CASE NOTE

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Guilt by Association: How "Standby Co-Counsel" Exposes Attorneys to Malicious Prosecution Liability

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Beware of "co-counsel" risks. That is the clear message in the California appellate decision, *Cole v. Patricia A. Meyer & Associates*[1]—a high-profile malicious prosecution case—and a warning to plaintiffs' attorneys who play a "standby" trial counsel role.[2] *Cole* is a cautionary tale involving two attorneys who allowed their names to be listed on litigation pleadings, yet never participated in the actual case. Essentially, they were standby co-counsel, meaning they agreed to assist only if the case proceeded to trial.[3] The case never made it to trial; instead, the defendant subsequently sued all attorneys listed as counsel of record for malicious prosecution.[4] The standby attorneys adamantly stressed their complete lack of involvement: "It is axiomatic that where there has been no act, there can be no liability."[5] Ultimately, *Cole* rejected this "passive counsel" defense,[6] and the court stated that the associated attorneys still had a duty to research the validity of the case.[7] Specifically, Justice Norman L. Epstein held:

1. Cole v. Patricia A. Meyer & Assocs., APC, 142 Cal. Rptr. 3d 646 (Ct. App. 2012), *pet. denied* (Aug. 29, 2012).

2. *See* Robert P. Ottilie's Reply to Christopher Cole's Answer to the Petition at 7, *Cole*, 142 Cal. Rptr. 3d 646 (No. S203895), 2012 WL 4006263 (criticizing the opinion because it "eviscerates the longstanding practice in the legal profession of associating counsel for limited purpose").

3. *See Cole*, 142 Cal. Rptr. 3d at 663–64 (describing the defendants' roles in the underlying case).

4. *Id.* at 651.

5. Boucher Respondents' Brief at 1, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 4073521; *see also Cole*, 142 Cal. Rptr. 3d at 663–66 (discussing the defendants' arguments).

6. The "passive defense" asserts that attorneys should not be liable for malicious prosecution if they never participated in the case, despite their status as counsel of record. For example, the defendants in this case described their passivity and detailed that they "did not draft or sign any pleadings or motions, propound or answer any written discovery, participate in any depositions, make any decisions regarding strategy, or discuss, accept, reject, analyze, or implement any strategy." Boucher Respondents' Brief at 27–28, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 4073521.

7. *See Cole*, 142 Cal. Rptr. 3d at 663 (describing the duty of care the counsel of record owes to their client).

> [A]ttorneys who appear on all of the pleadings and papers filed for the plaintiffs in [an] underlying case cannot avoid liability for malicious prosecution merely by showing that they took a passive role in that case as standby counsel who would try the case in the event it went to trial.[8]

Already deemed a "Blockbuster decision" due to its "far-ranging ramifications and implications," Ronald E. Mallen, a professional liability expert, cautioned that the decision "should create waves of concern for plaintiffs' lawyers."[9] For example, consider the common practice (often used in consumer litigation and class actions) where a small plaintiffs' firm enlists the help of a more prominent trial attorney.[10] In these situations, *Cole* will "create liability for all co-counsel who are merely identified in an action as co-counsel and have no responsibility to do anything until called upon to perform their limited role at trial."[11] As a result, these arrangements are discouraged "because it makes trial attorneys potentially liable for pretrial errors committed by other lawyers"[12] and attorneys do not want "to pick up that exposure."[13] Furthermore, this case raises precedent and policy issues.[14] One defense attorney criticized the holding

8. *Id.* at 651.

9. Samson Habte, *'Standby' Counsel Who Didn't Participate May Be Held Liable for Malicious Prosecution*, [2012–2013 Transfer Binder] 28 Law. Man. on Prof. Conduct (ABA/BNA) No. 14, at 414 (July 4, 2012), *available at* www.bna.com/standby-counsel-who-n12884910458/.

10. The Respondents argued:

> This arrangement is a common practice among California lawyers, and particularly with lawyers who specialize in representing plaintiffs, but who practice individually or in small firms . . . . [It] represents a division of labor that permits the lead counsel to have access . . . to the expertise or skills of another attorney who is known to the lead counsel.

Boucher Respondents' Brief at 21, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 407352; *see also* Samson Habte, *'Standby' Counsel Who Didn't Participate May Be Held Liable for Malicious Prosecution*, [2012–2013 Transfer Binder] 28 Law. Man. on Prof. Conduct (ABA/BNA) No. 14, at 414 (July 4, 2012), *available at* www.bna.com/standby-counsel-who-n12884910458/ (discussing the common practice of dividing power).

11. Boucher Respondents' Brief at 3, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 407352.

12. *See* Samson Habte, *'Standby' Counsel Who Didn't Participate May Be Held Liable for Malicious Prosecution*, [2012–2013 Transfer Binder] 28 Law. Man. on Prof. Conduct (ABA/BNA) No. 14, at 414 (July 4, 2012), *available at* www.bna.com/standby-counsel-who-n12884910458/ (referring to Ronald E. Mallen's interpretation of the decision).

13. *See id.* (summarizing Ronald E. Mallen's predictions regarding how *Cole* will affect attorneys).

14. The lower court raised economic concerns, deeming it "defensive medicine":

> The policy of the law wouldn't seem to support the shifting of fees when the standby counsel's doing nothing but protecting themselves from malicious prosecution liability. In a different context, that's called defensive medicine, where doctors or healthcare providers do tests which may not be indicated but which are appropriately done in order to leave a paper trail showing

as "unrealistic" and "unfair" because "[i]t makes trial lawyers liable through osmosis for everything a 'workup' lawyer has done."[15]

At the opposite spectrum, others suggest the *Cole* decision does not drastically change the legal landscape. Taking a back-to-basics approach, Cole's attorney commented on the outcome:

> All the opinion does is reaffirm what has always been the law: that an attorney has an obligation—to his client, to the court, and to his adversaries—to ensure that he has a minimal level of probable cause to support the claims, and the probable cause standard is not a particularly high standard.[16]

This case is significant because it challenges the common practice of including additional well-known attorneys in pleadings.[17] This Case Note focuses on how the *Cole* ruling impacts co-counsel liability for malicious prosecution, and provides guidance and risks for practitioners to consider before associating with a case.[18] A lengthy procedural history involving numerous parties prompted this malicious prosecution case, and understanding this background is essential. Accordingly, Section I summarizes the background, and clearly sets out the role each party played in the case. Section II delves into the appellate arguments advanced by the defendants, and analyzes their mistakes for practical lessons regarding what not to do as co-counsel. The court's decision is discussed in Section III, which emphasizes the duties of co-counsel attorneys and discusses the court's reliance on precedent to strengthen its holding. Section IV analyzes the ethical implications of using co-counsel collaboration as a

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that you hadn't fallen below the standard of care.

Boucher Respondents' Brief at 54, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 407352 (agreeing with the lower court's analysis).

15. *See* Samson Habte, *'Standby' Counsel Who Didn't Participate May Be Held Liable for Malicious Prosecution*, [2012–2013 Transfer Binder] 28 Law. Man. on Prof. Conduct (ABA/BNA) No. 14, at 416 (July 4, 2012), *available at* www.bna.com/standby-counsel-who-n12884910458/ (reporting the outrage expressed by James J. Kjar, an attorney for one of the defendants in the case).

16. *See id.* (emphasizing how the hyperbole surrounding the decision may be unrealistic).

