a result of these concerns, whichever approach is chosen—factor-balancing in tort or third-party beneficiary in contract—no court has found an attorney liable to a genuinely adverse party, that is, where the attorney had not undertaken an obligation to that party, but not for want of being urged to do so. In the late 1970s, the American Medical Association (“AMA”) and other doctors’ groups, launched a heavily-litigated, broad-based campaign to deter medical malpractice suits by holding lawyers who pursued ultimately unsuccessful claims liable for the damages caused to the doctors sued. These attempts were rejected

109. See id.
111. It is interesting to note the courts’ concern about these issues when confronted by adverse third-party actions in the legal domain. Arguably, nearly identical problems would exist for therapists were adverse third parties permitted to sue them against their clients’ wishes. See Dangerous Direction, supra note 47, at 586-93. One wonders whether the legal professionals who have power to decide whether to permit adverse third-party suits against therapists will be as concerned about clients being denied access to treatment as they are about clients being denied access to legal representation.
112. See RONALD E. MALLEN & JEFFREY M. SMITH, 1 LEGAL MALPRACTICE § 7.13, at 527, 536 (4th ed. 1996); see, e.g., Bowman v. John Doe Two, 704 P.2d 140, 144 (Wash. 1985) (refusing to hold attorney hired to represent child liable to child’s mother for legal malpractice).
in every state that considered them. For example, in *Friedman v. Dozorc*, a Michigan Supreme Court case, plaintiff doctor and numerous medical associations as amici curiae urged the court to hold:

[A]n attorney who initiates a civil action owes a duty to his client's adversary and all other foreseeable third parties who may be affected by such an action to conduct a reasonable investigation and re-examination of the facts and law so that the attorney will have an adequate basis for a good-faith belief that the client has a tenable claim.

The court roundly rejected this argument on the grounds that it would create an irreconcilable conflict of interest for the attorney and detrimentally interfere with the attorney-client relationship. In addition, the court opined, such a duty "might unduly inhibit attorneys from bringing close cases or advancing innovative theories, or taking action against defendants who can be expected to retaliate," in conflict with the strong public policy of encouraging free access to the courts.

In recognition of all these policies, the Model Rules of Professional Conduct place the concern for the effect of litigation upon third parties squarely upon the shoulders of the client and direct the attorney to defer to her judgment in this respect.

3. Application to Child Sex Abuse Survivor Cases

The policy considerations described above apply with equal, if not greater, force in the case of an attorney representing an adult survivor of sexual abuse. As the Michigan Supreme Court noted in *Friedman*, the impact upon access to the courts is most severe in cases that are close on the facts, based upon innovative legal theories, and brought against defendants who are likely to retaliate. Most claims for childhood sexual abuse will be "close," because they are brought after a substantial period of time has elapsed and involve private, "hidden" actions to

114. *See* Joan Teshima, *Annotation, What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client*, 61 A.L.R.4TH 464, 574 (1988). For a list of appellate courts which had rejected such claims by 1979, see *Weaver*, 156 Cal. Rptr. at 754.


117. *See id.* at 591-92.

118. *Id*. at 593.

119. *See id.*

120. *See MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.2(a) & cmt. 1 (1997).

121. Another area in which claims have frequently been made against opposing counsel is domestic relations litigation, yet they have typically failed in this context as well. *See* Teshima, *supra* note 114, at 512-22.

122. *See Friedman*, 312 N.W.2d at 593.
which there are no observers and for which corroborative evidence is
difficult to obtain. Many will reduce to a direct conflict between the
plaintiff’s and defendant’s testimony, requiring the judge or jury to
make a credibility-based determination. The legal claims are relatively
new in this context and thus unfamiliar, while the science involved in
the phenomenon of recovered memory is complex and may appear
counter-intuitive to the finders of fact. Moreover, defendants who are in
fact guilty of sexual abuse—which will be true in at least some subset of
cases—are individuals who have violated an intimate trust and sought to
keep this secret hidden from view by controlling the victim; such defen-
dants can be expected to retaliate when that control and secrecy are
threatened.123

Furthermore, imposing a third-party duty in abuse cases would
raise all of the ethical conflicts discussed above—between the lawyer’s
duty to represent her client zealously and with undivided loyalty, on the
one hand, and potential liability to the opposing party, on the other. Im-
posing a duty to the adverse party would require the attorney represent-
ing a sexual abuse claimant to take possible harm to the defendant into
account in her decisions. This would not only dilute the attorney’s en-
ergies but also place her repeatedly in conflictual situations when con-
sidering a litigation tactic that would help her client but harm the defen-
dant. With the specter of potential liability hanging over her, it would be
only human for the attorney to pull back from aggressive tactics that
may be required to further the client’s interests. The lawyer is also
likely to take elaborate self-defensive measures that would be expensive
and possibly counterproductive, such as excessive documentation of the
factors considered at each turn. In short, imposition of these conflicting
duties places the attorney in an impossible ethical bind.

Moreover, given the costs involved in undertaking the representa-
tion of an abuse survivor where potential liability to the defendant ex-
ists, it also seems likely that fewer attorneys will be willing to file civil
damage claims in this field if malpractice liability were extended to
third parties. Given the difficulties of winning an abuse case long after
the events have taken place, and the contingent-fee nature of much of
this litigation, many lawyers might simply prefer to avoid the additional
risks of liability, resulting in a significant decrease in the ability of
abuse survivors to gain legal representation.

In sum, substantial reasons of public policy have led the courts to

123. See Elizabeth Mertz & Kimberly A. Lonsway, The Power of Denial: Individual and
reject third-party malpractice suits against attorneys, and all of those reasons apply in the context of attorneys representing childhood sexual abuse survivors. Negligence liability would be appropriate in these cases, therefore, only if we were to design an exception to normal rules of tort liability for one category of cases, on the grounds that child sex abuse cases are “special,” because of the time often elapsed since the events alleged and the type of damages resulting from the accusations. Perhaps third-party suits should be allowed if restricted to situations of gross negligence—that is, where evidence of the falsity of the allegations exists, but the attorney simply failed to explore it. However, it is dangerous to make exceptions for special cases. It is likely to prove difficult to confine liability to gross negligence in only this one set of cases; once we accept this approach, there will be strong arguments for applying it wherever third parties are injured by attorneys who proceed with this degree of negligence. Moreover, given the multiple possibilities for interference with the lawyer’s ethical obligations to his or her client and with the client’s rights to effective assistance of counsel and free access to the courts, this is a step that should not be taken lightly. Whether to do so will depend upon the availability of other remedies, to which we now turn.

B. Suits for Malicious Prosecution or Abuse of Civil Proceedings

Some courts have rejected the imposition of a duty upon an attorney to the adverse party because an adequate remedy already exists in the form of an action for malicious prosecution. Indeed, many commentators feel that the only appropriate vehicle for an independent cause of action by an adverse party against his opponent’s attorney is a suit for malicious prosecution—or, as often styled in a civil rather than criminal case, a suit for abuse or wrongful use of civil proceedings. According to this view, the courts quite rightly reject the cause of action in negligence discussed above because the tort of malicious prosecution “[o]ver the years ... has been carefully constructed and delicately balanced to give due weight to the different interests involved.”

The malicious prosecution tort, which may be brought against the opposing party, his or her attorney, or both, developed early in the his-

124. See supra Part III.A.2.
125. See, e.g., Weaver v. Superior Court, 156 Cal. Rptr. 745, 751 (Ct. App. 1979).
126. See, e.g., Birnbaum, supra note 113, at 1074.
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tery of the common law and was intended to prevent the bringing of groundless and harassing actions. In 1269, it was modified by the Statute of Marlbridge, which also provided for the recovery of costs and attorneys' fees by the prevailing party in the original lawsuit. For this reason, the English tort of malicious prosecution required the pleading of special damages beyond those incident to the litigation itself. Ironically, many of the American states retained the special damages requirement although it made little sense in a legal system that did not operate under the English Rule on attorneys' fees. This inconsistency has led many commentators to urge that the jurisdictions that retain this requirement should abolish it, but its retention apparently serves as a general way for the courts in those states to express the disfavor with which the action is viewed. Because special damages were defined historically to require seizure of the person or of property, the requirement is not fulfilled by the kinds of damages—loss of wages, emotional distress, stigma, loss of time or goodwill, and the like—that the defendant typically incurs in cases involving childhood sexual abuse.

Jurisdictions differ as to whether a malicious prosecution action relates only to the initial filing of the previous case or to its continuation as well. The latter would impose liability on the attorney in essence for not withdrawing from the case prior to trial if it is not possible to persuade his or her client to dismiss the action. From the point of view of the attorney's professional responsibility, this is problematic, because of the limitations placed upon a lawyer's right to withdraw from representation of a client at a late stage in the proceedings. If an attorney

128. For a fascinating discussion of the development of this tort out of earlier Anglo-Saxon remedies for false suits (loss of the tongue, for example), see Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis, 88 YALE L.J. 1218 (1979).
129. See MALLEN & SMITH, supra note 112, § 6.7, at 414.
130. See Note, supra note 128, at 1228-29.
131. For citations concerning the substantial minority of states that retain the special injury requirement, including Delaware, the District of Columbia, Georgia, Hawaii, Illinois (which nonetheless creates a special exception for medical malpractice cases), Iowa, Kentucky, Louisiana, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia, see MALLEN & SMITH, supra note 112, § 6.21, at 460-62 n.2.
134. See MALLEN & SMITH, supra note 112, § 6.21, at 462-63.
135. See id. § 6.12, at 427.
136. Professional responsibility rules for lawyers require that a lawyer seek permission of the court to withdraw and may not do so until reasonable steps are taken to avoid foreseeable preju-
has represented a client throughout the pleading and discovery stages, a court is unlikely to excuse him or her from this representation on the eve of trial, especially over the client’s objections, unless another attorney is both willing and able to step in without substantial delay in the proceedings.

In addition to the possible requirement of special damages, there are three basic elements to a claim for malicious prosecution:

1. termination of the previous proceeding in a manner favorable to the plaintiff for malicious prosecution (“favorable termination”);
2. lack of probable cause for the previous proceeding; and
3. malice.\textsuperscript{137}

We discuss each of these requirements in the context of a case involving a previous suit alleging sexual abuse based upon recovered memory and of the policies at stake at each turn.

