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Civility, the rules of professional conduct, and avoiding Dragonetti

Presented by guest speakers:
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Subpart D. CODE OF CIVILITY

CHAPTER 99. CODE OF CIVILITY

Source

The provisions of this Chapter 99 adopted December 6, 2000, effective December 6, 2000, 30 Pa.B. 6541; amended April 21, 2005, effective May 7, 2005, 35 Pa.B. 2722. Immediately preceding text appears at serial pages (276507) to (276508) and (272355) to (272356), unless otherwise noted.

§ 99.1. Preamble.

The hallmark of an enlightened and effective system of justice is the adherence to standards of professional responsibility and civility. Judges and lawyers must always be mindful of the appearance of justice as well as its dispensation. The following principles are designed to assist judges and lawyers in how to conduct themselves in a manner that preserves the dignity and honor of the judiciary and the legal profession. These principles are intended to encourage lawyers, judges and court personnel to practice civility and decorum and to confirm the legal profession's status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

The conduct of lawyers and judges should be characterized at all times by professional integrity and personal courtesy in the fullest sense of those terms. Integrity and courtesy are indispensable to the practice of law and the orderly administration of justice by our courts. Uncivil or obstructive conduct impedes the fundamental goal of resolving disputes in a rational, peaceful and efficient manner.

The following principles are designed to encourage judges and lawyers to meet their obligations toward each other and the judicial system in general. It is expected that judges and lawyers will make a voluntary and mutual commitment to adhere to these principles. These principles are not intended to supersede or alter existing disciplinary codes or standards of conduct, nor shall they be used as a basis for litigation, lawyer discipline or sanctions.

§ 99.2. A Judge's Duties to Lawyers and Other Judges.

1. A judge must maintain control of the proceedings and has an obligation to ensure that proceedings are conducted in a civil manner.

2. A judge should show respect, courtesy and patience to the lawyers, parties and all participants in the legal process by treating all with civility.

3. A judge should ensure that court-supervised personnel dress and conduct themselves appropriately and act civilly toward lawyers, parties and witnesses.

4. A judge should refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

5. A judge should always refer to counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss) or by the professional title of attorney or counselor while in the courtroom.

6. A judge should not employ hostile or demeaning words in opinions or in written or oral communications with lawyers, parties or witnesses.

7. A judge should be punctual in convening trials, hearings, meetings and conferences.

8. A judge should be considerate of the time constraints upon lawyers, parties and witnesses and the expenses attendant to litigation when scheduling trials, hearings, meetings and conferences to the extent such scheduling is consistent with the efficient conduct of litigation.

9. A judge should ensure that disputes are resolved in a prompt and efficient manner and give all issues in controversy deliberate, informed and impartial analysis and explain, when appropriate, the reasons for the decision of the court.

10. A judge should allow the lawyers to present proper arguments and to make a complete and accurate record.

11. A judge should not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which he or she represents.

12. A judge should recognize that the conciliation process is an integral part of litigation and thus should protect all confidences and remain unbiased with respect to conciliation communications.

13. A judge should work in cooperation with all other judges and other jurisdictions with respect to availability of lawyers, witnesses, parties and court resources.

14. A judge should conscientiously assist and cooperate with other jurists to assure the efficient and expeditious processing of cases.

15. Judges should treat each other with courtesy and respect.

§ 99.3. The Lawyer's Duties to the Court and to Other Lawyers.

1. A lawyer should act in a manner consistent with the fair, efficient and humane system of justice and treat all participants in the legal process in a civil, professional and courteous manner at all times. These principles apply to the lawyer's conduct in the courtroom, in office practice and in the course of litigation.

2. A lawyer should speak and write in a civil and respectful manner in all communications with the court, court personnel, and other lawyers.

3. A lawyer should not engage in any conduct that diminishes the dignity or decorum of the courtroom.

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4. A lawyer should advise clients and witnesses of the proper dress and conduct expected of them when appearing in court and should, to the best of his or her ability, prevent clients and witnesses from creating disorder and disruption in the courtroom.

5. A lawyer should abstain from making disparaging personal remarks or engaging in acrimonious speech or conduct toward opposing counsel or any participants in the legal process and shall treat everyone involved with fair consideration.

6. A lawyer should not bring the profession into disrepute by making unfounded accusations of impropriety or personal attacks upon counsel and, absent good cause, should not attribute improper motive or conduct to other counsel.

7. A lawyer should refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

8. A lawyer should not misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral or written communication to the court.

9. A lawyer should be punctual and prepared for all court appearances.

10. A lawyer should avoid ex parte communications with the court, including the judge's staff, on pending matters in person, by telephone or in letters and other forms of written communication unless authorized. Communication with the judge on any matter pending before the judge, without notice to opposing counsel, is strictly prohibited.

11. A lawyer should be considerate of the time constraints and pressures on the court in the court's effort to administer justice and make every effort to comply with schedules set by the court.

12. A lawyer, when in the courtroom, should make all remarks only to the judge and never to opposing counsel. When in the courtroom a lawyer should refer to opposing counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss) or the professional title of attorney or counselor.

13. A lawyer should show respect for the court by proper demeanor and decorum. In the courtroom a lawyer should address the judge as ''Your Honor'' or ''the Court'' or by other formal designation. A lawyer should begin an argument by saying ''May it please the court'' and identify himself/herself, the firm and the client.

14. A lawyer should deliver to all counsel involved in a proceeding any written communication that a lawyer sends to the court. Said copies should be delivered at substantially the same time and by the same means as the written communication to the court.

15. A lawyer should attempt to verify the availability of necessary participants and witnesses before hearing and trial dates are set or, if that is not feasible, immediately after such dates have been set and promptly notify the court of any anticipated problems.

16. A lawyer should understand that court personnel are an integral part of the justice system and should treat them with courtesy and respect at all times.

17. A lawyer should demonstrate respect for other lawyers, which requires that counsel be punctual in meeting appointments with other lawyers and considerate of the schedules of other participants in the legal process; adhere to commitments, whether made orally or in writing; and respond promptly to communications from other lawyers.

18. A lawyer should strive to protect the dignity and independence of the judiciary, particularly from unjust criticism and attack.

19. A lawyer should be cognizant of the standing of the legal profession and should bring these principles to the attention of other lawyers when appropriate.

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159 A.3d 478
Supreme Court of Pennsylvania.

Jean Louise VILLANI, Individually and in her Capacity as Personal Representative of the Estate of Guerino Villani, Deceased
v.
John SEIBERT, Jr. and Mary Seibert
Frederick John Seibert, Jr. and Mary Seibert
v.
Jean Louise Villani and Thomas D. Schneider, Esquire
Appeal of: Frederick John Seibert, Jr. and Mary Seibert

No. 66 MAP 2016
|
ARGUED: December 6, 2016
|
DECIDED: April 26, 2017

Synopsis

Background: Property owners who had prevailed in action to quiet title and in ensuing ejectment proceedings brought action against opposing parties and their attorney for wrongful use of civil proceedings. The Court of Common Pleas, Civil Division, Chester County, No. 2012–09795, granted defendants' preliminary objections grounded on constitutional challenge to Dragonetti Act, which sets forth cause of action for wrongful use of civil proceedings. Owners sought permission for interlocutory direct appeal.

[Holding:] The Supreme Court, Saylor, C.J., held that Dragonetti Act does not infringe on powers accorded to Supreme Court under Constitution.

Reversed.

Baer, J., filed concurring opinion in which Wecht, J., joined.

Todd, J., filed concurring opinion.

Donohue, J., filed dissenting opinion.

West Headnotes (5)

[1] Appeal and Error
Review of constitutional questions

Review of a challenge to the constitutionality of a duly enacted statute is plenary.

1 Cases that cite this headnote

[2] Appeal and Error
Constitutional questions

Plaintiffs in action for wrongful use of civil proceedings sufficiently preserved for review all defenses of constitutionality of Dragonetti Act, which sets forth cause of action for wrongful use of civil proceedings, even though plaintiffs did not discuss specifics of interaction between Act and Rules of Disciplinary Procedure and even though their advocacy could have been sharper; fair reading of plaintiffs' presentation to trial court encompassed position that Act should be regarded as a broadly applicable substantive, remedial scheme within province of General Assembly. 42 Pa. Cons. Stat. Ann. § 8351 et seq.

Cases that cite this headnote

[3] Constitutional Law
Clearly, positively, or unmistakably unconstitutional

Constitutional Law
Doubt

Constitutional Law
Burden of Proof

A party challenging the constitutionality of a statute bears the heavy burden of establishing that a duly-enacted and presumptively valid statute clearly and palpably violates the Constitution, with any doubts being resolved in favor of the statute's validity.

1 Cases that cite this headnote

[4] **Constitutional Law**
Remedies and procedure in general
Courts
Power to regulate procedure

The Dragonetti Act, which sets forth a cause of action for wrongful use of civil proceedings, does not infringe on the powers accorded to the Supreme Court under the Constitution to prescribe general rules governing practice, procedure, and the conduct of all courts; the Act has a strong substantive, remedial thrust, and the Act is of general application and is not specifically targeted to legal professionals. Pa. Const. art. 5, § 10(c); 42 Pa. Cons. Stat. Ann. § 8351 et seq.

1 Cases that cite this headnote

[5] **Constitutional Law**
Making, Interpretation, and Application of Statutes

While the Supreme Court clearly retains a residual, common law role in substantive lawmaking, the Court cedes such power when the Assembly chooses to exercise its own constitutional prerogative to enact substantive legislation.

Cases that cite this headnote

***479** Appeal from the Order of the Chester County Court of Common Pleas, Civil Division, dated 10/5/15 amending the 8/27/15 order at No. 2012–09795. Edward Griffith, Judge

Attorneys and Law Firms

Jeffrey B. Albert, Esq., for Nicholas O. Brown, Amicus Curiae.

Anthony Salvatore Cottone, Esq., Burns White, LLC, for The Professional Liability Defense Federation, Amicus Curiae.

H. Robert Fiebach, Esq., Cozen O'Connor, for Pennsylvania Bar Ass'n, Amicus Curiae.

Bruce Richard Beemer, Esq., PA Office of Attorney General, Joshua D. Shapiro, Esq., for Attorney General's Office, Participants.

Peter Michael Newman, Esq., Mark William Tanner, Esq., Feldman Shepherd Wohlgelemter Tanner Weinstock & Dodig LLP, for Mary Seibert and Frederic John Seibert, Jr., Appellants.

Guy Anthony Donatelli, Esq., Lamb McErlane, PC, for Jean Louise Villiani, Appellee.

Paul Christopher Troy, Esq., Kane, Pugh, Knoell, Troy & Kramer, L.L.P., for Thomas D. Schneider, Appellee.

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

CHIEF JUSTICE SAYLOR

In this interlocutory direct appeal by permission, we consider whether a legislative enactment recognizing a cause of action for wrongful use of civil proceedings infringes upon this Court's constitutionally prescribed power to regulate the practice of law, insofar as such wrongful-use actions may be advanced against attorneys.

The underlying litigation arose out of a land-ownership dispute between Jean Louse Villani, who was a co-plaintiff with her late husband until his death, and defendants John Seibert, Jr. and his mother, Mary Seibert ("Appellants"). Appellants prevailed in both an initial quiet title action and ensuing ejectment proceedings. During the course of this dispute, the Villanis were represented by Thomas D. Schneider, Esquire ("Appellee").

