

2610 MALICIOUS PROSECUTION: ADVICE OF COUNSEL: AFFIRMATIVE DEFENSE (CRIMINAL PROCEEDING)

(Defendant), contends that prior to instituting a criminal prosecution against (plaintiff), (he) (she) made a full and fair disclosure to (the district attorney) ([his] [her] own lawyer) of the material facts within (his) (her) knowledge which relate to (plaintiff)'s alleged commission of the criminal offense of _____.

The term "full and fair disclosure of the material facts within the knowledge of (defendant)," does not necessarily mean all the facts discoverable, but rather all the facts within the knowledge of the person making the statements. If (defendant) knew facts, either personally or in reliance upon credible information, and fully and fairly stated them to (the district attorney) ([his] [her] own lawyer), and honestly acted upon the advice given (him) (her) in commencing the criminal proceedings, it can then be said that (defendant) had probable cause or good reason to press criminal charges.

(Defendant) has the burden to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that, prior to (instituting) (pursuing) (continuing) (assisting) a criminal prosecution, (defendant) did make a full and fair disclosure to (the district attorney) ([his] [her] own lawyer) of all material information possessed by (him) (her) in relation to the alleged criminal offense and honestly followed the advice of (the district attorney) ([his] [her] own lawyer).

SPECIAL VERDICT

Question 1: Before (instituting) (assisting in) (continuing) (pursuing) criminal charges against (plaintiff), did (defendant) make a full and fair disclosure of facts to (the district attorney) ([his] [her] own attorney)?

ANSWER: _____

(yes or no)

If you answered no to Question 1, then answer this question:

Question 2: Did (defendant) maliciously prosecute (plaintiff)?

ANSWER: _____

(yes or no)

Question 3: What sum of money will compensate (plaintiff) for [insert damages]?

ANSWER: _____

COMMENT

The instruction and comment were initially approved by the Committee in 1962. The instruction was revised in 1986, 1991, 2002, and 2015.

If this defense is raised and proved, then it negates lack of probable cause and is, therefore, a complete defense to the lawsuit. See Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419 (1974). If the defendant raises advice of counsel as a defense, then this question should be submitted to the jury before asking whether the defendant has maliciously prosecuted the plaintiff.

Reliance on Advice of Counsel. The advice of an attorney whom a client has no reason to believe to be personally interested is conclusive evidence of the existence of probable cause for initiating a prior proceeding in reliance upon such advice when it is sought in good faith and given after a full disclosure of the facts within the client's knowledge and information. Meyer, supra; Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966). A "fair and full disclosure" does not mean disclosure of all discoverable facts but disclosure of all of the facts within the knowledge of the person making the statement. Neumann, supra. This knowledge may be based upon personal observation or upon credible information. Id.

Burden of Proof. The burden of proof to establish the affirmative defense is the lower civil burden.