2400 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402
TELEPHONE (612) 334-8400
FACSIMILE (612) 334-8650

BRIGGS AND MORGAN

PROFESSIONAL ASSOCIATION

WRITER'S DIRECT DIAL
(612) 334-8448

WRITER'S E-MAIL
stegre@briggs.com

November 22, 2000

via MESSENGER

Clerk of Court
United States District Court
316 North Robert Street
St. Paul, MN 55101

Re: Lambros v. Faulkner, et al.
Court File No.: 98-1621 DSD/JMM

Dear Clerk:

Enclosed herewith for filing is the original and one copy of:

1. Plaintiff's Memorandum in Support of Plaintiff's Objection to Magistrate Judge Mason's Report and Recommendation.

2. The following Attachments:

   - Copy of letter dated November 4, 2000 from Plaintiff John Gregory Lambros to Gregory Stenmoe with enclosures.
   - Copy of letter dated November 6, 2000 from Plaintiff John Gregory Lambros to Gregory Stenmoe.
   - Copy of letter dated November 7, 2000 from Plaintiff John Gregory Lambros to Gregory Stenmoe.
   - Copy of letter dated November 8, 2000 from Plaintiff John Gregory Lambros to Gregory Stenmoe.
   - Copy of letter dated November 9, 2000 from Plaintiff John Gregory Lambros to Gregory Stenmoe with enclosures.

1230001.1

- Copy of letter dated November 11, 2000 from Plaintiff John Gregory Lambros to Gregory Stenmoe.
- Copy of letter dated November 13, 2000 from Plaintiff John Gregory Lambros to Gregory Stenmoe with enclosures.
- Copy of letter dated November 15, 2000 from Plaintiff John Gregory Lambros to Gregory Stenmoe with enclosures.

Thank you.

Very truly yours,

BRIGGS AND MORGAN

By
Gregory J. Stenmoe

Enclosures

c.c.: John Lambros w/encl. (via Express Mail)

GJS:sjp

1230081.1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS,

Plaintiff,

v.

CHARLES W. FAULKNER, sued as Estate/Will Business Insurance of Deceased Attorney Charles W. Faulkner, SHEILA REGAN FAULKNER, FAULKNER AND FAULKNER, Attorneys at Law, and JOHN AND JANE DOE

Defendant.

Case No.: Civil 98-1621 (DSD/JMM)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE MASON'S REPORT AND RECOMMENDATION

John Gregory Lambros, ("Lambros") submits this Memorandum and attached correspondence from Mr. Lambros in Support of his Objections to Magistrate Judge John M. Mason's Report and Recommendation dated October 31, 2000 ("Recommendation"). Magistrate Judge Mason erroneously recommends that Lambros' complaint be dismissed based on an unwarranted extension of the Dziubak case. Further, material questions of fact exist with regard to Plaintiff's remaining claims. Accordingly, pursuant to 28 USC 636(b)(1)(C), Plaintiff respectfully requests that this Court decline to adopt Magistrate Judge Mason's Report and Recommendation and deny Defendants' Motion.

STANDARD OF REVIEW

A district court reviews a magistrate's report and recommendation and any objections to it under the standards set forth in 28 U.S.C. 636(b)(1). This Court conducts a *de novo* review of the Recommendation to the extent a party objects and it may accept, reject, or modify, in whole or in part, the magistrate judge's findings or recommendations. Fed. R. Civ. Pro. LR 72.1(c)(2); Branch v. Martin 886 F.2d 1043 (8th Cir. 1989).

ARGUMENT

I. The Defendant Is Not Immune From Suit Based On Common Law Immunity.

Magistrate Judge Mason's recommendation that Lambros' claim be dismissed based on the argument that Defendant is immune from suit under common law immunity is erroneous. Magistrate Judge Mason's Recommendation is based on an unwarranted extension of Dziubak v. Mott, 503 N.W.2d 771 (Minn. 1993). In Dziubak, the Minnesota Supreme Court held that full-time state public defenders are immune from suit for malpractice. The Dziubak case had limited applicability and offered immunity only to full-time public defenders paid by the state. Dziubak is not applicable to the instant case because the Defendant is not a full-time state public defender, but rather, a federal court-appointed, private attorney who was paid by the federal government. Therefore, no nexus existed between the state of Minnesota and defendant. See Polk County v. Dodson, 454 U.S. 312, 70 L. Ed. 2d. 509 (1981) (public defender paid by the state does not act under color of state law, functions performed by public defender are private in nature and not those of the state). Magistrate Judge Mason acknowledged in his Recommendation that the Dziubak case differed from the case at issue and stated:

> In Dziubak, the Minnesota Supreme Court held that full-time state public defenders are immune from suit for legal malpractice. C.W. Faulkner [the defendant], on the other hand, was a private attorney selected to represent Plaintiff in a single criminal case. The Minnesota decision does not directly address the issue of immunity for private attorneys who serve as part-time public defenders presented by this case.

Report and Recommendation ("R&R") at 10-11. Magistrate Judge Mason further acknowledged that the state may define defenses to malpractice claims, "unless of course, the state rule is in conflict with federal law." Ferri, 444 U.S. at 198; (R&R at 7). Nonetheless, Magistrate Judge Mason extended Dziubak, predicting that the Minnesota Supreme Court would find enough similarities between part-time, court-appointed federal public defenders and full-time state public defenders to extend the reasoning in the Dziubak to grant Federal court-appointed attorneys immunity from malpractice lawsuits. In contrast, United States Supreme Court has declared that strong federal policy reasons dictate that federal court-appointed attorneys not be granted immunity. According to the United States Supreme Court, federal court-appointed attorneys parallel privately retained attorneys. Therefore Dziubak should not be extended to offer immunity to federal court-appointed attorneys. In Ferri v. Ackerman, 444 US 193 (1979) the United States Supreme Court denied immunity to a federal court-appointed attorney, stating:

> The point of immunity for such...officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion. In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel...His principal responsibility is to serve the undivided interests of his client...The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently. The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client.

Id. at 204 (emphasis added). The Eighth Circuit in White v. Bloom, 621 F.2d 276 (8th Cir. 1980)

followed the United States Supreme Court decision in Ferri and applied the reasoning in Ferri in denying immunity to a court-appointed attorney. The White court agreed that the "important reason supporting common law immunity for prosecutors and judges therefore does not support a like immunity for court-appointed attorneys." Id. at 280. The Eighth Circuit court interpreted the application of the Ferri case to apply broadly, stating, "its broad holding is that the federal common law immunity available to prosecutors and judges...is not available to court-appointed attorneys." White, 621 F.2d at 280 (citation omitted). Accordingly, Magistrate Judge Mason erred as a matter of law in extending Dziubak to federal court-appointed attorneys such as Defendant Faulkner. Magistrate Judge Mason failed to consider the United States Supreme Court's as well as the Eighth Circuit Court's analysis of the similarities between court-appointed attorneys and private practice attorneys and erroneously predicted the Minnesota Supreme Court would extend Dziubak to protect federal court-appointed attorneys from malpractice suits and deprivation of Sixth Amendment Rights to effective assistance of counsel.

II. The Issue of Causation Presents A Genuine Issue of Material Fact

The elements of a legal malpractice cause of action are (1) the existence of an attorney-client relationship; (2) the attorney's negligence or breach of contract; (3) the attorney's negligence or breach proximately caused the plaintiff damages; and (4) but for the attorney's conduct, the plaintiff would have prevailed in the cause of action. See Rouse v. Dunkley & Benett, P.A., 520 N.W.2d 406, 408 (Minn. 1994). Magistrate Judge Mason determined that Lambros' malpractice claim lacked genuine issue of material fact by erroneously finding that Lambros cannot establish that the Defendant's actions were the cause of his inability to obtain a more favorable sentence. There is

substantial evidence submitted to the court which clearly provides ample genuine issues of material fact for a jury to determine with regards to the issue of causation.

Lambros states in his affidavit that he "would of [sic] accepted a plea bargain of NOLO CONTENDRE as to the drug indictment and/or pled guilty to Conspiracy to defraud IRS lawful function..." August 3, 2000 Lambros Aff. ¶25. Magistrate Judge Mason ignored Lambros' affidavit and instead relied on two defective pieces of evidence. First, Magistrate Mason cites a statement in which Lambros informs the court that he feels he is facing the death penalty and therefore would not negotiate a possible plea bargain. (R&R at 13). The second piece of evidence Magistrate Mason erroneously relies on is a statement by Jeffrey L. Orren, who stated in his affidavit that Lambros told him that he would not have accepted a plea agreement even if it meant he would spend no time in jail. (R&R at 13-14). Based on these two pieces of evidence, Magistrate Judge Mason concluded that "there is no issue of material fact as to whether C.W. Faulkner's actions were the cause of Plaintiff's injury, and that Plaintiff cannot establish the causation element of his malpractice claims." (R&R at 14).

However, neither piece of evidence lends support to conclude that there is no genuine issue of material fact as to whether the Defendant's actions caused Lambros' injury. The statement in which Lambros says that he chooses not to negotiate a plea bargain was made by Lambros based on fraudulent information given to him by the Defendant regarding his mandatory life sentence without parole. Lambros made this statement with the false belief, created by Defendant, that he was facing a "life term without possibility of parole". This statement, which was relied on by Magistrate Mason in making his Recommendation, does not establish that Lambros would have declined to take

a plea bargain if offered to him, especially when Lambros could only receive no more than a 30-year sentence under Brazilian law, which the court was bound to enforce due to Lambros' extradition from Brazil. Rather, this statement lends further support to Lambros' claim that incorrect sentencing information given to him by Defendant resulted in a less favorable sentence for Lambros, personal financial ruin and deprivation of his Sixth Amendment Right to effective assistance of counsel. August 3, 2000 Lambros Aff. That is, the statement Lambros made reflects his negative impression about his chances of getting a better plea bargain and his constitutional rights under Brazilian law. Lambros made this statement with the mistaken idea that any plea bargain would have been fruitless because he was facing a mandatory life sentence and not be given his constitutional rights under Brazilian law. Lambros' misunderstanding of his ability to plea bargain, as reflected in his statement, was created by the fraudulent sentencing information that Defendant provided him. Additionally, defendants committed fraud when they offered Lambros a 7-year plea agreement, as the government did not meet the requirements of filing a § 3553 (e) or § 5K1.1 motion. See U.S. v. Coleman, 895 F.2d 501, 504-07 (8th Cir. 1990)(notice must appear within plea agreement).

Further, there are no statements from Lambros wherein he said he would not accept a plea bargain in the context of having correct sentencing information. As a result, several questions of material fact relating to causation exists. It is a question of fact for a jury to determine whether Lambros' statements were made as a result of receiving fraudulent sentencing information from Defendant. It is also a question of fact for a jury to determine whether Lambros would have received a more favorable plea agreement if he had correct sentencing information. These issues relate to whether Defendant's actions caused Lambros injury and are questions of material fact for the jury

to decide. As a result, Magistrate Judge Mason erred when he concluded, based on this statement, that no questions of material fact exist with regards to the issue of causation.

The second piece of evidence Magistrate Judge Mason erroneously relies upon is a statement made by Jeffrey L. Orren, dated January 27, 1994, in which Mr. Orren asserts that Lambros told him that Lambros would not have accepted a plea agreement even if it meant he would not have to go to jail. This statement should not have been considered by Magistrate Judge Mason in his Recommendation because it is inadmissable hearsay and therefore must not be relied on as proof of Lambros' position with regards to whether or not he would take the plea bargain. Neff v. World Publishing Co., 349 F.2d 235, 253 (8th Cir. 1965)

Further, evidence was submitted that lends support to Lambros' claim that Lambros would have received and accepted a plea bargain had the Defendant provided accurate sentencing information. Lambros submitted an affidavit which states that he would have accepted the plea bargain that co-defendant Pamela Rae Lemon was offered and accepted had he received accurate sentencing information from the Defendant and been offered such a plea bargain. August 3, 2000 Lambros Aff.

That Lambros' co-defendants received a plea bargain and a lesser sentence lends further support to Lambros' claim that he, too, would have received a plea bargain with a lesser sentence had Defendant provided Lambros and the federal prosecutor with correct sentencing information, as per the requirements of the U.S./Brazil Extradition Treaty Lambros was extradited under. Mr. Lambros' co-defendants Pam Lemon, Larry Pebbles, Ralph Amero and Ira Bernie were offered and accepted lesser plea agreements. August 3, 2000 Lambros Aff. ¶¶ 36-40. For example, Pam Lemon received

a sentence of 2 months with work release and supervised release for 2 years. (August 3, 2000 Lambros Aff. ¶ 38). This presents a genuine issue of material fact as to whether based on this evidence, Mr. Lambros would have received and would have accepted a lesser plea agreement if the Defendant had provided the correct sentencing information to Lambros and the federal prosecutors. In fact, Lambros' Maximum Sentence Exposure was only 30 years, a lesser maximum sentence than say of Lambros' co-defendants, due to Brazilian law and the U.S./Brazil Extradition Treaty Lambros was denied.

Moreover, under Minnesota case law, the issue of causation is a matter of fact to be decided by a jury, not a judge. St. Paul, Fire & Marine Insurance Company, v. Honeywell, 2000 WL 685007 (Minn. App. 2000), (holding causation is a question of fact for the jury's finding and therefore, in concluding appellant failed to establish causation, the district court "impermissibly weighed evidence and judged witness credibility.) (Citation omitted). Therefore, Magistrate Judge Mason erred when he recommended this case be dismissed because a genuine question of material fact did not exist for a jury to decide.

III. Lambros' RICO Claim Presents a Genuine Issue of Material Fact

Magistrate Judge Mason erroneously concluded that no genuine issue of material fact exists to support a RICO claim against the Defendant. However, Lambros maintains in his affidavit that the Defendant violated RICO when they entered into a "scheme to intimidate, corruptly coerce and corruptly persuade witnesses and clients in official proceedings to withhold, fabricate and falsify evidence, information and testimony." (P's Response to Def's Motion dated April 26, 1999). See August 3, 2000 Lambros Aff. Therefore, sufficient evidence exists on the RICO claim that would

raise to a genuine issue of material fact.

CONCLUSION

Based on the foregoing, and the submissions attached hereto from Mr. Lambros dated November 4, 6, 7, 8, 9, 11, 13, and 15, 2000 and all previous submissions. Plaintiff objects to Magistrate Judge Mason's Recommendation that Lambros' case should be dismissed. Accordingly, Plaintiffs respectfully request that this Court decline to adopt the Recommendation and deny the Motion to Dismiss and/or for Summary Judgment.

Respectfully submitted,

BRIGGS AND MORGAN, P.A.

Dated: November 22, 2000

By _____
Gregory James Stenmoe (#131155)
2400 IDS Center
80 South 8th Street
Minneapolis, Minnesota 55402
(612) 334-8448

ATTORNEYS FOR PLAINTIFF

November 4, 2000

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: www.brazilboycott.org

Attorney Gregory J. Stenmoe
BRIGGS & MORGAN
2400 IDS CENTER
80 South Eighth Street
Minneapolis, Minnesota 55402
Web site: www.briggs.com

RE: YOUR NOVEMBER 1, 2000 LETTER AS TO JUDGE MASON'S REPORT & RECOMMENDATION

Dear Greg:

Thank you for forwarding Judge Mason's REPORT & RECOMMENDATION dated October 31, 2000.

This response is my initial thoughts as to same:

1. MINNESOTA STATE LAW CAN NOT OFFER IMMUNITY TO PUBLIC DEFENDERS **FOR CRIMINAL CONDUCT AND/OR CRIMINAL DEPRIVATION OF CONSTITUTIONAL RIGHTS [TREATY RIGHTS].** See, U.S. vs. GILLOCK, 63 L.Ed.2d 454, 464-465 (1980). (see attached for pages 464 & 465) Therefore, the state law is unconstitutional as it grants immunity to any public defender **FOR ANY ACTION WHILE REPRESENTING HIS CLIENT.**

2. Also see, U.S. vs. BREWSTER, 33 L.Ed.2d 507, 520-21 (1980).

3. I don't have my past briefs infront of me but I think I touched on the point that STATE FUNDS where not involved thus no state rights should attach, etc.

4. Judge Mason did not even touch on all the **MERITS** of my MALPRACTICE CLAIMS. The list is extensive and I don't have time to go into them know. - Dismissal of all claims except Count One (1) as they are included within the conspiracy as per BRAZILIAN LAW is a prime example. What about 50 plus years when the Brazilian Constitution only allows 30 years. CRAZY.

RICO: (Fraud/Defraud)

5. I included all claims within the RICO CLAIM as I expanded the record within my responses to Defendants request for summary judgement. The defendants DID NOT object.

6. The record reflects that I included **COMMON PREDICATE ACTS OF MAIL AND WIRE FRAUD**, Title 18 U.S.C. 1341 & 1343. I believe we have stated a violation of wire and/or mail fraud statute, as we showed: **(ELEMENTS)**

12. File

a. a scheme to defraud;
b. participation by the defendant in the scheme;
c. specific intent to defraud;
d. the use of the U.S. wires or mails in furtherance of the scheme [mailing & telephoning as to the negotiations of PLEA AGREEMENT];
e. reliance.