1. Favorable Termination

   a. Traditional Doctrine

   The first requirement, that the previous lawsuit have terminated in favor of the malicious prosecution plaintiff, is designed to prevent inconsistent judgments, such as would occur if the plaintiff in the underlying suit prevailed yet were then subjected to liability for having brought suit.\textsuperscript{138} Thus, the first lawsuit must be concluded in the defendant’s favor before the defendant can sue for malicious prosecution.

   Favorable termination is easily determined in a case where the suit proceeds to an adjudication on the merits. Ambiguity results, however, when a case is settled or otherwise dismissed prior to trial, and the case law differs as to whether a settlement or voluntary dismissal, with or without prejudice, constitutes favorable termination.\textsuperscript{139} The standard that

\textsuperscript{137} See Weaver v. Superior Court, 156 Cal. Rptr. 745, 754 (Ct. App. 1979); MALLEN \\& SMITH, supra note 112, § 6.10, at 419.

\textsuperscript{138} See Birnbaum, supra note 113, at 1027.

\textsuperscript{139} See, e.g., McCubbrey v. Veninga, 39 F.3d 1054, 1055 (9th Cir. 1994) (holding that a dismissal resulting from a settlement does not constitute favorable termination); Haight v. Handweiler, 244 Cal. Rptr. 488, 490 (Ct. App. 1988) (holding that dismissal in connection with a settlement does not constitute favorable termination); Kurek v. Kavanaugh, Scully, Sudow, White \\&
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has attracted the most substantial following appears to be that developed by the California courts, originally in the criminal context, which requires that the dismissal reflect the innocence of the party sued. Thus, unless the defendant can demonstrate innocence, the prosecution can not be found to have been malicious.

This test was subsequently adapted in civil cases as a requirement that the context of the dismissal reflect that the original case was without merit. Under this standard, a settlement or compromise of claims prior to trial does not typically constitute a favorable dismissal for purposes of a malicious prosecution action. Voluntary dismissals, however, can pose problems of interpretation requiring scrutiny of the circumstances of the dismissal. Some states require that nothing short of a judicial determination addressing the merits will suffice, thus defining settlement, voluntary dismissal, and perhaps even involuntary dismissal all as not fitting within the category of favorable termination. Still other courts hold that there is favorable termination whenever the previous plaintiff has chosen not to pursue an action, on the assumption that no one will abandon a meritorious claim. In short, courts differ as to whether ambiguity over a pretrial dismissal should be construed in favor of the plaintiff or defendant in a malicious prosecution action.

b. Application to Child Sex Abuse Cases

In evaluating these differing judicial responses, it is helpful to place the question in a concrete context and to consider the policies involved. If Amy Feld's or Steven Cook's lawsuits had gone to trial and resulted in verdicts for the defendants, for example, the favorable termination prerequisite to a claim for malicious prosecution would clearly have been satisfied. Both, however, were dismissed prior to trial—in


140. See Jaffe v. Stone, 114 P.2d 335, 338 (Cal. 1941).
142. See McCubbrey, 39 F.3d at 1035 (decided under California law); Haight, 244 Cal. Rptr. at 489-90.
144. See, e.g., Kurek, 365 N.E.2d at 1194 (applying Illinois law).
Cook’s case because the plaintiff recanted his allegations\textsuperscript{146} and in the Feld case for reasons that remain unclear but appear not to have included any recantation of the daughter’s memories.\textsuperscript{147} Thus, it is important to consider the panoply of reasons why a sexual abuse case might be dismissed prior to trial.

First, as in any lawsuit where the prospect of a trial is both expensive and personally painful, the parties may settle the case in order to avoid a trial but without compromising their respective positions as to the merits. Indeed, clauses to the effect that the parties “do not concede liability on any of the allegations raised in the complaint, but nonetheless desire to settle this lawsuit without incurring the expense and other burdens of further litigation” are standard in most settlement agreements. These clauses reflect the common truth that neither party is willing to concede its position, but that both now want the lawsuit to go away. In many cases, the settlement includes the exchange of no consideration other than the disappearance of the litigation, which both parties for their own reasons now desire. In other cases, the defendants, in a case like Feld, might agree to pay their child’s therapy expenses and legal costs in return for dismissal of the suit—no matter what the truth of the underlying accusations may have been—in order to resolve the dispute between them more amicably. If either of these types of settlement are interpreted as favorable termination, the plaintiff’s attorney would recommend them only at personal risk. Is it in the interests of the parties or of the judicial system to discourage settlement under these circumstances by adding the possibility of a subsequent malicious prosecution suit against the plaintiff or her attorney to the costs of settlement? Probably not—and well-represented parties would include a provision foreclosing such a suit in the settlement agreement itself. However, though a party might be protected against subsequent suit by a broadly-based release from all liability, her attorney could not be; thus this disincentive to settlement would remain.

At the other end of the spectrum, a sexual abuse plaintiff might voluntarily dismiss her lawsuit because she has become convinced that it is without merit—as Cardinal Bernardin’s accuser apparently did. Alternatively, her attorney may reach this conclusion independently of the client and seek to withdraw—although the court may not allow withdrawal at this point in the litigation process. Under either of these circumstances—if they were clear—the test for favorable termination

\textsuperscript{146} See supra note 18 and accompanying text.
\textsuperscript{147} See supra note 38 and accompanying text.
would, under some states' interpretations, be fulfilled. The policy decision to be made, however, is whether we want to discourage the party or attorney from dismissing the case in this situation out of fear of laying the groundwork for a subsequent lawsuit for damages. On the one hand, it may be argued that that is precisely what is necessary in order to deter groundless lawsuits in this area, and one's answer would differ according to how great a danger this appears to be. On the other hand, it may be unwise from the point of view of both parties to place substantial obstacles in the path of dismissal—obstacles that may split the interest of the attorney from that of his or her client by giving the attorney an incentive to continue the litigation rather than to convince the client to dismiss it. If this type of liability were likely to be imposed, for example, what would the impact be in situations such as that presented in the Bernardin case? Certainly one possibility would be that both the party and his attorney would be reluctant to dismiss the lawsuit speedily once either had begun to doubt the accuracy of the memories upon which it was based, for fear of making admissions that would open them to wide-ranging liability for damages. Yet the longer the litigation continues, the greater the damage incurred by the defendant will be as well. Thus, both parties have an interest in not creating disincentives to voluntary dismissal of this type of lawsuit.

Moreover, there will be countless ambiguous cases in between the clearer extremes. Contrary to one court's assumption, 41 it is clearly not true that the only reason a plaintiff would dismiss a lawsuit voluntarily is that it had no merit in the first place. She may decide it is not worth going on with the litigation for a variety of reasons unrelated to the merits. The plaintiff may run out of money for litigation expenses, or the amount expended or extended as credit by the lawyer in a contingent fee action may come to exceed the total recovery, including the psychic satisfaction, for which she hopes. Under each of these scenarios, it would make sense for the plaintiff to dismiss a meritorious lawsuit voluntarily.

A sexual abuse plaintiff may give up her lawsuit for all of these and other reasons as well. Typically, the results of sexual abuse in the past include substantial psychological damage in the present; these plaintiffs are thus likely to be emotionally fragile. 49 Lengthy litigation

148. One court assumes that there exists a "natural assumption that one does not simply abandon a meritorious action once instituted." Minasian, 145 Cal. Rptr. at 832.

149. For a review of the studies on the long-term effects of child sexual abuse, see Joseph H. Beitchman et al., A Review of the Long-Term Effects of Child Sexual Abuse, 16 CHILD ABUSE & NEGLECT 101 (1992), and Angela Browne & David Finkelhor, Impact of Child Sexual Abuse: A
that leads to a questioning of her very sanity may turn out to be more than such a plaintiff can bear given her vulnerable psychological condition, even if it seemed possible to do so at the outset. In the course of that litigation, moreover, she may have been subject to severe pressure from the other party and members of her family to dismiss the suit. Indeed, the guiltier the defendant, the more badgering one might expect in this type of case. Hence a sexual abuse plaintiff may ultimately choose to voluntarily dismiss her case even though her charges are well-grounded, because of intimidation and emotional stress. In these circumstances, a “voluntary” dismissal surely could not be interpreted as a reflection on the merits; it is a “favorable termination” of the underlying case only in the crudest sense of litigation as battlefield.

In sum, if the definition of favorable termination is extended beyond an adjudication on the merits, this element may be particularly difficult to determine in a malicious prosecution case involving a prior suit for childhood sexual abuse. If it is defined too broadly, moreover, it will doubtless include many cases that could have been won on the merits, the filing of which should not be deterred. Finally, an over-broad definition of favorable termination will also invite collateral litigation that will deter settlements which the legal system, on a more reflective consideration of the public policies at stake, may wish to encourage.

2. Lack of Probable Cause

a. Traditional Doctrine

The second element of a malicious prosecution claim is the absence of probable cause for the previous lawsuit. The currently prevailing view is that the standard for probable cause in malicious prosecution cases is an objective one, but that it is not a negligence standard. Previously, the California appellate court had been widely cited for the proposition that “[a]n attorney has probable cause to represent 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.” Under this standard, probable cause could

150. See supra note 137 and accompanying text.
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depend upon the extent of the attorney's factual investigation and his competence—in essence, a negligence standard—and the attorney's subjective belief might also become critical. In an influential decision, the Michigan Supreme Court disagreed, holding that "[a] lawyer is entitled to accept his client's version of the facts and to proceed on the assumption that they are true absent compelling evidence to the contrary." According to the Michigan court, this standard, rather than one grounded upon what a hypothetical reasonable lawyer might have done under similar circumstances, is necessary in order to protect the lawyer's duty to represent his client zealously, loyally, tenaciously and single-mindedly. In response to this and like criticism, the California Supreme Court in 1989 rejected the broad dictum of its own appellate courts and adopted the Michigan approach, holding that the issue of probable cause was one for the court to determine under an objective standard, and that what the attorney subjectively believed about the prior claim was irrelevant. Also, because this was a question for the court, expert testimony was deemed inadmissible on the subject. Moreover, according to the leading California case, the amount of the attorney's investigation and research is irrelevant to the question of probable cause, although it might be relevant on the issue of malice. The court reasoned that to hold otherwise would improperly shift the inquiry to the adequacy of the attorney's performance instead of the tenability of the claim, and it would contradict the line of opinions holding that a party may not bring a negligence action against opposing counsel. After all, as the California Supreme Court pointed out, the defendant could have been put to the same burden of defense if his adversary had chosen a more careful attorney, and incorporating a duty of investigation into the probable cause standard would tempt attorneys to take elaborate self-protective measures at the expense of their clients. This non-negligence-based approach to the element of probable cause has been endorsed by the courts in most other jurisdictions.