17. This case is also significant because it broadens the applicability of malicious prosecution, which "has traditionally been regarded as a disfavored cause of action." *See* Sheldon Appel Co. v. Albert & Oliker, 765 P.2d 498, 501–02 (Cal. 1989) (en banc) ("Although the malicious prosecution tort has ancient roots, courts have long recognized that the tort has the potential to impose an undue 'chilling effect' on the ordinary citizen's willingness to report criminal conduct or to bring a civil dispute to court, and, as a consequence, the tort has traditionally been regarded as a disfavored cause of action.").

18. This is a multi-faceted case that also deals with other interesting legal issues, but this Case Note focuses solely on those pertaining to liability for malicious prosecution when the associated attorneys did not participate in the underlying case.

show of power, and cautions attorneys to understand the risks of power tactics. Section V suggests policy implications of holding co-counsel liable for malicious prosecution despite non-participation in the underlying case. Finally, Section VI offers several solutions that attorneys can implement to avoid facing co-counsel conundrums of their own.

I. PROCEDURAL BACKGROUND AND PARTY IDENTIFICATION

A. *Christopher Cole, Peregrine, and Unhappy Shareholders: How It All Started*

Christopher A. Cole is the central figure in this analysis.[19] In 1981, he founded a computer software industry (Peregrine) and held various management positions in the company.[20] After resigning in 1989, his involvement in Peregrine was limited to serving as an outside director and shareholder.[21] Fast-forward to 2002 when "improper transactions came to light" regarding Peregrine company practices; this triggered an independent investigation documented in an extensive report (referred to as the Latham Report).[22] Fortunately for Cole, the report cleared him of any wrongdoing.[23] However, Peregrine did not fare as well in the Latham

19. Cole was the defendant and target of a class action suit (discussed in further detail in Section I) and then became the plaintiff in *Cole v. Patricia A. Meyer & Associates*, which is the focus of this Case Note. Thus, the following is a brief overview of his background:

> Cole has spent his entire adult life in the computer-software industry, and founded Peregrine Systems, Inc. ("Peregrine") in 1981. Prior to that time, Cole attended college at Harvard University, and pursued post-graduate studies at California Institute of Technology while employed by IBM. Before Peregrine's incorporation, it was a partnership that Cole formed with other former IBM employees.

Appellant's Opening Brief at 7–8, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634 (citations omitted).

20. *Cole*, 142 Cal. Rptr. 3d at 651.

21. *Id.*; *see also* Appellant's Opening Brief at 8, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634 (explaining Cole resigned because his "technology skills were less relevant to Peregrine's needs" and stating he "ceased to have any employment, consulting or other relationship with Peregrine" other than as an outside board member and shareholder).

22. "This report was based on approximately 86 interviews, 897,000 e-mail messages generated between 1996 and 2002, and analysis of 170 suspect transactions." *Cole*, 142 Cal. Rptr. 3d at 652.

23. *See id.* (noting the absence of any "evidence that the outside directors knew of management's improper business and accounting practices" and stating "Cole had sold Peregrine stock whenever trading was allowed"); *see also* Appellant's Opening Brief at 10, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634 (exonerating portions of the report that favored Cole). Not only was Cole cleared of any wrongdoing, but the report went a step further and observed: "The Board and Audit Committee acted appropriately when accounting or management integrity issues came to their attention. Even with the benefit of hindsight, there is no basis to assign blame to the Outside Directors [Cole being one of them] for Peregrine's accounting or disclosure problems."

Report, as it revealed "massive accounting fraud."[24] Soon after this report, Peregrine filed for bankruptcy, which "caused more than $4 billion in shareholder losses and triggered a string of federal prosecutions against corporate executives."[25]

B. Bains v. Moores:[26] *The Six-Year Meritless Derivative Suit and the Role of Standby Co-Counsel*

Although the Latham Report cleared Cole of any wrongdoing, this did not protect him from becoming the target of angry shareholders.[27] In 2003, Cole and other Peregrine directors were charged with securities fraud, insider trading, negligent misrepresentation, and a slew of related claims in *Bains v. Moores*,[28] a class action lawsuit filed on the shareholders' behalf.[29] Cole was allegedly the mastermind behind the fraudulent Peregrine scheme with "day-to-day control over its operations."[30]

Bains is significant because all of the relevant parties (and future defendants) entered the scene. Specifically, attorneys Patricia A. Meyer and Michael Aguirre filed the complaint, and they recruited two prominent trial attorneys as standby co-counsel—Raymond P. Boucher[31]

Appellant's Opening Brief at 10, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634. Furthermore, Cole joined with other directors to initiate an independent investigation as soon as he was aware of possible misconduct, "even though the aftermath left him holding over a million shares of now-worthless Peregrine stock." *Id.* at 11.

24. *Cole*, 142 Cal. Rptr. 3d at 651; *see also* Appellant's Opening Brief at 9–10, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634 (reporting senior management "engage[d] in improper accounting and undisclosed balance sheet manipulation" and "encouraged senior Sales executives to pursue transactions that were designed to achieve a superficial appearance of revenue, but lacked economic substance").

25. Samson Habte, *'Standby' Counsel Who Didn't Participate May Be Held Liable for Malicious Prosecution*, [2012–2013 Transfer Binder] 28 Law. Man. on Prof. Conduct (ABA/BNA) No. 14, at 414 (July 4, 2012), *available at* www.bna.com/standby-counsel-who-n12884910458/.

26. Bains III v. Moores, 91 Cal. Rptr. 3d 309 (Ct. App. 2009). For the remainder of the analysis, this case will be referred to as *Bains*.

27. "The class action was brought on behalf of a group of Peregrine shareholders who allegedly lost $13 million." Samson Habte, *'Standby' Counsel Who Didn't Participate May Be Held Liable for Malicious Prosecution*, [2012–2013 Transfer Binder] 28 Law. Man. on Prof. Conduct (ABA/BNA) No. 14, at 414 (July 4, 2012), *available at* www.bna.com/standby-counsel-who-n12884910458/.

28. Bains III v. Moores, No. GIC806212, 2007 WL 6830423 (San Diego Cnty. Super. Ct. granted summary judgment Dec. 13, 2007), *aff'd by* Bains III v. Moores, 91 Cal. Rptr. 3d 309 (Ct. App. 2009).

29. *Bains*, 91 Cal. Rptr. 3d at 313–14 (providing procedural background).

30. Cole v. Patricia A. Meyer & Assocs., APC, 142 Cal. Rptr. 3d 646, 652 (Ct. App. 2012), *pet. denied* (Aug. 29, 2012).

31. Boucher is a partner of Kiesel, Boucher & Larson, LLP in Los Angeles, which was also listed as counsel of record, collectively referred to as "Boucher" throughout this Case Note. Appellant's Opening Brief at 8, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634.

and Robert P. Ottilie.[32] It is important to understand the crucial difference in the roles each party played in *Bains*: Meyer and Aguirre were responsible for all preliminary matters, while Boucher and Ottilie were listed as co-counsel, but would participate in the case only if it proceeded to trial.[33] Boucher and Ottilie's role as standby co-counsel is particularly relevant to this analysis.

Bains never made it to trial. In fact, the lawsuit did not even survive summary judgment.[34] Though Cole was victorious, it was not a quick feat.[35] Christopher A. Cole endured over six years of meritless allegations before the appellate court finally dismissed the case.[36] The record listed Boucher and Ottilie as co-counsel throughout the entire process, but they never participated because the case did not proceed to trial.[37]

32. Ottilie became an attorney in 1980 and was a solo practitioner during the relevant periods of this case. *Id.*

33. *See Cole*, 142 Cal. Rptr. 3d at 663 (explaining the parties' relationships).