SCHEME TO DEFRAUD must involve **MISREPRESENTATION OR OMISSIONS** reasonably calculated to deceive persons of ordinary prudence and comprehension. WALTER vs. FIRST NAT'L BANK, N.A., 855 F.2d 267 (6th Cir. 1988), cert. denied, 489 U.S. 1067 (1989). **FRAUD OCCURS** only when a person of ordinary prudence and comprehension would **RELY** on the **MISREPRESENTATION**. ASSOCIATION IN ADOLESCENT PSYCHIATRY, S.C. vs. HOME LIFE INS. CO., 941 F.2d 561 (7th Cir. 1991)

MENS REA: The term "scheme to defraud" connotes some degree of planning by the defendant. It is ESSENTIAL that the evidence show that the defendant entertained an intent to defraud. ATLAS PILE DRIVING CO. vs. DICON FIN CO., 886 F.2d 986 (8th Cir. 1989). **THE SPECIFIC INTENT TO DECEIVE CAN BE FOUND FROM A MATERIAL MISSTATEMENT OF FACT WITH RECKLESS DISREGARD OF ITS TRUTH.** IN RE PHILLIPS PETROLEUM SECS. LITIG., 881 F.2d at 1249. At the minimum, the mens rea element of the offense requires that **RELIANCE** be anticipated by the defendant. PELLETIER vs. ZWEIFEL, 921 F.2d 1465 (11th Cir.).

DECEPTION REQUIREMENT: The scope of the mail and wire fraud statutes is **BROADER THAN THAT OF COMMON LAW FRAUD**. McEVOY TRAVEL BUREAU, INC. vs. HERITAGE TRAVEL, INC., 904 F.2d 786 (1st Cir.), cert. denied, 111 S.Ct. 536 (1990)("the scope of **FRAUD** under the [the mail and wire fraud] statutes is broader than common law fraud, and . . . no misrepresentation of fact is required in order to establish a scheme to defraud"); accord ATLAS PILE DRIVING CO., 886 F.2d at 99).

I like to know what the hell I'm missing here, if I wasn't DECEIVED as to the MISREPRESENTATION and/or OMISSIONS of facts within the PLEA AGREEMENT, **WHAT HAPPENED?????????????????????????**

The library is closing and I want to get this out in the Sunday mail to you. I'll call monday. THANKS.

Sincerely,

John G. Lambros

2686. Although the lack of an evidentiary privilege for a state legislator might conceivably influence his conduct while in the legislature, it is not in any sense analogous to the direct regulation imposed by the federal wage-fixing legislation in National League of Cities.

The second rationale underlying the Speech or Debate Clause is the need to insure legislative independence. Gillock relies heavily on Tenney v Brandhove, 341 US 367, 95 L Ed 1019, 71 S Ct 783 (1951), where this Court was cognizant of the potential for disruption of the state legislative process. The issue there, however, was whether state legislators were immune from civil suits for alleged violations of civil rights under 42 USC § 1983 [18 USCS § 1983]. The claim was made by a private individual who alleged that a state legislative committee hearing was conducted to prevent him from exercising his First Amendment rights. The Court surveyed the history of the speech or debate privilege from its roots in the British parliamentary experience through its adoption in our own Federal Constitution.

[445 US 373]

In light of these "presuppositions of our political history," 341 US, at 372, 95 L Ed 1019, 71 S Ct 783, the Court stated:

> "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of § 1983] before us." Id., at 376, 95 L Ed 1019, 71 S Ct 783.

Accordingly, the Court held that a state legislator's common-law absolute immunity from civil suit survived the passage of the Civil Rights Act of 1871.[10]

[5a] Although Tenney reflects this Court's sensitivity to interference with the functioning of state legislatures, we do not read that opinion as broadly as Gillock would have us. First, Tenney was a civil action brought by a private plaintiff to vindicate private rights. [redacted] As recently as O'Shea v Littleton, 414 US 488 (1974), 38 L Ed 2d 674, 94 S Ct 669, we stated:

> "Whatever may be the case with respect to civil liability generally, . . . or civil liability for willful corruption, . . . we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the [redacted] *Act of Congress*. . . ." Gravel v United States, 408 US 606, 627, [33 L Ed 2d 583, 92 S Ct 2614] (1972)." Id., at 503, 38 L Ed 2d 674, 94 S Ct 669 (emphasis supplied).

[445 US 374]

Accord, Imbler v Pachtman, 424 US

10. Despite the frequent invocation of the federal Speech or Debate Clause in Tenney, the Court has made clear that the holding was grounded on its interpretation of federal common law, not on the Speech or Debate Clause. See Lake Country Estates, Inc. v Tahoe Regional Planning Agency, 440 US, at 404, 59 L Ed 2d 401, 99 S Ct 1171.

409, 429, 47 L Ed 2d 128, 96 S Ct 984 (1976); Scheuer v Rhodes, 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474 (1974). Thus, in protecting the independence of state legislators, Tenney and subsequent cases on official immunity have drawn the line at civil actions.[11]

[8] We conclude, therefore, that although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields. We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in United States v Nixon, 418 US 683, 41 L Ed 2d 1039, 94 S Ct 3090 (1974), when balanced against the need of enforcing federal criminal statutes. There, the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding. See also United States v Burr, 25 F Cas 187 (No. 14,694) (CC Va 1807). Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.[12]

[445 US 374]

IV

[7] The Federal Speech or Debate Clause, of course, is a limitation on the Federal Executive, but by its terms is confined to federal legislators. The Tennessee Speech or Debate Clause is in terms a limit only on the prosecutorial powers of that State. Congress might have provided that a state legislator prosecuted under federal law should be accorded the same evidentiary privileges as a Member of Congress. Alternatively, Congress could have imported the "spirit" of Erie R. Co. v Tompkins, 304 US 64, 82 L Ed 1188, 58 S Ct 817, 11 Ohio Ops 246, 114 ALR 1487 (1938), into federal criminal law and directed federal courts to apply to a state legislator the same evidentiary privileges available in a prosecution of a similar charge in the courts of the state. But Congress has chosen neither of these courses.

In the absence of a constitutional

11. [5b] Federal prosecutions of state and local officials, including state legislators, using evidence of their official acts are not infrequent. See, e.g., United States v Rabbitt, 583 F2d 1014 (CA8 1978), cert denied, 439 US 1116, 59 L Ed 2d 75, 99 S Ct 1022 (1979); United States v Mazzei, 521 F2d 639 (CA3), cert denied, 423 US 1014, 46 L Ed 2d 386, 96 S Ct 446 (1975); United States v Homer, 411 F Supp 872 (WD Pa 1976). See also Anderson v United States, 417 US 211, 216-218, 41 L Ed 2d 20, 94 S Ct 2253 (1974). Of course, even a Member of Congress would not be immune from prosecution for the acts which form the basis of the Hobbs Act, 18 USC § 1951 [18 USCS § 1951], and 18 USC § 1962 [18 USCS § 1962], charges here. See United States v Helstoski, 442 US 477, 61 L Ed 2d 12, 99 S Ct 2432 (1979).

12. Cf. Gravel v United States, 408 US 606, 627, 33 L Ed 2d 583, 92 S Ct 2614 (1972) ("[W]e cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute").

United States § 9 — speech or debate clause — legislative acts — motivation

8. The speech or debate clause of Art I, § 6, of the United States Constitution, protects members of Congress from inquiry into legislative acts or the motivation for actual performance of legislative acts.

United States § 24 — legislative act — definition

9. A legislative act is defined as an act generally done in Congress in relation to the business before it.

United States § 9 — speech or debate clause — inquiry — official duties

10. The speech or debate clause of Art I, § 6, of the United States Constitution, prohibits inquiry only into those things generally said or done in Congress by its members in the performance of official duties, and into the motivation for those acts.

United States § 9 — speech or debate clause — political acts

11. Members of Congress engage in many activities, such as giving assistance in securing government contracts, preparing news releases, and delivering speeches outside Congress, other than purely legislative activities; and while such activities are perfectly legitimate, they are political in nature rather than legislative, and are not afforded protection by the speech or debate clause of Art I, § 6, of the United States Constitution, which provides that members of Congress shall not be questioned in any other place with regard to speeches or debates in Congress.

United States § 9 — speech or debate clause — enacting legislation

12. The speech or debate clause of Art I, § 6, of the United States Constitution, which provides that members of Congress shall not be questioned in any other place with regard to speeches or debates in Congress, protects only acts generally done in the course of the process of enacting legislation.

United States § 9 — speech or debate clause — legislative process — due functioning

13. The speech or debate clause of Art I, § 6, of the United States Constitution, does not protect all conduct relating to the legislative process, but is limited to the protection of acts which are clearly a part of the due functioning of the legislative process.

Constitutional Law § 68.5; United States § 9 — legislative independence — criminal responsibility — no immunity

14. Although the speech or debate clause of Art I, § 6, of the United States Constitution, must be read broadly to effectuate its purpose of protecting the independence of the legislative branch, nevertheless the clause's purpose is not to make members of Congress supercitizens, immune from criminal responsibility; in its narrowest scope, the clause is a very large, albeit essential, grant of privilege, which has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the framers of the Constitution.

United States §§ 9, 10 — members of Congress — behavior — necessary shield

15. The privilege contained in the speech or debate clause of Art I, § 6, of the United States Constitution, which provides that members of Congress shall not be questioned in any other place for speeches or debates in Congress, tolerates and protects behavior on the part of members of Congress which is not tolerated when done by other citizens; but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.

United States § 10 — members of Congress — discipline — unbridled discretion

16. The process whereby Congress disciplines one of its own members is not without risks of abuse, since the process is not surrounded with the panoply of protective shields that are present in a criminal case, an accused member is judged by no specifically articulated standards, and he is at the mercy of an almost unbridled discretion of a charging body that functions at once as accuser, prosecutor, judge, and jury, from whose decision there is no established right of review.

United States § 10 — members of Congress — punishment

17. The jurisdiction of Congress to punish its members is not all-embracing.

Bribery § 1 — legislative process — inquiry into motive

18. Taking a bribe is obviously no part of the legislative process or function; it is not a legislative act, nor is it, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator, nor is it an "act resulting from the nature and execution of the office," nor is it a thing said or done by a legislator as a representative in the exercise of the functions of his office; and it is not necessary to inquire into a legislative act, or into the motivation for a legislative act, in order to prosecute a member of Congress for taking a bribe.

Bribery § 1; Evidence § 418; United States § 12 — criminal offense — influencing member of Congress — proof

19. Under 18 USCS § 201(c)(1), which provides, inter alia, that it is a criminal offense for any public official to receive anything of value for himself or for any other person in return for being influenced in his performance of any official act, the government, in prosecuting a member of Congress for accepting a bribe in return for being influenced in his performance of official acts, need not show, in order to make a prima facie case under an indictment, any act of the member of Congress subsequently to the corrupt promise for payment, for it is the taking of a bribe, and not the performance of any illicit compact, that is the criminal act under the statute; and thus, it makes no difference whether the member of Congress in fact defaulted on his illegal bargain.

United States § 9 — speech or debate clause — illegal conduct

20. The speech or debate clause of Art I, § 6, of the United States Constitution, does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions.

United States § 9 — speech or debate clause — history — legislative process

21. The only reasonable reading of the speech or debate clause of Art I, § 6, of the Constitution, consistent with its history and purpose, is that it does not prohibit inquiry into activities which are casually or incidentally related to legislative affairs, but are not a part of the legislative process itself.

SYLLABUS BY REPORTER OF DECISIONS

Appellee, a former United States Senator, was charged with the solicitation and acceptance of bribes in violation of 18 USC §§ 201(c)(1) and 201(g). The District Court, on appellee's pretrial motion, dismissed the indictment on the ground that the Speech or Debate Clause of the Constitution shielded him "from any prosecution for alleged bribery to perform a legislative act." The United States filed a direct appeal to this Court under 18 USC § 3731 (1964 ed., Supp V) which appellee contends this Court does not have jurisdiction to entertain because the District Court's action was not "a decision or judgment setting aside, or dismissing" the indictment but was instead a summary judgment on the merits based on the facts of the case. *Held:*

1. This Court has jurisdiction under 18 USC § 3731 (1964 ed., Supp V) to hear the appeal, since the District Court's order was based upon its determination of the constitutional in-

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: www.brazilboycott.org

Attorney Gregory Stenmoe
BRIGGS & MORGAN
2400 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Web site: www.briggs.com

RE: PARTIAL COMMENTS & OBJECTIONS TO OCTOBER 31, 2000 - REPORT & RECOMMENDATION

Dear Greg:

I tried telephoning you this morning several times to no avail. I'll try again later this afternoon and/or tomorrow. I mailed you my initial letter on November 4, 2000 and I will expand again. Here are my thoughts:

1. You stated in your letter of November 1, 2000, that our response is due by November 14, 2000, please request an extension to November 30, 2000.

2. Charles Faulkner committed **FRAUD** when he stated, "Plaintiff was offered a plea bargain of seven (7) years in prison for all charges pending against him." See, October 31, 2000, REPORT & RECOMMENDATION, FINDING OF FACT/REPORT, page 2.

3. It was **LEGALLY IMPOSSIBLE** for the Court to give me a SEVEN (7) year sentence on any of the counts within the INDICTMENT. The Minimum by statute was ten (10) years on **Count VIII (8)**, Violation of Title 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). See November 16, 1992 PLEA AGREEMENT, paragraph 1 & 3. Also the government stated that the GUIDELINE RECOMMENDATION range would be **292 to 365 months**. The PLEA AGREEMENT is **EXHIBIT G** within my in initial complaint and/or declaratory judgement, dated June 15, 1998.

4. The government could not change the INDICTMENT due to the fact that my extradition proceedings prevented same, nor could they bring new charges without sending me back to **BRAZIL** first. Therefore, no matter what kind of scheme Charles Faulkner and/or the U.S. Attorneys Office came up with, it would not work due to my EXTRADITION FROM BRAZIL. It would not be legal.

5. Magistrate Judge Mason stated on page 11 of the REPORT AND RECOMMENDATION, "We conclude that the **MINNESOTA SUPREME COURT** would most likely extent its grant of **IMMUNITY** to include private attorneys acting as court-appointed public defenders. Defendants' request that Plaintiff's malpractice claims be dismissed because C.W. Faulkner was acting in the capacity of a public defender should be granted."

16. File

6. Therefore, the question is, "WHAT TYPE OF IMMUNITY DO STATE OF MINNESOTA PUBLIC DEFENDERS ENJOY."

**** a. QUALIFIED IMMUNITY: (This can be appealed NOW if the Court is giving FAULKNER this defense, See; NAPOLITANO vs. FLYNN, 949 F.2d 617, 621 (2nd Cir. 1991)

b. Qualified immunity applies to state law claims only. See, NAPOLITANO vs. FLYNN, 949 F.2d 617, 621 (2nd Cir. 1991); JACKSON vs. BOSTICK, 760 F.Supp. 524, 532 n.6 (D.Md. 1991)(Maryland courts have REJECTED qualified immunity for state CONSTITUTIONAL VIOLATIONS).

c. Qualified immunity protects officials from damage liability in civil cases unless they violate "clearly established statutory or constitutional rights of which a REASONABLE PERSON WOULD HAVE KNOWN." See, HARLOW vs. FITZGERALD, 457 U.S. 800, 818 (1982). The question has also been stated as "whether a reasonable officer could have believed [her actions] to be lawful, in light of clearly established law and the information the [defendant] possessed." ANDERSON vs. CREIGHTON, 483 U.S. 634, 641 (1987). The Supreme Court described this rule as one of "OBJECTIVE LEGAL REASONABLENESS." Id. A defendant's subjective state of mind is not relevant to the qualified immunity defense. DAVIS vs. SCHERER, 468 U.S. 183, 191 (1984).

d. Qualified immunity only applies to officials sued in their individual capacities for money damages. **(If the State of Minnesota wants to offer FAULKNER immunity they should be liable)**

e. Was the Minnesota law clear in 1992 that State of Minnesota PUBLIC DEFENDERS had immunity??? See, HARLOW vs. FITZGERALD, 457 U.S. at 818.

**** f. Statutes and regulations are no defense if FAULKNER engaged in clearly UNCONSTITUTIONAL CONDUCT. See, J.H.H. vs. O'HARA, 878 F.2d 240, 244 n.4 (8th Cir. 1989), cert. denied, 493 U.S. 1072 (1990).

g. State law or regulations that CONFORM to the constitution may help show how well established the constitutional law is. See, O'BRIEN vs. BOROUGH OF WOODBURY HEIGHTS, 679 F.Supp. 429, 435-36 (D.N.J. 1988) (amendment of state statute limiting strip search of arrestees helped overcome QUALIFIED IMMUNITY.); See also, GREEN vs. BAUVI, 792 F.Supp. 928, 940 (S.D.N.Y. 1992)(where due process required a hearing within a "REASONABLE" time, defendants could not have reasonably believed that exceeding their own regulations' time limit was reasonable).

**** h. Official/FAULKNER was also expected to use common sense in assessing their legal obligations. See, DOE vs. RENFROW, 631 F.2d 91, 93 (7th Cir. 1980)(qualified immunity IS NOT available when "simple common sense" indicates that a search is unreasonable), cert. denied, 451 U.S. 1022 (1981); SEPULVEDA vs. RAMIREZ, 967 F.2d at 1416 (officer was not immune for conduct that "runs contrary to common sense, decency," and state regulations).

i. In a prison mental health care case, the court stated that the question is "whether a reasonable doctor in the same circumstances and possessing the same knowledge as [the defendants] could have concluded taht his actions were lawful . . . See, WALDROP vs. EVANS, 871 F.2d 1030, 1034 (11th Cir. 1989), rehearing denied, 880 F.2d 421 (11th Cir. 1989).

J. **HAUGLE vs. WITNEY, 755 F.Supp. 1506, 1518-19 (D.Utah 1990) (Official who gave legal advice contrary to clearly established law may be held liable.**

I have to end here and get this in the mail. More tomorrow.