153. Friedman, 312 N.W.2d at 605.
154. See id. at 606.
156. See id. at 510.
157. See id. at 509-10.
158. See id. at 509. For a discussion of cases prohibiting a party from bringing a negligence action against opposing counsel, see supra Part III.A.
160. See MALLEN & SMITH, supra note 112, § 6.14, at 440-42. But see Smith v. Lucia, 842 P.2d 1303, 1307 (Ariz. Ct. App. 1992) (embracing a subjective standard for probable cause). Pennsylvania, however, has modified its common law in this respect by a statute which provides...
Significantly, a finding of probable cause is fatal to an action for malicious prosecution. No matter what the attorney’s state of mind—even if he or she specifically hates the defendants and wants to hurt them for whatever reason—if there is probable cause for the underlying suit, the inquiry is at an end. The attorney may in fact doubt his or her client, but so long as the issue is genuinely in doubt, there is no absence of probable cause. For purposes of malicious prosecution, moreover, the attorney need not verify or investigate the truth of the client’s representations before recommending or pursuing an action, for it is not the attorney’s role to act as the trier of fact about the client’s credibility. Indeed, the lawyer’s ethical obligation is to resolve any doubts in favor of the client. Thus, in the vast majority of jurisdictions, unless the prior proceeding was clearly brought without probable cause, the question of malice would never be reached.

b. Application to Child Sex Abuse Cases

An examination of the probable cause element in the context of the case filed against Cardinal Bernardin shows how difficult it may be to determine—in effect, to second-guess—the attorney’s decision to file suit. Would probable cause in this sense have been found to exist if Cardinal Bernardin had chosen to sue Steven Cook’s lawyer, Stephen Rubino, after the allegations of abuse had been withdrawn? Several participants at the Northwestern symposium opined that sanctions of some sort would have been in order because Rubino had proceeded in the knowledge that the “memories” of abuse by Cardinal Bernardin were very recent and were the product of sessions with an unlicensed and untrained hypnotist. On the other hand, Cook’s attorney responded that he had been dealing with his client for a substantial period of time in relation to the allegations against the other priest, which ap-

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161. See MALLEN & SMITH, supra note 112, § 6.20, at 453.
162. See id. § 6.17, at 448-49.
163. See id. at 449.
164. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-6 (1986); see also MALLEN & SMITH, supra note 112, § 6.17, at 449 (“Ethical requirements mandate that an attorney . . . resolve any reasonable doubt in favor of the client.”).
165. See DOPPELT, supra note 6, at 2-3, 14.
pear to have been well-founded, and considered him "totally believ-
able."166 He also had his client take a lie detector test about the new alle-
gations, which Cook passed.167 Given the lack of witnesses, Rubino re-
lied upon "timing, history [and] proximity" to evaluate the truth of his
client’s allegations.168 In light of Cook’s failing health and intense desire
to tell his story before his imminent death, Rubino therefore decided to
include the charges in the initial lawsuit rather than seek to amend it
later, even though the allegations against the Cardinal surfaced only the
month before the complaint was filed.169 On the other hand, Rubino
dismissed the charges against Bernardin four months later when he
found out more about the hypnosis, conducted a second lie detector test,
had challenged his client about specifics, and recognized that the psy-
chiatric testimony would probably not be admitted into evidence.170 Of
course, all of this—further investigation into the hypnosis, research
about admissibility of the psychiatric evidence, and hard questioning of
his client—could and should have taken place prior to filing the allega-
tions against Bernardin. On the other hand, Rubino was acting under
what he perceived to be extreme time pressure—he had never repre-
sented a dying patient before—and he chose to believe his client, who
was apparently a very credible witness as to memories of sexual abuse
by the other priest. It is easy to say, in hindsight, that Rubino should
have taken the time to investigate more thoroughly before filing suit; it
is harder to conclude that he did not have "probable cause" for the alle-
gations against Bernardin, unless we are to import a negligence standard
into the element of probable cause that the courts have been loathe to
incorporate.171

Even though the law provides a standard that is relatively protec-
tive of the attorney, malicious prosecution actions against the opposing
party’s attorney are still in fact available to individuals who have been
wrongfully sued for childhood sexual abuse; and this possibility sug-
gests a number of measures that attorneys counseling clients with re-
covered memories of abuse should take to guard against liability. These precautionary measures are really not very different from what a good lawyer would do in any other case, though; they constitute good lawyering. First, of course, the attorney will want to obtain as much corroborative information as possible. Contemporary medical records should be examined, if available. Physical evidence is unlikely to be of much help in many childhood sexual abuse cases brought by adults, however. Pediatricians are understandably not in the habit of giving internal gynecological exams to their patients who are little girls; even if they were, the exam would reveal little if the sexual abuse did not include penetration. Questions of timing would determine whether other signs of abuse, such as genital irritation, might show up on routine annual physicals. Thus, unless the possibility of sexual abuse actually was brought up at the time, in which case subsequent events and memories are likely to be quite different in many ways, the relevant and probative medical tests are not likely to have been performed.

In the absence of physical evidence, the attorney should inquire into the possibility of other victims and the identities of persons to whom the plaintiff might have spoken about the abuse at the time, even if she does not currently remember having done so. Here one is likely to run into the problems of the sort typical of proving sex crimes against women in general. Like rape and sexual harassment, childhood sexual abuse occurs in secret; and it is accompanied by a sense of shame and/or intimidation that makes many women reluctant to speak about it. In the absence of institutional or multi-victim cases like the Father Porter or Ross Cheit cases, previously described in Part II, or of sisters with independent memories, corroborative testimony is unlikely to be available.

This often leaves the attorney and client with the supporting testimony only of the therapist who is now treating the abuse survivor. In this case, it is important for the attorney to inquire into the therapist’s qualifications, methods, and manner of reaching her conclusions, for all of these will come under intense scrutiny at trial. But when all is said and done, the attorney must—and is legally entitled to—gauge probable cause based upon the client’s own communications about what happened, evaluating them in the light of common sense, filtered through a knowledge that this type of abuse really exists. In short, the lawyer’s assessment of the case should take account of the facts that sexual abuse of children is widespread, happens in good families, is frequently ac-

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172. This happened in the Marilyn Van Derbur case discussed in TERR, supra note 57, at 120-51.
companied by denial on the part of all family members, and can be re-called belatedly by victims—no matter how improbable and unaccept-able such scenarios may seem.

As in other cases, the attorney will also want to ascertain the cli-ent’s motives for bringing the lawsuit. These are not decisive in deter-mining the accuracy of the allegations of abuse; for example, a family in which abuse and other violations of unity and trust have taken place will likely also contain a tangle of hostilities and desires for revenge that may erupt in numerous ways. Considering the client’s current motiva-tion may nonetheless enable the attorney to help the client assess what her best interest dictates under the circumstances, which, as in other cases, may not always be litigation. Steven Cook appears to have been strongly motivated by an attempt to tell the story of sexual abuse in the Catholic church before his death, 173 which, in itself, was not inappro-priate. However, if, as the Cardinal was convinced, another priest—one politically opposed to Bernardin—had repeatedly suggested adding the Cardinal to the litigation, 174 this fact should perhaps have caused Rubino to undertake a more thoroughgoing investigation before filing suit.

Finally, like a good therapist or other professional, the attorney should examine his or her own involvement and motivations in the law-suit, as well as their relationship to the client’s own interests, lest the two be at cross-purposes. Many of these issues may prove relevant to the element of malice as well.

3. Malice

a. Traditional Doctrine

Unlike probable cause, the standard for malice is a subjective one; and its presence is an issue for the finder of fact. 175 In a malicious prose-cution case brought against an attorney, the relevant state of mind is that specific to the attorney, not her client, although the fact that the attorney knows the client is proceeding from a desire to harass or injure or for revenge may be relevant to this question. 176

Malice, however, is a term of art, not an emotion. As one Illinois court aptly stated, “[w]hen disputes reach the litigious stage, usually some malice is present on both sides. Friendly tort suits are not com-

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173. See DOPPELT, supra note 6, at 3.
175. See MALLEN & SMITH, supra note 112, § 6.20, at 453-54.
176. See id. at 454.
Central to the issue of malice is whether the party or attorney proceeds with the case in knowledge of the fact that it is without merit. Thus, malice may be inferred from lack of probable cause by a kind of ruling-out logic: why else would anyone bring suit if they knew it was groundless? However, as we have discussed, a lack of probable cause may not be inferred from malice. The courts are split as to what level of knowledge is required. Some states hold that the attorney must be shown to have actual knowledge that the case was groundless; others expand this requirement to include situations where the attorney acted in reckless disregard of the non-existence of probable cause as well. The majority view, however, is that a finding of malice may not rest solely upon attorney negligence, such as failing to interview witnesses before trial or to obtain a second medical opinion. If it were otherwise, in the classic statement of one Louisiana court, "the court-rooms are full of malicious attorneys."

b. Application to Child Sex Abuse Cases

With this legal background in mind, what might be an improper purpose for an attorney to bring a lawsuit alleging recovered memories of childhood sexual abuse? To pursue a remedy for his or her client is obviously a proper motive. However, if the attorney files or continues the case in clear knowledge that the abuse did not take place and that the client is not telling the truth, malice could be established. The problem with this standard, as noted above, is that sexual abuse almost invariably takes place in private and whatever circumstantial evidence exists is