Subsequently, Appellants notified Mrs. Villani and Appellee that they intended to pursue a lawsuit for wrongful use of civil proceedings based upon Mrs. Villani's and Appellee's invocation of the judicial process to raise purportedly groundless claims. In November 2012, Mrs. Villani countered by commencing her own action seeking a judicial declaration vindicating her position that she did nothing wrong and bore no liability to Appellants. Appellants proceeded, as they had advised that they would do, to file a complaint naming Ms. Villani and Appellee as defendants. The declaratory judgment

complaint having been lodged in Chester County, but the ensuing wrongful-use action being filed ***480** in Philadelphia, a decision was made to coordinate the matters in the Chester County court.

Appellee interposed preliminary objections to Appellants' complaint. As is relevant here, he contended that the statutory scheme embodying a cause of action for wrongful use of civil proceedings, commonly referred to as the "Dragonetti Act," [1] is unconstitutional. [2] Appellee relied on Article V, Section 10(c) of the Pennsylvania Constitution, which invests in this Court the power to prescribe general rules "governing practice, procedure and the conduct of all courts," as well as "admission to the bar and to practice law," while directing that "[a]ll laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions." PA. CONST. art. V, § 10(c). He also stressed that this Court has characterized its constitutional and inherent powers to supervise the conduct of lawyers as being exclusive. *See, e.g.*, Pa.R.D.E. 103; *Commonwealth v. Stern*, 549 Pa. 505, 510, 701 A.2d 568, 570 (1997).

Centrally, Appellee portrayed the Dragonetti Act as an unconstitutional incursion by the General Assembly upon the Court's power under Article V, Section 10(c). Given this asserted defect, he claimed that attorneys should be immunized from any liability under these statutory provisions. In support, Appellee referenced a series of cases in which this Court had stricken legislative enactments on the basis that those statutes intruded on the Court's constitutionally prescribed powers. *See* Memorandum of Law in Support of Preliminary Objections in *Seibert v. Villani* ("Defendant's Memorandum"), No. 2012–09795 (C.P. Chester), at 7–9 (citing *Beyers v. Richmond*, 594 Pa. 654, 937 A.2d 1082 (2007) (plurality), *Shaulis v. Pa. State Ethics Comm'n*, 574 Pa. 680, 833 A.2d 123 (2003), *Gmerek v. State Ethics Comm'n*, 569 Pa. 579, 807 A.2d 812 (2002) (equally divided Court), *Stern*, 549 Pa. 505, 701 A.2d 568, *Snyder v. UCBR*, 509 Pa. 438, 502 A.2d 1232 (1985), *Wajert v. State Ethics Comm'n*, 491 Pa. 255, 420 A.2d 439 (1980), and *In re Splane*, 123 Pa. 527, 16 A. 481 (1889)).

Appellee also observed that, in defining the contours of liability for wrongful use of civil proceedings, the Legislature fashioned a "probable cause" standard that permits a lawyer acting in good faith to proceed with litigation, where he or she "reasonably believes that under [the supporting] facts the claim may be valid under the existing or developing law." 42 Pa.C.S. § 8352(1). According to Appellee, however, such prescription clashes with the Pennsylvania Rules of Professional Conduct promulgated by this Court, which authorize attorneys to advance good faith arguments for "*extension, modification or reversal* of existing law." Pa.R.P.C. § 3.1 (emphasis added). It was his position that the asserted ***481** difference "surely represents an intrusion by the legislature into the exclusive power of the judiciary that is prohibited under Article V, Section 10(c)." Defendant's Memorandum at 11.

Furthermore, Appellee took issue with the Dragonetti Act's incorporation of subjective standards. *See, e.g.*, 42 Pa.C.S. § 8352(3) (defining another contour of "probable cause" as encompassing a good-faith belief that litigation "is not intended to merely harass or maliciously injure the opposite party"). He contrasted such subjectivity with the more objective litmus established under Rule of Professional Conduct 3.1. Pa.R.P.C. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless *there is a basis in law and fact* for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." (emphasis added)). Appellee opined that the statute's focus on subjective motivation "means, as a practical matter, that summary disposition is exceedingly difficult." Defendant's Memorandum at 12. He concluded that, "[o]nce again, the legislature violates Article V, section 10(c) by purporting to regulate attorney conduct through different standards than those selected by the Supreme Court." *Id.*

In a similar line of argument, Appellee claimed that the Act's prescription for monetary damages should be viewed as a further intrusion into this Court's exclusive province. In this regard, Appellee explained that the Rules of Disciplinary Enforcement, also promulgated by this Court, establish the procedures for addressing violations of the Rules of Professional Conduct, encompassing all stages from the investigation of an allegation of inappropriate conduct to the final disposition of a complaint by this Court, as well as delineating all available forms of discipline. *See* Pa.R.D.E. 204–208. Appellee commented that: "Nowhere do the disciplinary rules permit an opposing party to seek monetary damages from an attorney." Defendant's Memorandum at 12. According to Appellee, the only tribunal authorized to

address any and all grievances against attorneys is the Disciplinary Board, which functions under the Supreme Court's oversight. *See id.* (citing Pa.R.D.E. 205–207). "In short," he proclaimed, "the concept of a lawsuit against an attorney for money damages based on his conduct in a civil case is repugnant to Article V, section 10(c)." Defendant's Memorandum at 13; *accord id.* ("It is for the judiciary to sanction attorneys for bringing an action that is purportedly baseless or for engaging in other inappropriate conduct.").

In response, Appellants defended the Dragonetti Act as substantive remedial legislation designed, for the benefit of victims, to redress wrongs committed by those pursuing frivolous litigation. Appellants explained that it has long been the law of the Commonwealth that a lawyer may be liable for tortious conduct committed in his professional capacity. *See* Plaintiffs' Memorandum of Law in Opposition to Preliminary Objections in *Seibert*, No. 2012–09795 ("Plaintiff's Memorandum"), at 5 (citing *Adelman v. Rosenbaum*, 133 Pa.Super. 386, 391–92, 3 A.2d 15, 18 (1938), for the proposition that the defendant in a common law action for malicious use of process "cannot invoke the plea of privilege as an attorney acting for a client" because "malicious action is not sheltered by any privilege"); *accord Dietrich Indus., Inc. v. Abrams*, 309 Pa.Super. 202, 208, 455 A.2d 119, 123 (1982) ("An attorney who knowingly prosecutes a groundless action to accomplish a malicious purpose may be held accountable in an action for malicious ***482** use of process."). [3]

Appellants further offered that the Dragonetti Act was fashioned after Section 674 of the Second Restatement of Torts, which indicates as follows:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if
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> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
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> (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

RESTATEMENT (SECOND) OF TORTS § 674 (1977). Moreover, Appellants alluded to comment d to Section 674, which provides:

> If [an] attorney acts without probable cause for belief in the possibility that [a] claim will succeed, and for an improper purpose, as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid, he is subject to the same liability as any other person.

Id., cmt. d.

Appellants noted that the Superior Court had repeatedly cited and adopted Section 674 and referenced comment d relative to actions brought against attorneys, *see* Plaintiffs' Memorandum at 6 (citing *Gentzler v. Atlee*, 443 Pa.Super. 128, 135 n.6, 660 A.2d 1378, 1382 n.6 (1995), *Meiksin v. Howard Hanna Co.*, 404 Pa.Super. 417, 420–21, 590 A.2d 1303, 1305 (1991), and *Shaffer v. Stewart*, 326 Pa.Super. 135, 140–43, 473 A.2d 1017, 1020–21 (1984)), and that no appellate court had ever concluded that the Dragonetti Act is unconstitutional. Additionally, they asserted that "[t]he fact that the common law claim for wrongful use of civil process was codified in 1980 does not render the claim unconstitutional." *Id.* at 8. According to Appellants, none of the cases cited by Appellee in which this Court had declared other statutes to be unconstitutional bore any relevance, since none pertained to the prescription for substantive redress for victims considering the harm caused by a lawyer's tortious conduct.

Appellants also differed with Appellee's depiction of the legislative purpose underlying the Act as being to regulate the practice of law. Rather, they contended ***483** that the primary objective was to codify the common law cause of action for malicious prosecution, while adjusting it to eliminate the requirement of seizure or arrest and substitute gross negligence for malice as a liability threshold. *See* Plaintiffs' Memorandum at 7 (citing *Nw. Nat'l Cas. Co. v. Century III Chevrolet, Inc.*, 863 F.Supp. 247, 250 (W.D. Pa. 1994)); *accord Walasavage v. Nationwide Ins. Co.*, 806 F.2d 465, 467 (3d

Cir. 1986). *See generally* 42 Pa.C.S. § 8351(b) ("The arrest or seizure of the person or property of the plaintiff shall not be a necessary element for an action brought pursuant to this subchapter.").

According to Appellants' position as stated from the outset, the Dragonetti Act does not conflict with Rule of Professional Conduct 3.1, which was never intended to govern civil liability or otherwise grant or curtail remedies to third parties harmed by an attorney's tortious conduct. *See* Plaintiffs' Memorandum at 7–8 (citing the Scope provision from the Rules of Professional Conduct for the propositions that "violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached" and that the rules "are not designed to be a basis for civil liability"). Along these lines, Appellants also referenced *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 602 A.2d 1277 (1992), in which this Court chastised the Superior Court for "badly confus[ing] the relationship between duties under the rules of ethics and *legal rules that create actionable liability apart from the rules of ethics.*" *Id.* at 255, 602 A.2d at 1284 (emphasis added). In light of this essential distinction between ethical regulation and substantive remedial laws, Appellants maintained that the Dragonetti Act "supplements, but does not interfere with, the operation of those rules." Plaintiffs' Memorandum at 8.

The common pleas court granted Appellee's preliminary objections grounded on his constitutional challenge to the Dragonetti Act, for essentially the reasons that he had advanced. Citing to decisions that Appellee had referenced in which this Court has suspended statutes per its Article V, Section 10(c) powers, the county court observed that the "Supreme Court has long asserted its authority over the conduct of attorneys." *Villani*, No. 2012–09795, *op.* at 4 n.1 (C.P. Chester Aug. 27, 2015). The court further reasoned that the "Dragonetti Act goes to the heart of what an attorney is trained and called upon to do, exercise legal judgment about the existence of probable cause under the law as it presently exists or is developing." *Id.* at 5 n.1. In this regard, the court of common pleas credited the position that the Act conflicts with Rule of Professional Conduct 3.1 by adopting a more restrictive standard and in grounding liability upon subjective beliefs. *See id.* ("[T]he legislature violates Art. V, § 10(c) of the Pennsylvania Constitution by attempting to regulate attorney conduct through standards other than those selected by the Supreme Court."). Additionally, the court agreed with Appellee that the imposition of monetary damages under the Act, *see* 42 Pa.C.S. § 8353, represented a further transgression, since no disciplinary rule promulgated by this Court so provides. The court of common pleas concluded, again, essentially echoing Appellee's arguments:

> The only tribunal authorized by the Supreme Court to address grievances against an attorney is the Disciplinary Board. Pa.R.D.E. 205. The concept of a lawsuit against an attorney for money damages based on how a civil case is conducted is repugnant to the system of discipline established by the Supreme ***484** Court pursuant to Art. V, § 10(c) of the Pennsylvania Constitution.
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> * * *
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> For the reasons stated, the Dragonetti Act is a legislative attempt to intrude upon the Supreme Court's exclusive authority to regulate the conduct of attorneys in the practice of law. It is for the judiciary to sanction lawyers for bringing actions that are baseless or for otherwise engaging in inappropriate conduct. The Dragonetti Act, as it pertains to lawyers, is unconstitutional and unenforceable.