Sincerely, John G. Lambros

November 7, 2000

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: www.brazilboycott.org

Attorney Gregory J. Stenmoe
BRIGGS & MORGAN
2400 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Web site: www.briggs.com

RE: PARTIAL COMMENTS & OBJECTIONS TO OCTOBER 31, 2000 - REPORT & RECOMMENDATION

Dear Greg:

I tried again to telephone you this morning but you weren't in. This is my third (3rd) letter as to Judge Mason's October 31, 2000, REPORT & RECOMMENDATION: (a) November 4, 2000; (b) November 6, 2000.

COMMON LAW IMMUNITY:

1. Judge Mason quoted FERRI vs. ACKERMAN, 444 U.S. 193 (1979) but choose not to cite TOWER vs. GLOVER, 81 L.Ed2d 758 (1984), where the U.S. Supreme Court held, "Public defenders held **NOT IMMUNE FROM LIABILITY** in suits brought under 42 USCS §1983 alleging conspiracy with state officials to deprive client of federal rights." Therefore, the key to no immunity is "**INTENTIONAL MISCONDUCT.**"

DISMISSAL OF MALPRACTICE CLAIMS DUE TO QUALIFIED IMMUNITY IS IMMEDIATELY APPEALABLE AND NEED NOT AWAIT A FINAL DECISION:

2. I would like to immediately appeal Judge Mason's decision or do we have to wait for Judge Doty's final decision as to my malpractice claims being dismissed because C.W. Faulkner was granted immunity under Minnesota law. Please see, NAPOLITANO vs. FLYNN, 949 F.2d 617, 621 (2nd Cir. 1991):

> "[T]he question whether a defendant is entitled to qualified immunity from suit is thus **SEPERATE FROM THE MERITS OF THE UNDERLYING ACTION.** Id. at 528, 529, 105 S.Ct. at 2816, 2817. If a defendant's claim of qualified immunity is erroneously denied, he will lose forever his right not to stand trial unless he can obtain immediate appellate review. Id. at 527, 105 S.Ct. at 2816. A denial of a claim of qualified immunity, then, is immediately appealable and need not await a final decision. Id." (see, MITCHELL vs. FORSYTH, 472 U.S. 511)

18. file

RICO - LIBERAL CONSTRUCTION CLAUSE:

3. Congress has expressly directed that RICO is to be "liberally construed to effectuate its remedial purposes." See, Pub.L.No. 91-452, §904(a), 84 Stat. 947. See also, SEDIMA, S.P.R.L. vs. IMREX CO., 473 U.S. 479 (1985). If RICO's language is plain and unambiguous, it is controlling. See, NOW vs. SCHEIDLER, 114 S.Ct. 798, 806 (1994). On the other hand, **IF ITS LANGUAGE IS AMBIGUOUS, THE CONSTRUCTION THAT WOULD "EFFECTUATE ITS REMEDIAL PURPOSE" "BY PROVIDING ENHANCED SANCTIONS AND NEW REMEDIES " IS TO BE ADOPTED.** See, 84 Stat. 923, 947 (1970); TURKETTE, 452 U.S. at 587-588, 593; RUSSELLO, 464 U.S. at 27; SEDIMA, 473 U.S. at 497-98. As one commentator noted, ""[T]he policy Congress properly mandated for the construction of RICO is one of a GENEROUS, rather than a parsimonious reading of its promise of new criminal and CIVIL REMEDIES. See, BLAKEY & GETTING, RICO: Basic Concepts, note 3, at 1032-33.

RICO - SUMMARY JUDGEMENT:

4. If a genuine issue of MATERIAL FACT exists as to ANY MATERIAL RICO element, summary judgement is inappropriate. See, FEDERAL INS. CO. vs. AYERS, 772 F. Supp. 1503 (E.D.Pa. 1991)(denying summary judgement "because there are genuine issues of material fact regarding the commission of the alleged predicate acts").

RICO - BURDEN OF PROOF:

5. A simple preponderance of the evidence is all that is required to prove a predicate act and, therefore, the RICO violation. In SEDIMA, S.P.R.I. vs. IMREX CO, INC., 473 U.S. 479 (1985), the Supreme Court rejected a higher standard, observing that there was no indication that Congress sought to depart from the general principle that "conduct [which] can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard." Id. at 491 ('That the offending conduct is described by reference to criminal statutes does not mean that its occurrences must be established by criminal standards or that the consequences of a finding of liability in a private CIVIL ACTION are identical to the consequences of criminal conviction")

LEGAL MALPRACTICE, Fourth Edition, by RONALD E. MALLEN of the California Bar and JEFFREY M. SMITH, of the Georgia Bar, WEST PUBLISHING CO., St. Paul, Minnesota 1996:

6. **§ 8.9 - FRAUD or DECEIT:** LEGAL MALPRACTICE, pages 595 thru 599. **(ATTACHED)** Fraud or deceit **IS NOT LEGAL MALPRACTICE** as defined within this treatise. FRAUD is a distinct wrong and is no more a necessary incident to the rendition of legal services than dishonesty is to any other profession. - When committed by an attorney,

the tort of FRAUD or DECEIT is determined essentially by the same rules that apply to any defendant, despite whether one is a professional. FRAUD is a common claim, easy to allege, and often accompanied by other theories. Generally, there must be a **MATERIAL MISREPRESENTATION KNOWN TO BE FALSE WHEN MADE OR MADE IN RECKLESS DISREGARD OF ITS TRUTH**, with the intention that the plaintiff **SHOULD ACT UPON THE MISREPRESENTATION**, and on which the plaintiff relied to his or her injury. Usually, the courts require factual particularity in pleading the cause of action. . . .

A representation of the state of law or of legal principles by an attorney can be a representation of **FACT**. Therefore, an attorney's **ADVICE OR OPINION, IF KNOWINGLY FALSE, MAY BE FRAUD**. . . . The MISREPRESENTATION may be WRITTEN, ORAL, or may consist of conduct that reasonably can be understood as a representation.

7. **§ 8.12 - NEGLIGENCE:** LEGAL MALPRACTICE, pages 601 thru 608. **(Attached)** See, Minnesota list of cases on page 605.

MOTION REQUESTING A RULING FROM THE COURT AS TO ADDITION OF NEW DEFENDANTS:

8. On January 7, 2000, I served a motion dated **January 6, 2000**, entitled:

> PLAINTIFF'S REQUEST FOR A RULING BY THIS COURT AS TO THE ADDITION OF NEW DEFENDANTS' WITHIN THIS ACTION DUE TO AFFIDAVITS AND EXHIBITS INTRODUCED BY DEFENDANTS ON AUGUST 30, 1999, SO AS TO PRESERVE PLAINTIFF'S DUE PROCESS RIGHTS UNDER RES JUDICATA AND COLLATERAL ESTOPPEL, IN THIS ACTION. Dated: January 6, 2000.

9. I think we need to have Magistrate Mason make a ruling on this issue or I will be screwed in my suit against **BRAZIL et al as to my EXTRADITION.**

IGNORANCE OF A STATUTE:

10. Ignorance of a **STATUTE USUALLY IS NOT EXCUSABLE.** The failure to know of a **PENAL STATUTE RESULTING IN ADVICE THAT SUBJECTED THE CLIENT TO A CONVICTION DID NOT REQUIRE THE PRESENTATION OF EXPERT TESTIMONY** in the legal malpractice action. See, GOEBEL vs. LAUDERDALE, 214 Cal. App.3d 1502, 263 Cal.Rptr. 275 (1989) LEGAL MALPRACTICE, page 209.

PROVING THE UNDERLYING ACTION - MOTION FOR SUMMARY JUDGEMENT:

§ 32.23 (Legal Malpractice, page 235 thru 243) Factual sufficiency of a cause of action is based on **DISPUTED ISSUE OF FACT**. See, WOODDY vs. MUDD, 258 Md. 234, 265 A.2d 458 (1970).

Summary judgement is to decide whether there is an issue of fact to be tried. See, LEGAL MALPRACTICE, page 235 fn. 5.

An issue that can be readily examined by a motion for summary judgement is whether the **ATTORNEY MADE AN ERROR**. Legal Malpractice, page 236, fn. 8. Unlike the question of negligence, which usally partakes of **FACTUAL DISAGREEMENTS**, the decision of WHETHER THE LAWYER ERRED ALMOST INVARIABLY PRESENTS A QUESTION OF LAW. Legal Malpractice, page 236.

ERROR - NEGLIGENCE: (Legal Malpractice, page 237) Usually, NEGLIGENCE raises an issue of fact that cannot be decided by a motion for summary judgment. In contrast, whether the lawyer made an error almost always presents an issue of law.

HOUSE vs. DUNKLEY & BENNETT, P.A., 520 N.W.2d 406 (Minn. 1994) The Minnesota Supreme Court stated as to **SUMMARY JUDGEMENT**, the client need not produce persuasive evidence that he was likely to prevail in the underlying action but only that there was sufficient evidence to go to the trier of fact, which is that the claim could have survived a motion for summary judgement. This was a case of a client suing a lawyer.

I have to close now. My mother stated you would be out of town for a couple of days so I'll try later. WE NEED AN EXTENSION. THANKS.

Sincerely,

John G. Lambros

Negligence usually is not an issue, and thus is irrelevant to the question of a breach of contract.[11] Except for unspecified details, the attorney has no discretion concerning whether to follow the instructions,[12] but interpreting the client's instructions may require the exercise of judgment.[13]

Virtually any subject matter and any task may be made the subject of the client's specific directions. Thus, in litigation, the attorney may be told to file suit without delay,[14] to file an answer,[15] not to settle without specific authority,[16] or how to handle distribution of a settlement.[17] The attorney may be told to obtain a mechanic's lien,[18] to file for a discharge in bankruptcy,[19] to protect title,[20] or virtually any other task involving the practice of law.

These rules do not apply, however, to the client's suggestions regarding trial tactics or strategy. The United States Court of Appeals for the Tenth Circuit concluded that liability could not be predicated on an attorney's disregard of a client's direction concerning trial strategy.[21] The court explained that the attorney is the professional and that the ability to determine strategy is necessarily the professional's. Otherwise, reasoned the court, if the client had the last word, the client would be functioning as the lawyer. Similarly, an Oklahoma appellate court rejected what it characterized as a "brand new concept in professional malpractice ... subjection of a lawyer to liability for failure to follow the legal advice of his client."[22] The client claimed that the lawyer failed to follow her instructions to pursue unspecified legal remedies against a lender that had, in her opinion, "illegally" repossessed her car.

§ 8.9 · Fraud or Deceit

Fraud or deceit is not legal malpractice as defined within this

11. Jarnagin v. Terry, 807 S.W.2d 190 (Mo.App.1991) (citing book); Century Media Corp. v. Carlile Patchen Murphy & Allison, 773 F.Supp. 1047 (S.D.Ohio 1991); Gilbert v. Williams, 8 Mass. 51 (1811). *Cf.* McWhorter, Ltd. v. Irvin, 154 Ga.App. 89, 267 S.E.2d 830 (1980) (failure to follow client's instructions violates the standard of care).

12. Sjoberg v. Leach, 213 Minn. 360, 6 N.W.2d 819 (1942); Lichow v. Sowers, 334 Pa. 353, 6 A.2d 285 (1939); Ramage v. Cohn, 124 Pa.Super. 525, 189 A. 496 (1937); W.L. Douglas Shoe Co. v. Rollwage, 187 Ark. 1064, 63 S.W.2d 341 (1933).

13. Buchanan v. Huson, 39 Ga.App. 724, 148 S.E. 345 (1929).

14. Buchanan v. Huson, 39 Ga.App. 724, 148 S.E. 345 (1929); Gilbert v. Williams, 8 Mass. 51 (1811).

15. Lichow v. Sowers, 334 Pa. 353, 6 A.2d 285 (1939).

16. Wilson v. Coffin, 66 Mass. (2 Cush.) 316 (1848).

17. Ramage v. Cohn, 124 Pa.Super. 525, 189 A. 496 (1937).

18. Caltrider v. Weant, 147 Md. 338, 128 A. 72 (1925).

19. Sjoberg v. Leach, 213 Minn. 360, 6 N.W.2d 819 (1942).

20. Whitney v. Abbott, 191 Mass. 59, 77 N.E. 624 (1906).

21. Frank v. Bloom, 534 F.2d 1245 (10th Cir.1980).

22. Birchfield v. Harrod, 640 P.2d 1003, 1006 (Okl.App.1982).

treatise.[1] Fraud is a distinct wrong and is no more a necessary incident to the rendition of legal services than dishonesty is to any other profession.[2] The avoidance of fraudulent conduct requires no special skill or knowledge, but only basic precepts of honesty and integrity.

When committed by an attorney, the tort of fraud or deceit is determined essentially by the same rules that apply to any defendant, despite whether one is a professional.[3] Fraud is a common claim, easy to allege, and often accompanied by other theories. Generally, there must be a material misrepresentation known to be false when made or made in reckless disregard of its truth, with the intention that the plaintiff should act upon the misrepresentation, and on which the plaintiff relied to his or her injury.[4] Usually, the courts require factual particularity in

§ 8.9

1. Jackson v. Rogers & Wells, 210 Cal.App.3d 336, 258 Cal.Rptr. 454 (1989) (quoting text). *See* § 1.1, *supra*, Definitions and Overview. *Accord* Lawson v. Cagle, 504 So.2d 226 (Ala.1987).

2. Brownell v. Garber, 199 Mich.App. 519, 503 N.W.2d 81 (1993) (citing text).

3. *E.g.*, Jourdain v. Dineen, 527 A.2d 1304 (Me.1987); Brown v. Gerstein, 17 Mass.App.Ct. 558, 460 N.E.2d 1043 (1984), review denied 391 Mass.1105, 464 N.E.2d 75 (1984) (citing text); Newman v. Silver, 563 F.Supp. 485 (S.D.N.Y.1982), judgment affirmed in part, vacated in part 713 F.2d 14 (2d Cir.1983); McKinnon v. Tibbetts, 440 A.2d 1028 (Me.1982); Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 107 Mich.App. 509, 309 N.W.2d 645 (1981); Almgren v. Engelland, 94 Ill.App.3d 475, 50 Ill.Dec. 66, 418 N.E.2d 1060 (1981); Rodriguez v. Horton, 95 N.M. 356, 622 P.2d 261 (App.1980) (liability found); Riddle v. Driebe, 153 Ga.App. 278, 265 S.E.2d 92 (1980) (no fraud where the attorney incorrectly said that documents he prepared were legally sufficient); Ames Bank v. Hahn, 205 Neb. 353, 287 N.W.2d 667 (1980); Hennigan v. Harris County, 593 S.W.2d 380 (Tex.Civ.App.1979); Chase Manhattan Bank, N.A. v. Perla, 65 A.D.2d 207, 411 N.Y.S.2d 66 (1978); Roberts v. Ball, Hunt, Hart, Brown and Baerwitz, 57 Cal.App.3d 104, 128 Cal.Rptr. 901 (1976); Hall v. Wright, 261 Iowa 758, 156 N.W.2d 561 (1968); Republic Mortgage Corp. v. Beasley, 117 Ga.App. 303, 160 S.E.2d 429 (1968); Easton v. Chaffee, 6 Wash.2d 509, 113 P.2d 31 (1941).

4. *E.g.*,

Ala.—Voyager Guaranty Insurance Co., Inc. v. Brown, 631 So.2d 948 (Ala.1994) (lawyer's opinion regarding legal effect of guaranty was not erroneous though lawyer was unaware that the signature was forged); McConico v. Corley, Moncus and Bynum, P.C., 567 So.2d 863 (Ala.1990); Sellers v. Knight, 185 Ala. 96, 64 So. 329 (1913).

Ariz.—Lietz v. Primock, 84 Ariz. 373, 327 P.2d 285 (1958).

Ark.—*Cf.* Perry v. Shelby, 196 Ark. 541, 118 S.W.2d 849 (1938) (attorney taking advantage of party to transaction).

Cal.—Day v. Rosenthal, 170 Cal.App.3d 1125, 217 Cal.Rptr. 89 (1985); Roberts v. Ball, Hunt, Hart, Brown and Baerwitz, 57 Cal.App.3d 104, 128 Cal.Rptr. 901 (1976); Robinson v. Robinson, 187 Cal.App.2d 677, 10 Cal.Rptr. 130 (1960); Frost v. Hanscome, 198 Cal. 550, 246 P. 53 (1926).

Del.—Browne v. Robb, 583 A.2d 949 (Del.1990), cert. denied 499 U.S. 952, 111 S.Ct. 1425, 113 L.Ed.2d 477 (1991).

Fla.—Gutter v. Wunker, 631 So.2d 1117 (Fla.App.1994).

Ga.—Republic Mortgage Corp. v. Beasley, 117 Ga.App. 303, 160 S.E.2d 429 (1968).

Ill.—Almgren v. Engelland, 94 Ill.App.3d 475, 50 Ill.Dec. 66, 418 N.E.2d 1060 (1981); McFail v. Bredan, 19 Ill.2d 108, 166 N.E.2d 46 (1960); Schmidt v. Landfield, 23 Ill.App.2d 55, 161 N.E.2d 702 (1959), affirmed 20 Ill.2d 69, 169 N.E.2d 229 (1960); Fortune v. English, 229 Ill. 262, 80 N.E. 751, 12 L.R.A.(n.s.) 1005 (1907).

Iowa—Hall v. Wright, 261 Iowa 758, 156 N.W.2d 561 (1968).

pleading the cause of a
necessary supporting
cogent and persuasive.
is not a favored action

The liability of a
representations may be
rule that an opinion
attorneys.[3] A represen

Kan.—Harris v. Dressing
188 P. 1106 (1917).

Me.—Jourdain v. Dineen,
(Me.1987).