34. *See Bains*, 91 Cal. Rptr. 3d at 318–27 (explaining the plaintiff failed to raise a genuine issue of material fact), *aff'g* No. GIC806212, 2007 WL 6830423 (San Diego Cnty. Super. Ct. order granting summary judgment Dec. 13, 2007); *see also Cole*, 142 Cal. Rptr. 3d at 653 (supporting summary judgment because "even the plaintiffs' expert did not conclude the outside directors [Cole] knew of the fraud").

35. The original *Bains* complaint was filed in 2003, and the final appellate decision affirming the summary judgment was decided six years later in 2009. *See Bains*, 91 Cal. Rptr. 3d at 313 (providing the 2003 initial filing date).

36. The *Bains* case was filed in February 2003, the appellate court affirmed the summary judgment on March 20, 2009, and the petition to review was denied on July 8, 2009. After a lengthy four-year span, the trial court granted Cole's motion for summary judgment in 2007 and held that the suit lacked merit because there was no evidence that outside directors knew of the fraudulent accounting practice. *See id.* at 315–16 (summarizing the trial court's decision to grant a summary judgment). The fraud claims "required proof that [Cole] had made statements that [he] knew to be false, or that [Cole] had made with reckless disregard for their truth or falsity." *Id.* at 315. The plaintiffs' evidence was rejected by the trial court because it did not show "defendants intended to defraud," nor did it establish "that they, as outside directors, had knowledge of the fraud." *Id.* at 316. On the other hand, Cole provided "direct evidence" that he was unaware of the fraud "at the time he signed various financial statements." *Id.* at 315. Specifically, the defendants signed certain statements based on "recommendations of Peregrine's in-house counsel, outside counsel, and [an] outside accounting firm." *Id.* at 315–16. Two years later, the appellate court affirmed Cole's summary judgment in 2009. *See id.* at 318 (concluding the appellants failed to provide evidence to raise a genuine issue of fact as to Cole's knowledge of the fraud, and also rejecting the appellant's contention regarding the scienter and intent elements of fraud).

37. *See id.* at 313 (listing the attorneys representing each party, including Boucher and Ottilie). At the time the trial court granted Cole's summary judgment, the plaintiffs' attorneys, including Boucher and Ottilie, had no shortage of access to materials:

> (a) Lantham's interview memoranda of 102 individual witnesses; (b) electronic records assembled by Peregrine, consisting of 897,000 emails, of which 502,000 were unique, and 151,000 email attachments, all in searchable databases; (c) over 200 boxes of documents produced by Peregrine to U.S. government investigators, comprising 740,298 pages of documents, as well as a separate collection of electronic documents; (d) the depositions of 14

C. Cole v. Patricia A. Meyer & Associates[38]—*Cole Sues All Counsels of Record in* Bains

A bit of justice (or revenge) was in order. Not surprisingly, Cole commenced his own action for malicious prosecution in *Cole v. Patricia A. Meyer & Associates* in 2010 and sued every attorney listed as counsel of record in the *Bains* action.[39] Who did this include? Meyer and Aguirre were obvious defendants due to their work on all preliminary matters. But an interesting twist, and the focal point of this Case Note, resulted from Cole's inclusion of the two prominent standby attorneys—Boucher and Ottilie—even though they did not actually work on the *Bains* case. Their mere listing as counsel of record was enough for Cole to include them in the suit.[40]

D. *Malicious Prosecution, Anti-SLAPP Motions, and the Trial Court's Ruling*

All four attorney-defendants relied on California's anti-SLAPP (Strategic Lawsuit Against Public Participation)[41] law to dismiss the malicious prosecution claims.[42] To overcome an anti-SLAPP motion, Cole had to make a prima facie showing he would prevail on the malicious prosecution

other witnesses in the bankruptcy case; (e) the depositions of 35 additional witnesses taken in pending civil cases; (f) written responses to 16 separate discovery requests; and (g) detailed admissions from four of the eight indicted officers of Peregrine in their respective plea agreements.

Appellant's Opening Brief at 15, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634. However, Boucher and Ottilie never looked at any of this material to assess whether the case was based on meritorious claims. Suppose one of them so much as peeked at a few pages of this material, could they have dissuaded Meyer and Aguirre from continuing their action against Cole or from even filing the action? Indeed, such knowledge is unascertainable, but it is possible that court costs and time could have been drastically reduced.

38. Cole v. Patricia A. Meyer & Assocs., APC, 142 Cal. Rptr. 3d 646 (Ct. App. 2012), *pet. denied* (Aug. 29, 2012).

39. *Id.* at 651.

40. At the time Cole filed this malicious prosecution suit, he was unaware Boucher and Ottilie had not taken an active role in the *Bains* case because they had not alerted "the court and opposing counsel of their limited involvement in the case." *Id.* at 666.

41. *Id.* at 651 n.1.

42. *See* CAL. CIV. PROC. CODE § 425.16(b)(1) (Deering Supp. 2012) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."). The anti-SLAPP motion to strike is a remedy for the "disturbing increase in lawsuits brought primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for the redress of grievances." *Id.* § 425.16(a).

claims.[43] Thus, Cole had to prove the *Bains* action was: (1) brought without probable cause,[44] and (2) initiated with malice.[45] The trial court allowed Cole to proceed against Meyer and Aguirre; yet dealt Cole a major setback regarding Boucher and Ottilie.[46]

Agreeing with Boucher and Ottilie, the lower court granted their motions to strike.[47] The trial judge ruled they did not have a duty to investigate whether probable cause existed for the *Bains* case: "[T]he legal profession, in its custom and practice, does not require co-counsel who is not actively participating in litigation to investigate and independently

43. *See Cole*, 142 Cal. Rptr. 3d at 655–56 (discussing the requirements necessary to defeat an anti-SLAPP motion to strike); *see also* CAL. CIV. PROC. CODE § 425.16(b)(1) (Deering Supp. 2012) (providing a plaintiff can defeat the motion by "establish[ing] that there is a probability that the plaintiff will prevail").

44. *Cole*, 142 Cal. Rptr. 3d at 655 (providing an overview of probable cause as it relates to malicious prosecution). The court clarified that "[p]robable cause exists when a lawsuit is based on facts reasonably believed to be true, and all asserted theories are legally tenable under the known facts." *Id.* (citing Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30, 51 (Cal. 2006)). If Cole could prove "any one of the theories in *Bains* was legally untenable or based on facts not reasonably believed to be true," then he would prevail. *Id.*

45. The court elaborated on the malice requirement and explained it "does not require that the defendants harbor actual ill will toward the plaintiff in the malicious prosecution case," and it can be inferred from a range of attitudes, such as "open hostility to indifference." *Id.* at 661. Various scenarios may be considered to determine whether "malice" occurred, including the following: "the defendants' lack of probable cause, supplemented with proof that the prior case was instituted largely for an improper purpose" or the "evidence that the prior case was knowingly brought without probable cause"; and the "investigation and research" of an attorney may also be included in the malice analysis. *Id.* Another possibility would require Cole to "show[] that [Boucher and Ottilie] maliciously *continued* to prosecute the case against him, in the trial court and on appeal, without probable cause." *Id.* at 655 (emphasis added) (citing Zamos v. Stroud, 87 P.3d 802, 807 (Cal. 2004)). In 2004, the California Supreme Court examined a question of first impression: whether a defendant could be held liable for malicious prosecution by simply continuing a lawsuit, even though the defendant had not initiated it. *Zamos*, 87 P.3d at 807. In *Zamos*, the court acknowledged that malicious prosecution is considered a "*disfavored* cause of action," but cautioned that its stigma should not defeat legitimate claims. *Id.* at 807. The *Zamos* court found no reason to limit malicious prosecution to the "*initiation* of a suit." *Id.* "It makes little sense to hold attorneys accountable for their knowledge when they file a lawsuit, but not for their knowledge the next day." *Id.* at 809. In other words, Boucher and Ottilie may not have technically initiated the suit, yet they also did not do anything to stop the meritless allegations. Worth noting, aside from malice and probable cause, a third element of malicious prosecution is "favorable termination," but that is not an issue in this case as there was no dispute that *Bains* was terminated in favor of Cole. *See Cole*, 142 Cal. Rptr. 3d at 661 (listing the elements of malicious prosecution). Another interesting issue, though one not analyzed in this Case Note, is the criticism that the *Cole* decision created a "new slippery slope standard to determine malice." *See* Robert P. Ottilie's Reply to Christopher Cole's Answer to the Petition for Review at 8, *Cole*, 142 Cal. Rptr. 3d 646 (No. BC436506), 2012 WL 4006263 (stressing the opinion "glossed over" the malice element, and mistakenly removed the defendant's subjective intent from the malice analysis).