Id. at 6–7 n.1.

[1] Appellants sought permission to appeal on an interlocutory basis, [4] initially in the Superior Court, which was granted after the proceedings were transferred to this Court. *See* 42 Pa.C.S. § 722(7) (vesting exclusive original appellate jurisdiction in the Supreme Court over a final order holding a Pennsylvania statute unconstitutional). Our review of a challenge to the constitutionality of a duly enacted statute is plenary. *See, e.g.*, *Commonwealth v. Hopkins*, 632 Pa. 36, 49, 117 A.3d 247, 255 (2015).

Presently, Appellants maintain their core contention that the Dragonetti Act constitutes a substantive remedial law designed to provide an essential remedy to third parties harmed by abusive litigation, and not a misguided effort by the General Assembly to usurp this Court's regulatory power over attorneys.

Appellants supplement this position with a number of observations and arguments that they did not specifically

present to the county court. In addition to referencing cases from the Superior Court, Appellants relate that this Court has acknowledged the Dragonetti Act on several occasions. *See* Brief for Appellants at 23 (citing *Stone Crushed P'ship v. Kassab Archbold Jackson & O'Brien*, 589 Pa. 296, 299 n.1, 908 A.2d 875, 877 n.1 (2006), and *McNeil v. Jordan*, 586 Pa. 413, 438–39, 894 A.2d 1260, 1275 (2006)). In the *McNeil* decision, Appellants elaborate, this Court found that the Dragonetti Act served as a useful aid in interpreting the Rules of Civil Procedure governing pre-complaint discovery. *See McNeil*, 586 Pa. at 438–39, 894 A.2d at 1275. From this, Appellants draw the conclusion that "the Dragonetti Act comports entirely with the duty of the litigant, whether party or attorney, to demonstrate good faith and probable cause 'in the procurement, initiation or continuation of civil proceedings' and to conduct discovery in conformity with these basic principles." Brief for Appellants at 26–27 (quoting 42 Pa.C.S. § 8351(a)); *see also id.* at 27 ("In other words, this Court has extolled the Dragonetti Act, which codified centuries of common law, as a necessary and appropriate basis for relief for victims of abusive litigation conduct.").

Next, Appellants explain that this Court previously considered the constitutionality of a segment of the Dragonetti Act, at least, when it suspended its provision for attorney certifications and civil penalties for violations. *See* Pa.R.C.P. No. 1023.1(e) (reflecting the suspension of 42 Pa.C.S. § 8355). According to Appellants, by suspending Section 8355, while leaving intact the remaining sections of the Act, this Court "tacitly endorsed Sections 8351 through 8354 as constitutional." Brief for Appellants at 28. Appellants also highlight the explanatory note to Rule 1023.1, referencing the Act as providing "additional relief from dilatory or frivolous proceedings." Pa.R.C.P. No. 1023.1, Note; *see* Brief for Appellants at 29 ("The explanatory comment to ***485** Rule of Civil Procedure 1023.1, which refers directly to the Dragonetti Act as a viable cause of action, is further evidence that the Supreme Court has for several decades approved of the Dragonetti Act as a supplemental remedy for victims of frivolous civil proceedings.").

Appellants additionally argue that Rule 1023.1 sanctions do not adequately compensate the victims of frivolous claims. In this regard, Appellants quote *Werner v. Plater–Zyberk*, 799 A.2d 776 (Pa. Super. 2002), as follows:

> [The Dragonetti Act defendant] argue[s] that [the plaintiff's] interests would be vindicated adequately via sanctions imposed by the federal district court. However, the damages [the plaintiff] seeks are distinct from the various types of penalties that may be imposed by a court as sanctions against a tortfeasor. Sanctions, including monetary sanctions paid to an adversary in the form of fees or costs, address the interests of the court and not those of the individual. A litigant cannot rely on a sanction motion to seek compensation for every injury that the sanctionable conduct produces. Rather, an injured party must request tort damages to protect his personal interest in being free from unreasonable interference with his person and property.
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> The main objective of Rule 11 is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. While imposing monetary sanctions under Rule 11 may confer a financial benefit on a victimized litigant, this is merely an incidental effect on the substantive rights thereby implicated. Simply put, Rule 11 sanctions cannot include consequential damages and thus are not a substitute for tort damages. In light of the foregoing, we conclude that [the plaintiff's] right to seek tort damages for his alleged injuries exists independently of, and in addition to, any rights he might possess to petition for sanctions from the federal district court ....

Id. at 784–85 (citations omitted); *accord Perelman v. Perelman*, 125 A.3d 1259, 1269–72 (Pa. Super. 2015).

Appellants further take issue with the distinction drawn by the common pleas court and Appellee between the Dragonetti Act's probable cause requirement and the standard set forth in Rule of Professional Conduct 3.1. In this regard, Appellants again cite *McNeil* as clarifying that "the term 'probable cause' is sufficiently well defined and understood in Pennsylvania law to ensure an objective, unified standard ...." *McNeil*, 586 Pa. at 438, 894 A.2d at 1275. Furthermore, Appellants explain that in the decades throughout which the Dragonetti Act has been in existence, no Pennsylvania appellate court has ever interpreted the enactment to require that the term "developing law," as it appears in the enumeration of the probable cause standard set forth in Section 8352(1), should not include an argument for extension,

modification or reversal of exiting law. *See* Brief for Appellants at 34 ("What, after all, is a 'developing law' if not a law that is the subject of legal argument and debate, including debate over the extension, modification or reversal of existing law?").

In terms of the subjective-objective distinction drawn by the county court and Appellee, Appellants asserts that this rests on a misinterpretation of Rule of Professional Conduct 3.1, which recognizes the necessity of "good faith" in argumentation. Pa.R.P.C. 3.1. Appellants also posit:

> Whether charged with a violation of [Rule] 3.1 or a violation of the Dragonetti Act, an attorney would defend with the same evidence upon which the attorney ***486** based his or her good faith belief that there was a basis in law and fact to bring or defend the underlying civil proceeding. In either case, the finder of fact would be charged with determining whether the lawyer's belief was objectively reasonable, *i.e.*, whether the lawyer had acted in good faith by relying upon creditable facts and a non-frivolous legal argument for purposes of probable cause to pursue a claim.

Brief for Appellants at 35. In this line of argument, Appellants note that the governing standards, as they have developed in the decisional law, are highly deferential relative to attorney judgment. *See, e.g.*, *Perelman*, 125 A.3d at 1264 ("Insofar as attorney liability is concerned, 'as long as an attorney believes that there is a slight chance that his client's claims will be successful, it is not the attorney's duty to prejudice the case.' " (quoting *Morris v. DiPaolo*, 930 A.2d 500, 505 (Pa. Super. 2007))). To the degree that an assessment of a lawyer's beliefs is necessary, Appellants do not agree with the common pleas court and Appellee that this unnecessarily complicates the summary judgment process.

Appellants also relate that there are other legislative remedial schemes that operate to authorize compensation to victims of wrongful, injurious acts committed by attorneys. For example, Appellants reference the Loan Interest and Protection Law,[5] which imposes civil liability for collection of interest or charges in excess of those otherwise permitted under the enactment. *See* 41 P.S. § 502. They indicate that this Court recently confirmed, as a matter of statutory interpretation, that attorneys are not excluded from the category of persons subject to liability under the act. *See Glover v. Udren Law Offices, P.C.*, —— Pa. ——, ——, 139 A.3d 195, 200 (2016). Appellants draw supportive significance from the absence of any mention, in *Glover*, of a conflict between the enactment under review and Article V, Section 10(c) of the Pennsylvania Constitution.

Finally, Appellants explain that this Court previously has rejected constitutional challenges to other statutes that impose ethical and professional requirements upon groups that include attorneys. *See Maunus v. State Ethics Comm'n*, 518 Pa. 592, 544 A.2d 1324 (1988) (disapproving an attack upon an Ethics Act requirement for all employees of the Pennsylvania Liquor Control Board, which included attorney-employees, to file statements of financial interest). Appellants highlight the *Maunus* Court's observations that: the challenged enactment was not targeted solely at lawyers; the statute did not impose a duty upon every attorney admitted to practice law in the Commonwealth; and the duty imposed was not inconsistent with the professional and ethical obligations arising from directives of this Court. *See id.* at 600, 544 A.2d at 1328. Indeed, responding to the assertions of the county court and Appellee that the imposition of civil liability upon attorneys is repugnant, Appellants express the contrary position that "immunization of lawyers who have engaged in the wrongful use of civil proceedings is repugnant." Brief for Appellants at 44.

In support of Appellants, *amicus curiae* Nicholas O. Brown—who is a plaintiff in a pending Dragonetti action lodged against an attorney-defendant—invokes Article I, Section 11 of the Pennsylvania Constitution. *See* PA. CONST. art. I, § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law ...."). *Amicus* views the form of lawyer immunity envisioned by ***487** Appellee to be fundamentally inconsistent with this constitutionally prescribed right to a remedy. Furthermore, he believes that nothing in Article V, Section 10(c) was ever intended to invalidate the Legislature's core power to fashion substantive law, *inter alia*, by compensating persons harmed by abusive and frivolous litigation.

Appellee, for his part, opens his brief with an extensive array of waiver-based arguments, mainly contending that, since Appellants failed to present most of the arguments advanced in their appellate brief during the course of the proceedings in the common pleas court, those are unavailable for this Court's present review. For example, Appellee asserts that Appellants failed to reference Rules of Disciplinary Enforcement 204 though 208 or to provide a developed argument with regard to Rule of Professional Conduct 3.1. Indeed, according to Appellee's parsimonious view of what was presented to the county court, the sole argument that Appellants preserved for appellate review "is the irrelevant and inaccurate claim that the Dragonetti Act 'recodified' Section 674 of the Restatement (Second) of Torts." Brief for Appellee at 8 n.1.

On the merits, Appellee reiterates the arguments that prevailed in the common pleas court, while highlighting some of this Court's more doctrinaire expressions of the principle of separation of powers. *See, e.g.*, *Commonwealth v. Sutley*, 474 Pa. 256, 262, 378 A.2d 780, 783 (1977) (pronouncing that "any encroachment upon the judicial power by the legislature is offensive to the fundamental scheme of our government," while invalidating provisions of a statutory scheme attempting to extend leniency to persons convicted of certain misdemeanor drug offenses). [6]

To the list of the seven cases which he presented to the common pleas court, Appellee adds the opinion in support of affirmance in *Lloyd v. Fishinger*, 529 Pa. 513, 605 A.2d 1193 (1992) (equally divided Court) (determining, by operation of law, that a statute intended to curtail attorney solicitations of hospitalized persons represented an infringement upon the Supreme Court's exclusive power to regulate attorneys). He also references the Commonwealth Court's decision in *Heller v. Frankston*, 76 Pa.Cmwlth. 294, 303, 464 A.2d 581, 586 (1983) (finding a statute attempting to regulate attorneys' fees to be invalid on separation of powers grounds). It is Appellee's core position that "the Dragonetti Act is yet another attempt by the legislature to trod on turf belonging exclusively to this Court." Brief for Appellee at 31.

