

**2611 MALICIOUS PROSECUTION: ADVICE OF COUNSEL: AFFIRMATIVE DEFENSE (CIVIL PROCEEDING)**

(Defendant) contends that prior to commencing a civil proceeding against (plaintiff), (he ) (she) made a full and fair disclosure to ([his] [her] lawyer) of all the material facts within (his) (her) knowledge which relate to the civil proceeding.

The term "full and fair disclosure of all of the material facts within the knowledge of the 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 ([his] [her] lawyer), and honestly acted upon the advice given (him) (her) in commencing the civil proceedings, it can then be said that (defendant) had probable cause or good reason to start the civil proceeding.

(Defendant) has the burden to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that, prior to starting the civil proceeding, (defendant) made a full and fair disclosure to ([his] [her] lawyer) of all material information possessed by (him) (her) in relation to the civil proceeding and honestly followed the advice of ([his] [her] lawyer).

**SPECIAL VERDICT**

Question 1: Before commencing the civil proceeding against (plaintiff), did (defendant) make a full and fair disclosure of facts to ([his] [her] attorney) and honestly follow the advice of the 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 approved in 2015.

If this defense is raised and proved, it negates lack of probable cause and is, therefore, a complete defense to the lawsuit. If the defendant raises advice of counsel as a defense, 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 v. Ewald, 66 Wis.2d 168 (1974); 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.