178. See MALLEN & SMITH, supra note 112, § 6.20, at 454-55.
179. See id. at 457-58.
180. See supra note 161 and accompanying text.
182. See, e.g., Berlin, 381 N.E.2d at 1372.
184. See, e.g., Berlin, 381 N.E.2d at 1372-73 (failing to obtain another doctor’s opinion before filing suit is insufficient to support a claim for malicious prosecution); Spencer, 337 So. 2d at 599 (holding that an attorney’s failure to interview witnesses before trial did not imply reckless disregard). Again, the Pennsylvania statute concerning wrongful use of civil proceedings provides an alternative standard on this issue. Rather than requiring malice, the statute provides that the party or attorney have acted “primarily for a purpose other than that of securing the proper discovery . . . or adjudication of the claim in which the proceedings are based.” 42 PA. CONS. STAT. ANN. § 8351(a)(1) (West 1982). This is also the approach of the Restatement. See RESTATEMENT (SECOND) OF TORTS § 674(a) (1977). This standard has been criticized as difficult to determine and likely to result in self-protective measures rather than zeal in representation. See MALLEN & SMITH, supra note 112, § 6.20, at 455 n.11.
185. Spencer, 337 So. 2d at 600, quoted in Berlin, 381 N.E.2d at 1373.
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often mixed or inconclusive.\textsuperscript{186} This results, as many rape cases do, in a contest over the credibility of the two individual parties and requires a finding about ambiguous facts—which is the task of the trier of fact, not of the plaintiff’s attorney. Nonetheless, there may be a subset of cases in which the attorney becomes aware that his or her client’s allegations are clearly false, and malice can then be inferred from continuing with the representation. Bringing a groundless lawsuit solely for the purpose of obtaining a settlement for nuisance value is clearly malicious.\textsuperscript{187}

A variety of other motivations may drive an attorney to pursue or continue to pursue a lawsuit for childhood sexual abuse. An attorney may wish to make money, gain publicity for her practice, gain a reputation for expertise in this practice area, seek a settlement short of trial in an otherwise meritorious case, obtain publicity for a cause, pursue justice on behalf of individual victims out of commitment to that cause, and/or seek revenge against perpetrators of sexual abuse for some personal motive. Which of these are improper purposes? So long as there is a tenable basis for the lawsuit, none of them are improper. Desires to seek adjudication or settlement of the claim or to earn a legal fee are clearly inadequate bases to establish malice.\textsuperscript{188} Moreover, more personal and/or political motivations—the attorney’s own or friends’ experience with sex crimes or a commitment to ending violence against women, for example—may well provide the primary motivation for many attorneys to undertake representation of plaintiffs alleging childhood sexual abuse, rather than monetary return.\textsuperscript{189} Personal or political motivations are irrelevant to the question of malice as long as probable cause exists.\textsuperscript{189} In short, unless an attorney representing a sexual abuse survivor is proceeding with the clear knowledge that a lawsuit is groundless, it is difficult, if not impossible, to show that she is proceeding with malice.

In conclusion, malicious prosecution is available as a remedy

\textsuperscript{186} See supra Part III.B.2.b.
\textsuperscript{187} Cf. Wade, supra note 127, at 448 (suggesting that if a lawyer brings a claim when the lawyer knows it lacks probable cause “then he is bringing it for a purpose other than that for which the... action was established, and malice, or ulterior purpose, is present”).
\textsuperscript{188} See MALLEN & SMITH, supra note 112, § 6.20, at 456; see also RESTATEMENT (SECOND) OF TORTS § 674 cmt. d (1977) (stating that if attorney acts primarily for the purpose of aiding in achieving a proper adjudication of a client’s claim then the attorney is not liable).
\textsuperscript{189} The following remarks by Nancy Wasser, attorney in the Fled case, on a panel at the 1994 annual conference of the Philadelphia Bar Association are interesting in this respect: “This area is essentially pro bono, I have to stress that... You’re not looking to make a lot of money. You’re doing something for the public good.” Hank Grezlak, Recovered Memory Suits Face Uphill Battle, LEGAL INTELLIGENCER, Dec. 7, 1994, at 1.
\textsuperscript{190} See Debra E. Wax, Annotation, Liability of Attorney, Acting for Client, for Malicious Prosecution, 46 A.L.R.4th 249, 254 (1986).
against an attorney filing a baseless claim for childhood sexual abuse, although it is a difficult action to sustain.\textsuperscript{191} Malicious use of civil proceedings cases rarely succeed and, if they do, are rarely affirmed on appeal.\textsuperscript{192} To explain their lack of favor, the courts emphasize, as with the negligence cases described in a previous section,\textsuperscript{193} the tort’s chilling effect upon the right of access to the courts,\textsuperscript{194} a right specifically incorporated in the constitutions of most states.\textsuperscript{195} A second consideration, also discussed above,\textsuperscript{196} is the danger of placing an attorney in a position of ethical conflict by giving him incentives to protect himself from a subsequent action rather than to represent his client with zeal. Third, one of the main reasons for the late 1970s’ movement to revive or broaden the action for malicious prosecution, as was done in Pennsylvania,\textsuperscript{197} was to address the proliferation of lawsuits, especially those for medical malpractice.\textsuperscript{198} However, as at least one commentator points out, the expansion of malicious prosecution proceedings threatens to exacerbate whatever litigation “explosion” may exist, rather than to ameliorate it, by adding yet another lawsuit—and, indeed, the prospect of still another suit as lawyers may strike back with suits for malicious prosecution of their own.\textsuperscript{199} For all of these reasons, courts are not very receptive to claims against attorneys for malicious prosecution.

Finally, most states responded to the perceived “litigation explosion” and to the AMA campaign not by reviving the malicious prosecution tort, but instead by passing legislation providing for sanctions, including attorneys’ fees, in the original action,\textsuperscript{200} and the courts have

\textsuperscript{191} Indeed, it is a disfavored action in general. See, e.g., Sheldon Appel Co. v. Albert & Oliker, 765 P.2d 498, 501-02 (Cal. 1989); MALLEN & SMITH, supra note 112, § 6.9, at 417 & n.11.
\textsuperscript{192} See MALLEN & SMITH, supra note 112, § 6.6, at 411-12; Wade, supra note 127, at 454.
\textsuperscript{193} See supra Part II.A.
\textsuperscript{195} For a listing of state constitutional provisions concerning the right of access to the courts, see John M. Johnson & G. Edward Cassady III, Frivolous Lawsuits and Defensive Responses to Them—What Relief Is Available?, 36 ALA. L. REV. 927, 928 n.8 (1985).
\textsuperscript{196} See supra Part III.A.2.
\textsuperscript{197} See 42 PA. CONS. STAT. ANN. § 8351(a)(1) (West 1982).
\textsuperscript{198} For a description of the movement by the medical community to utilize the malicious prosecution claim to fight the proliferation of groundless medical malpractice suits in the late 1970s, see Birnbaum, supra note 113, at 1003-05, 1020-33.
\textsuperscript{199} See id. at 1033.
\textsuperscript{200} For a discussion of the responses by different states, see Wade, supra note 127, at 457-68.
deferred to this as a more appropriate solution to the problem. In the next sections, we evaluate the adequacy of this type of remedy, as well as the efficacy of attorney disciplinary proceedings in the context of child sex abuse cases.

C. Attorney Disciplinary Proceedings

Both the filing of a complaint before an attorney disciplinary tribunal and a motion for sanctions in the original case are routes open to parties seeking a remedy for a groundless or “frivolous” lawsuit, although neither may provide all the relief desired. Disciplinary proceedings against attorneys for violation of ethical rules are the most problematic in this respect. An attorney is, for example, prohibited from taking a position that “would serve merely to harass or maliciously injure another [party].” However, the courts have steadfastly refused to recognize a private right of action to enforce these rules, holding that “[t]he remedy for such a breach is a public one and not a private one.” Thus, enforcement is to be had only if the local disciplinary commission decides to prosecute a complaint. Moreover, the Model Code of Professional Responsibility does not define the penalties for its violation. Typical remedies, like censure, suspension of an attorney’s license, or disbarment, provide no compensation to an injured party, although they may be regarded as a moral victory by individuals who have been falsely accused of abuse; they presumably provide some level of deterrence as well. In short, extremely limited relief is available from filing an ethics complaint with an attorney disciplinary board.

D. Motions for Sanctions

1. Traditional Doctrine

By contrast, a motion for sanctions does provide compensation, although it is limited to attorneys’ fees and the costs of defending the litigation. Thus, the damage to reputation, emotional distress, family disruption, and loss of income that accompany the defense of actions for sexual abuse would go uncompensated by a successful motion for san-

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204. See, e.g., FED. R. CIV. P. 11(c)(2).
tions. Within these limits, however, sanctions litigation in many ways provides a functional substitute for a malicious prosecution action. Even prior to passage of the sanctions provisions of Federal Rule of Civil Procedure 11, cases brought pursuant to the courts’ inherent power to assess fees against attorneys who bring suit in bad faith defined the standard for “bad faith” as amounting to conduct without a colorable basis in law—essentially the same inquiry as in a malicious prosecution case.

State after state passed sanctions legislation in response to the outcry over allegedly frivolous litigation in the late 1970s and early 1980s. The Illinois rule passed at that time, which has since been replaced with another version, provided, for example, that “[a]llegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney’s fee.” Under this Illinois rule, the moving party was required to show that the opposing counsel had pled untrue statements of fact which he knew or reasonably should have known were untrue. This contrasts with the standard for malicious prosecution in the same state at that time, which apparently required actual knowledge of the falsity of the allegations to establish the tort. Thus, the sanctions standard in Illinois was broader than that for malicious prosecution, although the remedies available from sanctions were more limited. Even within this broader standard, however, attorneys were still “not required to make complete investigations of all facts before filing suit . . . [but] may exercise broad discretion based on an honest judgment from the facts presented to them.”

Since the passage of a strengthened Federal Rule 11 in 1983 and its amendment in 1993, sanctions have provided the principal weapon against frivolous or harassing proceedings in federal court. Federal Rule

205. In Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), the Supreme Court held that the power to sanction attorneys for abuse of process was well within the inherent power of the courts. See id. at 767.
206. See MALLEN & SMITH, supra note 112, § 10.2, at 650.
207. See Wade, supra note 127, at 457-66. For a listing of the state statutes providing sanctions parallel to Rule 11, see MALLEN & SMITH, supra note 112, § 10.13, at 708 n.3.
211. St. Paul, 481 N.E.2d at 1058.
11, which the current Illinois rule tracks for the most part, explicitly requires that an attorney make a reasonable inquiry into the facts in order to avoid liability, a requirement which, for cases brought in federal court or in states whose sanctions legislation tracks the current version of Rule 11, arguably extends the duty to investigate beyond that pertaining to malicious prosecution cases. The inquiry or investigation required, however, is only that which is adjudged to be “reasonable under the circumstances,” with some courts hastening to distinguish this from a negligence standard. The Second Circuit, for example, has held that it must be “patently clear that a claim has absolutely no chance of success” before sanctions are imposed. Nonetheless, Rule 11 does appear to impose more of a duty than is present in the case law pertaining to malicious prosecution. While malicious prosecution apparently allows an attorney to rely upon his or her client’s recitation of the facts, Rule 11 does not, at least in situations where a reasonable inquiry could show otherwise.