In this respect, Appellee notes that the Act makes specific reference to attorneys, *see* 42 Pa.C.S. 8352(3) (discussing probable cause in terms of the good-faith belief of an "attorney of record"), and plainly purports to regulate them in legal endeavors, including "tak[ing] part in the procurement, initiation or continuation of civil proceedings against another." *Id.* § 8351. Appellee further distinguishes the scenario from those under consideration in decisions such as *Gmerek*, *Shaulis*, and *Beyers*, where at least some Justices did not regard the core functions of legal representation as necessarily being at stake. *See* Brief for Appellee at 34 n.4 (discussing this author's responsive opinions in *Gmerek*, *Shaulis*, and *Beyers*).

***488** Appellee also contrasts the monetary sanctions authorized under the civil procedural rules—"an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation," Pa.R.C.P. No. 1023.4(a)(2)(ii), (iii)—with the Dragonetti Act's authorization of damages for harm to reputation and emotional distress, as well as punitive damages. *See* 42 Pa.C.S. § 8353(2), (5), (6). Moreover, Appellee takes comfort in the fact that a judge determines what, if any, sanctions to impose under Rule 1023.4, while expressing apprehension that Dragonetti claims that surmount the summary disposition stage are submitted to lay juries. According to Appellee, it was this Court's intention to prevent the Legislature from "inventing" monetary remedies and permitting juries to consider awards of damages against lawyers. Brief for Appellee at 39.

In terms of the argument that the Dragonetti Act is substantive and remedial in nature, Appellee points to the *Stone Crushed Partnership* decision, in which this Court indicated that the enactment "punishes" an attorney who brings a wrongful civil action. *Stone Crushed P'ship*, 589 Pa. at 299 n.1, 908 A.2d at 877 n.1. Moreover, because the "Dragonetti Act makes attorneys the target of lawsuits by their opponents in civil cases," Appellee discerns a "regulatory—indeed, inhibitory—effect on plaintiffs' attorneys." Brief for Appellee at 41. To the degree that the Act would be found to have remedial attributes, it is Appellee's position that Article V, Section 10(c) makes no exception for remedial considerations.

Additionally, Appellee undertakes to provide some assurance that other remedies will be available to injured litigants, upon this Court's disapproval of the Dragonetti Act. For example, Appellee explains that plaintiffs will

retain the ability to sue laypersons under the Act, as well as laypersons *and attorneys* for the common law tort of abuse of process. In the latter regard, Appellee accepts that attorneys are properly subject to substantive common law lawmaking by this Court, in spite of his position that the Legislature cannot supplant the common law pertaining to lawyers, as is otherwise its prerogative in the broader sphere. *See generally Sternlicht v. Sternlicht*, 583 Pa. 149, 163, 876 A.2d 904, 912 (2005) (recognizing the primacy of the General Assembly in the substantive lawmaking arena). Appellee also highlights that plaintiffs retain the ability to seek monetary sanctions against attorneys under the Rules of Civil Procedure. *See, e.g.*, Pa.R.C.P. 1023.1(d). In this segment of his argument, Appellee relates that plaintiffs (albeit not Appellants at this stage) have the ability to ask this Court to adopt the Second Restatement's Section 674 or some variant as remedial measures, per its common law decision-making authority. [7]

With respect to the issues raised by Appellants' *amicus*, Appellee explains, *inter alia*, that *amici* cannot raise issues that have not been preserved by the litigants. *See, e.g.*, *Hosp. & Healthsystem Ass'n of Pa. v. DPW*, 585 Pa. 106, 114 n.10, 888 A.2d 601, 606 n.10 (2005).

Appellee's merits position is supported by *amici* the Professional Liability Defense ***489** Federation and the Pennsylvania Bar Association, both of which present a series of policy arguments to the effect that the Dragonetti Act represents bad policy. *See, e.g.*, Brief for *Amicus* Prof'l Liab. Def. Fed'n at 13 (asserting that "attorneys are dis-incentivized from arguing for changes or reforms to existing law," infringing on access to the court system for citizens); *id.* at 16 (indicating that the Act imposes punishment that is "superfluous and inappropriately magnifies an already steep set of consequences appropriately set forth by law"); *id.* (suggesting that the Dragonetti Act discourages the voluntary settlement of actions); Brief for *Amicus* PBA at 19, 25 (portraying the Act as encroaching on "an attorney's ethical duty to advocate vigorously for his or her clients," since the "prospect of facing a jury trial stands in tension with the lawyer's ethical and fiduciary duties to represent each client zealously within the bounds of the law and to act in the client's best interests"); *id.* at 29 (contending that the Act "tends to undermine the mutual respect and civility with which Pennsylvania lawyers treat each other"); *id.* at 29 (suggesting that "Dragonetti threat letters have now become routine and may be employed as a tactical weapon to leverage a premature dismissal or unfair settlement with impunity").

I. Waiver

[2] In response to Appellee's claim that Appellants have preserved solely an argument that the Dragonetti Act aligns with Section 674 of the Second Restatement of Torts, and thus, that they have waived any and all defenses of the Act's constitutionality, we disagree. While plainly Appellants' advocacy could have been sharper from the outset, we believe that a fair reading of their presentation to the common pleas court encompasses the position that the Act should be regarded as a broadly applicable substantive, remedial scheme within the province of the General Assembly, and not as a legislative regime targeted to lawyer regulation.

Considered as such, it was never necessary for Appellants, for example, to discuss the specifics of the Rules of Disciplinary Procedure. In this regard Appellants' defense of the statute does not depend on the particulars of Rule 204's prescription for eight forms of discipline; Rule 205's delineation of the structure, power, and duties of the Disciplinary Board; Rule 206's provision for hearing committees and special masters; Rule 207's designation of the power and duties of Disciplinary Counsel; or Rule 208's enumeration of the procedures, including informal proceedings, formal hearings, review and action by the Disciplinary Board and the Supreme Court, and emergency temporary suspension orders. *See* Pa.R.D.E. 204–208. Simply put, Appellants have not disputed the fact that this Court has implemented a comprehensive regulatory regime governing the professional conduct of lawyers; rather, they merely have maintained that the Act should not be regarded as transgressing the Court's authority in such arena.

[3] For these reasons, we believe that this appeal can be fairly resolved by this Court based on the core arguments presented, and without a lengthy digression into the extensive waiver discussion presented by Appellee. Moreover, in the common pleas court and before this Court upon our *de novo* and plenary review, Appellee bore—and bears—the heavy burden of establishing that a duly-enacted and presumptively valid statute clearly and palpably violates the Constitution, with any doubts being

resolved in favor of the statute's validity. *See, e.g.*, *Payne v. DOC*, 582 Pa. 375, 383, 871 A.2d 795, 800 (2005). We deem the presentations both in the ***490** county court and here to be sufficient to permit our present review of whether Appellee has done so. [8]

II. Merits

[4] We begin with the notion that the powers accorded to this Court under Article V, Section 10(c) are exclusive. There are several reasons why this assertion must be considered with great circumspection.

For example, this Court promulgated and maintains a set of evidence rules per its rulemaking authority under Article V, Section 10(c), *see* Pa.R.E. 101(b), while also expressly recognizing that some of the law of evidence is appropriately governed by statute. *See id.*, comment; *see also Commonwealth v. Olivo*, 633 Pa. 617, 127 A.3d 769, 780 (2015). Furthermore, this Court enforces procedural provisions of statutes, such as the Post Conviction Relief Act. *See* 42 Pa.C.S. § 9545. [9]

The Court also has acknowledged that many subjects of legislation and/or judicial rulemaking possess both attributes implicating this Court's rulemaking power *and* substantive-law characteristics which are suited to the province of the political branch. *See Olivo*, 127 A.3d at 777 ("We have often recognized that the distinction between procedural and substantive actions engenders little consensus." (citation omitted)); *see also Laudenberger v. Port Auth. of Allegheny Cnty.*, 496 Pa. 52, 57, 436 A.2d 147, 150 (1981) (indicating that procedure and substance are often "interwoven" and incapable of "rational separation," and the lines of demarcation are "difficult to determine" and "shadowy" (citations omitted)). Notably, moreover, per ***491** the very provision of the Constitution which Appellee invokes, this Court simply is not permitted to access its rulemaking power to "enlarge nor modify the *substantive rights* of any litigant." PA. CONST. art. V, § 10(c) (emphasis added); [10] *cf. Sutley*, 474 Pa. at 264–65, 378 A.2d at 784 (alluding to the Legislature's power to "promulgate all of the substantive law for this jurisdiction").

Accordingly, in the multitude of mixed-faceted lawmaking and rulemaking ventures, some discerning judgment obviously must be brought to bear to sort through the pervading power questions. Indeed, even the most inflexible of this Court's decisions historically have recognized that the separation of powers doctrine contemplates "a degree of interdependence and reciprocity between the various branches." *Sutley*, 474 Pa. at 262, 378 A.2d at 783.

With respect to the Dragonetti Act, notwithstanding the dictum from *Stone Crushed Partnership*, we agree with Appellants that the statute manifests a legislative purpose to compensate victims of frivolous and abusive litigation and, therefore, has a strong substantive, remedial thrust. [11] *See Dooner v. DiDonato*, 601 Pa. 209, 231, 971 A.2d 1187, 1201 (2009) (explaining that tort laws "necessarily perform an important *remedial role* in compensating victims of torts," albeit in the context of a common law tort (emphasis added)); *accord United States v. Burke*, 504 U.S. 229, 234, 112 S.Ct. 1867, 1871, 119 L.Ed.2d 34 (1992) ("Remedial principles ... figure prominently in the definition and conceptualization of torts."). It is also important, in our estimation, that the law is of general application and is not specifically targeted to legal professionals. *See Maunus*, 518 Pa. at 600, 544 A.2d at 1328. [12]

There is no question that the enactment has a punitive dynamic, since it authorizes the award of punitive damages "according to law," 42 Pa.C.S. § 8353(6), and that it embodies disapprobation of a specified range of conduct by attorneys. Both of these aspects may bear closer review in future cases that are framed more narrowly. For example, there may be an argument to be made that punitive damages awards should not be available against attorney-defendants in Dragonetti cases, given that this Court has specifically provided for sanctions to deter violations. *See* Pa.R.C.P. No. 1023.4(a)(1). And it may also be that, in an appropriate case, the Court ***492** might invoke Article V, Section 10(c)—in a fashion more restrained than according blanket immunization to lawyers from the effects of a substantive-law statute—to construe Dragonetti Act liability as unwarranted in instances in which a claim was pursued based on a good faith argument that the existing law should be changed. Potentially, the principle that statutes should be afforded a constitutional construction might come into play in such a case. *See* 1 Pa.C.S. § 1922(3).

There is no directed challenge to the punitive damages aspect here, however, and no assertion that Appellee had been vying, in good faith, for a reversal of precedent when the underlying land-ownership litigation was commenced and pursued. Rather, a far broader lawyer-immunity focus has been engrafted onto this case. [13] Responding to the matter as so framed, we decline to recognize generalized attorney immunity from the substantive principles of tort law embodied in the Dragonetti Act. *Accord* Pa. R.C.P. No. 1023.1, Note (depicting the Dragonetti Act as providing "additional relief from dilatory or frivolous proceedings").

In this regard, this Court frequently acknowledges the Legislature's superior resources and institutional prerogative in making social policy judgments upon a developed analysis. *See generally Seebold v. Prison Health Servs., Inc.*, 618 Pa. 632, 652–54 & n.19, 57 A.3d 1232, 1245–46 & n.19 (2012). In exercising the common law decision-making function, this Court lacks the tools available to the Assembly—such as investigations and the self-directed gathering of empirical evidence at public hearings—and is confined to the adversarial, record-based system of judicial adjudication. Accordingly, judges plainly stand at a disadvantage in the substantive lawmaking process, which also, quite frankly, is often steeped in difficult political judgments, including choices among vital competing interests.