46. *See Cole*, 142 Cal. Rptr. 3d at 651, 653 (recalling the 2010 action by the trial court).

47. *Id.*

determine that the lead counsel has [probable] cause" for the underlying claims.[48] Dissatisfied with this result, Cole piqued legal interest by presenting the appellate court with the following issue: whether non-participating, standby co-counsel can be held liable for malicious prosecution by simply being listed as counsel of record.[49]

II. WHAT NOT TO DO—LEARNING FROM THE DEFENDANTS' MISTAKES

Practitioners may be surprised to discover that Boucher and Ottilie were ordinary attorneys doing something they had done for many years—they agreed to be co-counsel if a case went to trial and agreed to be listed on the pleadings. Many practitioners may be unknowingly making the same mistakes as Boucher and Ottilie.

This section discusses the defendants' three main arguments urging the appellate court to shield them from malicious prosecution liability. Although the appellate court rejected each argument (analysis provided in Section III), they are useful as detailed guides of what not to do when associating on a case. By understanding these flawed arguments, attorneys can better understand their duties and risks when deciding whether to become associated with a case as counsel of record.

A. *Argument 1: We Did Not Have an Independent Duty to Assess Whether Probable Cause Existed Because Our Role in the Case Was Limited to the Trial Stage.*

Simply put, this was the gist of their argument: We only agreed to enter the scene if the case went to trial; this means that any and all pretrial issues were not part of our duties.[50] Both Boucher and Ottilie stressed their non-participation in all preliminary matters, and asserted that the probable cause determination was the sole duty of Meyer and Aguirre.[51]

For example, Boucher and the Meyer defendants had an agreed arrangement where "one firm initiated and developed a case and the other

48. Appellant's Opening Brief at 29, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634 (quoting the lower court's holding).

49. *See Cole*, 142 Cal. Rptr. 3d at 651 ("Cole appeals the striking of his malicious prosecution claims against the Boucher defendants and Ottilie."); *see also* Appellant's Opening Brief at 30, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634 (listing the issues on appeal).

50. *See* Boucher Respondents' Brief at 54, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 4073521 (emphasizing that the lower court's ruling correctly recognizes "the duty only arises when co-counsel's role in the litigation is initiated," and arguing this is more in line with precedent).

51. *See Cole*, 142 Cal. Rptr. 3d at 663–65 (summarizing the defendants' arguments regarding their limited roles in the case).

firm tried it."[52] Applying this to the *Bains* case, Meyer and Aguirre were responsible for all pretrial work, while Boucher remained completely detached from all decision-making. Further emphasizing this passive role, Boucher declared they "did not sign, draft, prepare, review, serve, approve, or discuss the contents of any pleading in *Bains* or participate in the case in any way."[53]

Similarly, Ottilie asserted his "role was limited to assisting with trial" and emphasized that he did not bill any time for the case.[54] Ottilie urged the court to consider his blatant lack of securities expertise, and how absurd it would be "to suggest that Ottilie had a duty to oversee or second-guess the decisions" of Aguirre, who had far "superior technical expertise in the esoteric area of securities law."[55] Essentially, he was incapable of determining whether probable cause existed, which is precisely why he deferred to Aguirre ("the expert securities litigator") for such pretrial matters.[56]

Additionally, the defendants argued that if all attorneys were required to research the merits of the case, this would result in a conflict of interest. An attorney would "perform[] extensive legal research, not for the benefit of [the] client, but simply to protect himself from his client's adversaries in the event the suit fails."[57]

How to avoid this mistake: Before associating with any case as counsel of record, evaluate the allegations to ensure probable cause exists by asking whether they are "based on facts not reasonably believed to be true" or "whether 'any reasonable attorney would have thought the claim tenable.'"[58] The duty to assess the merits is not particularly burdensome: "It doesn't mean you have to go through . . . 18 boxes of discovery, it doesn't mean you have to interview every witness. You just need to know

52. *Id.* at 663.

53. *Id.* Note, however, despite the defendants' list of how they were not involved, the court observed, "Boucher's declaration did not indicate whether he or his law firm knew anything about the *Bains* case." *Id.*

54. *See* Robert P. Ottilie's Respondent's Brief at 5, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 5238835 ("[I]t is undisputed that Ottilie never billed a single minute of attorney time in the underlying case, again because his role was simply to be available to assist at trial . . . . He simply waited to be called to assist, and the call never came.").

55. *Id.* at 24.

56. *Cole*, 142 Cal. Rptr. 3d at 663.

57. Boucher Respondents' Brief at 52–53, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 4073521 (relying on *Sheldon Appel Co. v. Albert & Oliker*, 765 P.2d 498, 509 (Cal. 1989), as precedent for why attorneys' research is irrelevant to probable cause, and creates bad policy).

58. *See Cole*, 142 Cal. Rptr. 3d at 655 (quoting *Sheldon*, 765 P.2d at 511) (explaining the objective standard of review and comparing it to the standard for assessing whether a lawsuit is frivolous).

that there are some facts that establish probable cause."[59]

Additionally, do not assume that agreeing to be co-counsel for the sole purpose of trial means your duties are postponed until the trial stage. As Section III explains in detail, certain duties are triggered the moment an attorney associates as co-counsel on a case.[60] Once the defendants' names were listed as counsel of record, they were assumed to have already determined probable cause existed to prosecute the case.[61] "If this were not so, an attorney could associate into a clearly unmeritorious case with impunity, as long as the attorney was careful not to become familiar with the claims or the evidence."[62]

Both attorneys rattled off seemingly endless lists of tasks they did not do in the case—drafting, analyzing, preparing, signing, and discussing. Yet the court was more concerned with what they should have done.[63] Attorneys may passively shirk tasks and take a hands-off approach, but they cannot evade mandatory duties and avoid liability. The bottom line is that attorneys should not associate with a case as counsel of record until they have researched the merits to ensure probable cause exists.

B. *Argument 2: Our Arrangement Was Based on a Permissible Division of Power, and We Relied in Good Faith on Meyer and Aguirre Based on Our Working Relationship.*

Neither Boucher nor Ottilie researched whether probable cause existed; at the same time, they were not mindlessly attaching their names to the case. Instead, they wholeheartedly believed probable cause existed based on their relationship with Meyer and Aguirre.[64] Essentially, the thrust of

59. *See* Samson Habte, *'Standby' Counsel Who Didn't Participate May Be Held Liable for Malicious Prosecution*, [2012–2013 Transfer Binder] 28 Law. Man. on Prof. Conduct (ABA/BNA) No. 14, at 416 (July 4, 2012), *available at* www.bna.com/standby-counsel-who-n12884910458/ (quoting Leighton M. Anderson, attorney for Christopher Cole) (downplaying the amount of effort actually required to fulfill the duty of assessing whether probable cause exists).