Mich.—Brownell v. Gart
App. 519, 503 N.W.2d 81 (19
v. Ragittarius Recording Co
1814 (E.D.Mich.1985), affir
681 (6th Cir.1987) (tax opi
Pool, 9 Mich.App. 131, 1
(1967).

Minn.—Veit v. Anderson
429 (Minn.App.1988); Blac
der, 156 Minn. 478, 195 N.

N.J.—Berkman v. Cohn,
148 A. 290 (1933).

N.M.—Rodriguez v. Horto
622 P.2d 261 (App.1980).

N.Y.—Brisard v. Compar
___, 624 N.Y.S.2d 632 (1995
client relationship nor fraud
of written disclosures); Wil
Real Estate Corp., Inc. v
A.D.2d 777, 611 N.Y.S.2d
misrepresentation to real
Green v. Leibowitz, 118 A.
N.Y.S.2d 146 (1986); Americ
Marina Agencies, Inc. v. Kr
1090, 244 N.Y.S.2d 602 (196
Levy, 11 A.D.2d 411, 207
(1960), reargument and ap
A.D.2d 740, 211 N.Y.S.2d 6
sterdam v. Apfel, 226 N.Y. 1
(1919); In re Cushman, 9
N.Y.S. 661 (1916); Sinclair
App.Div. 206, 97 N.Y.S. 415
ton v. Newcombe, 48 N.
(1882).

N.C.—Brantley v. Dunsta
19, 193 S.E.2d 423 (1972).

N.D.—Bjorgum v. Kinsey,
(N.D.1991) (liable to client
ing text).

Okl.—Helms v. Bulington,
70 P.2d 65 (1937).

23.

pleading the cause of action.[5] Fraud, however, is not easily proved. The necessary supporting evidence should be clear, unequivocal, convincing, cogent and persuasive.[6] This is simply another way of saying that fraud is not a favored action.

The liability of attorneys for fraud does differ concerning what representations may be justifiably relied upon by the client. The normal rule that an opinion is not actionable does not necessarily apply to attorneys.[7] A representation of the state of law or of legal principles by

Kan.—Harris v. Dreaning, 101 Kan. 711, 168 P. 1106 (1917).

Ms.—Jourdain v. Dineen, 527 A.2d 1304 (Me.1987).

Mich.—Bruynell v. Garber, 199 Mich. App. 519, 508 N.W.2d 81 (1993); Pastarnak v. Bagittarius Recording Co., 617 F.Supp. 1514 (E.D.Mich.1985), affirmed 816 F.2d 681 (6th Cir.1987) (tax opinion); Lewis v. Peel, 9 Mich.App. 131, 156 N.W.2d 41 (1967).

Minn.—Veit v. Anderson, 428 N.W.2d 429 (Minn.App.1988); Blackey v. Alexander, 156 Minn. 478, 195 N.W. 456 (1923).

N.J.—Berkman v. Cohn, 111 N.J.L. 229, 168 A. 290 (1933).

N.M.—Rodriguez v. Horton, 95 N.M. 356, 622 P.2d 251 (App.1980).

N.Y.—Brisard v. Compere, ___ A.D.2d ___, 624 N.Y.S.2d 632 (1995) (no attorney-client relationship nor fraud found because of written disclosures); Wilson Associates Real Estate Corp., Inc. v. Pirilly, 204 A.D.2d 777, 611 N.Y.S.2d 694 (1994) (no misrepresentation to real estate broker); Green v. Leibowitz, 116 A.D.2d 756, 500 N.Y.S.2d 146 (1986); American Hemisphere Marine Agencies, Inc. v. Kreis, 40 Misc.2d 1090, 244 N.Y.S.2d 602 (1963); Geltman v. Levy, 11 A.D.2d 411, 207 N.Y.S.2d 366 (1960), reargument and appeal denied 12 A.D.2d 740, 211 N.Y.S.2d 695 (1961); Amsterdam v. Apfel, 226 N.Y. 158, 123 N.E. 69 (1919); In re Cushman, 96 Misc. 9, 160 N.Y.S. 681 (1916); Sinclair v. Higgins, 111 App.Div. 206, 97 N.Y.S. 415 (1906); Wheaton v. Newcombe, 48 N.Y.Sup.Ct. 215 (1882).

N.C.—Brantley v. Dunstan, 17 N.C.App. 19, 193 S.E.2d 423 (1972).

N.D.—Bjergen v. Kinsey, 466 N.W.2d 553 (N.D.1991) (liable to client for conflict, citing text).

Okl.—Helms v. Bolington, 180 Okl. 390, 70 P.2d 66 (1937).

Or.—Byland v. Nowack, 76 Or.App. 416, 709 P.2d 252 (1985) (insufficient allegations).

Pa.—In re Marcus Hook Development Park, Inc., 153 B.R. 693 (Bkrtcy.W.D.Pa. 1993).

S.D.—Ingalls v. Arbaiter, 72 S.D. 488, 36 N.W.2d 869 (1949).

Tex.—Dillard v. Broyles, 633 S.W.2d 836 (Tex.App.1982), cert. denied 463 U.S. 1208, 103 S.Ct. 3539, 77 L.Ed.2d 1389 (1983); Yarbrough v. Cooper, 559 S.W.2d 917 (Tex. Civ.App.1977); Sharwood v. South, 29 S.W.2d 805 (Tex.Civ.App.1930).

Utah—Krofcheck v. Downey State Bank, 580 P.2d 243 (Utah 1978).

Wash.—Easton v. Chaffee, 8 Wash.2d 509, 113 P.2d 31 (1941); Cornell v. Edsen, 78 Wash. 662, 139 P. 602 (1914).

Wis.—Goerke v. Vojvodich, 67 Wis.2d 102, 226 N.W.2d 211 (1975); Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943).

5. Albright v. Seyforth, Fairweather, Shaw & Geraldson, 176 Ill.App.3d 921, 126 Ill.Dec. 321, 531 N.E.2d 940 (1988), appeal denied 125 Ill.2d 563, 130 Ill.Dec. 478, 537 N.E.2d 807 (1989); Goodman v. Kennedy, 18 Cal.3d 335, 134 Cal.Rptr. 375, 556 P.2d 737 (1976); Brack v. Sarton, 185 Md. 368, 45 A.2d 100 (1945).

6. Schmidt v. Henehan, 140 Ill.App.3d 796, 95 Ill.Dec. 194, 489 N.E.2d 415 (1986); Lewis v. Peel, 9 Mich.App. 131, 156 N.W.2d 41 (1967).

7. Lawson v. Cagle, 504 So.2d 226 (Ala. 1987); American Hemisphere Marine Agencies, Inc. v. Kreis, 40 Misc.2d 1090, 244 N.Y.S.2d 602 (1963).

24.

an attorney can be a representation of fact.[8] Therefore, an attorney's advice or opinion, if knowingly false, may be fraud.[9] A statement of intended conduct, however, can be the basis of fraud only if the statement was false when made.[10] The misrepresentation may be written, oral, or may consist of conduct that reasonably can be understood as a representation.[11] A statement or predication of the result in litigation, however, was not a representation of material fact.[12] The attorney, who is liable for damages caused by the misrepresentations to the client, also may forfeit any right to compensation.[13]

The scienter required need not involve a deliberate misrepresentation. It is sufficient that the attorney is aware that he or she does not know whether the representation is true or false,[14] i.e., a reckless disregard of the truth can suffice in some jurisdictions.[15] There must be more than the failure to exercise ordinary skill and knowledge, however, since deceit cannot rest upon negligent conduct.[16] Of course, good faith and honest intentions by the attorney negate the mental state required for a fraud action.[17] A mental illness that achieves the same result also is a defense.[18] The state of the attorney's mind is a question of fact that may be pleaded as a conclusion.[19]

Fraud is one of the few widely accepted bases for which an attorney can be liable not only to a client[20] but also to the client's adversary.[21] Rarely, however, can an attorney be liable to an adverse party in

8. Lawson v. Cagle, 504 So.2d 226 (Ala. 1987); Fortune v. English, 228 Ill. 262, 80 N.E. 781, 12 L.R.A. (n.s.) 1005 (1904).

9. *E.g.*, Brownell v. Garber, 199 Mich. App. 519, 503 N.W.2d 81 (1993) (citing text); Lietz v. Primock, 84 Ariz. 273, 327 P.2d 286 (1958); Easton v. Chaffee, 8 Wash.2d 509, 113 P.2d 31 (1941).

10. Lawson v. Cagle, 504 So.2d 226 (Ala.1987); Newman v. Silver, 663 F.Supp. 485 (S.D.N.Y.1982), judgment affirmed in part, vacated in part 713 F.2d 14 (2d Cir. 1983).

11. Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943).

12. Lawson v. Cagle, 504 So.2d 226 (Ala.1987) ("guaranteed me a million dollars").

13. *E.g.*, Blackey v. Alexander, 156 Miss. 478, 126 N.W. 455 (1923); Harris v. Dunning, 101 Kan. 711, 168 P. 1106 (1917). See § 14.26, *supra*, Legal Malpractice as a Defense to Compensation.

14. Berkman v. Cohn, 111 N.J.L. 229, 168 A. 290 (1933).

15. Helms v. Bulington, 180 Okl. 380, 70 P.2d 65 (1937).

16. Berkman v. Cohn, 111 N.J.L. 229, 168 A. 290 (1933).

17. Sellers v. Knight, 185 Ala. 96, 64 So. 329 (1913).

18. Schumann v. Crofoot, 43 Or.App. 53, 602 P.2d 298 (1979).

19. Brantley v. Dunstan, 17 N.C.App. 18, 193 S.E.2d 423 (1972).

20. *E.g.*, Bamberger v. Barnholz, 96 N.C.App. 556, 386 S.E.2d 450 (1989), decision reversed 326 N.C. 589, 391 S.E.2d 192 (1990) (underlying action not meritorious); Parsons Steel, Inc. v. Beasley, 522 So.2d 253 (Ala.1988); Chiaramonte v. Boxer, 122 A.D.2d 13, 504 N.Y.S.2d 182 (1986); Covello v. Covello, 119 A.D.2d 792, 501 N.Y.S.2d 415 (1986); Roberts v. Ball, Hunt, Hart, Brown and Baerwitz, 57 Cal.App.3d 104, 128 Cal.Rptr. 901 (1976); Goerke v. Vujnovich, 67 Wis.2d 102, 226 N.W.2d 211 (1975).

21. Goodman v. Kennedy, 18 Cal.3d 335, 134 Cal.Rptr. 375, 556 P.2d 737 (1976); Robinson v. Robinson, 187 Cal.App.2d 617, 10 Cal.Rptr. 130 (1960); Wills v. Maier, 256 N.Y. 466, 176 N.E. 841 (1931), reargument denied 256 N.Y. 692, 177 N.E. 198 (1931). See also, § 6.6, *supra*, Fraud.

litigation for a mi
system portends th
to be adverse, typ
precludes justifiabl
adversary analysis
situation involving
actions.

If the fraud is
material facts, the t
ly, such a duty is ba
or a representation
In contrast, the cl
obligations, which i
have been accused o
client,[24] there should
are directly attribut

Occasionally, a
"fraud" even thoug
statutory equivalent
rized withdrawal fro
"fraud in law."[25] T
tional and selfish u
This latter descriptio
breach of the attorn
confidentiality. In a
but the elements of

§ 8.10 Constru

Constructive fra
as fraudulent, despi

22. Traders & General
Keith, 107 S.W.2d 710 (T
error dismissed.

23. Cornell v. Wunsch
369 (Iowa 1987); O'Callag
291 Pa.Super. 471, 436
(settlement proceeds from
waiver not personal injury d
man v. Kennedy, 18 Cal.
Rptr. 375, 556 P.2d 737 (1
made).

24. Horne v. Friendly
Inc., 53 Md.App. 337, 612
(non-disclosure of conflict;
client that purchasers had
assume liability for loans);
lion, 168 A.D.2d 858, 56

25.

litigation for a misrepresentation. The very nature of the adversary system portends that expressions almost invariably are opinions, likely to be adverse, typically hostile, and the relationship of the parties precludes justifiable reliance, particularly on opinions of law.[22] The adversary analysis is not limited to litigation, but can apply to any situation involving negotiation, such as real estate or commercial transactions.

If the fraud is alleged to have been committed by the omission of material facts, the third party must show a duty of disclosure. Typically, such a duty is based on a confidential relationship, active concealment or a representation that was likely to mislead for lack of the disclosure.[23] In contrast, the client usually can rely on the attorney's fiduciary obligations, which include a duty of disclosure.[24] Although attorneys have been accused of fraud for allegedly concealing their errors from the client,[25] there should be no cause of action without specific damages that are directly attributable to the concealment.

Occasionally, an attorney's conduct has been characterized as "fraud" even though a cause of action for common-law fraud or the statutory equivalent did not exist. For example, deliberate, unauthorized withdrawal from, or abandonment of, a case has been described as "fraud in law."[26] The same characterization has been applied to intentional and selfish usurpation of a client's confidential information.[27] This latter description of "fraud" is a knowing, deliberate and dishonest breach of the attorney's fiduciary obligations of undivided loyalty and confidentiality. In a sense, such breaches may be considered fraudulent, but the elements of the cause of action differ substantially from deceit.

§ 8.10 Constructive Fraud

Constructive fraud consists of acts or omissions that the law treats as fraudulent, despite the attorney's intent or motive.[1] Constructive

22. Traders & General Insurance Co. v. Keith, 107 S.W.2d 710 (Tex.Civ.App.1937), error dismissed.

23. Cornell v. Wunschel, 408 N.W.2d 389 (Iowa 1987); O'Callaghan v. Weitzman, 291 Pa.Super. 471, 436 A.2d 212 (1981) (settlement proceeds from malpractice insurer not personal injury defendant); Goodman v. Kennedy, 18 Cal.3d 335, 134 Cal.Rptr. 375, 556 P.2d 737 (1976) (no showing made).

24. Home v. Friendly Mobile Manor, Inc., 93 Md.App. 337, 612 A.2d 322 (1992) (non-disclosure of conflict; failed to inform client that purchasers had no intention to assume liability for loans); Lane v. McCallion, 168 A.D.2d 688, 561 N.Y.S.2d 272 (1990); Cornell v. Wunschel, 408 N.W.2d 389 (Iowa 1987); Boisdore v. Bridgeman, 502 So.2d 1149 (La.App.1987); Dey v. Rosenthal, 170 Cal.App.3d 1125, 217 Cal.Rptr. 69 (1985), cert. denied 475 U.S. 1048, 106 S.Ct. 1267, 89 L.Ed.2d 576 (1986).

25. Allred v. Rabon, 572 P.2d 979 (Okl. 1977).

26. Ingalls v. Arbeiter, 72 S.D. 456, 36 N.W.2d 669 (1949).

27. Teate v. Herring, 264 Ga. 694, 453 S.E.2d 686 (1994); Sherwood v. South, 29 S.W.2d 806 (Tex.Civ.App.1930).

§ 8.10

1. See § 14.3, *infra*, Intent or Motive.

26.

fraud reposes exclusively in the fiduciary obligations[3] and simply is a characterization of a breach of such a duty.[3] For that reason, the theory of constructive fraud usually is not available to a nonclient.[4]

Because a breach of a fiduciary obligation does not require wrongful intent, constructive fraud is not an intentional tort.[5] Although the attorney may have acted with a wrongful intention, the misconduct often is attributable to negligence. In other words, a breach of the standard of care is negligence, and a breach of a fiduciary obligation is constructive fraud.[6]

However characterized, such a breach sounds in tort, not contract.[7] Causation and damages are essential to a cause of action. There is no remedy for constructive fraud that has not injured the client.[8] There has been some judicial inconsistency, however, in describing the nature of the wrong. Constructive fraud was construed to qualify as "fraud" for admitting evidence to vary the terms of a written contract under a Montana parole evidence statute.[9] Yet, such a claim was not "fraud," as

2. Wiseman v. Batchelor, 315 Ark. 85, 864 S.W.2d 248 (1993); Douthitt v. Guardian Life Insurance Co. of America, 235 Ky. 828, 31 S.W.2d 377 (1930). *See* Milbank, Tweed, Hadley & McCloy v. Boon, 13 P.3d 637 (2d Cir.1994).

3. Eaton v. Morse, 212 Mont. 233, 687 P.2d 1004 (1984); Gronner v. Hahn, 97 Ill. App.2d 276, 240 N.E.2d 136 (1968). *See* Chapter 14, *infra*, The Fiduciary Obligations—In General.

4. Mullen v. Cogdell, 643 N.E.2d 390 (Ind.App.1994) (attorney for seller, who was liable to that client, after payment could assert the fiduciary duty of disclosure owed by the buyers); Castillo v. First City Bancorporation of Texas, 43 F.3d 953 (5th Cir. 1994); Silvia Moroder Leon y Castillo v. Keck, Mahin & Cate, 873 F.Supp. 12 (S.D.Tex.1993) (fiduciary duty requires more than a long-standing relationship of faith and trust), judgment affirmed in part, reversed in part 43 F.3d 953 (5th Cir.1994).

5. Wiseman v. Batchelor, 315 Ark. 85, 864 S.W.2d 248 (1993).

6. *E.g.*,

U.S.—Baker v. Humphrey, 101 U.S. (11 Otto) 494, 25 L.Ed. 1065 (1879).

Cal.—American Box & Drum Co. v. Herron, 44 Cal.App.2d 370, 112 P.2d 332 (1941).

Ga.—Arnall, Golden & Gregory v. Health Service Centers, Inc., 197 Ga.App. 791, 399 S.E.2d 565 (1990) (failure to inform the client about a cause of action against the law firm tolls a statute of limitations).

Ind.—Sanders v. Townsend, 582 N.E.2d 355 (Ind.1991); Sanders v. Townsend, 569 N.E.2d 660 (Ind.App.1987).

