

PROFESSIONAL LIABILITY UPDATE

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MALICIOUS PROSECUTION

California Law

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The Second District holds that the malicious prosecution “interim adverse judgment rule” does not apply to a ruling that does not address the merits of the underlying claim.

Stroock & Stroock & Lavan v. Tendler 02 C.D.O.S. 9838

Mar-Jeanne and Arthur Tendler (Tendler) were officers of Wiz Technology, Inc. (Wiz). Wiz made an initial public offering that was underwritten by an investment-banking firm, Strasbourger. Strasbourger was represented by Stroock & Stroock & Lavan (Stroock.) Stroock hired Coopers & Lybrand to audit Wiz. The audit revealed that Wiz had violated its underwriting agreement with Strasbourger. Stroock then filed a lawsuit against Wiz on behalf of Strasbourger. Wiz’s motion to disqualify Stroock on the grounds that it represented Wiz in the stock qualification process and represented Coopers while it audited Wiz was granted. The order was not supported by any rationale, but the court’s comments at the hearing focused on the appearance of impropriety, not the existence of an attorney-client relationship with Wiz.

While Strasbourger appealed from the disqualification order, Rosen and Associates (Rosen) represented Wiz in a legal malpractice action authorized by

the Tendlers against Stroock. Wiz alleged Stroock committed malpractice by representing Strasbourger when it had previously represented Wiz and alleged that Stroock owed a duty to Wiz independent of the attorney-client relationship. Although Wiz did not serve the complaint, Stroock voluntarily answered it. The action was stayed until the resolution of the appeal. The Court of Appeal reversed the ruling on the disqualification motion because the evidence suggested Stroock was Strasbourger’s attorney, not Wiz’s. The Court also held Stroock owed no duty to Wiz independent of the attorney-client relationship. Wiz voluntarily dismissed its legal malpractice action against Stroock.

Stroock sued the Tendlers and Rosen for malicious prosecution. Rosen filed a motion to strike that was granted because probable cause existed for the underlying complaint. The trial court determined that probable cause existed, in part, because the court had granted Wiz’s motion to disqualify Stroock in the

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underlying lawsuit.

The Court of Appeal examined whether the disqualification motion established that Rosen had probable cause to file the malpractice claim. Rosen argued that under the interim adverse judgment rule, the order disqualifying Stroock established probable cause to file the malpractice claim. The Court of Appeal disagreed and declined to apply the “interim adverse judgment” rule first enunciated in *Roberts v. Sentry Park* (1999) 76 Cal. App. 4th 375, and later approved by the California Supreme Court in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal. 4th 811(PL Update No. 130) to the disqualification order. The Court observed that the protection of the interim adverse judgment rule ordinarily attaches to rulings that are based on a dependable evaluation of the facts and that address the merits of the claim.

The disqualification order did not support the application of the interim adverse judgment rule because it did not address whether Stroock was Wiz’s attorney. There was no rationale for the ruling and therefore it did not establish that Wiz’s conflict of interest claims were tenable. The Court drew a distinction between a favorable ruling in a motion and a favorable ruling on a specific issue. Where an interim adverse judgment does not address the specific issue being litigated in a malicious prosecution action, it will not establish probable cause.