60. *See Cole*, 142 Cal. Rptr. 3d at 665 (holding an attorney may be "liable for the very act of associating into a case containing frivolous claims").

61. *See id.* (reiterating what an attorney should do prior to becoming counsel of record, including the duty to make a "preliminary determination whether probable cause exists" (quoting Sycamore Ridge Apts. v. Naumann, 69 Cal. Rptr. 3d 561, 579 (Ct. App. 2007))). To be clear, "[t]he act of associating into a case as [co-counsel] carries with it at least the responsibility to be familiar with the claims made by one's clients in the litigation." *Sycamore Ridge*, 69 Cal. Rptr. 3d at 582.

62. *Sycamore Ridge*, 69 Cal. Rptr. 3d at 582 n.13.

63. *Cole*, 142 Cal. Rptr. 3d at 665 (finding no difference between "[m]aintaining a case one knows, *or should know*, is untenable" (quoting *Sycamore Ridge*, 69 Cal. Rptr. 3d at 582) (emphasis added)).

64. The trial court was influenced by this argument when granting their anti-SLAPP motions. *See* Robert P. Ottilie's Respondent's Brief at 6, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011

their argument was based on a division of power: why waste money and time assessing the underlying merits of *Bains* when that is precisely the job of our trusted co-counsel, Meyer and Aguirre?[65]

Consider Ottilie's working relationship with Aguirre: they had been friends since the 1980s; they worked on a high-profile public funding case for an NFL stadium, as well other pro bono matters; and Ottilie witnessed Aguirre's career develop over the course of twenty years, and was especially impressed by Aguirre's financial and securities successes.[66] Throughout Ottilie's joint endeavors and personal experiences, Ottilie considered Aguirre to be "a very hard worker and was always well prepared, and paid acute attention to detail."[67] Thus, when Aguirre approached Ottilie and requested assistance should the *Bains* case go to trial, Ottilie agreed to do so based on their history—a long friendship, personal trust, working relationship, successful professional career, and hard-working and competent disposition. Ottilie had every reason to rely on Aguirre and no reason to believe that he would prosecute a meritless case.

Similarly, Boucher knew Meyer and Aguirre for over ten years, and had a long professional relationship with them.[68] The parties commonly relied on arrangements with other law firms, and Boucher's attorney emphasized that this case was no different:

> [It was] a pattern and practice [that] the law firms had worked together in the past with a clear division of labor. Meyer did all the prep work; Boucher came in and tried the case. They did one, the reverse. So there was a pattern and practice between these firms as to that division of labor.[69]

WL 5238835 (providing relevant portions of the lower court's decision observing the parties' good faith reliance based on their relationship); *see also* Boucher Respondents' Brief at 20–22, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 4073521 (also listing relevant portions of the lower court's decision and elaborating on why Cole would not prevail when asserting probable cause and malice). However, as discussed in Section III, the *Cole* appellate court was not nearly as persuaded by this argument.

65. Their confidence in this argument was likely bolstered by the fact that the trial court agreed with this reasoning. "As found by the trial court, it would be uneconomic to require stand-by counsel to 'become sufficiently familiar with the facts and the law . . . in order to evaluate the filings and other actions of lead counsel.'" Appellant's Opening Brief at 29, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634.

66. *See* Robert P. Ottilie's Respondent's Brief at 7–8, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 5238835.

67. *Id.* at 7.

68. Boucher Respondents' Brief at 33, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 4073521.

69. Appellant's Opening Brief at 25–26, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634 (echoing the argument asserted by the defendants) (citing transcripts from hearings held on August 9, 2010 and August 18, 2010).

Furthermore, they justified this division of labor using the California Rules of Professional Conduct. Rule 3-110(C) provided them with authority because it "allows an attorney who lacks sufficient learning and skill necessary to provide competent representation to associate with or consult another lawyer reasonably believed to be competent."[70] The defendants argued that deferring to other attorneys with superior expertise is proper and in the best interest of the client and claimed that they were actually providing better representation by dividing the power according to skill.

Ottilie's attorneys offered a cinematic reference to simplify this argument: "'Dirty Harry' Callahan, a fictional Californian portrayed in several films by Clint Eastwood, recognized famously: 'A man's gotta know his limitations.' California law requires lawyers to do the same thing."[71]

How to avoid this mistake: Dirty Harry is only partially correct. As discussed in further detail in Section III, an attorney must be informed enough to assess the judgment of co-counsel.[72] Although attorneys may seek assistance and divide work with other attorneys, the duty of competent representation remains wholly intact.[73] Lessening the workload is permissible, but attorneys should not assume this limits their duties to the client.[74] Thus, an attorney must not rely solely on another attorney's experience, expertise, friendship, or professional reputation; she may be exceedingly intelligent and better-equipped to handle a case, but the counsel of record must still remain sufficiently informed to judge other attorneys' quality of work.

In this case, Boucher and Ottilie had no reason to believe Meyer and Aguirre would vigorously prosecute a meritless case. However, a good faith belief alone is insufficient; attorneys must have a requisite familiarity with the subject matter of the case.[75] Reviewing the *Bains* case, Judge

70. *See Cole*, 142 Cal. Rptr. 3d at 664 (citing CAL. MODEL RULES OF PROF'L CONDUCT R. 3-110(C) (Deering Supp. 2012)).

71. *See* Robert P. Ottilie's Respondent's Brief at 23–24, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 5238835 (internal citation omitted) (providing reasons why Ottilie's reliance on Aguirre was reasonable based on his limited knowledge of securities litigation).

72. *See Cole*, 142 Cal. Rptr. 3d at 664 ("But even when work on a case is performed by an experienced attorney, competent representation still requires *knowing enough* about the subject matter to be able to judge the quality of the attorney's work.") (emphasis added); *see also* CAL. MODEL RULES OF PROF'L CONDUCT R. 3-110(B) (Deering Supp. 2012) (defining the elements of competence as "1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.").

73. *Cole*, 142 Cal. Rptr. 3d at 664.

74. *Id.*

75. *See id.* (interpreting how the California Rules of Professional Conduct relate to this case).

Epstein described it as mere "allegations for the most part [that] consisted of inferences from circumstantial evidence couched as statements of ultimate fact."[76] If Boucher and Ottilie were familiar with the subject matter, they may have questioned Meyer's and Aguirre's judgment regarding the pursuit of baseless allegations.[77]

C. *Argument 3: All We Did Was Allow Our Names on Some Pleadings. No Authority Exists to Hold Us Liable When We Never Actually Participated in the Case.*

Simply stated, Boucher argued that authority is non-existent to hold them liable for malicious prosecution solely on the basis that their names appeared on the filings. The argument asked the court: under what authority could we possibly be held liable for malicious prosecution when we never actively prosecuted or participated in the case?[78] The court had no trouble responding with precedent, which is discussed below in Section III.

How to avoid this mistake: Attorneys should not assume that lending their name to a case is a risk-free practice. If it is a meritless action and the defendant subsequently sues for malicious prosecution, any attorney listed as counsel of record may be liable. An attorney can argue that he was sailing around the world for the entirety of the case and had no inkling of participation in the decisions, yet if listed as counsel of record then he is not precluded from malicious prosecution liability.[79] Attorneys have a duty to diligently research and remain informed about the subject matter of the case, and should not downplay the court's willingness to hold them to a high standard regarding such duties.[80] Though *Cole* is a California appellate court holding, other courts will likely rely on its reasoning for guidance when faced with similar issues.