Mich.—Olitkowski v. St. Casimir's Saving & Loan Association, 302 Mich. 303, 4 N.W.2d 664 (1942).

Mo.—Gardine v. Cottey, 360 Mo. 681, 230 S.W.2d 731, 16 A.L.R.2d 1100 (1950).

Mont.—Morse v. Espeland, 216 Mont. 148, 696 P.2d 428 (1985).

Nev.—Golden Nugget, Inc. v. Ham, 95 Nev. 45, 589 P.2d 173 (1979).

N.Y.—Howell v. Ransom, 11 Paige Ch. 538, 5 Ch. 1 (N.Y.1845).

N.C.—Bamberger v. Bernholz, 98 N.C.App. 555, 386 S.E.2d 460 (1989), decision reversed 326 N.C. 589, 391 S.E.2d 193 (1990) (underlying action not meritorious).

Wis.—Lasha Coal & Wood Co. v. Koehler, 267 Wis. 297, 64 N.W.2d 823 (1954).

7. Citizens State Bank of Dickinson v. Shapiro, 575 S.W.2d 376 (Tex.Civ.App. 1978), error ref. n.r.e.

8. Sanders v. Townsend, 582 N.E.2d 358 (Ind.1991).

9. Eaton v. Morse, 212 Mont. 233, 687 P.2d 1004 (1984).

the word is used in a

§ 8.11 Bad Faith

Periodically, client for a cause of action a implied obligation of contractual relationsh concerns the contract

Thus far, the cou attorneys, even for in specially protected law fiduciary obligations substantially more de predicated upon a dish faith and fair dealing

§ 8.12 Negligenc

The most common gence. The cause of a elements as any ordi duty, proximate cause contractual nature of legal malpractice actio the widely-prevailing

The phraseology

10. Brooks, Tarlton, Gi Kreseler v. United States Co., 632 F.2d 1378 (5th Cir

§ 8.11

1. Cal.—Blain v. The D Cal.App.3d 1048, 272 Cal.R Gruenberg v. Aetna Insuran 566, 106 Cal.Rptr. 480, (1973); Lysick v. Walcom, 156, 65 Cal.Rptr. 406 (1968

Idaho—O'Neil v. Vasa 414, 788 P.2d 229, subsequ Idaho 257, 796 P.2d 134 (Ap erred but not decided).

Miss.—Compare Hurst v. sissippi Legal Services Corp (Miss.1992). Mississippi law a cause of action for tort contract, that is, bad faith tract. The wrongful con based upon an intentional

27

the word is used in an insurance policy.[10]

§ 8.11 · Bad Faith

Periodically, clients have alleged the theory of "bad faith" as a basis for a cause of action against their attorneys.[1] The theory is based on an implied obligation of good faith and fair dealing held to arise from a contractual relationship. The most commonly accepted use of the tort concerns the contractual relationship between an insurer and insured.

Thus far, the courts have rejected the application of this theory to attorneys, even for insurance defense counsel.[2] Judicial action has not specially protected lawyers. Instead, the courts have recognized that the fiduciary obligations of undivided loyalty and confidentiality impose substantially more demanding duties than the implied covenant. A tort predicated upon a dishonest purpose or knowing breach of a duty of good faith and fair dealing is superfluous to a lawyer's fiduciary obligations.

§ 8.12 Negligence

The most common form of a legal malpractice action is for negligence. The cause of action for legal malpractice involves the same basic elements as any ordinary negligence action: duty, negligent breach of duty, proximate cause and damage. Yet, several courts, emphasizing the contractual nature of the attorney-client relationship, have said that a legal malpractice action is not an action in tort.[1] That, however, is not the widely-prevailing rule.

The phraseology and relation of the elements of the cause of action

10. Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Insurance Co., 832 F.2d 1378 (5th Cir.1987).

§ 8.11

1. Cal.—Blain v. The Doctor's Co., 222 Cal.App.3d 1048, 272 Cal.Rptr. 250 (1990); Gruenberg v. Aetna Insurance Co., 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973); Lysick v. Walcom, 258 Cal.App.2d 136, 65 Cal.Rptr. 406 (1968).

Idaho—O'Neil v. Vasseur, 117 Idaho 414, 788 P.2d 229, subsequent opinion 118 Idaho 257, 796 P.2d 134 (App.1990) (considered but not decided).

Miss.—Compare Hurst v. Southwest Mississippi Legal Services Corp., 610 So.2d 374 (Miss.1992). Mississippi law does recognize a cause of action for tortious breach of contract, that is, bad faith breach of contract. The wrongful conduct could be based upon an intentional wrong or breach of a fiduciary obligation, which in *Hurst* was alleged to be intentional abandonment of an appeal.

Tex.—Highway Insurance Underwriters v. Lufkin-Beaumont Motor Coaches, 215 S.W.2d 904 (Tex.Civ.App.1948), refused n.r.e.

2. Gruenberg v. Aetna Insurance Co., 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973); Lysick v. Walcom, 258 Cal. App.2d 136, 65 Cal.Rptr. 406 (1968); Highway Insurance Underwriters v. Lufkin-Beaumont Motor Coaches, 215 S.W.2d 904 (Tex.Civ.App.1948), rehearing denied.

§ 8.12

1. Jackson State Bank v. King, 844 P.2d 1093 (Wyo.1993) (because legal malpractice derives from a contractual relationship, contributory negligence is not a defense); Chicago Title Insurance Co. v. Holt, 36 N.C.App. 284, 244 S.E.2d 177 (1978).

28.

vary. For example, negligence may be stated simply as "negligence,"[1] as a "breach of duty,"[2] as "neglect of a reasonable duty,"[3] or as a failure to conform to the standard of care.[4] In some jurisdictions, the basis of the duty is contractual but the breach of that duty and causation are discussed using terms such as ordinary care and negligence.[5]

Sometimes, the elements of a cause of action are stated within the context of a specific type of negligent conduct. Thus, the act or omission may be described as negligent "advice."[7] The statement of a cause of action may be described in terms of causation, such as whether the client would have recovered a collectible judgment or succeeded in a defense.[8] No matter how colored or phrased, the essential elements of a cause of action for professional negligence are:[9]

1. *E.g.*, Eckert v. Schaal, 251 Cal.App.2d 1, 58 Cal.Rptr. 817 (1967).

2. *E.g.*, Harding v. Bell, 265 Or. 202, 506 P.2d 215 (1973).

3. *E.g.*, Weiner v. Moreno, 271 So.2d 217 (Fla.App.1973); Maryland Casualty Co. v. Price, 231 Fed. 397 (C.C.A.4 1916).

4. *E.g.*, Ventura County Humane Society for P.C.C. & A., Inc. v. Holloway, 40 Cal.App.3d 897, 115 Cal.Rptr. 464 (1974); Cochrane v. Little, 71 Md. 323, 18 A. 698 (1889).

5. *E.g.*, Guillebeau v. Jenkins, 182 Ga. App. 225, 355 S.E.2d 453 (1987); Rogers v. Norvell, 174 Ga.App. 453, 330 S.E.2d 392 (1985).

7. *See* § 22.5, *infra*, Recurring Problems—Advice.

8. *See* Chapter 29, *infra*, The Litigation Attorney.

9. *E.g.*,

Ala.—Herring v. Parkman, 631 So.2d 996 (Ala.1994); Pickard v. Turner, 592 So.2d 1016 (Ala.1992); Lightfoot v. McDonald, 587 So.2d 936 (Ala.1991); McDuffie v. Brinkley, Ford, Chestnut and Aldridge, 576 So.2d 198 (Ala.1991); Moseley v. Lewis and Brackin, 533 So.2d 513 (Ala.1988); Dorsey v. Purvis, 543 So.2d 703 (Ala.Civ.App.1989); Hulsey v. Coggin, 470 So.2d 1202 (Ala. 1985); Pisl v. Dillard, 414 So.2d 87 (Ala. Civ.App.1982).

Alaska—Shaw v. State, Department of Administration, 681 P.2d 566 (Alaska 1983); Doe v. Hughes, Thorsness, Gantz, Powell & Brundin, 838 P.2d 804 (Alaska 1992); Befland v. O.K. Lumber Co., Inc., 797 P.2d 638 (Alaska 1990); Bukoshey v. Walter W. Shuham, CPA, P.C., 666 F.Supp. 181 (D.Alaska 1987); Linck v. Barokas & Martin, 667 P.2d 171 (Alaska 1983).

Ariz.—Standage v. Jaburg & Wilk, P.C., 177 Ariz. 221, 866 P.2d 869 (App.1993); Franko v. Mitchell, 158 Ariz. 391, 762 P.2d 1345 (App.1988); Phillips v. Clancy, 158 Ariz. 415, 733 P.2d 300 (App.1988).

Ark.—Callahan v. Clark, 321 Ark. 276, 901 S.W.2d 842 (1995); Sevier v. Hollister, 2 Ark. (2 Pike) 512 (1844) (contract).

Cal.—Thompson v. Halvonik, 36 Cal. App.4th 657, 43 Cal.Rptr.2d 142 (1995); Nichols v. Keller, 15 Cal.App.4th 1672, 19 Cal.Rptr.2d 601 (1993); Daniels v. DeSimone, 13 Cal.App.4th 800, 16 Cal.Rptr.2d 615 (1993); McDaniel v. Gile, 230 Cal. App.3d 363, 281 Cal.Rptr. 242 (1991); In re Wolf & Vine, Inc., 118 B.R. 781 (Bkrtcy. C.D.Cal.1990); Blain v. The Doctor's Co., 222 Cal.App.3d 1048, 272 Cal.Rptr. 250 (1990); Garris v. Severson, Merson, Berke & Melchior, 205 Cal.App.3d 301, 252 Cal. Rptr. 204 (1988); Edwards v. Chain, Younger, Jameson, Lemucchi & Noriega, 191 Cal.App.3d 515, 236 Cal.Rptr. 465 (1987); Harris v. Smith, 157 Cal.App.3d 100, 203 Cal.Rptr. 541 (1984); Purdy v. Pacific Automobile Insurance Co., 157 Cal.App.3d 59, 203 Cal.Rptr. 524 (1984); Albino v. Starr, 112 Cal.App.3d 158, 169 Cal.Rptr. 136 (1980); Baldock v. Green, 109 Cal.App.3d 234, 167 Cal.Rptr. 157 (1980); Commercial Standard Title Co., Inc. v. Superior Court, 92 Cal.App.3d 934, 155 Cal.Rptr. 393 (1979); Zelta v. Dillips, 81 Cal.App.3d 193, 144 Cal.Rptr. 888 (1978); Banarian v. O'Malley, 42 Cal.App.3d 804, 116 Cal.Rptr. 815 (1974); Ventura County Humane Society for P.C.C. & A., Inc. v. Holloway, 40 Cal.App.3d 897, 115 Cal.Rptr. 464 (1974); Budd v. Nixen, 6 Cal.3d 195, 98 Cal.Rptr.

443 (1991); Pantely v. Garris, Garris & Garris, P.C., 180 Mich.App. 768, 778–779; 447 N.W.2d 884 (1989). *See also*, Charles Reinhart Co v. Winiemko, 444 Mich. 579, 586, 513 N.W.2d 773, 776 (1994); Mieras v. DeBona, 204 Mich.App. 703, 516 N.W.2d 164 (1994); Charles Reinhart Co. v. Winiemko, 444 Mich. 579, 513 N.W.2d 773 (1994); Coleman v. Gurwin, 443 Mich. 59, 503 N.W.2d 435 (1993); Teodorescu v. Bushnell, Gage, Reizen & Byington, 201 Mich.App. 260, 506 N.W.2d 276 (1993); Simko v. Blake, 201 Mich.App. 191, 506 N.W.2d 258 (1993); Bonner v. Chicago Title Insurance Co., 194 Mich.App. 462, 487 N.W.2d 807 (1992); Espinoza v. Thomas, 189 Mich.App. 110, 472 N.W.2d 16 (1991); Jackson v. Pollick, 751 F.Supp. 132 (E.D.Mich.1990), affirmed 941 F.2d 1209 (6th Cir.1991); Pantely v. Garris, Garris & Garris, P.C., 180 Mich.App. 768, 447 N.W.2d 884 (1989); Leymon v. Keckley, 696 F.Supp. 299 (W.D.Mich.1988); K75 Corp. v. Stanicati, 174 Mich.App. 225, 435 N.W.2d 433 (1988); Schlumm v. Terrance J. O'Hagan, P.C., 173 Mich.App. 346, 433 N.W.2d 839 (1988); Adell v. Sommers, Schwartz, Silver and Schwartz, P.C., 170 Mich.App. 196, 428 N.W.2d 26 (1988); Ignatov v. Beiter, 130 Mich.App. 409, 343 N.W.2d 574 (1983); Bourke v. Warren, 118 Mich.App. 694, 325 N.W.2d 541 (1982); Basic Food Industries, Inc. v. Grant, 107 Mich. App. 685, 310 N.W.2d 26 (1981).

Minn.—Macawber Engineering, Inc. v. Robson & Miller, 47 F.3d 253 (8th Cir. 1995); CPJ Enterprises, Inc. v. Garnander, 521 N.W.2d 522 (Minn.App.1994); Gustafson v. Chestnut, 515 N.W.2d 114 (Minn. App.1994); Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261 (Minn.1992); Wartnick v. Moss & Barnett, 490 N.W.2d 106 (Minn.1992); Anoka Orthopaedic Associates, P.A. v. Mutschler, 773 F.Supp. 158 (D.Minn.1991); Wartnick v. Moss & Barnett, 476 N.W.2d 166 (Minn.App.1991); Fiedler v. Adams, 468 N.W.2d 39 (Minn.App.1991) (citing book); TJD Dissolution Corp. v. Savoie Supply Co., Inc., 460 N.W.2d 59 (Minn.App. 1990); Padco, Inc. v. Kinney & Lange, 444 N.W.2d 889 (Minn.App.1989); Raske v. Gavin, 438 N.W.2d 704 (Minn.App.1989); Friesens, Inc. v. Larson, 435 N.W.2d 444 (Minn.App.1989); Carey and Enemings, Ltd. v. Ludowese, 434 N.W.2d 483 (Minn. App.1989); Veit v. Anderson, 428 N.W.2d 429 (Minn.App.1988); Gillespie v. Khin, 406 N.W.2d 547 (Minn.App.1987); Paoletti v. Zilmer, 398 N.W.2d 883 (Minn.App. 1986); Spannaus v. Larkin, Hoffman, Daly, and Lindgren, Ltd., 368 N.W.2d 396 (Minn. App.1985); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn.1980) (articulated a fourth element proving success in underlying action, which is really part of the third element in certain cases); Christy v. Sellterman, 288 Minn. 144, 179 N.W.2d 268 (1970).

Miss.—Terrain Enterprises, Inc. v. Mockbee, 654 So.2d 1122 (Miss.1995); Century 21 Deep South Properties, Ltd. v. Corson, 612 So.2d 369 (Miss.1992); Bass v. Montgomery, 515 So.2d 1172 (Miss.1987); Hutchinson v. Smith, 417 So.2d 926 (Miss. 1982).

Mo.—Ross v. Summers, Compton, Wells & Hamburg, P.C., 887 S.W.2d 683 (Mo.App. 1994); London v. Waltaman, 884 S.W.2d 674 (Mo.App.1994); Suelthaus & Kaplan, P.C. v. Byron Oil Industries, 847 S.W.2d 873 (Mo.App.1992); Boatright v. Shaw, 804 S.W.2d 795 (Mo.App.1990).

Mont.—Uhler v. Doak, 268 Mont. 191, 885 P.2d 1297 (1994); Kane v. Miller, 258 Mont. 182, 852 P.2d 130 (1993); Our Lock Land & Cattle Co. v. Crowley, Haughey, Hanson, Toole & Dietrich, 253 Mont. 336, 833 P.2d 146 (1992); Marslak v. Purcell, 252 Mont. 527, 830 P.2d 1278 (1992).

Neb.—Sports Courts of Omaha, Ltd. v. Brower, 248 Neb. 272, 534 N.W.2d 317 (1995); Gravel v. Schraidt, 247 Neb. 404, 527 N.W.2d 199 (1995); Patterson v. Swarr, May, Smith & Anderson, 238 Neb. 911, 473 N.W.2d 94 (1991); Staman v. Yeager & Yeager, P.A., 238 Neb. 153, 469 N.W.2d 532 (1991); McVaney v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, 237 Neb. 451, 466 N.W.2d 499 (1991); Stansbery v. Schroeder, 226 Neb. 492, 412 N.W.2d 447 (1987) (citing book).

N.H.—Fairhaven Textile Corp. v. Sheehan, Phinney, Bass & Green, P.A., 695 F.Supp. 71 (D.N.H.1988).

N.J.—Ingani v. Palino & Lents, 866 F.Supp. 158 (D.N.J.1994); Lovett v. Estate of Lovett, 250 N.J.Super. 79, 593 A.2d 382 (Ch.Div.1991).