Moreover, as one treatise points out, sanctions “provide expedient relief in an efficient proceeding that is typically before the judge who witnessed the events that are the subject of the complaint.” A party seeking redress can get it before many years have passed and without incurring the costs of an additional lawsuit. A hearing before a judge familiar with the facts and parties to the case is an added benefit, mak-

212. SeeILL. ST. SUP. CT. R. 137.
213. The current version of Federal Rule 11 provides, in relevant part:
   By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
   (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
   (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
   (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; . . . .
FED. R. CIV. P. 11(b) (emphasis added).
214. Id.
215. SeeMALLEN & SMITH, supra note 112, § 10.4, at 657.
217. SeeMALLEN & SMITH, supra note 112, § 10.7, at 665-67. Again, the Second Circuit sounds a note of caution, warning that the judge is not to second-guess the attorney in passing judgment on the client’s credibility at a later date. SeeOliveri v. Thompson, 803 F.2d 1265, 1277-78 (2d Cir. 1986);MALLEN & SMITH, supra note 112, § 10.7, at 667.
218. MALLEN & SMITH, supra note 112, § 10.1, at 644.
In sum, Rule 11 and its state counterparts provide somewhat broader grounds for attorney liability but more limited damages than does malicious prosecution. Although liability is limited to statements made in the pleadings, the 1993 amendments to Rule 11 add a continuing duty to reevaluate the truth of the allegations. Hence, if discovery proves that the allegations in the complaint are without foundation, liability is possible unless the pleading is withdrawn or amended.

2. Application to Child Sex Abuse Cases

Sanctions appear well designed as a remedy for cases in which child sex abuse allegations are filed but a reasonable investigation would have revealed to the plaintiff’s attorney that they were baseless. Rule 11 and its state counterparts are specifically designed to compensate parties forced to defend these types of cases. Moreover, Rule 11 allows sexual abuse defendants to escape the serious barriers imposed by both the favorable termination and probable cause prongs of the malicious prosecution tort. Sanctions are available even when the case has been voluntarily dismissed, as happened in both the Bernardin and Feld cases, thus alleviating the need to establish favorable termination. A sanctions action also specifically addresses situations in which an action is filed, or continued, without adequate investigation. Indeed, state counterparts of Rule 11 have been successfully used to sanction attorneys for pursuing cases involving legally or factually unfounded allegations of sexual abuse, including cases brought by adult survivors of childhood abuse.

219. This was done by adding the following emphasized language to the definition of sanctionable acts in Rule 11(b): “[P]resenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper....” Fed. R. Civ. P. 11(b) (emphasis added); see also Fed. R. Civ. P. 11(b), Notes of Advisory Committee on Rules, 1993 Amendments (discussing the revision as continuing the attorney’s duty past the initial filing of the case).

220. The 1993 amendments to Rule 11 also added a “safe harbor” provision, under which sanctions motions are served upon the opposing party, but are not filed or presented to the court unless within 21 days the challenged allegations, claims or pleadings have not been withdrawn or corrected. See Fed. R. Civ. P. 11(e)(1)(A).


222. See, e.g., Jamerson v. Vandiver, 934 P.2d 1199, 1200 (Wash. Ct. App. 1997) (affirming award of sanctions where adult survivor’s claim for negligent supervision by adoptive parents was dismissed as time-barred); see also Humphrey v. Humphrey, 614 So. 2d 837, 846-47 (La. Ct. App. 1993) (affirming award of fees and other expenses incurred by mother defending against groundless and harassing custody suit by grandmother alleging, inter alia, sexual abuse); Black v. Dallas County Child Welfare Unit, 835 S.W.2d 626, 637 (Tex. 1992) (affirming award of attorney’s fees as sanctions where government attorney pursued groundless case to remove children from family based upon allegations of sexual abuse).
stances depends, as it should, upon a careful weighing of the particular legal and factual circumstances of the individual case.223

Where the investigation of facts, rather than the adequacy of the legal argument, provides the basis for sanctions, the court may have a more difficult task. In the Bernardin case, the admissibility of the psychiatric evidence was legally questionable, and further investigation—possibly even just the passage of additional time—would have revealed the implications of the hypnotist’s lack of competence and failure to follow recommended procedures, among other things. Given the inadmissibility of the plaintiff’s hypnotically-produced evidence, sanctions against Cook’s attorney may well have been appropriate, even though the Cardinal’s legal representation was apparently provided on a pro bono basis,224 in order to deter other lawyers from filing charges in a similarly precipitous fashion. Cardinal Bernardin, however, instructed his lawyers not to file any form of “countersuit,” lest it deter genuine victims of sexual abuse from coming forward.225

It is much harder to assess the adequacy of sanctions in a case like Feld v. Feld, which was likely to culminate, as many do, in an in-court contest between the sworn testimony of parent versus child and a choice between the conflicting testimony of expert witnesses on behalf of each party. If the case had gone to hearing, the judge presiding over it would likely decide the sanctions motion as well and would have first-hand experience of the parties to enable him or her to assess their credibility. By contrast, where, as here, the complaint was dismissed prior to trial, an assessment whether it was sanctionable would be extremely difficult.

At any rate, the Felds did not ask for sanctions in the original case, despite their subsequent allegation that their attorneys’ and expert witness fees had amounted to $50,000, but apparently preferred to pursue the attorney alone in a subsequent proceeding.226 By contrast, unless a strictly legal issue forms the basis for sanctions, sanctions motions are typically brought not against the attorney but against the client, or against the attorney and client together.227 Where the lack of foundation

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223. Thus, for example, sanctions against an attorney have been upheld in a childhood sexual abuse case where those claims, which were based on negligent supervision, were time-barred, see Jamerson, 934 P.2d at 1200, but were rejected in another case, where plaintiff’s counsel presented substantial legal arguments that the statute of limitations had not run as to certain of the alleged acts of abuse. See Cassidy v. Smith, 817 P.2d 555, 557-58 (Colo. Ct. App. 1991).


225. See id.


227. For example, in the Cassidy and Jamerson cases, the sanctions action was brought against the party’s attorney only. See Cassidy, 817 P.2d at 556; Jamerson, 934 P.2d at 1200. By
is primarily factual, it seems particularly appropriate to include the
source of the allegations—the client—as a defendant in the sanctions
motion. This is in stark contrast to the collateral suit by the Fields, where
only the attorney and not the daughter was sued. Perhaps a reluctance
to hold the daughter herself accountable for her memories guided the
parents’ selection of remedies, but failure to raise these issues in a mo-
tion for sanctions in the original lawsuit does raise questions about the
purpose of the subsequent lawsuit. Rather than to deter a party from
making groundless allegations, it appears instead to have been intended
to punish the particular attorney who represented the daughter in her
civil damage suit—and to send a deterrent message to attorneys taking
childhood sexual abuse cases in general. In short, filing a motion for
sanctions against both the daughter and her attorney in the underlying
lawsuit would have been a more appropriate course of action.

In this respect, it is helpful to return to the balancing of interests
that was reflected by the passage of sanctions legislation—between vic-
tims’ right of access to the courts for compensation, on the one hand,
and compensation to defendants forced to defend against false accusa-
tions, on the other. The Texas Supreme Court considered this balance in
a case involving apparently unfounded allegations of sexual abuse. The
court upheld sanctions against a government attorney who prose-
cuted an unsuccessful suit to take a minor child away from her parents
based on allegations of sexual abuse. Affirming the appropriateness of
sanctions under Texas’ version of Rule 11, the court emphasized:

This case involves a delicate balancing test between two competing
interests: the need to protect children from abuse and the need to pro-
tect families from governmental overreaching and unnecessary inter-
ference. In order to achieve a proper balance, the legislature has en-
acted laws authorizing the state to pursue legal action to remove

contrast, in Humphrey, where the court found that the sexual abuse charges against the mother
constituted purposeful harassment by the child’s grandparents, the court assessed sanctions against
the party—the grandparents. See Humphrey, 614 So. 2d at 846-47. In other cases, sanctions are
sought against both the party and attorney, although the court may uphold sanctions against one
and not the other. See, e.g., In re Marriage of Stockham, 928 P.2d 104, 108 (Kan. Ct. App. 1996)
(affirming award of attorney’s fees as sanctions against former wife, whose allegations of sexual
abuse were found to have been frivolous and not made in good faith, but not against wife’s attor-
ney).

228. See Feld, No. 1374.
229. By the time of the filing of the second lawsuit, Mr. Feld was employed as a staff person
at the FMSF, and such a tactic would have fit within the FMSF litigation strategy.
232. See id. at 627-30.
children from abusive homes, while permitting a private citizen to re-
cover attorney’s fees for an agency’s prosecution of a legal cause of 
action that is frivolous, unreasonable or without foundation. 233

If this balance is an appropriate one in a case involving the extreme 
intrusion of removing a minor child from her family, it should apply 
with equal force to a civil suit for childhood sexual abuse. 234 In this 
context, the comparable interests to be balanced are those for compen-
sation of the plaintiff, and thus deterrence of child sex abuse through the 
tort system, over and against the damages incurred in defending a law-
suit brought by an adult child. If the taint of being accused of sexual 
abuse, plus the threat of losing custody over a minor child, can be com-
pensated by sanctions and the award of costs of defending the lawsuit, 
as in the Texas case, 235 the same remedy appears appropriate to remedy 
the injuries incurred in the successful defense of allegations by an adult 
child. The sanctions may also be reported in the media, thus providing 
an important kind of public vindication for the defendant. Thus, in es-
sence, sanctions may result in a free lawsuit to clear one’s name.