76. *Id.* at 661. The court provides examples of some of the "more serious" allegations: "Cole was actively involved in the day-to-day operations at Peregrine, worked closely with the company's CEO to establish its business model, attended operational meetings, and was instrumental in establishing sales and revenue forecasts." *Id.* Thus, Boucher and Ottilie did not have to be highly skilled in any specialized area to investigate whether probable cause existed for such allegations; yet they made no attempts to familiarize themselves with the case.

77. *See id.* at 665 (noting that Boucher and Ottilie lacked the requisite knowledge).

78. *See id.* at 664–65 ("The Boucher defendants argue that there is no authority for holding them liable for maliciously initiating or prosecuting the case against Cole just because their names appeared on the filings in *Bains* because they did not actively participate in the case.").

79. *See id.* at 664 (prohibiting defendants from escaping "liability for malicious prosecution by claiming to have been ignorant of the merits of the allegations").

80. *Id.* at 663–65 (explaining duties as counsel of record).

III. ANALYSIS OF THE COURT'S DECISION: A REJECTION OF THE PASSIVE CO-COUNSEL DEFENSE

The appellate court sharply disagreed with the defendants, and Judge Epstein explained: "[W]e cannot conclude as a matter of law that these attorneys may avoid liability for malicious prosecution by learning nothing or close to nothing about the *Bains* case, throughout which they allowed themselves to be consistently identified as counsel of record for the plaintiffs."[81] Although the defendants stressed their lack of involvement and detachment, Judge Epstein observed that as co-counsel they were intimately tied to the case throughout its duration:

> Ottilie and [Boucher] were identified in *Bains* as "[a]ttorneys for [p]laintiffs" along with Meyer [and Aguirre]. They apparently were listed as counsel for the plaintiffs on all filings in *Bains*, including the appellate briefs filed after the summary judgment . . . . [D]efense filings in *Bains* were served on all counsel of record. There is no evidence that Ottilie and [Boucher] objected to service or notified the court or opposing counsel that they did not actually represent the *Bains* plaintiffs.[82]

The following subsections discuss cautionary lessons gleaned from the court's decision. Most importantly, the "passive, standby co-counsel" defense cannot be used as an escape route for performing certain duties, nor can it shield attorneys from malicious prosecution liability.

A. *The Duties of All Co-Counsel and Division of Power*

What about the defendants' argument that no duty existed? The court vitiated this logic by explicitly stating a counsel of record is automatically accompanied with a "duty of care to [his or her] clients that encompasse[s] 'both a knowledge of the law and an obligation of diligent research and informed judgment.'"[83]

Acknowledging that California law permits attorneys to divvy up duties with attorneys of record,[84] Epstein draws a sharp distinction—allowing a division of labor between attorneys is not to be confused with allowing "an

81. *Id.* at 663.

82. *Id.* (citations omitted). Thus, Epstein seems to agree with the assertion that "it is unlikely to the point of incredulity that Ottilie and Boucher Defendants were *completely* unaware of the facts and circumstances of the case as it evolved—and as the adverse rulings piled up." Appellant's Opening Brief at 54, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634 (emphasis added).

83. *Cole*, 142 Cal. Rptr. 3d at 663 (quoting Wright v. Williams, 121 Cal. Rptr. 194, 199 (Ct. App. 1975)).

84. *See id.* at 664 ("California law generally allows an attorney of record to associate with another attorney and to divide the duties of conducting the case.").

associated attorney whose name appears on all filings [to] be able to avoid liability by intentionally failing to learn anything about a case that may turn out to have been maliciously prosecuted in whole or in part."[85] Thus, even when an experienced attorney (such as Aguirre) works on a portion of the case, other associated attorneys (such as Ottilie and Boucher) have a duty to continue to provide "competent representation."[86] This means they must "know[] enough about the subject matter to be able to judge the quality of the attorney's work."[87]

The defendants asserted the Dirty Harry "know your limitations" argument by claiming clients are benefitted when attorneys divide tasks and defer to highly-skilled co-counsel.[88] However, Judge Epstein would likely tell Dirty Harry to join Boucher and Ottilie in the liability hot seat.[89] The *Cole* decision provides insight into the Dirty Harry fallacy regarding competent representation—mainly that it misleadingly omits the crucial requirement of "knowing enough."[90] To clarify, it is not sufficient for an attorney to know their own limitations (e.g., lack of securities expertise) if they fail to "know enough" about the case. For example, both defendants recognized their limits, yet Boucher "knew nothing about the merits" and Ottilie did not know enough about the asserted theories.[91] This lack of knowledge left them incapable of judging the work of other attorneys, and incapable of satisfying the duty to provide competent representation.[92]

Further, not only did Ottilie and Boucher owe a duty to their clients, but as attorneys they had "a responsibility to avoid frivolous or vexatious litigation."[93] Relying on a Ninth Circuit case,[94] Epstein rejected "willful

85. *Id.*

86. *See id.* (clarifying that competent representation is still required "even when work on a case is performed by an experienced attorney").

87. *Id.*

88. Robert P. Ottilie's Respondent's Brief at 23–24, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 5238835.

89. *See Cole*, 142 Cal. Rptr. 3d at 664 (responding to the defendants' argument that California Rules of Professional Conduct do not require that they remain informed after dividing duties).

90. *Id.*

91. *Id.* (pointing to the defendants' own declarations as evidence that they did not know enough about the case).

92. *Id.*

93. *Id.* (citing CAL. CIV. PROC. CODE § 128.7(b) (Deering Supp. 2012) (explaining an attorney who "presents" a pleading to the court "impliedly certifies its legal and factual merit")). Section 128.7(b) mandates attorneys should ensure they are only presenting the court with meritorious claims "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . ." *See* CAL. CIV. PROC. CODE § 128.7(b)(1–4) (Deering Supp. 2012) (listing four conditions that attorneys must consider before presenting to the

ignorance" as a defense.[95] Nor did it matter that the defendants never personally signed any of the filings: "[T]he Boucher defendants and Ottilie lent their names to all filings in that case, supporting an inference that they 'presented' these filings to the court and thus initiated and prosecuted *Bains* along with the Meyer defendants."[96]

B. *Sycamore Ridge Apartments LLC v. Naumann*[97]

Responding to the assertion that no authority could possibly support a holding disfavoring the defendants, the *Cole* appellate court relied on *Sycamore Ridge Apartments LLC v. Naumann*. Also a malicious prosecution case, *Sycamore Ridge* involved a landlord that was sued by apartment tenants for poor living conditions and unfair business practices.[98] In that case, the LaFave attorneys became co-counsel for the limited "mold exposure aspect of litigation," and they associated with the case just one month before it was dismissed.[99] After the case was dismissed, the landlord brought a malicious prosecution case against all of the attorneys who represented the tenants in the prior case, including the LaFave defendants.[100]

The *Sycamore Ridge* court ruled in favor of the landlord and wisely cautioned: "Before agreeing to become attorney of record in a pending case, an attorney should, at a minimum, be familiar with the client's claims and should have made a preliminary determination whether probable cause exists to support the asserted claims of defenses."[101] The LaFave defendants were only listed as co-counsel for one month and did not participate in the case, yet the *Sycamore Ridge* court remained steadfast in maintaining their limited involvement did not shield them from malicious prosecution liability. "An attorney's assertion that he or she did not initiate a lawsuit and that his or her participation in the case was to be limited in time and scope does not eliminate the attorney's potential liability for malicious prosecution."[102] "[T]he very act of associating into

court). Additionally, "presenting" can be in the form of "signing, filing, submitting, or later advocating a pleading, petition, written notice of motion, or other similar paper." *Id.* § 128.7(b).

94. *In re* Girardi, 611 F.3d 1027 (9th Cir. 2010).