Nev.—Charleson v. Hardesty, 108 Nev. 878, 839 P.2d 1303 (1992); Semenza v. Nevada Medical Liability Insurance Co., 104 Nev. 666, 765 P.2d 184 (1988); Warmbrodt v. Blanchard, 100 Nev. 703, 692 P.2d 1283 (1984); Holland v. Lawless, 95 N.M. 490, 623 P.2d 1004 (App.1981), cert. denied 95 N.M. 593, 624 P.2d 535 (1981); Soren-

(1) The employment of the attorney or other basis for imposing a duty;[10]

(2) the failure of the attorney to exercise ordinary skill and knowledge;[11] and

(3) that such negligence was the proximate cause of damage to the plaintiff.[12]

§ 8.13 Contribution and Indemnity

Increasingly, recent decisions concern efforts by both clients[1] and nonclients[2] to secure indemnity from an attorney. Indemnity may lie if the claimant has incurred a liability because of the attorney's breach of a duty.[3] When the claimant is the client, despite the label of "indemnity,"

735 P.2d 675 (1986); Evans v. Steinberg, 40 Wash.App. 585, 699 P.2d 797 (1985); Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co., 33 Wash.App. 129, 652 P.2d 962 (1982), cause remanded 101 Wash.2d 1009, 679 P.2d 388 (1984) (nonlawyer closing agent); Sherry v. Diercks, 29 Wash.App. 433, 628 P.2d 1336 (1981); Hawkins v. King County, Dept. of Rehabilitative Services, Div. of Involuntary Treatment Services, 24 Wash.App. 338, 602 P.2d 361 (1979); Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975).

W.Va.—Keister v. Talbott, 182 W.Va. 745, 391 S.E.2d 895 (1990).

Wis.—Cook v. Continental Casualty Co., 180 Wis.2d 237, 509 N.W.2d 100 (App. 1993); Harris v. Bove, 178 Wis.2d 862, 505 N.W.2d 159 (App.1993); Estate of Campbell v. Chaney, 169 Wis.2d 399, 485 N.W.2d 421 (App. 1992); Peck v. Medi-Care Ambulance Corp., 156 Wis.2d 662, 457 N.W.2d 536 (App.1990), review denied 458 N.W.2d 833 (1990); Acharya v. Carroll, 152 Wis.2d 330, 448 N.W.2d 275 (App.1989), review denied 451 N.W.2d 797 (1989); Glamann v. St. Paul Fire & Marine Insurance Co., 140 Wis.2d 540, 412 N.W.2d 522 (App.1987); Helmbrecht v. St. Paul Insurance Co., 122 Wis.2d 94, 362 N.W.2d 116 (1985); Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 276 N.W.2d 284 (1979).

Wyo.—Peterson v. Scorsine, 896 P.2d 382 (Wyo.1995); Meyer v. Mulligan, 889 P.2d 509 (Wyo.1995).

10. *See* § 8.2, *supra*, Duty—In General; and Chapter 5, *supra*, Liability to the Nonclient—Contract and Intentional Torts and Chapter 7, *supra*, Liability to the Nonclient—Negligence.

11. Moore v. McComsey, 313 Pa.Super. 364, 459 A.2d 841 (1983). *See also* Chapter 18, *infra*, The Standard of Care.

12. *See* § 8.6, *supra*, Causation.

§ 8.13

1. Oliviari v. Florida Association of Public Employee Pension Trustees, Inc., 627 So.2d 1335 (Fla.App.1993); Baker, Watts & Co. v. Miles & Stockbridge, 690 F.Supp. 431 (D.Md.1988), judgment affirmed in part, reversed in part 876 F.2d 1101 (4th Cir.1989); Rinebuck v. Steuart, 76 Md.App. 288, 544 A.2d 808 (1988); May's Family Centers, Inc. v. Goodman's, Inc., 104 F.R.D. 111 (N.D.Ill.1985); Bunker v. Bunker, 80 A.D.2d 817, 437 N.Y.S.2d 326 (1981); Rawley v. Rawley, 367 So.2d 286 (La.App.1978), writ denied 357 So.2d 1154 (La.1978), cert. denied 439 U.S. 968, 99 S.Ct. 459, 58 L.Ed.2d 427 (1978) (dismissal since client prevailed); Smiley v. Manchester Insurance & Indemnity Co. of St. Louis, 71 Ill.2d 306, 16 Ill.Dec. 487, 375 N.E.2d 116 (1978) (insurer suing defense counsel); Scherf v. Myers, 258 N.W.2d 831 (S.D.1977); Royal Crown Bottling Co. of Oklahoma City, Inc. v. Aetna Casualty & Surety Co., 438 F.Supp. 39 (W.D.Okl.1977).

2. *See* § 7.15, *supra*, Liability for Indemnity or Contribution. *See also*, Pioneer National Title Insurance Co. v. Sabo, 432 F.Supp. 76 (D.Del.1977); Hill v. Okay Construction Co., Inc., 312 Minn. 324, 252 N.W.2d 107 (1977); Fladerer v. Needleman, 30 A.D.2d 371, 292 N.Y.S.2d 277 (1968).

3. Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967 (4th Cir.1987) (client sued because of improper credit check of ex-husband); Hill v. Okay

November 8, 2000

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: www.brazilboycott.org

Attorney Gregory J. Stenmoe
BRIGGS & MORGAN
2400 IDS CENTER
80 South Eighth Street
Minneapolis, Minnesota 55402
Web site: www.briggs.com

RE: PARTIAL COMMENTS & OBJECTIONS TO OCTOBER 31, 2000 - REPORT & RECOMMENDATION

Dear Greg:

I am researching **TOWER** vs. **GLOVER**, 81 L.Ed2d 758 (1984) and offer the following as to public defenders held **NOT IMMUNE FROM LIABILITY** in suits brought under 42 U.S.C.S. §1983:

1. Whether a state agency may be sued under section 1983 depends whether it is considered an "AGENCY OR INSTRUMENTALITY" of the state. See, EDELMAN vs. JORDAN, 39 L.Ed2d 662. This inquiry is generally conducted on the basis of state law. Mt. HEALTHY BOARD OF EDUCATION vs. DOYLE, 50 L.Ed.2d 471 (1977). Quoting, 637 F.Supp. 426, 434 (1986).

2. "[s]ection 1983 provides NO CAUSE of action against federal officers or private individuals acting under color of federal law." See, BETLYON vs. SKY, 573 F.Supp. 1402, 1407 (D.Del.1983); DISTRICT OF COLUMBIA vs. CARTER, 409 U.S. 418, 423-25, 34 L.Ed.2d 613 (1973).

3. When a private party has been held to be acting under color of state law, it has always been because of action in conjunction with an official who was then a state actor. See, e.g. ADICKES, 398 U.S. at 149-152. It is the presence of that state actor that clothes the private party with the "under color of state law' vestment. Id. at 152.

4. ELING vs. JONES, 797 F.2d 697, 699 **(8th Cir. 1986)** (Minnesota District court case to 8th Cir.) "The uncontroverted evidence clearly shows that the PUBLIC DEFENDER [State of Minnesota] exercised a certain amount of **DISCRETION AND USED PROFESSIONAL JUDGEMENT** in deciding not to order copies of the transcripts. Such an exercise of "independent professional judgment in a criminal proceeding" brings the present case squarely within the Supreme Court's holding in POLK COUNTY vs. DODSON, 454 U.S. at 324, 70 L.Ed.2d 509, 520 (1981) (Attorney did not act under color of state law in exercising her independent professional judgment in a criminal proceeding, we do not suggest that a **PUBLIC DEFENDER** never acts in that role. . . . we found that a public defender so acted when making hiring and firing decisions on behalf of the state. . . possible administrative and investigation functions.

5. STATE ASSISTANT ATTORNEY GENERAL - ABSOLUTE IMMUNITY - (8th Cir.) WILLIAMS vs. HARTJE, 827 F.2d 1203, 1208-10 (8th Cir. 1987) (The advocacy function entails preparatory and other activity outside of the courtroom undertaken "within the role of advocate.")

6. WATERTOWN EQUIPMENT CO. vs. NORWEST BANK WATERTOWN, 830 F.2d 1487, 1495-96 (8th Cir. 1987) quoting, CHAPMAN vs. MUSICH, 726 F.2d 405 (8th Cir.), cert. denied, 83 L.Ed.2d 262 (1984), where the 8th Cir. held that a PUBLIC DEFENDER performing his or her traditional functions as defense counsel DID NOT ACT UNDER COLOR OF STATE LAW. Quoting, POLK COUNTY vs. DODSON, 70 L.Ed.2d 509 (1981) (DODSON contending that public defender deprived him of his SIXTH AMENDMENT right to counsel and denied him DUE PROCESS OF LAW.)

7. 8th Circuit (2000) INEFFECTIVE ASSITANCE OF COUNSEL: KING vs. KEMNA, 226 F.3d 981, 987 - To prevail on his ineffective assistance claim, KING must show that counsel's performance was DEFICIENT and that he was PREJUDICED BY THAT DEFICIENT PERFORMANCE. . . . Deficient performance means representation that falls "outside the wide range of professional competent assistance." . . ."Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful. . . . However, "counsel must exercise reasonable diligence to produce exculpatory evidence [,] and strategy resulting from lack of diligence in preparation and investigation is NOT PROTECTED BY THE PRESUMPTION IN FAVOR OF COUNSEL."

8. IN RE SCOTT COUNTY MASTER DOCKET, 618 F.Supp. 1534, 1566 (D.C.Minn. 1985) Thus, if the HSD defendant actually violated MINNESOTA statutes and regulations dealing with child removal, they WOULD NOT BE ENTITLED TO QUALIFIED IMMUNITY.

Running out of time and will continue to research more tomarrow.

Sincerely,

John G. Lambros

November 9, 2000

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: www.brazilboycott.org

Attorney Gregory J. Stenmoe
BRIGGS & MORGAN
2400 IDS CENTER
80 South Eighth Street
Minneapolis, Minnesota 55402
Web site: www.briggs.com

RE: PARTIAL COMMENTS & OBJECTIONS TO OCTOBER 31, 2000 - REPORT & RECOMMENDATION

Dear Greg:

I am going to offer you an overview of **PLEA AGREEMENTS:**

1. MACHIBRODA vs. U.S., 7 L.Ed.2d 473, 478 (1962) "[O]ut of just consideration for persons accused of crime, courts are careful that a **PLEA OF GUILTY** shall not be accepted unless made voluntarily **AFTER PROPER ADVICE AND FULL UNDERSTANDING OF THE CONSEQUENCES.**" KERCHEVAL vs. U.S., 71 LEd 1009, 274 US 220, 223.

2. U.S. vs. BECKLEAN, 598 F.2d 1122, 1125 (8th Cir. 1979), "[A] defense counsels mistaken representation to a defendant as to what a prosecutor promised may constitute grounds to vacate the plea, notwithstanding the prosecutor's lack of complicity in the mistake, if the representation played a substantial part in inducing the plea."

3. McCARTHY vs. U.S., 22 L.Ed.2d 418, 425 (1969) "[C]onsequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of **DUE PROCESS** and therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, **IT CANNOT BE TRULY VOLUNTARY UNLESS THE DEFENDANT POSSESSES AN UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS.**" "Moreover, since the elements of the offense were not explained to petitioner, and since the specific acts of tax evasion do not appear of record, it is also possible that if petitioner had been adequately informed he would have concluded that he was actually guilty of one of two closely related lesser included offenses, which are mere misdemeanors." Id. at 428.

4. U.S. vs. BROCE, 102 L.Ed.2d 927, 928 (1989) "[I]t was held that the defendants' double jeopardy challenge was foreclosed by the guilty pleas and the judgement of conviction on the pleas, where the defendants **NEITHER ALLEGED THAT THEIR COUNSEL WAS INEFFECTIVE** nor called into question the voluntary and intelligent character of the pleas, because (1) a guilty plea and the ensuing conviction **COMPREHEND ALL OF THE FACTUAL AND LEGAL ELEMENTS NECESSARY TO SUSTAIN A BINDING FINAL JUDGMENT OF GUILT AND A LAWFUL SENTENCE**, (2) a voluntary and intelligent plea of guilty made by an accused person, **WHO HAS BEEN ADVISED BY COMPETENT COUNSEL,**

4. (continued) . . ." . . . "[a]nd why the plea 'cannot be truly voluntary unless the **DEFENDANT POSSESSES AN UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS,'**" Id. at 936.

5. U.S. vs. COLEMAN, 895 F.2d 501, 505 (8th Cir. 1990) The only way a court may depart from a MANDATORY MINIMUM SENTENCE is for the government to file a MOTION under **Title 18 U.S.C.A. § 3553(e)**. This was never offered to LAMBROS' within his plea agreement, thus **NOT BINDING**. Therefore, FAULKNER could not tell me that the government would give me a seven (7) year sentencing offer. **EXCELLENT:** "[F]urthermore, because of the extraordinary nature of the relief provided by §3553(e) and the clear dictate that the government must first file a motion before the court may depart, **NO DEFENDANT COULD REASONABLY READ A PLEA AGREEMENT TO BIND THE GOVERNMENT TO FILE A §3553(e) MOTION ABSENT AN EXPLICIT PROMISE TO DO SO.** Therefore, there can be no ambiguity in the **ABSENCE** of an ***** express government promise **IN THE PLEA AGREEMENT** to file a §3553(e) motion. **. . . THE LACK OF SUCH A PROMISE IS CLEAR EVIDENCE THAT SUCH A PROMISE WAS NOT MADE. IN INTERPRETING EACH PLEA AGREEMENT AS THE EXCLUSIVE AND FINAL AGREEMENT, WE ARE BOUND TO CONCLUDE THAT EACH PLEA AGREEMENT UNAMBIGUOUSLY EXCLUDED A COMMITMENT BY THE GOVERNMENT TO FILE A §3553(e) MOTION. THEREFORE, APPELLEES WERE NOT ENTITLED TO AN ORDER DIRECTING THE GOVERNMENT TO FILE A MOTION."** Id. 506-507.

6. U.S. vs. BRITT, 917 F.2d 353, 359 (8th Cir. 1990) "[A] **PLEA AGREEMENT** is **CONTRACTUAL IN NATURE AND GENERALLY GOVERNED BY ORDINARY CONTRACT PRINCIPLES.** A plea agreement is more than merely a contract between two parties, however, and must be attended by **CONSTITUTIONAL SAFEGUARDS** to ensure a defendant receives the performance he is due. Also see, U.S. vs. CRAWFORD, 20 F.3d 933, 935 (8th Cir. 1994) (Immunity agreements are analogous to plea agreements, and therefore may be enforced under the principles of contract law)

I'll end here and try to reach you on the telephone so we may compare notes. THANKS.

Sincerely,

John G. Lambros

government or is ambiguous, then we must determine whether appellees are entitled to relief in the form of an order directing the government to file such a motion. Because we find paragraph 9 was not even ambiguous, we hold appellees were not entitled to an order directing the government to file a § 3553(e) motion.

In determining whether paragraph 9 is ambiguous, our inquiry is limited. It is irrelevant that the paragraph may be in certain respects ambiguous as long as it is not ambiguous on the issue of whether the government committed itself to file a § 3553(e) motion. The district court emphasizes that paragraph 9 is ambiguous in part because it does not state the precise manner in which the government will inform the court of appellees' assistance. Specifically, it does not state that the government will inform the court "by letter" which is what the government represents it had agreed to do. The precise manner in which the government agreed to inform the court is not the relevant focal point, however. Even if paragraph 9 was ambiguous as to the exact manner in which the government would inform the court, the paragraph clearly excluded § 3553(e) as an option. On this one point, there is no ambiguity.

From the very beginning of her discussions with defense counsel, the prosecutor categorically refused to place any provision in the plea agreements committing the government to file a § 3553(e) motion. *United States v. Coleman*, 707 F.Supp. at 1105. The government's position never changed. There is absolutely no evidence in the record to the contrary. [redacted] Despite the misunderstandings noted by the district court, the government's uncompromising position combined with the absence of any language in the plea agreements committing the government to filing a § 3553(e) motion leads us to conclude that the plea agreements were not ambiguous.[9]

[5] Furthermore, because of the extraordinary nature of the relief provided by § 3553(e) and the clear dictate that the [redacted] An express promise to file a motion unambiguously binds the government. The lack of such a promise is clear evidence that such a promise was not made. [redacted]

294, 300-01 (4th Cir.1988) (whether plea agreement is ambiguous is a legal question).

4. The government prosecutor informed counsel for Coleman that she had knowledge of a California case which could allow departures absent a government motion. No such case ever surfaced and the district court concluded that it never existed. *United States v. Coleman*, 707 F.Supp. at 1107, 1108. We do not believe that the government's mistake on this point has any effect on the outcome of this case. First, the government never informed Coleman's counsel it would acquiesce in that interpretation of § 3553(e) in argument before the district court. Second, the case mentioned was allegedly from California and as such had no binding precedential value in this circuit even if it did exist. Third, defense counsel failed to locate any such California case. Finally, the language of § 3553(e) that a motion by the government is required before the sentencing court can depart from the minimum sentence provided by statute is clear and unambiguous. Therefore, any reliance on the alleged California case was unreasonable. We also note that there was no allegation of maliciousness on the part of the prosecutor in mentioning the California case. The California case controversy actually hurts appellees' position. It constitutes further evidence that even though its reasoning was based upon inaccurate information, the government nevertheless refused to commit itself to file a § 3553(e) motion..

6. Plea Agreement, ¶ 12.

11. Furthermore, paragraph 2 of the plea agreement identifies the sentence to be imposed as containing a mandatory minimum sentence of one year. This provision is consistent with the government's position that it did not commit to filing a § 3553(e) motion.

[redacted]

[11.]

In summary, we hold that a government motion is required before a court may depart from the mandatory minimum sentence under § 3553(e). We further hold that the plea agreement was not ambiguous but clearly excluded a government commitment to file a § 3553(e) motion. We therefore reverse the district court's imposition of appellees' sentences finding them to be in violation of § 3553(e), and remand for further sentencing proceedings consistent with this opinion.

DANT & RUSSELL, INC., a corporation; Fireman's Fund Insurance Company, a corporation, Plaintiffs-Appellees.

v.

DILLINGHAM TUG & BARGE CORP., dba Hawaiian Tug & Barge Co.; The TUG MIKONIA, a vessel, in rem; et al., Defendants,

and

Pacific Hawaiian Lines, a corporation; The BARGE NORTON SOUND, in rem, Defendants-Appellants.