[5] Consistent with these observations, we find that the policy arguments of Appellee and his *amici* are better presented to the Legislature. While this Court clearly retains a residual, common law role in substantive lawmaking, the Court cedes such power when the Assembly chooses to exercise its own constitutional prerogative to enact substantive legislation. *See, e.g.*, *Sternlicht*, 583 Pa. at 163, 876 A.2d at 912. [14] In relation to the prior decisions referenced by the litigants, the judicial philosophy of this opinion may differ from predecessor ones, but we find nothing in the precedent that precludes our present holding.

In conclusion, in our considered judgment, Appellee has failed to establish that the Dragonetti Act clearly and palpably violates the Pennsylvania Constitution, or that this Court should *per se* immunize attorneys, as attorneys, from the application of the substantive tort principles promulgated ***493** by the political branch in the Dragonetti Act. [15]

The order of the common pleas court is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Justices Baer, Todd, Dougherty and Mundy join the opinion.

Justices Baer and Todd file concurring opinions.

Justice Wecht joins the substance of Justice Baer's concurrence but does not join the majority opinion.

Justice Donohue files a dissenting opinion.

JUSTICE BAER, Concurring

I agree with the majority that Appellee has failed to establish that the Dragonetti Act clearly and palpably violates this Court's Article V, Section 10(c) authority to regulate the practice of law. I write separately, however, to distance myself from the majority's apprehension over the exclusivity of our constitutional power in this regard. *See* Majority Opinion at 490 (stating that we should consider with "great circumspection" the notion that the powers accorded to this Court under Article V, Section 10(c) are exclusive). Consistent with Justice Donohue's dissenting opinion, I find that our Article V, Section 10(c) authority is exclusive. *See* Dissenting Opinion, Donohue, J., at 495–96 (citing well-established case law and a rule of disciplinary enforcement recognizing the exclusive nature of this Court's Article V, Section 10(c) authority). [1]

That is not to say, however, that our Article V, Section 10(c) power is unlimited as the plain language of the constitutional provision denies this Court the authority to prescribe rules modifying the substantive rights of a litigant. *See* PA. CONST., art. V, § 10(c) (affording this Court "the power to prescribe general rules governing practice, procedure and the conduct of all courts ... and for admission to the bar and to practice law ... if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant ...."). Pursuant to this constitutional mandate, we have held that the threshold inquiry in determining whether a particular statute violates Article V, Section 10(c), is whether the challenged legislation is procedural

or substantive in nature. *Commonwealth v. Payne*, 582 Pa. 375, 871 A.2d 795, 801 (2005). Generally, "substantive law is that part of the law which creates, defines and regulates rights, while procedural laws are those that address methods by which rights are enforced." *Commonwealth v. Olivo*, 127 A.3d 769, 777 (Pa. 2015) (citing *Payne*, 871 A.2d at 801).

Without hesitation, I agree with the majority that the Dragonetti Act "manifests a legislative purpose to compensate victims of frivolous and abusive litigation and, therefore, has a strong substantive, remedial thrust." Op. at 491. As further referenced by the majority, the statute is of general application and is not targeted specifically to legal professionals. *Id.* It ***494** appears that the General Assembly, in enacting the Dragonetti Act, did what this Court cannot do by procedural rule, *i.e.*, created substantive rights benefitting litigants targeted by abusive litigation. *See* Pa.R.P.C., Scope ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached;" the rules "are not designed to be a basis for civil liability").

Because I agree with the majority that the statutory provisions challenged herein are clearly substantive, I find that the Legislature did not encroach upon this Court's Article V, Section 10(c) exclusive authority.[2] Accordingly, I agree with the majority's mandate to reverse the order of the trial court, which declared the Dragonetti Act unconstitutional, and remand for further proceedings.

JUSTICE TODD, Concurring

I join the Majority Opinion in full, but write to make two additional points.

First, while I agree with the majority's conclusion that the Dragonetti Act is not unconstitutional as applied to attorneys, I underscore the issues the majority notes "may bear closer review" in a future case—specifically, whether an attorney could be liable under the Act for an award of punitive damages, and whether an attorney could be liable despite a good faith argument that existing law should be changed. *See* Majority Opinion at 491–92. Because the present challenge concerns a claim that attorneys have *generalized* immunity to Dragonetti Act claims—an assertion we reject—and because neither of the above more narrow issues are implicated by the facts of this case, the majority appropriately does not address them. Yet, these questions focus on aspects of the Dragonetti Act which, in my view, are most starkly in tension with our exclusive authority to regulate the practice of law under Article V, Section 10(c) of the Pennsylvania Constitution and will deserve close review when properly before our Court.

My second observation also relates to Appellee's concern that an attorney's good faith argument that existing law should be changed could lead to Dragonetti Act liability. Section 8352 of the Act sets forth three scenarios under which a person has probable cause for commencing or advancing litigation, and, thus, is not subject to liability.[1] It states:

> A person who takes part in the procurement, initiation or continuation of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either:
>
> (1) reasonably believes that under those facts the claim may be valid under the existing or developing law;
>
> (2) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or
>
> ***495** (3) believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party.

42 Pa.C.S. § 8352. The concern forwarded by Appellee herein implicates the first scenario, as Appellee offers that an attorney who seeks an "extension, modification or reversal of existing law" as ethically permitted under the Rules of Professional Conduct[2] might nonetheless be subject to Dragonetti Act liability because such a claim might not be viewed as having been based upon a reasonable belief that "the claim may be valid under the existing or *developing* law," 42 Pa.C.S. § 8352(1) (emphasis added). *See* Appellee's Brief at 9. However, regardless of whether we might, in a future case, construe "developing law" to encompass claims for an "extension, modification or reversal of existing law" and, thus, preclude Dragonetti Act liability under Section 8352(1)

on that basis, subsection (3) would appear to provide a safe harbor to attorneys in such situations (as well as in other situations). It specifically protects an "attorney of record" who believes "in good faith that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party." 42 Pa.C.S. § 8352(3). To Appellee's concern, I would be hard-pressed to envision a scenario in which an attorney who seeks, in good faith, the reversal of governing law would be liable under the Act because he or she is nonetheless found to have "intended to merely harass or maliciously injure the opposite party."

JUSTICE DONOHUE, Dissenting

This appeal presents a facial challenge [1] to the Dragonetti Act's constitutionality as applied to attorneys, and requires that we decide whether the legislation violates this Court's exclusive authority under Article V, Section 10(c) of the Pennsylvania Constitution to regulate the conduct of attorneys practicing in the courts of this Commonwealth. The Majority proposes that we disavow any claims to such exclusive constitutional authority. This, to me, is an incorrect and revolutionary proposition. Article V, Section 10(c) of our Constitution entrusts the regulation of attorneys practicing law in this Commonwealth exclusively to this Supreme Court. Because the Dragonetti Act constitutes an impermissible legislative encroachment into this Court's exclusive domain, it is unconstitutional. I must therefore dissent.

The Majority contends that the "notion" of this Court's exclusive power under Article V, Section 10(c) to regulate the conduct of attorneys "must be considered with great circumspection." Majority Op. at 490. Until now, this Court has not considered its exclusive power to regulate the conduct of lawyers as a mere "notion" requiring any "circumspection," but rather as an undeniable statement of constitutional fact. In adopting the Pennsylvania ***496** Rules of Disciplinary Enforcement, for example, this Court declared that "it has inherent and exclusive power to supervise the conduct of attorneys who are its officers (which power is reasserted in Section 10(c) of Article V of the Constitution of Pennsylvania) and in furtherance thereof promulgates these rules." Pa.R.D.E. 103. Similarly, in our decisional law, we have repeatedly acknowledged our "inherent and exclusive power to govern the conduct of those privileged to practice law in this Commonwealth," *Wajert v. State Ethics Comm'n*, 491 Pa. 255, 420 A.2d 439, 442 (1980), and have insisted that no other branch of our state government "may impose duties applicable to every attorney admitted to practice in the Commonwealth." *Maunus v. State Ethics Comm'n*, 518 Pa. 592, 544 A.2d 1324, 1325–26 (1988); *see also Shaulis v. Pa. State Ethics Comm'n*, 574 Pa. 680, 833 A.2d 123, 129–32 (2003); *Commonwealth v. Stern* 549 Pa. 505, 701 A.2d 568 (1997); *Laffey v. Court of Common Pleas of Cumberland Cty.*, 503 Pa. 103, 468 A.2d 1084, 1085 (1983); *Kremer v. State Ethics Comm'n*, 503 Pa. 358, 469 A.2d 593, 595 (1983); *Office of Disciplinary Counsel v. Lucarini*, 504 Pa. 271, 472 A.2d 186, 187 (1983); *Beyers v. Richmond*, 594 Pa. 654, 937 A.2d 1082, 1091 (2007) (plurality); *Lloyd v. Fishinger*, 529 Pa. 513, 605 A.2d 1193, 1197 (1992) (plurality); *Gmerek v. State Ethics Com'n*, 569 Pa. 579, 807 A.2d 812, 817 (2002) (Saylor, C.J.) (Opinion in Support of Reversal) ("Certainly, this Court's responsibility and authority with regard to regulation of the general practice of law are: firmly grounded in [Article V, Section 10(c)]; supported by the concept of inherent powers, *see* Pa.R.D.E. 103; and as a function of the doctrine of separation of powers, guarded by the assertion of exclusivity.").

Prior to 1968, the Pennsylvania Constitution did not include an express statement regarding this Court's rulemaking authority. *In re 42 Pa.C.S. § 1703*, 482 Pa. 522, 394 A.2d 444, 447 (1978). Nevertheless, in *In re Splane*, 123 Pa. 527, 16 A. 481 (1889), this Court struck down an 1887 statute that purported to establish standards for application for admission to the Pennsylvania bar. In so doing, we rejected any suggestion that the Legislature has any constitutional power to regulate the conduct of attorneys or the practice of law in this state. We held that "[i]f there is anything in the constitution that is clear beyond controversy, it is that the Legislature does not possess judicial powers. They are lodged exclusively in the judiciary as a co-ordinate department of the government." *Id.* at 483.

In 1968, an explicit statement of this Court's rulemaking authority was set forth in Article V, Section 10(c) of the newly amended Pennsylvania Constitution, which provides as follows:

> (c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers

> serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent ***497** with rules prescribed under these provisions. Notwithstanding the provisions of this section, the General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television.

Pa. Const. art. V, § 10(c). [2]

The Majority, apparently, is of the view that our authority under this constitutional provision to regulate the conduct of attorneys practicing in this Commonwealth is not exclusive, but rather is shared concurrently with the General Assembly. A careful examination of this constitutional language demonstrates that there is no basis for such a contention. [3] To begin, under the principle of separation of the powers of government, no branch of the government (executive, legislative, or judicial) may exercise functions exclusively committed to another branch. *See, e.g.*, *Wilson v. Philadelphia School District*, 328 Pa. 225, 195 A. 90, 93 (1937); *Bailey v. Waters*, 308 Pa. 309, 162 A. 819, 821 (1932). This Court, as the ultimate interpreter of the Pennsylvania Constitution, has the responsibility to "determine whether a matter has been exclusively committed to one branch of the government." *Stern*, 701 A.2d at 570 (citing *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698, 705 (1977)).