95. *See Cole*, 142 Cal. Rptr. 3d at 664 (relying on the holding provided by *In re Girardi*, which stated the plaintiffs' co-counsel could not use "willful ignorance" as a defense).

96. *Id.*

97. Sycamore Ridge Apts. LLC v. Naumann, 69 Cal. Rptr. 3d 561 (Ct. App. 2007).

98. *Cole*, 142 Cal. Rptr. 3d at 665 (citing *Sycamore Ridge*, 69 Cal. Rptr. 3d at 561).

99. *Id.* (quoting *Sycamore Ridge*, 69 Cal. Rptr. 3d at 561).

100. *Id.* (citing *Sycamore Ridge*, 69 Cal. Rptr. 3d at 561).

101. *Id.* (quoting *Sycamore Ridge*, 69 Cal. Rptr. 3d at 579) (alteration in original).

102. *Sycamore Ridge*, 69 Cal. Rptr. 3d at 582.

a case containing frivolous claims"[103] is a low threshold for malicious prosecution liability, yet the *Cole* appellate court found support in *Sycamore Ridge* to strengthen its holding.[104] Thus, Judge Epstein had no qualms holding Boucher and Ottilie liable for malicious prosecution despite a lack of any actual participation in the case, especially since the circumstances in *Cole* seemed "more egregious than those of the LaFave defendants in *Sycamore Ridge*."[105]

IV. THE ETHICAL ROLE OF POWER

Boucher's counsel remarked to the trial court judge: "[Y]ou know, Kiesel, Boucher and Larson. It's a big firm. *They've got a big name*. Maybe their placing their name on [the *Bains* action] was designed for—*to show more power in the case*."[106] Collaboration for power is a common practice in the legal world.[107]

In the *Cole* appellate opinion, Judge Epstein raised eyebrows with his discussion of power. Specifically, he questioned why Boucher and Ottilie had to associate with *Bains* from the very beginning.[108] Why did they allow their names to appear as counsel for the plaintiffs on filings over several years?[109] Why did they fail to disclose their limited involvement to the court or opposing party?[110] The court observed that "no explanation ha[d] been offered" for any of these questions, and Epstein concluded "their premature association supports [the] inference" that Boucher and Ottilie "associated with the case for an improper purpose, such as to 'show

103. *Cole*, 142 Cal. Rptr. 3d at 665.

104. *See id.* (analogizing the *Sycamore Ridge* facts with the instant case). Specifically, the court draws a few parallels. "The LaFave defendants did nothing beyond associating as counsel [just like Boucher and Ottilie]." *Id.* (citing *Sycamore Ridge*, 69 Cal. Rptr. 3d at 561). Furthermore, "[t]heir contemplated role was limited to the mold exposure aspect of the case [Boucher's and Ottilie's was limited to trial] and was not triggered in the month after they associated into the case [Boucher's and Ottilie's was never triggered]." *Id.* (citing *Sycamore Ridge*, 69 Cal. Rptr. 3d at 561). The court concluded "*Sycamore Ridge* provides authority for holding an attorney liable for the very act of associating into a case containing frivolous claims." *Id.*

105. *Id.* at 666. *But cf.* Robert P. Ottilie's Respondent's Brief at 18–24, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 5238835 (distinguishing *Sycamore Ridge* from the instant case and downplaying its significance); Boucher Respondents' Brief at 52–54, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 4073521 (negating the similarities between *Sycamore Ridge* and *Cole* and asserting that *Sycamore Ridge* should not be extended to impose liability on the defendants).

106. Appellant's Opening Brief at 26, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634 (citing transcripts from hearings held on August 9, 2010, and August 18, 2010).

107. *Id.* at 5 (noting that the trial court's decision was based on this "common practice").

108. *Cole*, 142 Cal. Rptr. 3d at 666.

109. *Id.*

110. *Id.*

more power.'"[111]

This prompted critics and commentators to ask a basic question: when did collaboration with another attorney for the purpose of showing more power become legally improper or unethical?[112] Epstein's baffling conclusion, which was espoused in a short paragraph and unaccompanied by sufficient explanation, opened the door for skepticism, criticism, and confusion. Robert E. Mallen, a professional liability expert, stated: "There's no ethics rule I can think of under the ABA rules or under California's semi-unique rules that would prohibit that."[113]

Another critique is simply that the court got it all wrong. The court's power analysis was completely backwards according to Ottilie's attorney, James J. Kjar. "The ethical duty to advocate zealously on a client's behalf may actually require an attorney to enlist the services of a good trial lawyer to 'show more power.'"[114] The legal world is one of vast financial disparities, so collaborating to show power is especially useful when defendants have deeper pockets. Enrolling a prominent trial attorney as co-counsel becomes a "great equalizer."[115] Plus, enlisting powerful standby co-counsel is not an uncommon practice, and it has positive effects. This is a technique to get the other side's attention and is also a method to "get these cases resolved."[116]

In Epstein's defense, perhaps his power stance should be interpreted in light of the entire *Cole* opinion rather than in isolation.[117] A more reasonable interpretation is this: "Even if the practice is common, the passive counsel of record should not be regarded as free of professional or ethical responsibilities for clients, the opposing parties, or the judicial system."[118] Epstein did not declare that enlisting well-known attorneys as a power move is always improper. The show of power may be a proper, ethical purpose so long as the associated parties diligently research and

111. *Id.*

112. *See* Samson Habte, *'Standby' Counsel Who Didn't Participate May Be Held Liable for Malicious Prosecution*, [2012–2013 Transfer Binder] 28 Law. Man. on Prof. Conduct (ABA/BNA) No. 14, at 416 (July 4, 2012), *available at* www.bna.com/standby-counsel-who-n12884910458/ (discussing the spectrum of views regarding whether power is an improper purpose).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (providing another critique by Ottilie's attorney, James J. Kjar).

117. *See* Cole v. Patricia A. Meyer & Assocs., APC, 142 Cal. Rptr. 3d 646, 666 (Ct. App. 2012), *pet. denied* (Aug. 29, 2012) (representing Epstein's brief discussion regarding the defendants' purpose for associating with the case).

118. Appellant's Opening Brief at 5, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634.

make informed judgments regarding the merits of the case.[119] In other words, associating with a case simply to intimidate the defendant without knowing whether the suit has merit would be improper; yet it would be acceptable to lend your name as co-counsel after ensuring the case is not wrought with frivolous accusations.

Applying this more reasonable theory to Boucher and Ottilie, neither assessed the merits of the *Bains* action, yet both were content to be associated with the high-profile case for many years.[120] This lack of diligence supports Epstein's inference that the collaboration was likely for an improper purpose. Power is a pivotal legal technique and creating the perception that power is on your side is neither a new nor inherently improper practice. However, power can have its pitfalls if not exercised properly. Lending your reputation to a case as co-counsel as a power ploy does not come without risks. The *Cole* holding is an instructive lesson as to why attorneys must become informed as to the merits of the case their name is associated.

V. POLICY IMPLICATIONS: WHAT IS THE HARM IN LETTING NON-PARTICIPATING ATTORNEYS ESCAPE LIABILITY?

Would any harm actually exist in letting these passive attorneys escape liability? After all, if they were completely removed from the case, and had a good faith belief it was meritorious, then why should they bear the heavy burden of other counsel's mistakes? Furthermore, Cole would not be left without recourse because the trial court allowed him to proceed against the lead attorneys, Meyer and Aguirre.[121] Cole's attorneys suggest the significance of counsel of record would be diminished to mere "window dressing"; they paint a picture of a hierarchical legal landscape driven by power ploys couched in trickery rather than justice and ethics:

> A rule that the appearance by counsel as *counsel of record* in California litigation may legitimately be no more than a form of window dressing would promote public cynicism regarding attorneys' performance of their professional duties. It would surely increase, rather than diminish, the risk that attorneys will pursue meritless litigation, as the "top gun" co-counsel of

119. *Cole*, 142 Cal. Rptr. 3d at 664–66 (reiterating the duties of co-counsel to their clients, regardless of when their role in the case is triggered).