DANT & RUSSELL, INC., a corporation; and Fireman's Fund Insurance Company, a corporation, Plaintiffs-Appellants,

v.

DILLINGHAM TUG & BARGE CORP., dba Hawaiian Tug and Barge Company; the TUG MIKIONA, a vessel, in rem; Pacific Hawaiian Lines, a corporation; the BARGE NORTON SOUND, in r Dillingham Ship Repair, Portland, O gon, Defendants-Appellees.

Nos. 86-4284, 86-4344.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 8, 1988.

Decided June 16, 1989.

As Amended on Denial of Rehearing a Rehearing En Banc Jan. 30, 1990.

Cargo owner and insurer brought tion against vessel owner and vessel recover for cargo loss. The United Sta District Court for the District of Oreg Edward Leavy, J., dismissed vessel, terred summary judgment against ow for breach of warranty or seaworthine and found owner negligent. Appeal a cross appeal were taken. The Court Appeals held that: (1) agreement by mise charterer and vessel owner to def repairs until after voyage operated as wa er of vessel owner's liability for allege negligent failure to make repairs befo charter term; (2) vessel owner could not held liable for alleged breach of warran of seaworthiness; and (3) cargo policy did not bar cargo owner's claim against vess to recover insurance deductible.

Affirmed in part, reversed in part, a remanded.

Cynthia Holcomb Hall, Circuit Judg concurred in part, dissented in part, a filed opinion.

Opinion, 877 F.2d 1404, superseded.

1. Shipping ⇐51(5)

Agreement by demise charterer a vessel owner to defer repairs until aft voyage operated as waiver of vessel ow er's liability for allegedly negligent failu to make repairs before charter term.

2. Shipping ⇐51(5)

Demise charterer which supervised i spection of vessel, took active part in r pairs, had full knowledge of vessel's unse worthiness, and assumed all risks waiv

November 11, 2000

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: www.brazilboycott.org

Attorney Gregory J. Stenmoe
BRIGGS & MORGAN
2400 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Web site: www.briggs.com

RE: PARTIAL COMMENTS & OBJECTIONS TO OCTOBER 31, 2000 - REPORT & RECOMMENDATION

Dear Greg:

As per our telephone conversation on Friday afternoon November 10, 2000, I would like to highlight the following:

1. You will be requesting an extension of time to November 30, 2000 to file our response due to your out of town hearings.

2. You will file, as attachments to your/our RESPONSE to Judge Mason's October 31, 2000, REPORT & RECOMMENDATION, all of my letters to you as to the REPORT & RECOMMENDATION. We both agreed this would cover all parties concerned. Thank you.

3. I offered you an overview on **Title 18 U.S.C.A. § 3553(e)** and suggested your review of U.S. vs. COLEMAN, 895 F.2d 501, 505-507 **(8th Cir. 1990)**, as to:

a. **§ 3553(e)** provides upon Motion from the Government the Court shall have the authority to impose a sentence **BELOW** a level established by **STATUTE AS MINIMUM SENTENCE.** . . . Such sentence shall be imposed in accordance with the **GUIDELINES** and policy statements issued by the Sentencing Commission . . . Id. at 504.

b. Section 3553(e)'s counterpart under the **GUIDELINES** is **§ 5K1.1.** Which states "UPON MOTION FROM THE GOVERNMENT . . ., the **Court MAY DEPART FROM THE GUIDELINES"** Id. at 504.

c. Section 3553(e) and § 5K1.1. have different effects. Id. at 504.

d. The courts have construed the motion requirements the same. Id. at 504.

e. "The motion requirement is clear and unambiguous. There are **NO STATUTORY EXCEPTIONS."** Id. at 505.

f. An express promise to file a motion unambiguously binds the government. The lack of such a promise is **CLEAR EVIDENCE THAT SUCH A PROMISE WAS NOT MADE. Id. at 506.**

g. "[n]o defendant could reasonably READ A PLEA AGREEMENT TO BIND THE GOVERNMENT TO FILE A § 3553(e) [§5K1.1] MOTION ABSENT AN EXPLICIT PROMISE TO DO SO." Id. at 506.

PLEA AGREEMENT:

4. On November 16, 1992, U.S. Attorney Heffelfinger and U.S. Assistant Attorney Peterson offered John Gregory Lambros a WRITTEN PLEA AGREEMENT. See, EXHIBIT G-1 thru G-6 within Lambros' original June 15, 1998 DECLARATORY JUDGMENT/COMPLAINT.

5. The government states that C.W. Faulkner and the government had discussions over a ten (10) day period as to the written plea agreement.

6. The plea agreement DOES NOT mention either Title 18 U.S.C.A. §3553(e) or its counterpart under the GUIDELINES §5K1.1.

7. The plea agreement states the following FACTS:

a. Conviction on Count I charge, however, would carry a MANDATORY TERM OF IMPRISONMENT OF LIFE WITHOUT PAROLE . . . (Plea Agreement page 2)

b. The government would agree to dismiss Counts I, V, and VI.

c. The government would prosecute on Count VIII charge that carries a MANDATORY MINIMUM term of imprisonment of TEN (10) YEARS without parole. (Plea Agreement page 2).

d. The defendant understands that his sentence on the Count VIII charge will be determined and based upon the applicable sentencing guidelines under the Sentencing Reform Act of 1984. (Plea Agreement page 3).

e. [Lambros'] "[a]pplicable guideline range would be 292 to 365 months." (Plea Agreement, page 5)

C.W. FAULKNER'S NOVEMBER 17, 1992 LETTER TO LAMBROS WITH PLEA AGREEMENT:

8. On November 17, 1992, C.W. Faulkner sent LAMBROS a letter with the government's November 16, 1992 PLEA AGREEMENT. C.W. Faulkner stated the following FACTS within his letter: (See EXHIBIT H, in original June 15, 1998 DECLARATORY JUDGEMENT/COMPLAINT)

a. Attached please find the results of our negotiation for a PLEA AGREEMENT in your case. IT ALLOWS YOU CONSIDERABLE LATITUDE TO ARGUE THAT YOU OUGHT TO BE TREATED IN THE SAME RANGE AS THE OTHER DEFENDANTS AND IT AVOIDS THE MANDATORY LIFE COUNT.

er 11, 2000
s' letter to Attorney Stenmoe
CT. 31, 2000, REPORT & RECOMMENDATION

b. The key words in the above is "YOU OUGHT TO BE TREATED IN THE SAME AS THE OTHER DEFENDANTS."

c. At that time I knew that the MOST prison time any of the other ants received was FOUR (4) YEARS.

d. Therefore, C.W. Faulkner committed FRAUD & DECEIT when he informed ther and myself that I would only receive SEVEN (7) YEARS IN PRISON FOR E CHARGES IF I TOOK THE PLEA AGREEMENT. It was legally imposible for me eive same due to §3553(e) and §5K1.1.

TIARY HEARING:

Should we request an EVIDENTIARY HEARING to call individuals as to C.W. ner's statements regarding the SEVEN (7) YEARS?

lly the above will assist you as to the FRAUD Faulkner committed in trying e me to sign the plea agreement. You may want to refer to my letter dated ber 9, 2000 as to my overview on PLEA AGREEMENTS.

ct me if I'm wrong, since the seven (7) year prison sentence FAULKNER stated ld receive was not legally possible, then the BUT FOR logic within our would have to be, LAMBROS would of been offered a plea agreement of less 292 to 365 months (as per the plea agreement) if LAMBROS had been offered orrect information as to the MAXIMUM SENTENCE he could receive. That being, T (30) YEARS DUE TO ARTICLE 75 OF THE BRAZILIAN LAW. (365 months is 5 more s than possible under Brazilian Law).

ing you in advance for your continued assistance.

rely,

G. Lambros

November 13, 2000

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: www.brazilboycott.org

Attorney Gregory J. Stenmoe
BRIGGS & MORGAN
2400 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Web site: www.briggs.com

RE: PARTIAL COMMENTS & OBJECTIONS TO OCTOBER 31, 2000 - REPORT & RECOMMENDATIONS

Dear Greg:

On November 11, 2000, I wrote and offered an overview of **TITLE 18 U.S.C.A. §3553(e)** and suggested your review of U.S. vs. COLEMAN, 895 F.2d 501, 505-507 (8th Cir. 1990), as to the governments requirement in filing both a **§3553(e) and 5K1.1** if they choose to depart under the **MINIMUM** STATUTORY SENTENCE and the SENTENCING GUIDELINES. **ALSO NOTICE MUST APPEAR WITHIN A SIGNED PLEA AGREEMENT.**

REPORT & RECOMMENDATION: Judge Mason has stated on page two (2) "[P]laintiff was offered a plea bargain of seven (7) years in prison for all charges pending against him. Plaintiff did not accept this plea agreement."

The above statement is false in this respect. First, yes C.W. Faulkner did state that I could receive a seven (7) year plea bargain. This is supported by:

1. August 27, 1999, AFFIDAVIT OF DONNA RAE JOHNSON IN SUPPORT OF MOTION TO DISMISS OR SUMMARY JUDGEMENT AND OPPOSING REPORT AND RECOMMENDATION. See, Pages 2, 3, and referenced EXHIBIT B, page A-32 thru 35. (Affidavit of Jeffrey Orren, dated January 27, 1994. **(ATTACHED FOR YOUR REVIEW)**

But, he could not legally of offered me the seven (7) year plea bargain because the government DID NOT offer same within the plea agreement. See, COLEMAN, 895 F.2d at 506 (. . ., no defendant could reasonably read a PLEA AGREEMENT to bind the government to file a §3553(e) motion absent an explicit promise to do so. Therefore, there can be no ambiguity in the **ABSENCE** of an express government promise in the plea agreements to file a §3553(e) motion")

THEREFORE, C.W. FAULKNER COMMITTED FRAUD AND VIOLATED THE STANDARDS OF DUE PROCESS THAT RESULTED IN A LOSS OF LIBERTY TO ME THAT IS A DENIAL OF A CONSTITUTIONAL RIGHT.

Hopefully the above AFFIDAVITS will assist you in your argument.

Sincerely,
John G. Lambros

40. 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS,

Plaintiff,

vs.

CHARLES W. FAULKNER, sued as Estate/Will Business Insurance of deceased Attorney Charles W. Faulkner, SHEILA REGAN FAULKNER, FAULKNER & FAULKNER, and JOHN & JANE DOE

Defendants

CIVIL CASE # 98-1621 DSD/JMM

AFFIDAVIT OF DONNA RAE JOHNSON IN SUPPORT OF MOTION TO DISMISS OR SUMMARY JUDGMENT AND OPPOSING REPORT AND RECOMMENDATION

8/27/99

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

Donna Rae Johnson, being first duly sworn, on oath, states as follows:

1. That I am one of the attorneys representing the Defendants in the above-captioned matter, and that I make this affidavit in support of Defendants motion to dismiss and/or motion for summary judgment, and in opposition to the Report and Recommendation.

2. That, although we have obtained the United States v. Lambros files from Colia Ceisel, who represented Plaintiff during his appeal, we have been unable to locate the Seven (7) Volumes of the trial transcripts to date. Neither the, Eighth Circuit Administrator, the Clerk of District Court, nor attorney Ceisel can locate the transcripts. We will proceed with the information we have at hand, but if the Court finds we are lacking documentation from the transcripts, we ask that the court allow us the courtesy of locating the transcripts for additional

41.

documentation.

3. To assist the court in its review of Defendant's Objections to Report and Recommendation, affiant will respond to each claim made by Plaintiff in his Amended Complaint, asserting malpractice of Charles W. Faulkner and attach relevant documents in opposition to that claim. The following Exhibits will be referenced as needed:

Exhibit A - United States v. Lambros, 65 F3d 698 (8th Cir. 1995), cert. denied, 116 S.Ct. 796 (1996)
Exhibit B - Appendix of Appellant, Case No. 94-1332MNMI
Exhibit C - Resentencing Memoradum dated February 19, 1997
Exhibit D - Brief of Appellant - Case No. 94-1332 MNMI
Exhibit E - Brief of Appellee - Case No. 94-1332MNMI
Exhibit F - Affidavit of Charles W. Faulkner dated 7/21/93 and transmittal letter
Exhibit G - Summary Dismissal, Board of Prof. Responsibility
Exhibit H - Docket No. 4-89-82, United States v. Lambros
Exhibit I - Federal Public Defender letter to C.W. Faulkner, 9/92
Exhibit J - Plaintiff's letter to counsel, 12/21/92
Exhibit K - Addendum of Appellant, Case No. 94-1332MNMI
Exhibit L - Supplemental Brief of Appellant, Case No. 94-1332MNMI
Exhibit M- United States v. Lambros, unpublished opinion No. 97-1553
Exhibit N - Indictment of John Gregory Lambros

4. **Defendants response to Plaintiff's Claim I:**

Although an error was made by the prosecutor regarding the statement in his proposed plea agreement that conviction on the Count I charge would carry a mandatory term of imprisonment of life without parole, and neither counsel nor the court caught the mistake, that matter was corrected on appeal. Also, the Plaintiff acknowledged that the Court could have sentenced him to life imprisonment under the statute in effect at the time of his offense. United States v. Lambros, 65 F3d 698, 700 (8th Cir. 1995) (Exhibit A, attached hereto) The Court must find that the Plaintiff has suffered damages from counsel's actions, and it is clear that Plaintiff could have served just seven years, instead of 360 months, had he followed counsel's recommendation.

42.

Plaintiff's argument that he might have accepted a plea bargain if counsel had obtained a plea bargain for fewer years and had properly advised him is refuted by Plaintiff's history and the affidavit of Jeffrey Orren, dated January 27, 1994, Page A-32, Appendix of Appellant (Exhibit B attached hereto) Mr. Orren's affidavit specifically states that in conversations he had with Plaintiff, Plaintiff told Mr. Orren that *he wouldn't have accepted a plea if he hadn't had to do any time at all*. (emphasis added) It was Mr. Orren's opinion that this conversation affirmed that Plaintiff was not competent to stand trial, but the court determined that he was competent. In the Resentencing Memorandum filed February 19, 1997, the Honorable Robert G. Renner, in declining an additional competency hearing (two had already been held) noted that the district court had found Plaintiff competent to stand trial. (Exhibit C attached hereto)

It is clear from the trial transcripts, which are cited by Douglas Peterson in Appellee's Brief, pages 38 to 44, (Exhibit E attached hereto) that Plaintiff was fully competent to stand trial, exhibiting a clear understanding of the charges against him. There is nothing in any of the proceedings which would indicate that Plaintiff would have been acquitted if counsel had done anything differently.

5. **Defendants response to Plaintiff's Claim II.**

Charles W. Faulkner is deceased, and unable to speak for himself in this matter. However, Plaintiff's charge that counsel refused to pay for legal services "they" contracted with National Legal Professional Associates is answered in paragraph 10 of the Affidavit of Charles W. Faulkner dated July 21, 1993. (Exhibit F attached hereto) Although this is an unsigned copy of the affidavit, it was in the Lambros file provided by Colia Ceisel, and it is a responsive affidavit to the affidavit of John Lambros, Docket No. 87. Plaintiff took it upon himself to have his family hire Mr. Robinson of the National Legal Professional Associates, and

documentation.

3. To assist the court in its review of Defendant's Objections to Report and Recommendation, affiant will respond to each claim made by Plaintiff in his Amended Complaint, asserting malpractice of Charles W. Faulkner and attach relevant documents in opposition to that claim. The following Exhibits will be referenced as needed:

Exhibit A - United States v. Lambros, 65 F3d 698 (8th Cir. 1995), cert. denied, 116 S.Ct. 796 (1996)
Exhibit B - Appendix of Appellant, Case No. 94-1332MNMI
Exhibit C - Resentencing Memoradum dated February 19, 1997
Exhibit D - Brief of Appellant - Case No. 94-1332 MNMI
Exhibit E - Brief of Appellee - Case No. 94-1332MNMI
Exhibit F - Affidavit of Charles W. Faulkner dated 7/21/93 and transmittal letter
Exhibit G - Summary Dismissal, Board of Prof. Responsibility
Exhibit H - Docket No. 4-89-82, United States v. Lambros
Exhibit I - Federal Public Defender letter to C.W. Faulkner, 9/92
Exhibit J - Plaintiff's letter to counsel, 12/21/92
Exhibit K - Addendum of Appellant, Case No. 94-1332MNMI
Exhibit L - Supplemental Brief of Appellant, Case No. 94-1332MNMI
Exhibit M- United States v. Lambros, unpublished opinion No. 97-1553
Exhibit N - Indictment of John Gregory Lambros

4. **Defendants response to Plaintiff's Claim I:**

Although an error was made by the prosecutor regarding the statement in his proposed plea agreement that conviction on the Count I charge would carry a mandatory term of imprisonment of life without parole, and neither counsel nor the court caught the mistake, that matter was corrected on appeal. Also, the Plaintiff acknowledged that the Court could have sentenced him to life imprisonment under the statute in effect at the time of his offense. United States v. Lambros, 65 F3d 698, 700 (8th Cir. 1995) (Exhibit A, attached hereto) The Court must find that the Plaintiff has suffered damages from counsel's actions, and it is clear that Plaintiff could have served just seven years, instead of 360 months, had he followed counsel's recommendation.

FRAUD ... NO POSSIBLE

42.

4. I had known for years that Mr. Lambros is an intelligent man, and this is born out by his legitimate successes and his ability to get licensed as a stock broker after his first prison term.