In sum, the courts have repeatedly found that an action for sanc-
tions is an adequate remedy against nonmeritorious proceedings of vari-
ous types, and it appears to be an appropriate one for cases involving 
claims of recovered memories of abuse as well. Even though damages 
beyond the costs involved in defending the case are unavailable in an 
action for sanctions, it is possible to raise the adequacy of the attorney’s 
factual investigation in a way that is not possible in most jurisdictions 
through a suit for malicious prosecution. Relief, and thus restoration of 
a falsely accused party’s reputation, are also available without the de-
lays attendant upon a collateral action. Given the significant societal 
interests to be balanced in any remedy which impacts upon plaintiffs’ 
access to the courts for compensation, sanctions provide an excellent, if 
a compromise, solution.

E. Defamation

Both the Bernardin and Feld cases attracted attention in the media, 
although coverage of the Feld case was limited to a few articles in local

233. Id. at 627 (citations omitted).
234. Of course, there are differences between the two contexts as well. Practically speaking, 
sanctions will operate more vigorously against a typical attorney in private practice than against a 
government attorney, who is almost certainly indemnified for such sanctions.
235. See Black, 835 S.W.2d at 627-30.
Pennsylvania papers and a couple of brief television appearances. By contrast, the allegations of sexual abuse filed against Cardinal Bernardin became headline news on television, radio, and in the national and international press. Indeed, Cook's attorney admitted that he filed the complaint to coincide with the opening of the National Conference of Catholic Bishops so as to maximize and make use of the media attention.

The use of the media in support of litigation in this way is not unusual. The practice of holding a press conference to announce the filing of a lawsuit has become common. Government lawyers announce indictments and the filing of major lawsuits, and report on their activities involving identified individuals; civil lawyers do the same to announce the initiation of class actions; and groups united around various causes publicize their legal actions in the media at the time of filing. When individuals are sued, however, this publicity compounds the lawsuit's damage to their reputation and also raises the possibility that pretrial publicity will deprive them of a fair trial. If the lawsuit is based on unfounded allegations, these damages are grievous. On the other hand, the public has a right to know what is happening in its public bodies, including news about pending litigation. Although a full discussion of the complex questions raised by this issue, including First Amendment concerns, deserves separate treatment, we deal here with a narrow subset of those questions—those that arise when an individual is sued for childhood sexual abuse by an adult survivor and her attorney comments on the case in the press.

237. For a discussion of the media coverage of the Bernardin case and its effects, see DOPPELT, supra note 6, at 2-11.
238. See id. at 3.
239. See, e.g., Kilgore v. Younger, 640 P.2d 793, 795-96 (Cal. 1982) (alleging defamation based upon Attorney General's dissemination of report on organized crime at a press conference, in which plaintiff was listed).
240. See, e.g., Green Acres Trust v. London, 688 P.2d 617, 619-20 (Ariz. 1984) (alleging defamation based upon reporter's conversations with defendant lawyers, when statements from that conversation later appeared in an article published on the day the class action was filed).
241. See RESTATEMENT (SECOND) OF TORTS § 611 cmt. a (1977) (describing the basis of the privilege for reports of official proceedings as "the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings"); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 115, at 836 (5th ed. 1984) (describing further this privilege as resting upon the idea that members of the public could see and hear the statements for themselves if they were present) [hereinafter PROSSER ON TORTS].
1. Defamation Claims Against Attorneys

Rule 11 and malicious prosecution actions cannot be used to punish a lawyer for extra-judicial statements, such as holding a press conference to announce a lawsuit or making statements to the press in seeking publicity for the lawsuit.\(^{242}\) For these purposes, an aggrieved party must turn to the law of defamation. False statements that an individual is guilty of sexually abusing a child fall squarely within the area generally deemed defamatory *per se*.\(^{243}\) If such a publicly-made statement were untrue, it might appear that the individual accused should be compensated. However, in recognition of the conflicting interests involved—the defendant’s reputational interest and right to a fair trial, on the one hand, and both the public’s right to know and the need of the parties and their lawyers to be free to investigate and detail their complaints to the court, on the other hand—the common law protects even untrue statements with an absolute privilege when they are made in the course of a judicial proceeding.\(^{244}\) This privilege clearly protects all the statements made in a complaint, but it does not extend to the press conference context.\(^{245}\) A more qualified or conditional privilege does protect the media, however, so long as its report of the pleadings is a fair and accurate one.\(^{246}\) Thus, reporters who hunt for stories by checking the day’s legal filings are protected from liability for defamation, so long as

\(^{242}\) See *In re Kunstler*, 914 F.2d 505, 520 (4th Cir. 1990).

\(^{243}\) See *Bryson v. News Am. Publications, Inc.*, 672 N.E.2d 1207, 1214-15 (Ill. 1996) (stating that words that impute the commission of a criminal offense are defamatory *per se*); see also *Prosser on Torts*, supra note 241, § 111, at 775 (stating that to say that someone is immoral, has made improper advances to women, or has done a thing which is oppressive or dishonorable qualifies as defamatory on its face).

\(^{244}\) This privilege is described in the Restatement of Torts as follows:

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

RESTATEMENT (SECOND) OF TORTS § 586. For cases describing the relationship of the absolute privilege to the necessity of parties to have leeway to fully investigate and detail their claims, see *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 698 (8th Cir. 1979); *Sullivan v. Birmingham*, 416 N.E.2d 528, 531 (Mass. App. Ct. 1981) (quoting *Asay*, 594 F.2d at 698). For a description of the necessity of allowing attorneys great latitude in pleadings, see *Birnbaum, supra* note 113, at 1043-44.


\(^{246}\) The Restatement describes this privilege as follows: "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported." RESTATEMENT (SECOND) OF TORTS § 611.
they describe the complaint with accuracy and do not give an entirely one-sided account.

A different question is presented when the plaintiff's attorney calls a press conference to announce the filing of the complaint and to comment on it. At this point, even though the attorney was protected by an absolute privilege for statements in the complaint, that privilege is lost when the same statements are disseminated to the public.247 The rationale for this distinction is that the absolute privilege should be limited to situations under judicial control, that is, where the judge may reprimand, sanction, or otherwise punish the attorney who abuses the privilege and also expunge irrelevant or clearly defamatory statements from the public record.248 By contrast, the attorney's statements at a press conference are protected, at most, by a qualified privilege.249 Thus, an attorney is safe from liability for defamation only if he simply quotes or fairly describes the allegations of the complaint to the press.250

The qualified privilege afforded to statements beyond those made in the pleadings or in actual court proceedings may be lost, however, if the privilege is abused through actual malice or excessive publication,251 as well as in situations where the extra-judicial statements stray too far from a fair statement of the public record.252 In one class action alleging fraudulent practices relating to pre-paid funerals, for example, plaintiffs' attorneys held a press conference that resulted in claims being brought against them for defamation.253 Given that the qualified privilege derives from the social utility of protecting certain types of statements made in response to a legal, moral or social duty, the attorneys argued that their statements furthered an important public interest in warning elderly people about this fraudulent business.254

247. See Bradley, 106 Cal. Rptr. at 724; Cappello, 644 A.2d at 102-03; Barto, 378 A.2d at 930.
248. See Asay, 594 F.2d at 697; Johnston v. Cartwright, 355 F.2d 32, 36 (8th Cir. 1966).
249. See, e.g., Capello, 644 A.2d at 103; Barto, 378 A.2d at 930.
250. The source of the information—news reporter or attorney—makes little difference to the qualified privilege, so long as the report of the public documents is an accurate one. The Restatement (Second) of Torts states that, although the privilege is typically exercised by the media, "[i]t is not . . . limited to these publishers. It extends to any person who makes an oral, written or printed report to pass on the information that is available to the general public." RESTATEMENT (SECOND) OF TORTS § 611 cmt. c; see also id. § 611 cmt. f (discussing the requisite standards for the accuracy and fairness of the report).
251. See Green Acres, 688 P.2d at 624.
252. See RESTATEMENT (SECOND) OF TORTS § 611 cmt. f (stating that the report need not be exactly accurate but must be a "substantially correct account of the proceedings").
253. See Green Acres, 688 P.2d at 619.
254. See id. at 624-25.
Supreme Court, sitting en banc, rejected this argument, holding that this did not constitute the type of special duty traditionally protected by the qualified privilege. Thus, an attorney who portrays the allegations in a particular case to the press as an example of a more general social problem does so at her own risk. In the context of abuse survivor suits, therefore, a perceived need to warn members of the public about an alleged abuser in their midst will not protect an attorney who publishes information about the case beyond that to which the public is already entitled by its right to information about public legal proceedings.

In short, in light not only of the law of defamation but also of an attorney's ethical obligations in relation to pretrial publicity, the attorney calling a press conference is skating on thin ice. As one court said, "an attorney who wishes to litigate his case in the press will do so at his own risk." In holding the attorney responsible in this fashion, the courts are concerned with protecting a defendant not only against excessive and possibly false publicity prior to adjudication of the charges but also against the possibility that a party may have filed the lawsuit against him solely to gain the immunity of making a defamatory statement in a judicial proceeding. In the latter situation, the allegations could then be publicized with impunity prior to dismissing the lawsuit—a possibility that cannot be ruled out if the source and publisher of the allegedly defamatory statements are the same. Some jurisdictions add protection against this danger by refusing to extend the privilege covering the report of a judicial proceeding until more has happened than just the filing of the complaint—less than a final resolution, certainly, but after some type of action has been taken by the court. In other words, the party filing suit must proceed to litigate the case before gaining the shield of absolute immunity even for statements in the complaint. When an attorney moves beyond the statements of the public

255. See id. at 625.
257. The Restatement (Second) of Torts and other authorities address this problem and state that the privilege will not extend to this scenario. See RESTATEMENT (SECOND) OF TORTS § 611 cmts. c, c; see also Green Acres, 688 P.2d at 626 ("One exception [to the extension of the privilege beyond the media] is the speaker who by design uses the privilege to republish defamation he previously made during the public proceeding. The privilege does not sanction self-serving republication." (citation omitted)).
document to commentary upon the case, however, liability for defama-
tion is clearly possible.

In sum, the law of defamation can provide a party who is falsely
accused of sexual abuse with a remedy for damages caused by public
commentary on those allegations by opposing counsel.