120. *See id.* at 666 ("[Boucher] and Ottilie have not shown they had any knowledge of the claims asserted against Cole in *Bains* or made any effort to independently investigate and research the validity of these claims."). Recall malice can be inferred in many ways, and the defendants' investigation and research is among them. *Id.* at 661 (citing Sheldon Appel Co. v. Albert & Oliker, 765 P.2d 498, 506 (Cal. 1989)).

121. *See id.* at 651 (providing overview of procedural history).

> record rest secure in the knowledge that they will not be held responsible for the meritlessness of the case, as long as lesser-known co-counsel . . . have been assigned to do the work.[122]

Justice Epstein agreed. Attorneys are "required to create a record of diligence" and ensure that meritorious claims are the basis for the lawsuit.[123] Relaxing this requirement for co-counsel would simply undercut this policy and result in more cases like this where courts conclude that parties merely "lent their names to the case with indifference to its actual merit."[124] Allowing attorneys to escape liability due to their lack of diligence or willful ignorance is counterintuitive to the legal profession—esteemed for demanding hours, work ethic, and innovative ways of thinking. Efficient administration of justice will improve if attorneys are encouraged to dismiss "meritless claims at the earliest stage possible."[125] Attorneys and the court system are not the only parties reaping benefits from the *Cole* decision. Just as attorneys protect themselves from malicious prosecution charges, their "client[s] will avoid the cost of fruitless litigation" and reduce their exposure to liability.[126]

Should an attorney associate as counsel of record with a case containing allegations that the world is square, Gandhi is racist, and the Loch Ness monster actually lives in Justice Scalia's swimming pool? Of course not. Requiring attorneys to research the merits of a case prior to associating as co-counsel not only benefits the client and court, but attorneys reap the benefit of reputation preservation. After all, as wisely noted by Benjamin Franklin, "[i]t takes many good deeds to build a reputation, and only one

122. Appellant's Opening Brief at 6, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634.

123. *Cole*, 142 Cal. Rptr. 3d at 666.

124. *Id.* Contrary to the *Cole* appellate decision, the trial judge feared requiring attorneys of record to be familiar with the merits would spark "defensive lawyering." Appellant's Opening Brief at 5–6, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634. Ottilie's attorney echoed this concern by deeming it "the legal equivalent to defensive medicine." *See* Robert P. Ottilie's Respondent's Brief at 4, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 5238835 (criticizing plaintiff's contentions as ones that "defy logic and good sense" by expounding on possible negative consequences). However, Cole's attorneys responded that such an outlook is flawed because it "subordinates the interest of clients, adversary parties and the judicial system to the economic interests of attorneys of record in contingent-fee cases in avoiding any familiarity with the matters until invited by their co-counsel." Appellant's Opening Brief at 5–6, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634.

125. Zamos v. Stroud, 87 P.3d 802, 809–10 (Cal. 2004).

126. *Id.* at 810. *But see id.* (summarizing the defendants' fear that this heightened liability will inhibit "zealous representation" by diverting attorneys' attention "to second-guess[ing] the merits of the litigation" rather than the actual case).

bad one to lose it."[127]

VI. SOLUTIONS FOR AVOIDING CO-COUNSEL CONUNDRUMS

Justice Epstein offered two straightforward ways to "easily avoid liability for malicious prosecution without having to engage in premature work on a case."[128] First, attorneys should "refrain from formally associating in [a case] until their role is triggered."[129] Second, attorneys should "refrain from lending their names to pleadings or motions about which they know next to nothing."[130]

Aside from Epstein's explicit suggestions, other observations in the *Cole* opinion provide guidance for attorneys. For example, the court noted that there was "no evidence that [Boucher and Ottilie] objected to service or notified the court or opposing counsel that they did not actually represent the *Bains* plaintiffs."[131] Thus, attorneys must recognize the dangers of complacency and take steps to avoid costly mistakes. They should be cognizant of signatures, paperwork, and routine administrative tasks. Receiving copies of unfamiliar defense filings should be a warning sign. In response, attorneys should immediately notify opposing counsel and the court to ensure the co-counsel label does not have devastating ramifications on their reputation or career.[132] Alternatively, Christopher Cole's attorney, Leighton M. Anderson, offered his advice to avoid liability: "If you're not going to pay any attention to [a case] until it goes to trial, then don't associate with it as attorney of record on day one."[133]

Another suggestion for avoiding liability was articulated by Judge Richard Fruin at the trial hearing regarding the defendants' anti-SLAPP motions:

> First, Mr. Ottilie could have said, Mr. Aguirre, if you need me at trial, I'll associate in, and I'll stand beside you at trial; let me know when that's in the offing. He then would not have been on the pleading. Or he could have

127. BRAINYQUOTE, http://www.brainyquote.com/quotes/quotes/b/benjaminfr385547.html (last visited Feb. 15, 2013).

128. *Cole*, 142 Cal. Rptr. 3d at 666.

129. *Id.*

130. *Id.*

131. *Id.* at 663.

132. *See* Sycamore Ridge Apts. LLC v. Naumann, 69 Cal. Rptr. 3d 561, 579 (Ct. App. 2007) (holding the defendants liable for malicious prosecution and emphasizing the lack of "evidence indicating that the LaFave defendants took *immediate* steps to dismiss the meritless claims upon associating into the case") (emphasis added).

133. Samson Habte, *'Standby' Counsel Who Didn't Participate May Be Held Liable for Malicious Prosecution*, [2012–2013 Transfer Binder] 28 Law. Man. on Prof. Conduct (ABA/BNA) No. 14, at 416 (July 4, 2012), *available at* www.bna.com/standby-counsel-who-n12884910458/.

> been [co-counsel], and he could have said, Mr. Aguirre, I'm relying on you, but I have an independent duty; so you tell me what the facts are that support the filing of this lawsuit, and you update me as long as I'm going to be on the pleading as [co-counsel] whether or not there's still sufficient cause to maintain these claims....[134]

Attorneys who have a specialized role in a case (such as for trial or on appeal) can associate with the case at that stage after diligently researching to ensure that the requisite merits exist.[135] Rushing to jump on a meritless case is unwise, impractical, unethical, and may have devastating effects on an attorney's pocketbook and reputation.

VII. CONCLUSION

Cole is significant because it illustrates that even miniscule participation can lead to monstrous liability, simply because of name association as counsel of record. Perhaps *Cole* may be understood as a judicial call to action for attorneys to take accountability for their professional responsibility, starting with their names. Rather than viewing the decision as punishing attorneys for the mistakes of other co-counsel, attorneys should use *Cole* as guidance regarding bedrock duties—diligently conducting research, remaining informed, ensuring probable cause exists for claims, and competently dividing duties while maintaining enough knowledge to judge other attorneys' quality of work. Plaintiffs' attorneys should become familiar with their duties and evaluate the risks before lending their names or reputations to a case. Attorneys can still recruit others to associate with a case for power. At the same time, the all-powerful co-counsel label will not protect attorneys from liability for malicious prosecution.

134. Appellant's Opening Brief at 25, *Cole*, 142 Cal. Rptr. 3d 646 (No. B227712), 2011 WL 3268634 (citing transcripts from hearings held on August 9, 2010 and August 18, 2010).

135. *Id.* at 6.