5. Immediately upon his first contact with me in 1992, Mr. Lambros informed me that neurological implants had been placed in his body while he was in Brazil, and that he was controlled by the implants by persons unknown to him. He suspected that the implants were put in by Brazilian military or police. He told me that the implants could monitor his speech, hearing and thoughts, and that the persons controlling the implants could make him black out, go into convulsions and even control his speech. The control is exercised by radio telemetry from satellites. The implants draw their power from electricity in Mr. Lambros' skin.

6. I was informed by several third-parties that Mr. Lambros had turned down a plea agreement offering seven years confinement when he knew he was facing a life without parole sentence and would likely be convicted. The reason Mr. Lambros gave for turning down the offer was that voices told him to do it. I asked Mr. Lambros about this on the evening of January 25, 1994, and he confirmed that he turned down the plea agreement, despite the alternative, because voices from satellites told him to do it. It made perfect sense to him. The implants control his mind and body, and he is in no position to make a decision that would not be his.

7. After confirming what I had heard about the plea agreement, I explored the matter further with Mr. Lambros. I

posed this hypothetical. "If Judge Murphy declared a mistrial and the seven year plea bargain was offered again, and if everyone told you to take the agreement would you accept it?" I was absolutely flabbergasted by his response. He told me that he couldn't accept any plea bargain because the voices tell him not to and because he is not in control of his own thoughts and actions. Even knowing as a fact that he would be convicted and that he would get life without parole, Mr. Lambros would not accept a seven year plea bargain agreement. The reason was the same, he does not control his thoughts and actions, and the voices from the implants tell him "no". And then he elaborated and told me that he would not even accept a no jail time agreement for the same reason. He is not in control of his own actions. He repeated several times that after he has an MRI and the implants are discovered and removed surgically, then he will be able to deal with his criminal problems.

8. I explored the matter even further. I tried to explain that the implants and the criminal proceeding are totally separate matters. I tried to explain that after being sentenced to the hypothetical seven years, he would get into the Bureau of Prisons and he would get the examination he needs, and the implants would be removed. Then he could finish his seven year sentence and get out. If he did not plead guilty, they would just send him away forever, implants or not. He was unable to separate the two issues.

9. I am convinced that Mr. Lambros seriously believes everything he has told me that I related above. He has been

carrying on this claim for well over two years now, without even the slightest break. He has spoken to me as the "third-party" (the person in telemetric control of the implants). He has made decisions that could not possibly be made by a competent person. He did in fact turn down the plea bargain agreement. As an attorney at law, I cannot conceive how Mr. Lambros could possibly be competent to stand trial. He obviously is not capable of contributing to his own defense when he cannot separate two totally separate issues in his mind, and when he takes decisions that are obviously not in his best interest because voices from satellites told him to, whether he has implants or not.

10. Upon penalty of perjury, I declare that all statements above are true, save and except those made upon information or belief, which are true and correct to the best of my knowledge. Further your Affiant sayeth not.

IN WITNESS WHEREOF, I have hereunto placed my hand on this 27th day of January, 19 94.

Jeffrey L. Orren

Subscribed and sworn to before me by Jeffrey L. Orren, personally known to me, on this 27th day of January, 19 94.

DEBORAH PETERSON
NOTARY PUBLIC-MINNESOTA
WASHINGTON COUNTY
My Commission Expires Mar 25, 1999

Notary Public

November 15, 2000

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: www.brazilboycott.org

Attorney Gregory J. Stenmoe
BRIGGS & MORGAN
2400 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Web site: www.briggs.com

RE: PARTIAL COMMENTS & OBJECTIONS TO OCTOBER 31, 2000 - REPORT & RECOMMENDATION

Dear Greg:

I am trying to reference all places within past pleadings where I stated that **I INCLUDED ALL CLAIMS WITHIN THE RICO CLAIM.** I have identified the following:

1. May 19, 1999, "PART TWO (II) (DELAYED FILING AS PER MOTION FOR EXTENSION OF TIME) PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGEMENT, MEMORANDUM IN SUPPORT AND REQUESTED ORDER DATED APRIL 26, 1999.

2. The above May 19, 1999, MOTION outlined and stated in paragraphs 97 thru 117 the predicate acts PLAINTIFF incorporated within his complaint that are relevent. Specifically, paragraph 111 stated:

> 111. Plaintiff has alleged the following **RICO** predicate acts and **INCORPORATES ALL ALLEGATIONS WITHIN THIS COMPLAINT THAT ARE RELEVENT:**
>
> a. Title 18 U.S.C. §201; (relating to bribery)
> b. Title 18 U.S.C. §1341; (relating to mail fraud)
> c. Title 18 U.S.C. §1343; (relating to wire fraud)
> d. Title 18 U.S.C. §1503; (relating to obstruction of justice)
> e. Title 18 U.S.C. §1512. (relating to tampering with witness, victim, or an informant)

3. Paragraph 109 offers an excellent overview as to **FRAUD** that is applicable to **UNENFORCEABLE CONTRACT** when applying RICO, citing, AMERICAN BUYING INS. SERV. vs. KORNREICH & SONS, 944 F.Supp. 240 (S.D.N.Y. 1996). The UNENFORCEABLE CONTRACT in my case is the **PLEA AGREEMENT.** Also, the rule that **FRAUD** must be plead with particularity **DOES NOT APPLY** to pleading of "enterprise" and "control" elements of civil action under RICO. Id. at 241.

4. Paragraph 110 offers a case almost exactly like mine, U.S. vs. EISEN, 974 F.2d 246, 247 (2nd Cir. 1992), Head Note 1, the court states:

> . . . MISREPRESENTATION IN PLEADING AND PRETRIAL SUBMISSIONS were made in hope of FRAUDULENTLY INDUCING SETTLEMENT BEFORE TRIAL, and alleged misconduct was intended to DEFRAUD the civil adversaries. Title 18 U.S.C.A. 1341.

In EISEN, attorneys, law firm's investigators, and it office administrator were convicted of RICO violations in connection with firm's fraudulent conduct of civil litigation as plaintiff's counsel in personal injury case.

5. Paragraph 116 offers an overview and listing of pleadings of **RICO CLAIMS FILED WITHIN MY CASE.** Greg, you may want to attach those listings.

6. Attached are pages 37, 38, 39, 40, & 41 of my May 19, 1999 MOTION.

Hopefully the above has been helpful.

Sincerely,

John G. Lambros

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS, Plaintiff,	*	
vs.	*	CIVIL NO. 98-1621 (DSD/JMM)
CHARLES W. FAULKNER, sued as Estate/Will/Business Insurance of Deceased Attorney Charles W. Faulkner, SHEILA REGAN FAULKNER, FAULKNER & FAULKNER, and JOHN & JANE DOE(s), Defendants.	*	

PART TWO (II)

(DELAYED FILING AS PER MOTION FOR EXTENSION OF TIME)

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGEMENT, MEMORANDUM IN SUPPORT AND REQUESTED ORDER DATED APRIL 26, 1999

COMES NOW, John Gregory Lambros, Plaintiff in the above-entitled action, stating in AFFIDAVIT FORM, opposition to Defendants' Motion to Dismiss or for Summary Judgement, Memorandum in Support, and requested Order, all dated April 26, 1999, and signed by Defendants' attorneys, Donna Rae Johnson and Deborah Ellis.

JOHN GREGORY LAMBROS declares under penalty of perjury:

44. THAT THIS DELAYED FILING IS A CONTINUATION OF PLAINTIFF'S MAY 11, 1999, FILING AND THAT PARAGRAPH SEQUENCE WILL REMAIN IN ORDER, THUS STARTING AT 44 AND PAGES WILL START AT 24. THANK YOU FOR YOUR CONSIDERATION.

CLAIM SEVEN (7):

96. BUT FOR, the above violations of defendants this plaintiff would of been set FREE and given thirty (30) to leave the United States before the indictment in this action would of been reactivated, as a reasonable probability exists that the Court lacked juriadiction, as to the extraditable crimes punishable under the FEDERAL LAWS OF THE UNITED STATES OF AMERICA.

CLAIM SIX (6): (CIVIL RICO CLAIM)

97. Defendants request this Court to dismiss plaintiff's Amended Complaint, "Pursuant to RULE 56, FRCP, on the grounds that there are no material fact in dispute and the defendants are entitled to judgement as a matter of law on plaintiff's malpractice and RICO claims. See, Defendants MOTION to dismiss or for Summary Judgement, paragraph 2, dated April 26, 1999.

98. Defendants state within there MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGEMENT, page 3, dated April 26, 1999, "With respect to plaintiff's RICO CLAIM, this claim APPEARS to be based upon a Tenth Circuit case which was reversed . . . Plaintiff failed to state any factual basis upon which to find a RICO VIOLATION by Charles W. Faulkner. Therefore plaintiff's RICO CLAIM should be dismissed pursuant to Rule 12, FRCP."

99. Defendants request this Court to sign an ORDER (to dismiss) as to plaintiff's RICO CLAIMS as to the following:

a. [4.] Plaintiff's RICO claim is WITHOUT any factual support. This is listed under the heading of FINDING OF FACT.

b. [3.] Plaintiff's RICO claim is dismissed pursuant to Rule 12(b), FRCP. This is listed under the heading of CONCLUSIONS OF LAW.

100. Plaintiff, as this court, must only wonder as to the legal education of allegedly trained lawyers when they rely on the fallacy in reasoning commonly known as "BEGGING THE QUESTION."

101. Defendants' essentially rely on an averment that they are not guilty of any "actionable behavior." This is all good and well, but defendants' bold assertions, unsupported by affidavit or deposition testimony, do not even begin to explain why Plaintiff's Complaint, DOES NOT STATE A PREDICATE ACT(S).

102. Defendants' have not listed the elements of the various offenses and ventured to demonstrate why Plaintiff's proof is lacking. Instead, defendants' and there lawyers/attorneys proffer conclusory denials. This is an insufficient showing on behalf of a litigant who seeks summary judgement. It is an elementary precept of civil procedure that "[t]he party moving for summary judgement cannot sustain his burden merely by DENYING THE ALLEGATIONS IN THE OPPONENT'S PLEADINGS." 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure §2727, at 131 (2nd ed. 1983). Importantly, "a party moving for summary judgement is not entitled to a judgement merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial." Id. at §2725, at 104-05. Therefore, this Plaintiff's complaint is not so facially deficient that this Court could justifiably say Plaintiff will be unable to corroborate his allegations that the defendants' committed predicate acts contained in Title 18 U.S.C. 1961(1).

103. The Eighth Circuit, the mother circuit of this Court, has stated Plaintiff's rules for STANDING TO BRING THIS RICO CLAIM. See, BOWMAN vs. WESTERN AUTO SUPPLY CO, 985 F.2d 383, 388 (8th Cir. 1993). ([4] We hold that STANDING to bring a civil suit pursuant to Title 18 U.S.C. §1964(c) and BASED on an underlying CONSPIRACY violation of Title 18 U.S.C. §1962(d) is limited to those individuals who have been harmed by a §1961(1) RICO PREDICATE ACT committed in furtherance of a CONSPIRACY TO VIOLATE RICO. The BUT-FOR CAUSATION REQUIREMENT is eliminated in RICO CLAIMS and replaced by the more restrictive PROXIMATE CAUSATION REQUIREMENT between the injury and the harm alleged. Id. at 388.)

context of causation, that is the connection between the injury and the RICO act that allegedly caused it. The reasons for including a directness element, according to the Court, are at least three fold. . . . Third, the more likely that individual will take on the **ROLE OF PRIVATE ATTORNEY GENERAL, AND THUS UPHOLD THE LAW**. See, BOWMAN vs. WESTERN AUTO SUPPLY CO. 985 F.2d 383, 387, fn.3 (8th Cir. 1993) quoting HOLMES, 117 L. Ed.2d at 554. (Private Attorney General John Gregory Lambros at your services)

105. ADEQUACY OF PLAINTIFF'S CONSPIRACY ALLEGATIONS: Section 1962(d) establishes liability for a conspiracy to violate Section 1962(a), (b), or (c). See, AMERICAN BUYING INS. SERV. vs. KORNREICH & SONS, 944 F.Supp. 240, 247 (S.D.N.Y. 1996).

106. All defendants listed within this action are included within this RICO CLAIM, under Section 1962(d) and (c) "participate[d], directly or indirectly in conduct of [the] enterprise's affairs." This "operation or management" test can be satisfied by the actions of "**ANY PERSON EMPLOYED BY OR ASSOCIATED WITH [THE] ENTERPRISE.**'" REVES, 113 S.Ct. at 1173. Quoting, AMERICAN BUYING INS. SERV., 944 F.Supp. 240, 247.

107. Plaintiff and the Eighth Circuit Court of Appeals have **PROVED** that the **WRITTEN PLEA AGREEMENT** offered plaintiff by defendants was an **UNENFORCEABLE CONTRACT**. This plaintiff was victim of **MISREPRESENTATION** and/or **FRAUD**. PLEA AGREEMENTS are **CONTRACTUAL IN NATURE**, and are interpreted according to general **CONTRACTUAL PRINCIPLES**. See, U.S. vs. BRITT, 917 F.2d 353, 359 (8th Cir. 1990), cert. denied, 498 U.S. 1090, 111 S.Ct. 971, 112 L.Ed.2d 1057 (1991); U.S. vs. CRAWFORD, 20 F.3d 933, 935 (8th Cir. 1994).

108. Where a PLEA AGREEMENT is AMBIGUOUS, the ambiguities are construed AGAINST the government [Plaintiff's Attorney???]. See, COLEMAN, 895 F.2d at 505; HARVEY, 791 F.2d at 300-01; CARNINE vs. U.S., 974 F.2d 924, 928-29 (7th Cir. 1992);

ANDERSON, 970 F.2d 607; cf. DAVIS vs. U.S., 649 F.Supp. 754, 758 (C.D.Ill 1986).

109. In 1996, U.S. Federal Judge J. Kaplan held that, "[p]urported ILLEGALITY OF CONTRACT between purchasing group and brokerage group DID NOT PRECLUDE purchasing group from proving DAMAGES UNDER RICO." See, AMERICAN BUYING INS. SERV. vs. KORNREICH & SONS, 944 F.Supp. 240 (S.D.N.Y. 1996). Courts will allow Plaintiff to recover damages on UNENFORCEABLE CONTRACT if plaintiff was excusably ignorant, and defendant was not, of FACTS that made agreement UNENFORCEABLE. Restatement (Second) of Contracts §180. Id. at 241. While courts generally do not grant restitution under agreements that are unenforceable due to illegality, courts will award damages in quantum meruit if it is found that parties are not in pari delicto, as when plaintiff is VICTIM OF MISREPRESENTATION by defendants. Id. at 241. Rule that FRAUD must be plead with particularity does not apply to pleading of "enterprise" and "control" elements of civil action under RICO. Id. at 241.

110. In U.S. vs. EISEN, 974 F.2d 246, 247 (2nd Cir. 1992), Key note 1, the court stated:

> . . . MISREPRESENTATION IN PLEADING AND PRETRIAL submissions were made in hope of fraudulently inducing settlement before trial, and alleged misconduct was intended to defraud the civil adversaries. Title 18 U.S.C.A. 1341

In EISEN, attorneys, law firm's investigators, and it office administrator were convicted of RICO violations in connection with firm's fraudulent conduct of civil litigation as plaintiff's counsel in personal injury case.

111. Plaintiff has alleged the following RICO predicate acts and incorporates all allegations within this complaint that are relevent:

a. Title 18 U.S.C. §201; (relating to bribery)

b. Title 18 U.S.C. §1341; (relating to mail fraud)

c. Title 18 U.S.C. §1343; (relating to wire fraud)

d. Title 18 U.S.C. §1503; (relating to obstruction of justice)

e. Title 18 U.S.C. §1512. (relating to tampering with witness, victim, or an informant)

112. MINNESOTA STATE LAW CLAIMS: (TREBLE DAMAGES) See, Minn. Stat. Ann. §§ 481.07-.071 (West 1990) (DEALS WITH PENALTIES FOR DECEIT OR COLLUSION) See, HANDEEN vs. LEMAIRE, 112 F.3d 1339, 1355 (8th Cir. 1997).

113. The above Minnesota statutes, M.S.A. §§ 481.07, 481.071, dealing with penalties for DECEIT or COLLOSION do not create a new cause of action, but merely provide penalties available to one who prevails on COMMON LAW RIGHTS OF ACTION. See, HANDEEN, at 1342, Key note 28.

114. Plaintiff incorporates all of the allegations relevant to the RICO CLAIM, and Plaintiff unequivocally asserts that the defendants acted to "DECEIVE PLAINTIFF AND/OR A PARTY TO A COURT PROCEEDING AND DECEIVE THE COURT."

115. Plaintiff invokes M.S.A. §§ 481.07, 481.071 FOR DAMAGE PURPOSES ONLY.

116. Plaintiff has attached to this pleading an overview, although not complete, of RICO claims filed in this case, so as to assist this Court in reviewing same. Attached are the following:

a. Plaintiff's July 20, 1998, MOTION TO SUPPLEMENT THIS DECLARATORY JUDGEMENT ACTION/COMPLAINT PURSUANT TO FRCP 15(a), pages 9 thru 12;

b. Plaintiff's September 15, 1998, AFFIDAVIT IN OPPOSITION TO DEFENDANTS ANSWER, pages 6 and 7;

c. Plaintiff's November 4, 1998, MOTION TO ALTER THE PLEADINGS IN THIS MATTER AS PER U.S. MAGISTRATE JUDGE MASON'S ORDER, DATED OCTOBER 15, 1998, pages 18 thru 23.

PLAINTIFF HAS STATED ACTIONABLE CLAIMS AGAINST SHEILA R. FAULKNER, FAULKNER & FAULKNER, AND JOHN AND JANE DOE(S):

55,

(The END)