2. Application to the Feld Case

The immense press coverage of the Bernardin case—unique to a
lawsuit involving such a well-known figure—would require separate
and lengthy treatment to do it justice. The Feld case, by contrast, pro-
vides an excellent opportunity to examine the legal standards governing
defamation by an attorney in a manageable context. In Feld, the
daughter’s complaint against her parents was filed on November 19,
1990, and an article appeared in the Scranton Times the following day
reporting its filing and some of the allegations in it. The article quoted
or closely tracked the language of the complaint. As discussed above,
the absolute privilege for allegations made in a complaint, combined
with the qualified privilege for “fair comment,” protects these state-
ments from forming the basis for a defamation suit.

By contrast, the following September, after further judicial proceedings had presumably
transpired, several more articles about the case appeared, which were
subsequently attached as exhibits to the Felds’ complaint against their
daughter’s attorney. Two of these articles relied almost entirely upon
Amy Feld and the complaint as sources, with the exception of several
comments in one article by her attorney about the history of incest cases
in Pennsylvania in general and about her own experience with them in
particular. Whatever material is susceptible of defamatory interpreta-

259. We should reemphasize at this point that the Feld suit is being used solely as an illus-
tration. It did not include a count for defamation, but pled the publicity-related issues as negligent
inflation of emotional distress and invasion of privacy. See Feld, No. 1374 at ¶ 74-88.

260. See Feld v. Feld, No. 90-CV-6667 (Ct. C.P., Lackawanna County, Pa. filed Nov. 19,
1990); see also Feld v. Wasser, No. 1374 (Ct. C.P., Phila. County, Pa. filed Mar. 19, 1996) at ¶ 15
(stating that the original lawsuit was filed on Nov. 19, 1990).

261. See Woman Sues Her Parents for ‘Assaults,’ SCRANTON TIMES, Nov. 20, 1990; see also
Feld, No. 1374 at ¶ 16 (stating that the article appeared on Nov. 20, 1990).

262. See discussion supra Part III.E.1.

263. See Feld, No. 1374 at ¶¶ 28-32 and Exhibits F and G thereto.

264. See Kennedy, supra note 29, at I-B; Erin Kennedy, When Parents Are ‘Bad People,’

265. See Kennedy, supra note 29, at I-B. The article included the following statements:

Amy Feld’s attorney, Nancy D. Wasser, said past Pennsylvania incest cases had
been settled out of court, mostly to avoid publicity and more pain for the families.
The Feld family could face off in court as early as the spring, Wasser said.

Incest cases “are risky on several levels, because it’s emotional and it’s legally
tion in those articles, in other words, was published by the Felds' daughter, raising once again the question why the Felds did not proceed directly against her, rather than against her attorney.

An article published in a local paper, however, quoted Ms. Feld's attorney more extensively, including her statement that "[t]his is one of the most disgusting cases I ever handled." This appears to be the most extreme statement about the case made by the attorney in the written media. As extreme as this statement may sound, a court would be unlikely to find it defamatory because of the well-recognized exception to defamation for statements of opinion. As the Supreme Court confirmed in *Hustler Magazine, Inc. v. Falwell*, a case concerning comments in *Hustler* magazine about evangelist Jerry Falwell's mother, statements of opinion are constitutionally protected. Thus, for example, in the context of an Ohio case for sexual harassment, the plaintiffs' lawyer told the press that "'[t]hese claims are the worst I've seen, short of rape.'" When this statement was subsequently challenged as defamatory, the court held that it could not reasonably be interpreted as defamatory because it was merely the attorney's opinion about the seriousness of the case—"rhetorical hyperbole," rather than a statement of objective fact. In short, attorneys' statements of opinion are typically held not to be susceptible of defamatory meaning.

Despite this protection, persons accused of childhood sexual abuse
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do have an avenue for the potential recovery of damages when (1) the opposing attorney disseminates information about the case against them to the press or public at large, (2) the statements made go beyond a fair and accurate account of the contents of a pleading or description of a public proceeding, and (3) the statements are not clearly hyperbolic expressions of opinion. Within these limits, if the attorney publishes false statements of fact about them, the individuals injured are entitled to recover for the harm to their reputations. Like an action for sanctions, moreover, and unlike malicious prosecution, the defamation claim may be brought prior to conclusion of the underlying lawsuit for abuse, and even as a counterclaim within it.274 Given that recovery for defamation can be defeated by an affirmative defense showing that the allegedly defamatory statements are true,275 however, the judge deciding the defamation question is likely to await determination of the underlying case before awarding damages for this reputational harm.

Finally, it is important to remember that persons falsely accused in a sexual abuse lawsuit have a remedy directly against the source of any inaccurate allegations: they can sue the plaintiff herself for defamation. She, of course, would be covered by the same system of constitutional privileges, and might also respond by publicizing an affirmative defense of truth.

F. Invasion of Privacy and Intentional Infliction of Emotional Distress

Claims for invasion of privacy and/or for intentional infliction of emotional distress are frequently included as additional counts when attorneys are sued for malicious prosecution and/or defamation.276 Because these counts stand or fall together for a variety of reasons—
reasons which are themselves similar to those upon which actions for malicious prosecution or defamation are judged—we treat invasion of privacy and intentional infliction in a combined and rather brief section.

1. Invasion of Privacy

Similar conduct can form the basis for a defamation suit and an invasion of privacy claim. Indeed, in the *Feld* case, the attorney’s comments on the case to the media were pled not as defamation but rather under the rubric of invasion of privacy. As Prosser and Keeton point out, however, the interests protected by the two torts are distinct: defamation is intended to protect the interest in a good reputation, and invasion of privacy is to protect the interest in being left alone. The Restatement includes four types of privacy rights that are protected, one of which is appropriate here—section 652D, which describes the public disclosure of private facts that "would be highly offensive to a reasonable person." Matters involving both sex and family quarrels are explicitly noted as falling into this category, so the facts of the typical sexual abuse case would be included.

However, the privacy right described does not apply to matters that are "of legitimate public interest." For this reason, if the matters publicized amount to an accurate recitation of the public record, such as the allegations of a complaint, they do not fall within the protected sphere. Indeed, as the Restatement commentary notes, it is possible to become an involuntary public figure in this respect, by either being accused of a crime or becoming the victim of a crime that attracts public attention. Once a lawsuit has been filed, therefore, an argument cannot be maintained that the defendant’s privacy has been unlawfully invaded by dissemination of the allegations in the complaint to the public.

The law of invasion of privacy also tracks the law of defamation in other respects. The Restatement explicitly provides that the rules concerning both absolute and conditional privileges which are applicable to defamation cases apply equally to the publication of any matter that

278. See PROSSER ON TORTS, supra note 241, ¶ 117, at 864.
279. RESTATEMENT (SECOND) OF TORTS § 652D(a).
280. See id. ¶ 652D cmt. b.
281. Id.
283. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. f.
might otherwise constitute an invasion of privacy.\textsuperscript{284} Thus, the viability of a claim for invasion of privacy against an attorney bringing a sexual abuse claim is subject to essentially the same analysis already described in connection with defamation.\textsuperscript{285} In short, if the attorney injures the defendant by making untrue extrajudicial statements that go beyond the allegations of the complaint, the defendant may seek to recover for those injuries under both defamation and invasion of privacy.

2. Intentional Infliction of Emotional Distress

Counts for intentional infliction of emotional distress are also regularly added to malicious prosecution or defamation claims against attorneys.\textsuperscript{286} (Given the courts' rejection of third-party actions for negligence against attorneys, an action for negligent infliction of emotional distress is unavailable in this context.)\textsuperscript{287} The Restatement defines intentional infliction of emotional distress as "extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress to another."\textsuperscript{288} The courts have thus far been adamant, however, that "[t]he mere filing of [a lawsuit] that [the] plaintiff was forced to defend ... even if [it was] entirely baseless, does not, as a matter of law, constitute extreme or outrageous conduct."\textsuperscript{289} Moreover, as one commentator opines, the courts are unlikely to view any of the attorney's conduct in prosecuting a case as extreme and outrageous unless there is an absence of probable cause for having brought the lawsuit in the first place, which would allow recovery in a malicious prosecution proceeding instead (or as well).\textsuperscript{290}

Consequently, an attorney's liability for intentional infliction of emotional distress, like that for defamation, will turn upon statements made outside the pleadings and judicial proceedings, such as statements at a press conference that go beyond those set out in the complaint.\textsuperscript{291} In this context, however, courts have also extended the privileges available

\textsuperscript{284} See id. § 652F (absolute privilege); id. § 652G (conditional privilege).
\textsuperscript{285} See discussion supra Part III.E.
\textsuperscript{286} See sources cited supra note 276.
\textsuperscript{287} See supra Part III.A. Thus, negligent infliction of emotional distress has been held to be unavailable in the absence of inferring a duty running from the attorney to the third party. See, e.g., Langeland v. Farmers State Bank, 319 N.W.2d 26, 30-31 (Minn. 1982).
\textsuperscript{288} RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).
\textsuperscript{289} Denenberg v. American Family Corp., 566 F. Supp. 1242, 1252 (E.D. Pa. 1983) (emphasis added); see also Birnbaum, supra note 113, at 1050 (stating that it is doubtful that filing an unjustified medical malpractice suit would be outrageous conduct).
\textsuperscript{290} See Birnbaum, supra note 113, at 1050.
\textsuperscript{291} See, e.g., Denenberg, 566 F. Supp. at 1252.
under defamation law to cover all civil liability for the same conduct, including counts for intentional infliction of emotional distress. Their rationale is that to do otherwise allows the circumvention of the important public policies reflected in the privileges by simply pleading the same facts under another label. Thus, an attorney’s exposure to damages under this tort will once again stand or fall based upon his or her liability under the tort of defamation. Courts are unlikely to impose liability under any of the three torts, moreover, if the statements alleging that the defendant sexually abused his child are in fact true.

Although the three torts—defamation, invasion of privacy, and intentional infliction of emotional distress—are based upon the same conduct, and will stand or fall upon the same facts, pleadings that remain true to the interests protected in these cases would only allege defamation. Where the facts of a baseless lawsuit are publicized, the defendants are centrally concerned about the harm to their reputations, not with some more abstract interest in being “left alone.” Moreover, except in the unlikely case that an attorney bringing suit on behalf of an abuse survivor is personally “out to get” the defendant and is doing so by filing a clearly baseless lawsuit against him, the core of the intentional infliction of emotional distress tort is not implicated, either. The onus of the complaint is essentially one for defamation, and the reputational harm involved should be pled as such.