Article V of our Constitution, "The Judiciary," establishes the judicial branch of our tri-partite government. It delineates, among other things, the structure and composition of the various courts within the Commonwealth's unified judicial system. The supervisory power for administration of the judicial branch is vested in the Supreme Court by virtue of Section 10 of Article V, which is broadly titled "Judicial Administration." Pa. Const. art. V, § 10. Section 10(c) straightforwardly confers all judicial authority upon this Court: "The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts..." *Id.* This grant of authority explicitly includes the power to prescribe all rules relating to the "supervision of all officers of the Judicial Branch." *Id.* All attorneys practicing in this Commonwealth are "officers of the Judicial Branch." *See, e.g.*, *Office of Disciplinary Counsel v. Zdrok*, 538 Pa. 41, 645 A.2d 830, 834 (1994).

The breadth of the Supreme Court's authority is manifested by the identification of three discrete areas of influence reserved to the Legislature in Article V, Section 10(c): the power to determine the jurisdiction of any court or justice of the peace, the right to set statutes of limitation and repose, and the authority to provide for the manner of testimony of child witnesses. *Id.* Given these specific, limited grants of authority to the Legislature, [4] ***498** there is no reading of Article V of our Constitution that leaves room for an interpretation that this Court's supervisory and rulemaking authority overlaps with the Legislature's authority.

With respect to our rulemaking powers, this Court has previously recognized that "there is simply no substantial support for the proposition that the grant of authority in Article V, Section 10(c) is anything other than exclusive." [5] *In re 42 Pa. C.S. § 1703*, 394 A.2d at 448. In so concluding, we emphasized that Section 10(c) also expressly provides this Court with the authority to suspend any acts of the Legislature that are inconsistent with our rules, a power that would be "incongruous with a scheme in which the Legislature exercised concurrent rule-making authority." *Id.* "[A] power does not adhere to the legislature if it has specifically been ... entrusted

to another co-equal branch of government." *Id.* (quoting *Commonwealth v. Sutley*, 474 Pa. 256, 378 A.2d 780, 788 (1977)).

This Court has consistently recognized its exclusive authority to regulate the conduct of attorneys practicing law in this Commonwealth. In *Wajert*, for example, a former common pleas judge filed a declaratory judgment action seeking a declaration that section 3(e) of the State Ethics Act, 65 P.S. § 403(e), was inapplicable to him as a former member of the judiciary. *Wajert*, 420 A.2d at 440. Section (3)(e) prohibited former officials or public employees from representing a person on any matter before the governmental body with which he or she had been associated for one year after leaving the position. *Id.* ***499** Noting that the Code of Professional Responsibility promulgated by this Court addressed precisely the same issue, we decided that section (3)(e) "constitute[d] an infringement on the Supreme Court's inherent and exclusive power to govern the conduct of those privileged to practice law in this Commonwealth." *Id.* at 442.

> Long before the Ethics Act was enacted, this Court adopted the Code of Professional Responsibility enunciating the standards governing the professional conduct of those engaged in the practice of law in this Commonwealth. In the rules enforcing that Code, this Court had made it abundantly clear that supervising the conduct of an attorney, including that of a former judge, before the courts of this Commonwealth was a matter exclusively for this Court.

Id.; *see also Maunus*, 544 A.2d at 1326 ("[T]his Court is the only governmental body entitled to regulate and discipline the professional class of attorneys. No other component of our state government may impose duties applicable to every attorney admitted to practice in the Commonwealth, nor may another Commonwealth entity admit to practice or discipline an attorney.").

Similarly, in *Stern*, we unanimously held that section 4117(b)(1) of the Crimes Code, which made it a crime for a lawyer to compensate or give "anything of value to a non-lawyer for recommending or securing employment by a client," was unconstitutional. *Stern*, 701 A.2d at 569. Section 4117(b)(1) was a "word-for-word restatement" of Rule 7.2(c) of our Rules of Professional Conduct, and had the effect of "criminaliz[ing] the conduct of attorneys in their practice of law." *Id.* at 572–73. In striking down the statute, we did not question the Legislature's own exclusive power to establish and classify crimes, but determined that the Legislature could not, as a co-equal branch of government, promulgate a statute that regulated in an area within this Court's exclusive authority, namely the regulation of attorney conduct.

> We have seen fit to prohibit the practice of attorneys paying for referrals in the exercise of our exclusive authority to supervise the conduct of attorneys. This involves a matter entrusted solely to the Supreme Court under Article V, Section 10(c) of the Pennsylvania Constitution. We hold, therefore, that § 4117(b)(1) is unconstitutional because it infringes upon this authority.

Id. at 573.

Pursuant to our exclusive authority under Article V, Section 10(c), this Court has promulgated Rules of Professional Conduct, Rules of Disciplinary Enforcement, and Rules of Civil Procedure, all of which bear directly on the professional conduct of attorneys and the manner in which they may practice law. Any statute encroaching on our Article V, Section 10(c) powers, including our power to regulate the professional conduct of attorneys, "must be regarded as a vain attempt by the Legislature to exercise a power which it does not possess." *In re Shigon*, 462 Pa. 1, 329 A.2d 235, 240 n.14 (1974). This Court has a clear duty to "invalidate legislative action repugnant to the constitution." *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165, 1169 (1981).

In 1980, the General Assembly created a statutory cause of action for the "wrongful use of civil proceedings," commonly referred to as the Dragonetti Act, that proscribes certain types of tortious litigation conduct. *See* 42 Pa.C.S. §§ 8351–8354.[6] ***500** Pursuant to the Act, an attorney (or any other person) "who takes part in the procurement, initiation or continuation of civil proceedings against another" may be liable

under described circumstances for a variety of damages, including, inter alia, harm to reputation, emotional distress, pecuniary losses, attorney fees, and punitive damages. 42 Pa.C.S. § 8353. The plaintiff must show that the underlying proceedings were terminated in his or her favor and that the attorney (or other person) acted "in a grossly negligent manner or without probable cause" and "primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based." 42 Pa.C.S. § 8351(a). Section 8352 of the Dragonetti Act provides that an attorney defendant has probable cause in the underlying proceeding if he or she "reasonably believes in the existence of the facts upon which the claim is based, and either, reasonably believes that under those facts the claim may be valid under existing or developing law" or believes "in good faith" that his or her action was "not intended to merely harass or maliciously injure the opposite party." 42 Pa.C.S § 8352(1),(3). [7]

The Dragonetti Act indisputably and notoriously regulates the conduct of attorneys engaged in the practice of law. This conclusion is not contested, even by the Majority, which acknowledges that the Dragonetti Act "embodies disapprobation of a specified range of conduct by attorneys." Majority Op. at 500. This Court has prescribed Rules of Professional Conduct, Rules of Disciplinary Enforcement and Rules of Civil Procedure that specifically address precisely the same conduct the Legislature attempts to regulate under the Dragonetti Act. Rule 3.1 of the Rules of Professional Conduct provides that an attorney "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Pa.R.P.C 3.1. Rule 208 of the Rules of Disciplinary Enforcement sets forth the procedures, from investigation to final disposition, for enforcing violations of the Rules of Professional Conduct (including Pa.R.P.C 3.1), and Rule 204 lists the types of discipline that may be imposed for said violations, from permanent disbarment to private informal admonition. Pa.R.D.E. 204, 208. [8] ***501** Rule 1023.1 of the Rules of Civil Procedure provides that the signing, filing, submitting or later advocating of any document constitutes a certification that the document is not being presented for any improper purpose, such as harassment or delay; that the claims, defense and legal contentions set forth therein are warranted by the existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; that the factual allegations have evidentiary support or will have evidentiary support; and that denials have evidentiary support or are reasonably based on a lack of information or belief. Pa.R.C.P. 1023.1(c). Rule 1023.1(d) provides that sanctions may be imposed for violations of subsection (c). Pa.R.C.P. 1023.1(d).

In its written opinion in support of its ruling that the Dragonetti Act is unconstitutional, the trial court discussed in some detail the specific inconsistences between the Dragonetti Act and these rules. Trial Court Opinion, 8/27/2015, at 5–6. In my view, it is not necessary to identify the precise inconsistencies, as such an effort serves only to highlight the fact that the Legislature should never have encroached on this Court's exclusive authority to regulate in this area. *See Stern*, 701 A.2d at 73. The Dragonetti Act purports to regulate the conduct of attorneys that only this Court, pursuant to Article V, Section 10(c) of the Pennsylvania Constitution, is empowered to regulate. [9] In so far is it applies to attorneys, the Dragonetti Act is unconstitutional.

A finding that the Dragonetti Act is unconstitutional as applied to lawyers would not deprive litigants of a remedy in the face of tortious litigation conduct. [10] I ***502** emphasize that a finding of unconstitutionality in no way immunizes attorneys from civil suit. As was true before the Dragonetti Act, litigants may bring civil suits against attorneys asserting claims for malicious use of process or abuse of process, two common law causes of action this Court developed and blessed in recognition of the need for a remedy for legal injuries inflicted by aberrant attorneys under our watch.

Long before the General Assembly enacted the Dragonetti Act, this Court recognized a tort for the malicious use of process which could be brought against an attorney. *See Farmers' Bank v. McKinney*, 7 Watts & Serg. 214, 215 (Pa. 1838) (stating that when "practitioners at law" used process "maliciously and with design to oppress," they "could be sued by the party aggrieved ... upon general principles of policy and justice"). To maintain an action for malicious use of process at common law, a plaintiff had to prove (1) that the defendant initiated legal process against him in the underlying action, (2) without probable cause and with malice, and (3) that the action against him

or her was unsuccessful. *See Publix Drug Co. v. Breyer Ice Cream Co.*, 347 Pa. 346, 32 A.2d 413, 415 (1943); *Johnson v. Land Title Bank & Trust Co.*, 329 Pa. 241, 198 A. 23, 24 (1938). The plaintiff also had to prove that there had been a seizure or interference with his person or property in the underlying proceeding. *Id.* This latter element, dating back to thirteenth century England, is known as the "old English rule." *See* Pa. L. Journal, 164th General Assembly, No. 70, Reg. Sess., 2634–35 (Nov. 19, 1980) (statement of Rep. Spencer).

An attorney can also be sued at common law for the separate and distinct tort of abuse of process. *McGee v. Feege*, 517 Pa. 247, 535 A.2d 1020, 1023 (1987); *see generally* G. Bochetto, D. Heim, J. O'Connell & R. Tintner, *Wrongful Use of Civil Proceedings and Related Torts in Pennsylvania* (1st ed. 2016) (citing cases and distinguishing between the two common law torts). An action for abuse of process can be brought to hold a person liable for "the improper use of process after it has been issued." *McGee,* 535 A.2d at 1023. Unlike a malicious use of process suit, an abuse of process suit alleges that civil process was employed "for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it." *Id.*; *see also Mayer v. Walter*, 64 Pa. 283, 286 (1870). Abuse of process need not relate to the initiation of proceedings and does not require either a lack of probable cause or that the underlying action was resolved in the plaintiff's favor. *Id.* Moreover, the "old English rule" was never an element of abuse of process. *McGee*, 535 A.2d at 1022.

