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Recent Case

RECENT CASE

MALICIOUS PROSECUTION — ATTORNEY — CLIENT

> "As you reread the decision carefully several times, its implications grow. Some lawyers have actually remarked that it cannot mean what it so plainly says - - that if someone maliciously and falsely makes a complaint against a lawyer to an Ethics Committee and as a result the lawyer suffers no matter how great a loss professionally or financially, he cannot recover in a civil action."[1]

Such is a sample of the comments which have followed the decision of the New Jersey Supreme Court in *Toft v. Ketchum.*[2] The decision was followed by a re-hearing at which the court considered a brief submitted by the State Bar Association. The court affirmed its prior decision.

Because of the importance of this decision to the public and members of the professions, this note is written to inform and report rather than to weigh or persuade the reader.

Plaintiff was an attorney against whom a complaint had been filed with the county ethics and grievance committee charging him with improper conduct.[3] Subsequently plaintiff brought an action for malicious prosecution aginst the one who filed the complaint. The attorney's action was dismissed on the ground that it failed to set forth a cause of action. The dismissal was upheld by the state supreme court in the instant case.

After disposing of preliminary questions raised in the arguments, Chief Justice Vanderbilt, for the majority, wrote:

> "The basic question before us is whether public policy requires that the filing of a complaint with an ethics and grievance committee be privileged."[4]

The majority opinion then considers "two conflicting considerations of policy".

> "On the one hand, there is the injury that may be suffered by any attorney as a result of the institution of disciplinary proceedings against him on what turns out to be improper or groundless charges. Even if the charges against him are found to be baseless and the complaint is dismissed, he still may suffer from the public knowledge of these proceedings which may damage his reputation and injure his ability in the future to earn a living. . . .
>
> "On the other hand, however, it is in the public interest to encourage those who have knowledge of any unethical conduct of attorneys to present such information to the appropriate county ethics and griev-

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1 5 CHATTERBOX 7 (1955) New Jersey Bar Association publication.
2 113 A. 2d 671 (N. J. 1955).
3 Pursuant to R. R. 1: 16-1 et seq.
4 See note 2, *supra.*

ance committee so that this court may carry out its constitutional disciplinary duties."[5]

The majority cite the Pennsylvania case of *In re Chernoff*[6] concerning the purpose of disciplinary actions against attorneys:

> "The purpose of disbarment is not the punishment of the attorney, but the maintenance of the purity of the Bar. Disbarment is for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them."

It is then that the majority opinion decides that:

> "It is only through the cooperation of those with knowledge of unethical conduct on the part of attorneys that the court is made aware of such conduct as requires action on its part. It is thus in the public interest to encourage those who have such information to forward it to the court through the filing of complaints with the county ethics and grievance committees, free from any threats of or danger of a possible malicious prosecution suit against the complainant by the accused attorney or his friends. . . .
>
> "We therefore find that *the filing of a complaint with an ethics and grievance committee is privileged and that an attorney cannot predicate a malicious prosecution action or similar suit upon it.*" (Emphasis added.)

Although Justice Jacobs concurred with the result of the majority in dismissing plaintiff's action, he joined with Justices Wachenfeld and Burling in dissenting from the proposition that any complaint made about a lawyer to such a committee is privileged no matter how malicious or untrue it may be.

The Chief Justice suggested that, to deter malicious complaints, the supreme court "has at all times the inherent power to punish for contempt those who may file baseless complaints . . . and we should not hesitate to use this power if the circumstances warrant it to protect the interest of an aggrieved member of the bar."

There has been considerable comment on the efficacy of proceedings for contempt acting to deter baseless complaints while not discouraging honest, well-founded complaints. Justice Wachenfeld in his dissent stated:

> "I cannot understand how the filing of a knowingly false and malicious charge against an attorney before a grievance committee to advance private interests can be said to aid us in fulfilling our constitutional duty to maintain the high standards of the bar or to advance the public interest. To confer blanket immunity in such a situation will, in my opinion, have precisely the opposite effect. Those who have legitimate grievances against attorneys need no cloak of immunity as an inducement to file complaints with grievance committees. Granting immunity will only serve to encourage the use of disciplinary proceedings as privileged sanc-

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[5] *Ibid.*

[6] 344 Pa. 527, 26 A. 2d 355, 339 (1942).

tuaries to carry on personal vendettas and excursions of ill will disassociated from the true facts in a cause. It will weaken, rather than strengthen, the disciplinary process and will make a mockery of equity and justice."[7] An editorial in the *New Jersey Law Journal* also commented on this point:[8]

> "But if the majority be right, control of possible misuse through proceedings for contempt seems self-defeating. The risk of a proceeding for contempt could be as much of a deterrent to just complaints as a possible suit for damages. And in the former there would not be any jury, in which a layman would probably have more confidence."

The State Bar Association points out that "even though such a contempt were effected promptly and in full, it would not replace the lawyer's loss of reputation and finances. Bread would be indeed a stone for his family. The 'iffens' give little feeling of security."[9]

Not all of the discussion of the *Toft* case has centered around its practicality; members of the profession have also expressed concern about the principles upon which it apparently rests. A practicing attorney, after recognizing the role of the supreme court in "tightening controls over the conduct of practitioners in order to strengthen public confidence in the Bar," commented:[10]

> "It seems to me that there has been too great a tendency to lean over backwards to protect the innocent public from the unscrupulous lawyer, with the result that the dignity of the lawyer has grossly suffered. We are on our way to acquiring a sort of second-class citizenship, in which, ultimately, we will not even be allowed to bring suit to collect our accounts receivable."

The State Bar Association has listed a few of the many questions which have been asked following the *Toft* decision:[11]

> "By what part of the oath a lawyer takes upon admission does he give up his own guarantees in the constitutions he swears to uphold?
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> "If it is in the public interest to hold that any complaint to an Ethics Committee against a lawyer, including one which is malicious and false, is privileged, is it not equally in the public interest that all complaints against persons in all other professions and businesses — medical, dental, real estate, newspaper, accounting, etc. — be likewise privileged?
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> "Could and would the court create such a privilege on the basis of public interest? . . .
>
> "In a proper case, what redress would a lawyer have if he were aggrieved and the Court refused to protect him?"

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7 See note 2 *supra* at 678.
8 78 N. J. L. J. 212 (1955).
9 See note 1 *supra*.
10 Jerome J. Heyman, writing in *"Voice of the Bar"*, 78 N. J. L. J. 220 (1955).
11 See note 1 *supra*.

The above questions illustrate the reasons for the interest in the *Toft* case which has been generated in all the professions.[12] Whether the *Toft* decision will stand or be reversed; whether it will be limited to the legal profession or extended to other professions; or whether the entire procedure of filing complaints with ethics and grievance committees will be revised, are, of course, as yet undecided. The New Jersey State Bar Association has announced that it has made plans to ask the Supreme Court of the United States for leave to join in any appeal which may be made to it.[13]

> "This is a precedent setting case in which every lawyer in the country has an interest. What has happened in New Jersey, can happen elsewhere."[14]

HARMAN R. CLARK JR.

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12 Mr. Heyman, note 11 *supra*, commented: "Carrying the Chief Justice's argument ti its logical conclusion, the lawyer will now be denied the right to bring an action where a real estate broker, for example, will not be prohibited. Otherwise the Court will have to rule that the ethics complaint to the Real Estate Commission is not judicial, while the Bar Association proceeding is. Either way, the result would be wholly artificial and unacceptable as a legal proposition."

13 See note 1 *supra*.

14 *Ibid.*