IV. THE APPROPRIATE LEGAL RESPONSE

To return to the questions posed at the outset of this Article, how should the legal system respond to the collision of rights and interests presented by a suit against an alleged abuser by an adult survivor of childhood sexual abuse? Is imposition of liability upon the plaintiff’s attorney an appropriate legal response? In this section, we both summarize the conclusions to be drawn from our discussion of potential legal remedies and present our concluding thoughts about the most appropriate response from the standpoint of law, policy, and the relations among the human beings involved.

First, actions against attorneys bringing claims based on recovered


294. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977) (stating that as long as the publicized information is true, it does not matter that it would be highly offensive to anyone).
memories of abuse should not be based upon theories of negligence or malpractice. Just as these claims have been rejected in other settings, they should be rejected on policy grounds in this context as well, because they raise severe conflicts of interest and negatively impact upon plaintiffs' right of access to the courts. Arguably, negligence actions might be allowed but confined to situations of gross negligence, but the existence of other, more appropriate remedies for the falsely accused party and the pitfalls involved in opening the courts to such actions lead us to reject this alternative.

Malicious prosecution actions against attorneys may be appropriate in a certain category of cases—those in which the survivor’s action has been adjudicated and rejected on the merits, and the court is also satisfied that it was brought without probable cause—a standard that is not satisfied merely by evidence of attorney negligence. Given the general policies that have led courts to limit such claims, judges should be particularly conservative in making these probable cause determinations, keeping in mind the contested and complex character of the science, therapeutic practices, and differing possible good-faith interpretations of statements regarding memories in these cases. On the other hand, there are indeed cases which an attorney should not initiate, and cases from which an attorney should seek to withdraw. The law of malicious prosecution is an appropriate remedy in those circumstances. However, the analysis in this Article supports an interpretation of the “favorable termination” requirement for a malicious prosecution suit as limited to cases where the previous suit has been adjudicated and dismissed on the merits. This interpretation is essential in order not to deter settlements that are otherwise in the interests of the parties, and also to ensure that attorneys who settle cases for reasons extraneous to their merits will not be exposed to liability.

Realistically, however, malicious prosecution is a difficult action to sustain against an attorney, and it cannot serve as a vehicle to police lawyers’ competence, the thoroughness of their investigations, and the like. Because of these limitations, the most appropriate remedy in most cases for an individual falsely accused of sexual abuse is an action for sanctions, which includes an inquiry into whether the attorney made a reasonable investigation into the truth of the allegations of the complaint and which places him or her under a continuing duty in this respect. The damages available from sanctions are limited to legal costs and attorneys’ fees, and thus will not compensate for the emotional dis-

295. See supra Part III.B.1.
tress, injuries to the family, and reputational damage that may have been suffered, but such a limitation seems justified in light of the conflicting interests involved. To treat cases resting upon recovered memories differently from other lawsuits in this respect would impose heavy burdens upon attorneys taking remembered abuse cases—burdens far beyond those they bear in other types of litigation. It is inappropriate to demand that lawyers act as insurers of their clients’ claims in this category of cases alone. Moreover, given that genuine victims of abuse in such situations would be especially vulnerable to self-doubt and to fears about being believed—fears that are often specifically inculcated by incest perpetrators—treatment of them as non-credible by their attorneys might prevent genuine abuse victims from proceeding with well-founded cases.

Finally, an action for defamation provides an appropriate and adequate remedy for situations in which the attorney bringing a complaint for childhood sexual abuse publicizes the allegations outside of court. Although the attorney’s statements are constitutionally protected if they fairly track the language of the pleadings or constitute a fair expression of opinion, a lawyer should exercise care when making extrajudicial statements that may injure those named as defendants. Using the facts of a case under litigation as an example of a larger social harm is and should be risky business.

In sum, a party injured by groundless accusations of sexual abuse has a number of remedies against the opposing party’s attorney: actions for sanctions, for defamation, and, in a very limited number of cases, for malicious prosecution. Are these remedies adequate to compensate for the tragic consequences that may ensue if a childhood sexual abuse case has been brought without foundation? Given the unlikelihood of prevailing in a malicious prosecution case, and providing the attorney limits the damages by exercising caution about extrajudicial comments on the case, the injured party’s damages will be limited to the costs of defending the abuse case, which are obtainable on a motion for sanctions. He will not be made whole for the family turmoil, emotional costs, and stigma involved in being the object of allegations of sexual abuse. In this respect, however, he will not be worse off than defendants in other types of cases, for these and similarly painful damages are inflicted upon persons sued for divorce, child custody, spousal battery, sexual harassment, and fraud, for example. Courts have repeatedly noted this unfortunate side effect of allowing free access to the courts, and have

296. For a discussion of the conflicting interests involved, see supra Part III.D.1.
sympathized with the suffering of innocent persons who may be sued; they have also repeatedly noted that this is the price we must pay for civil government.\textsuperscript{297} In the words of one court:

\begin{quote}
We recognize that through an effort to protect every citizen's free access to the courts some innocent persons may suffer the publicity, expense and other burdens of defending ill-founded lawsuits. While this is regrettable, the chilling effect that a broad rule of attorney liability would have upon the legal system, and ultimately upon its popular acceptance as a means of dispute resolution, appears to outweigh the value of the protection it would afford to those who might be deemed “innocent” defendants.\textsuperscript{298}
\end{quote}

In addition to this general weighing of the right of access to the courts against the burdens upon innocent parties, however, we return, in closing, to consider the particular balance of interests at stake in litigation over childhood sexual abuse. On the one hand, we do not want to keep a survivor of sexual abuse out of court by making her unable to get an attorney to represent her. Nor do we wish to hand to parents who actually did commit the acts of which they stand accused easy legal weapons to use in efforts to punish the victims and lawyers who call them to account for their often difficult-to-prove misdeeds. On the other hand, we want to avoid haling people into court and accusing them ofchild abuse when they do not deserve to be treated in this way. An inevitable tension results from entertaining these conflicting goals. If we do not want to give up either one, as we argue should not be done, the legal system is required to compromise between fully compensating persons who have been accused and deterring those who believe they have been abused from airing their complaints in court. Actions for sanctions represent this type of compromise: although they do not afford full compensation for the injuries suffered, other forms of liability have an impact upon important social policies that we should not be willing to tolerate.

Finally, stepping away from the strictly legal context of this discussion, on whom do we in fact wish to place the responsibility for the tragedies that may result from false accusations of sexual abuse? Should attorneys be the gatekeepers to the court in these cases? From a human

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\item \textsuperscript{297} "It remains a valid truism that '[s]uch ordinary trouble and expense as arise from the ordinary forms of legal controversy should be endured by the law-abiding citizen as one of the inevitable burdens which men must sustain under civil government.'" Berlin v. Nathan, 381 N.E.2d 1367, 1377 (Ill. App. Ct. 1978) (quoting Smith v. Michigan Buggy Co., 51 N.E. 569, 572 (Ill. 1898)).
\item \textsuperscript{298} Wong v. Tabor, 422 N.E.2d 1279, 1286 (Ind. Ct. App. 1981).
\end{itemize}
\end{footnotesize}
ATTORNEY LIABILITY IN RECOVERED MEMORY CASES

standpoint, the answer is no; indeed, charging them with this responsibility may in fact be counterproductive of the social goals at stake. One thing the legal actions discussed in this Article share is their avoidance of a direct confrontation between the person accused of sexual abuse and the person alleging that it occurred. This avoidance, as in cases brought against survivors’ therapists, essentially denies the adulthood and moral agency of the person whose memory is the source of the allegations of abuse. She is neither confronted directly nor held responsible for the consequences of her actions, unless she is joined as a defendant to the lawsuit against her attorney, or is sued directly for malicious prosecution, defamation, and/or intentional infliction of emotional distress. It is psychologically understandable why, for example, a father might be reluctant to confront his daughter in this way, but it is essentially dishonest about the human interactions at issue. The source of the allegations set forth in the complaint, and of the attorney’s information in general, is the client. And from the standpoint of a genuine resolution of the interpersonal issues involved, whether abuse occurred or not, it is questionable whether a suit against the attorney will be helpful. Should Cardinal Bernardin have sued Steven Cook’s lawyer to obtain compensation for the suffering caused by ill-founded allegations of past sexual abuse? Instead, Bernardin pursued the usual route to resolve issues of this sort, that is, a vigorous defense of the lawsuit filed against him; and he was in fact vindicated four months after the complaint was filed.

In his last book, Cardinal Bernardin detailed the immense pain he suffered during this period in his life; but he also described the road that ultimately led to a genuine resolution of the conflict—his direct confrontation with the other human being, his accuser, which resulted in reconciliation between them. He described the scene that took place between them as follows:

I looked directly into his eyes. “I have never abused you. You know that, don’t you?”

Steven nodded. “Yes,” he replied, “I know that, and I want to apologize for saying that you did.” Steven’s apology was simple, di-

299. See Dangerous Direction, supra note 47, at 633-37 (discussing the effects of third-party-liability suits on the accuser).

300. Again, we stress that we are not urging parents to sue their children. In many cases, discussions outside of legal fora seem far more likely to yield productive consequences for the family involved than do lawsuits.

301. See supra notes 17-24 and accompanying text.

302. See BERNARDIN, supra note 16, at 34-41.
rect, deeply moving. I accepted his apology. I told him that I had prayed for him every day and would continue to pray for his health and peace of mind.


Never in my entire priesthood have I witnessed a more profound reconciliation. The words I am using to tell you this story cannot begin to describe the power of God’s grace at work that afternoon.

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As we flew back to Chicago that evening, . . . I felt the lightness of spirit that an afternoon of grace brings to one’s life. I could not help but think that the ordeal of the accusation led straight to this extraordinary experience . . . .

Thus, ironically, the Bernardin case can be interpreted as one that demonstrates the strength of the adversarial system in providing a remedy for false accusations—and, indeed, of the benefits of widespread media attention, as reporters’ own investigations helped to uncover the truth. But a reconciliation of the previously contending parties—one that restored peace to both—required a courageous leap that no attorney, judge, or court system could have brought about.

303. Id. at 37-38, 39, 40. We express no specific opinion about the attorney’s conduct in the Bernardin case, but note that it obviously does not further clients’ interests to rush suits forward without adequate time for investigation or thought, as appears to have been done there (in part, because Mr. Cook was dying of AIDS).