In the proper case, a future litigant could argue to convince this Court to abolish the "old English rule," the aspect of the common law that Mr. Dragonetti found objectionable when he took his entreaty to the Legislature. *See supra*, note 6. We have explained that "[t]here is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others." *Tincher v. Omega Flex, Inc.*, 628 Pa. 296, 104 A.3d 328, 353 (2014). Moreover, developing the common law is one of this Court's equitable powers. *See id.* at 352 (noting our "authority to modify the common law forms of action to the right involved"). When the Dragonetti Act was enacted, a majority of our sister states had already done away ***503** with the "old English rule," and section 674 of Restatement (Second) of Torts (1977) reflects this trend while also eliminating the common law requirement to show malice. *See* G. Bochetto, D. Heim, J. O'Connell & R. Tintner, *Wrongful Use of Civil Proceedings and Related Torts in Pennsylvania*, § 1–1, at 5 (1st ed. 2016). We have, in the past, been convinced by logic and the interests of justice to adopt a section of the Restatement that differs from our common law. *See Tincher*, 104 A.3d at 354 (cautioning that "[a]s with any other common law rules, the normative principles of an 'adopted' section of a restatement are properly tested against the facts of each case"). Any change in common law tort claims imposing liability on attorneys for the manner in which they practice law, including bringing and litigating lawsuits, must come from this Court through the exercise of our equitable power to develop the common law. This Court is not only uniquely constitutionally qualified to engage in any such transformative process (given our expertise developed as a result of our supervisory authority in this realm), we are constitutionally the exclusive branch of government empowered to do so.

Enactment of the Dragonetti Act was an impermissible intrusion into this Court's exclusive province to regulate the conduct of attorneys in the practice of law in this Commonwealth. I would therefore rule that it is unconstitutional and unenforceable as applied to lawyers. Accordingly, I dissent.

All Citations

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Footnotes

1 Act of Dec. 19, 1980, P.L. 1296, No. 232 (codified at 42 Pa.C.S. §§ 8351–8354) (the "Dragonetti Act" or the "Act"). Notably, Appellants had not specifically referenced the Dragonetti Act in their complaint. As the proceedings have developed, however, it has become clear that Appellants are relying upon the enactment.

2 The record reflects that Appellee served a copy of the preliminary objections upon the Attorney General of Pennsylvania, as is required in instances in which "an Act of Assembly is alleged to be unconstitutional" by a civil litigant. Pa.R.C.P. No. 235. The Attorney General, however, apparently did not seek to intervene as a party or otherwise make a presentation in defense of the legislative enactment, as would be expected ordinarily. *See* 71 P.S. § 732–204(a)(3) ("It shall be the

duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction.").

3 Parenthetically, Pennsylvania courts recognize a distinction between the common law torts of abuse of process and malicious use of process. *See Dietrich Indus.*, 309 Pa.Super. at 206–07, 455 A.2d at 122. *See generally* RUSSELL J. DAVIS, 2 SUMM. PA. JUR. 2D TORTS § 19.1 (2017) ("An abuse of process, either civil or criminal, arises where a party employs it for some unlawful object rather than for the purpose that the law intends it to effect; in other words, a perversion thereof, in distinction from malicious use of process, either civil or criminal, wherein the tortfeasor intends that the process have its proper effect and execution although it is wrongfully instituted." (footnotes omitted)). Some other courts, however, have found the distinction between the two torts to be confounding and cumbersome and, accordingly, have combined them. *See, e.g.*, *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414, 417–18 (1986), *superseded by statute as recognized in Great W. Bank v. Se. Bank*, 234 Ga.App. 420, 507 S.E.2d 191, 192–93 (1999). Indeed, the Dragonetti Act may be regarded as encompassing aspects of both common law torts, given that, under its definition of "probable cause" which will support the legitimate procurement, initiation, or continuation of civil proceedings, such cause is lacking *either* in the absence of a reasonable belief that the claim may be valid, *see* 42 Pa.C.S. § 8352(1), *or* without an attorney's good faith belief that the cause is not intended merely to harass or injure the opposing party, *see id.* § 8352(3).

4 The claim against Mrs. Villani remained to be resolved in the common pleas court.

5 Act of Jan. 30, 1974, P.L. 13, No. 6 (as amended 41 P.S. §§ 101–605).

6 We note that several Justices, as well as other judges and commentators, have expressed substantial discomfort with decisions, such as *Sutley*, which have evaluated legislative social policy judgements having broad-scale, substantive impacts mainly in terms of a concern for judicial power. *See, e.g.*, *Friends of Pa. Leadership Charter Sch. v. Chester Cnty. Bd. of Assessment Appeals*, 627 Pa. 446, 463–64, 101 A.3d 66, 76 (2014) (Saylor, J., concurring, joined by Todd, J.).

7 Appellee has applied for leave to file a surrebuttal brief, the consideration of which was deferred to the merits stage of our review. That motion is now granted, albeit that the discrete discussion of waiver precepts contained in the brief is not of great relevance to our decision here. *See infra* Part I.

8 In any event, we do not find it necessary, in our own merits analysis, to rely on many of the minor premises within Appellants' presentation. For example, we do not see the line of Appellants' "tacit acceptance" arguments as being particularly useful. *Cf. Maloney v. Valley Med. Facilities, Inc.*, 603 Pa. 399, 417, 984 A.2d 478, 490 (2009) (rejecting the position that, because a particular legal approach had been accepted by an intermediate court for a lengthy period of time it therefore should be deemed to have been accepted by this Court, while observing that "[f]or very good reasons, our decisional law generally develops incrementally, within the confines of the circumstances of cases as they come before the Court").

Parenthetically, in terms of such minor premises, we also observe that the applicable Rule of Appellate Procedure is framed in terms of "issue" preservation. *See* Pa.R.A.P. 302 ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). *See generally United States v. Joseph*, 730 F.3d 336, 339–40 (3d Cir. 2013) (offering an interesting discussion of the difference between "issues" and "arguments" centered on the suppression context). Although certainly this Court has deemed various "arguments" waived with reference to Rule 302, *see, e.g.*, *Commonwealth. v. Ballard*, 622 Pa. 177, 210, 80 A.3d 380, 400 (2013), the interests of justice would not be well served were a court of last resort deciding matters of statewide public importance to forbid appellants *any* latitude to make adjustments to the supporting rationales offered in the hierarchical review process. For example, a previous reviewing court's expression of its own rationale may legitimately impact upon the focus of ensuing appellate presentations, by substantially narrowing and/or focusing the subject matter.

The appropriate degree of such latitude afforded to appellants to alter arguments can be most sharply determined in cases—unlike this one—in which the Court *disagrees* with a main thrust of the presentation that was rejected in the prior reviewing court or courts, albeit that this Court might *agree* with a supplemental argument offered on appeal.

9 Notably, this Court has acted to suspend certain procedural provisions of this statute, *see* 42 Pa.C.S. § 9545(d)(2) (suspended), but it has not suspended others, such as the requirement for a signed certification as to each intended witness, *see id.* § 9545(d)(1). These sorts of differences, implemented by predecessor Justices, are, to the present complement of the Court, difficult to explain.

10 Such prescription provides context to the explicit boundaries of the Rules of Professional Conduct. *See* Pa.R.P.C., Scope ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached" and that the rules "are not designed to be a basis for civil liability"). *See generally Maritrans*, 529 Pa. at 255, 602 A.2d at 1284 (stressing the difference between duties under rules of professional conduct and substantive liability standards).

11 Notably, this Court has previously recognized the Legislature's desire to supplant the substantive common law remedial scheme. *See, e.g.*, *Matter of Larsen,* 532 Pa. 326, 340, 616 A.2d 529, 587 (1992) ("[T]he common law tort of malicious prosecution has been codified and modified as a statutory cause of action.").

12 Appellee references an opinion in support of affirmance from the *Gmerek* case as reflecting that the significance of broad scale application is limited to a particular factual paradigm. *See Gmerek*, 569 Pa. at 589, 807 A.2d at 818 (Zappala, C.J., Opinion in Support of Affirmance) (positing that *Maunus* "was limited to the situation presented therein, that being the imposition of regulations by an employer of an employee/attorney"). Although that opinion correctly described the context of *Maunus*, in our considered judgment the significance of whether substantive lawmaking is targeted to attorneys or has broader application transcends scenarios involving lawyer-employees.

13 *Cf.* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 881 (2005) (observing that a litigant makes "a partial facial challenge" by arguing that "a statute is unconstitutional in a particular range of applications, even if not unconstitutional in all or most").

14 In terms of the arguments pertaining to the legislative decision to adjust the liability standard to subsume gross negligence, this Court's rules are not intended as a safe harbor for attorneys who cause harm to others via such elevated heedlessness. Similarly, while the Rules of Professional Conduct may describe lawyers' ethical obligations in a more objective fashion than is reflected in the Dragonetti Act's liability threshold, the interests of justice do not favor immunizing conduct undertaken with a subjectively wrongful state of mind. Indeed, the common law liability standard of malice certainly has subjective attributes.

15 In light of our disposition, we need not address the Remedies Clause issue raised by Appellants' *amicus*, which, in any event, had not been presented by Appellants.

1 While I appreciate the majority's concern that there have been topics upon which both statutes and judicial rules have spoken, *see* Op. at 490 (referencing evidentiary rules and post-conviction practices under the Post Conviction Relief Act, 42 Pa.C.S. § 9541–9546), these joint expressions need not be interpreted as limitations on this Court's Article V, Section 10(c) power but, rather, as a recognition that certain topics have both substantive and procedural aspects.

2 As this case involves only a generalized challenge to the Dragonetti Act as applied to attorneys, the majority's discussion regarding the "punitive dynamic" of the legislation and the "disapprobation of a specified range of conduct by attorneys," Op. at 491, need not be considered at this time. This Court can examine the contours of specific provisions of the Dragonetti Act when so challenged in an appropriate case.

1 A prerequisite to liability under the Act is that the person act "in a grossly negligent manner or without probable cause." 42 Pa.C.S. § 8351.

2 *See* Pa.R.P.C. § 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

1 I do not disagree with the Majority's characterization of this appeal as a "partial" facial challenge, as it is limited to application of the statute to a certain class of defendants (attorneys). *See* Majority Op. at 492 n.13; *see also Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 328–329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute, while leaving other applications in force.")

2 Article V, Section 10(c) was adopted as part of the Pennsylvania Constitution of 1968. It was amended in November 2003 to add the concluding sentence relating to child witnesses.

3 In conducting this analysis, we must employ an unstrained analysis, one that "completely conforms to the intent of the framers and which reflects the views of the ratifying voter." *In re Bruno*, 627 Pa. 505, 101 A.3d 635, 659 (2014) (quoting *Jubelirer v. Rendell*, 598 Pa. 16, 953 A.2d 514, 528 (2008)). In other words, "the constitutional language controls and 'must be interpreted in its popular sense, as understood by the people when they voted on its adoption.' " *Id.* (quoting *Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 939 (2006)).

4 Other sections of Article V of the Constitution grant the General Assembly certain additional powers not relevant to the present analysis. For example, the General Assembly has the power "to establish classes of magisterial districts" based on constitutionally designated factors and to "fix the salaries to be paid justices of the peace in each class." Pa. Const. art V, § 7(b). The General Assembly also has the power to "establish additional courts or divisions of existing courts, as needed, or abolish any statutory court or division thereof." Pa. Const. art V, § 8. These sections are germane to the point that any legislative authority within the judicial branch was limited and defined by the citizens.

5 In support of its contention for the Legislature's concurrent authority to engage in judicial rulemaking, the Majority refers to this Court's recognition that the Legislature may promulgate rules of evidence, *see Commonwealth v. Olivo*, 633 Pa. 617,

127 A.3d 769 (2015), and to our failure to suspend a particular procedural provision in the Post–Conviction Relief Act, 42 Pa.C.S. §§ 9541–46, specifically section 9545(d)(1), which requires a signed certification as to each witness expected to testify at an evidentiary hearing. Majority Op. at 490.

In *Olivo*, we addressed the constitutionality of 42 Pa.C.S. § 5920, which by its terms allows the introduction of expert testimony in certain cases involving sexual offenses to "assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted." *Id. Olivo* dealt with the distinct issue of whether the Legislature may enact substantive laws relating to the admissibility of certain forms of evidence in trials involving alleged violations of particular criminal statutes. As such, our decision there was unrelated to the issue presented here, namely whether this Court has the exclusive authority to regulate the conduct of attorneys practicing law in this Commonwealth.

To my knowledge, a litigant has never challenged the constitutionality of section 9545(d)(1) of the PCRA under the separation of powers doctrine. Regardless, our failure to suspend section 9545(d)(1) of the PCRA in no way diminishes the exclusive nature of our Article V, Section 10(c) rulemaking powers.

There may be circumstances not identified by the Majority where this Court turned a blind eye to legislative encroachment into the Supreme Court's exclusive powers under Article V, Section 10(c). This Court should be faulted for any sporadic dereliction in exercising or enforcing the dictates of Article V, Section 10(c). Falling short of our constitutional mandate on occasion, however, does not result in its relinquishment. We have no authority to dilute the tri-partite system of government established by the citizens of this Commonwealth.

6 Given the Majority's attempt to characterize the legislative process as superior to this Court's adjudicative process in making substantive law, Majority Op. at 491–93, the history behind the Dragonetti Act deserves some discussion. In addition to the fundamental problem that the Legislature has no power to act to define misconduct by attorneys, in my view, any deference to the Legislature because of its deliberate fact gathering before promulgating legislation is entirely misplaced here, as the Legislature reportedly acted hastily to enact this statute—at the behest of a single aggrieved litigant (Joseph Dragonetti). *See* Pa. L. Journal, 164th General Assembly, No. 70, Reg. Sess., 2634–35 (Nov. 19, 1980) (characterizing the process of enacting the statute as rushed and "last minute," despite a lack of urgency) (statement of Rep. Spitz). Mr. Dragonetti apparently led a "one-man crusade" to ensure the Act's passage. *See id.* (stating that one individual "has been the moving factor behind this legislation") (statement of Rep. Kukovich). His crusade, ultimately successful, was focused on abolishing the "old English rule"—a requirement that this Court had recognized, for more than a hundred years, as an essential element of the common law cause of action for malicious use of process, discussed in more detail *infra*. *See Publix Drug Co. v. Breyer Ice Cream Co.*, 347 Pa. 346, 32 A.2d 413, 415 (1943); *Johnson v. Land Title Bank & Trust Co.*, 329 Pa. 241, 198 A. 23, 24 (1938); *Farmers' Bank v. McKinney*, 7 Watts & Serg. 214, 215 (1838).

7 Under Section 8352, a different probable cause standard applies to clients who rely on the advice of counsel. 42 Pa.C.S. § 8352(2).

8 Pursuant to our Article V, Section 10(c) powers, we have established a comprehensive system for disciplining attorneys which functions effectively absent any interference by the Legislature. Our disciplinary system is comprised of a Disciplinary Board made up of appointed, uncompensated attorneys and non-attorneys and Hearing Committees made up of appointed, uncompensated attorneys. Acceptance of an appointment as a member of the Disciplinary Board of the Pennsylvania Supreme Court or as a hearing officer requires hundreds of hours of uncompensated service to the legal profession. The Board's work is dedicated to the application of the Rules of Professional Conduct promulgated by this Court, which serve as the polestar for the practice of law, the protection of clients and the integrity of the courts of this Commonwealth.

The Disciplinary Board of the Pennsylvania Supreme Court maintains an Office of the Secretary and Office of Disciplinary Counsel, both employing a range of paid staff members. Attorneys admitted to practice in our Commonwealth fund the operation of our disciplinary system through a fee structure imposed by the Pennsylvania Supreme Court. All of these entities operate under our exclusive authority. The dedicated manner in which our disciplinary system operates is evidenced by the fact that, in 2016 alone, the Office of Disciplinary Counsel received 3,900 complaints regarding attorney conduct and resolved 3,667 complaints, of which 240 resulted in discipline. Each proposed order of discipline is meticulously reviewed by the justices of this Court before it is entered. *See* Annual Report, The Disciplinary Board of the Supreme Court of Pennsylvania, 2016, *available at* http://www.padisciplinaryboard.org/about/annualreports.php (noting that a disciplinary matter involving a single attorney may consist of multiple complaints).

9 The Majority's attempt to carve out constitutional space for the Dragonetti Act by virtue of it being substantive and remedial in nature is unavailing. These traits do nothing to mitigate the fact that it sets forth rules of conduct and discipline governing each and every attorney admitted to practice in the courts of this Commonwealth. I do not question the Legislature's

authority to create substantive laws, generally, but any such laws must withstand constitutional muster. *See Stern*, 701 A.2d at 572. As described herein, a legislative enactment that regulates the conduct of attorneys, regardless of its substantive (as opposed to procedural) features, is unconstitutional.

10 The Dragonetti Act could still be used to hold a non-lawyer liable for the wrongful use of civil proceedings. *See* 1 Pa.C.S. § 1925. Pursuant to 1 Pa.C.S. § 1925, "a statute may be invalid as applied to a certain class and still be generally valid." *Com., Dep't of Ed. v. First Sch.*, 471 Pa. 471, 370 A.2d 702, 705 n.11 (1977).

End of Document

Subpart D. CODE OF CIVILITY

CHAPTER 99. CODE OF CIVILITY

Source

The provisions of this Chapter 99 adopted December 6, 2000, effective December 6, 2000, 30 Pa.B. 6541; amended April 21, 2005, effective May 7, 2005, 35 Pa.B. 2722. Immediately preceding text appears at serial pages (276507) to (276508) and (272355) to (272356), unless otherwise noted.

§ 99.1. Preamble.

The hallmark of an enlightened and effective system of justice is the adherence to standards of professional responsibility and civility. Judges and lawyers must always be mindful of the appearance of justice as well as its dispensation. The following principles are designed to assist judges and lawyers in how to conduct themselves in a manner that preserves the dignity and honor of the judiciary and the legal profession. These principles are intended to encourage lawyers, judges and court personnel to practice civility and decorum and to confirm the legal profession's status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

The conduct of lawyers and judges should be characterized at all times by professional integrity and personal courtesy in the fullest sense of those terms. Integrity and courtesy are indispensable to the practice of law and the orderly administration of justice by our courts. Uncivil or obstructive conduct impedes the fundamental goal of resolving disputes in a rational, peaceful and efficient manner.

The following principles are designed to encourage judges and lawyers to meet their obligations toward each other and the judicial system in general. It is expected that judges and lawyers will make a voluntary and mutual commitment to adhere to these principles. These principles are not intended to supersede or alter existing disciplinary codes or standards of conduct, nor shall they be used as a basis for litigation, lawyer discipline or sanctions.

§ 99.2. A Judge's Duties to Lawyers and Other Judges.

1. A judge must maintain control of the proceedings and has an obligation to ensure that proceedings are conducted in a civil manner.

2. A judge should show respect, courtesy and patience to the lawyers, parties and all participants in the legal process by treating all with civility.

3. A judge should ensure that court-supervised personnel dress and conduct themselves appropriately and act civilly toward lawyers, parties and witnesses.

4. A judge should refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

5. A judge should always refer to counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss) or by the professional title of attorney or counselor while in the courtroom.

6. A judge should not employ hostile or demeaning words in opinions or in written or oral communications with lawyers, parties or witnesses.

7. A judge should be punctual in convening trials, hearings, meetings and conferences.

8. A judge should be considerate of the time constraints upon lawyers, parties and witnesses and the expenses attendant to litigation when scheduling trials, hearings, meetings and conferences to the extent such scheduling is consistent with the efficient conduct of litigation.

9. A judge should ensure that disputes are resolved in a prompt and efficient manner and give all issues in controversy deliberate, informed and impartial analysis and explain, when appropriate, the reasons for the decision of the court.

10. A judge should allow the lawyers to present proper arguments and to make a complete and accurate record.

11. A judge should not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which he or she represents.

12. A judge should recognize that the conciliation process is an integral part of litigation and thus should protect all confidences and remain unbiased with respect to conciliation communications.

13. A judge should work in cooperation with all other judges and other jurisdictions with respect to availability of lawyers, witnesses, parties and court resources.

14. A judge should conscientiously assist and cooperate with other jurists to assure the efficient and expeditious processing of cases.

15. Judges should treat each other with courtesy and respect.

§ 99.3. The Lawyer's Duties to the Court and to Other Lawyers.

1. A lawyer should act in a manner consistent with the fair, efficient and humane system of justice and treat all participants in the legal process in a civil, professional and courteous manner at all times. These principles apply to the lawyer's conduct in the courtroom, in office practice and in the course of litigation.

2. A lawyer should speak and write in a civil and respectful manner in all communications with the court, court personnel, and other lawyers.

3. A lawyer should not engage in any conduct that diminishes the dignity or decorum of the courtroom.

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4. A lawyer should advise clients and witnesses of the proper dress and conduct expected of them when appearing in court and should, to the best of his or her ability, prevent clients and witnesses from creating disorder and disruption in the courtroom.

5. A lawyer should abstain from making disparaging personal remarks or engaging in acrimonious speech or conduct toward opposing counsel or any participants in the legal process and shall treat everyone involved with fair consideration.

6. A lawyer should not bring the profession into disrepute by making unfounded accusations of impropriety or personal attacks upon counsel and, absent good cause, should not attribute improper motive or conduct to other counsel.

7. A lawyer should refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

8. A lawyer should not misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral or written communication to the court.

9. A lawyer should be punctual and prepared for all court appearances.

10. A lawyer should avoid ex parte communications with the court, including the judge's staff, on pending matters in person, by telephone or in letters and other forms of written communication unless authorized. Communication with the judge on any matter pending before the judge, without notice to opposing counsel, is strictly prohibited.

11. A lawyer should be considerate of the time constraints and pressures on the court in the court's effort to administer justice and make every effort to comply with schedules set by the court.

12. A lawyer, when in the courtroom, should make all remarks only to the judge and never to opposing counsel. When in the courtroom a lawyer should refer to opposing counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss) or the professional title of attorney or counselor.

13. A lawyer should show respect for the court by proper demeanor and decorum. In the courtroom a lawyer should address the judge as ''Your Honor'' or ''the Court'' or by other formal designation. A lawyer should begin an argument by saying ''May it please the court'' and identify himself/herself, the firm and the client.

14. A lawyer should deliver to all counsel involved in a proceeding any written communication that a lawyer sends to the court. Said copies should be delivered at substantially the same time and by the same means as the written communication to the court.

15. A lawyer should attempt to verify the availability of necessary participants and witnesses before hearing and trial dates are set or, if that is not feasible, immediately after such dates have been set and promptly notify the court of any anticipated problems.

16. A lawyer should understand that court personnel are an integral part of the justice system and should treat them with courtesy and respect at all times.

17. A lawyer should demonstrate respect for other lawyers, which requires that counsel be punctual in meeting appointments with other lawyers and considerate of the schedules of other participants in the legal process; adhere to commitments, whether made orally or in writing; and respond promptly to communications from other lawyers.

18. A lawyer should strive to protect the dignity and independence of the judiciary, particularly from unjust criticism and attack.

19. A lawyer should be cognizant of the standing of the legal profession and should bring these principles to the attention of other lawyers when appropriate.

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