THE WOLTERS KLUWER

BOUVIER LAW DICTIONARY

DESK EDITION

Volume II

Stephen Michael Sheppard
General Editor

Wolters Kluwer
Law & Business

THE WOLTERS KLUWER

BOUVIER LAW DICTIONARY

Desk Edition

Volume II

Stephen Michael Sheppard
General Editor

Wolters Kluwer
Law & Business

Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-0611-0

Library of Congress Cataloging-in-Publication Data

The Wolters Kluwer Bouvier law dictionary / Stephen Michael Sheppard, general editor. — Desk ed.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-4548-0611-0
1. Law — United States — Dictionaries. I. Sheppard, Steve, 1963-
KF156.W653 2012
349.7303 — dc23

2011043714

SFI label applies to the text stock

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, Best Case, ftwilliam.com and MediRegs family of products.

CCH products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleafs, books, and electronic products for comprehensive information in many areas of international legal practice.

Loislaw is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Best Case Solutions is the leading bankruptcy software product to the bankruptcy industry. It provides software and workflow tools to flawlessly streamline petition preparation and the electronic filing process, while timely incorporating ever-changing court requirements.

ftwilliam.com offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

MediRegs products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

It is one of the surest indexes of mature and developed jurisprudence not to make a fortress out of the dictionary.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.), *quoted in* Brian A. Garner, *The Oxford Law Dictionary*, in–, *Garner on Language and Writing* 335 (ABA 2009).

M

M The thirteenth letter of the modern English alphabet. "M" serves a variety of functions as a symbol. It is translated into "Mike" for radio signals and NATO military transmissions, into "Mary" for some police radio traffic, and into dash, dash in Morse Code.

M AS A ROMAN NUMERAL The Latin symbol for one thousand (1,000). M is 1,000 when used as a numeral. In the Roman system of numeralization, the addition of an M to the right of another Roman numeral adds 1,000 to the numerical value. The addition of an M to the left of another Roman numeral subtracts 1,000 from the numerical value.

Usage: The 1946 edition of this work bears the following notices: "Solesmes rhythmic signs used throughout by special permission of Desclee & Co., Tournai, Belgium" and "Contents and Collection Copyright MCMXLVI and McLaughlin and Reilly Co., Boston, Mass. International Copyright secured Made in U.S.A." Desclee & Cie., S.A. v. Nemmers, 190 F. Supp. 381, 383 (E.D. Wis. 1961) (Grubb, J.).

M AS AN ABBREVIATION A word commencing with the letter M. When used as the first letter of an abbreviation, M often stands for madras, magistrate, Maine, male, mandamus, Manitoba, manual, marine, maritime, married, Maryland, Massachusetts, Medicaid, medicine, Memphis, mercantile, metropolitan, Michigan, military, ministry, Minnesota, miscellaneous, Mississippi, Missouri, modern, modified, Montana, mortgage, multiple, and mutual. It may also stand for the first letter of the abbreviation of an author or case reporter, such as M'Naghten, Maddock, Marshall, Martin, Mary (Queen), Maude, McAllister, McArthur, Menzie, Miles, Miller, Montagu, Moore, and Murphy.

Derivation: *Bouvier, 1853*, M2. This letter is sometimes put on the face of treasury notes of the United States, and signifies that the treasury note bears interest at the rate of one mill per centum, and not one per centum interest. 13 Peters, 176.

M AS A CRIMINAL LABEL A brand for manslaughter. M was a medieval brand, which was placed on the thumb of a person convicted of manslaughter and eligible for the more lenient treatment of a first-time offender granted to those who could claim benefit of clergy. The M apparently represented "manslayer." A person who received such a brand could not claim benefit of clergy a second time.

Derivation: *Bouvier, 1853*, M. When persons were convicted of manslaughter in England, they were formerly marked with this letter on the brawn of the thumb.

During the end of the fifteenth and first half of the sixteenth centuries a series of statutes were passed excluding the worst kind of homicides from benefit of clergy. In these statutes such homicides are defined as "wilful prepensed murders," "prepensedly murder," "murder upon malice prepensed," "wilful murder of malice prepensed," and "murder of malice prepensed." Thus, felonious homicide was finally divided into two main divisions — that with and that without malice aforethought, and the first was designated as murder. The two classes of homicide were punished very differently. The first, from which benefit of clergy was excluded, was punishable by death; and the second, which was clergyable, came to be practically punishable only by a year's imprisonment and branding on the brawn of the thumb. Francis Bowes Sayre, Mens Rea, 45 Harv. L. Rev. 974, 996 (1932).

Usage: See John H. Langbein, Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 U. Chi. L. Rev. 1, 38–40 (1983).

M.B.E. OR MBE *See:* BAR, ADMISSION TO THE BAR, MULTISTATE BAR EXAMINATION (M.B.E. OR MBE).

M.E.E. OR MEE *See:* BAR, ADMISSION TO THE BAR, MULTISTATE ESSAY EXAM (M.E.E. OR MEE).

M.O.U. OR MOU *See:* MEMORANDUM, MEMORANDUM OF UNDERSTANDING (M.O.U. OR MOU).

M.P.R.E. OR MPRE *See:* BAR, ADMISSION TO THE BAR, MULTISTATE PROFESSIONAL RESPONSIBILITY EXAM (M.P.R.E. OR MPRE).

M.P.T. OR MPT *See:* BAR, ADMISSION TO THE BAR, MULTISTATE PERFORMANCE TEST (M.P.T. OR MPT).

M.S.W.L.F. OR MSWLF *See:* LANDFILL, MUNICIPAL SOLID WASTE LANDFILL (M.S.W.L.F. OR MSWLF).

MACHINATION Unseemly planning. Machination is a term for a scheme that signals an unlawful, unethical, or unprofessional element of the scheme that renders the scheme itself inappropriate.

Derivation: *Bouvier, 1853*, MACHINATION. The act by which some plot or conspiracy is set on foot.

Machiner, to devise evil, or go subtilly or cunningly about it, machination, devising evil. The Law-French Dictionary, q.v. (2d ed.) (E. Nutt and H. Gosling, 1718).

Usage: There, two deeply decent, if somewhat dim, people were caught up in the machinations of the mean-spirited. What might have been a national dialogue on harassment, with real relief for its victims, degenerated into a decade-long harangue and witch-hunt, during which a host of promising public careers were wrecked on account of purely personal improprieties. Rob Atkinson, Lucifer's Fiasco: LAWYERS, LIARS, AND L'AFFAIRE LEWINSKY, 68 Fordham L. Rev. 567, 582–583 (December 1999).

Appellants assert that the evidence in the case shows [. . .] that defendant Schlink violated his promises, and by means of "wily machinations" obtained possession of the deed (of an undivided one-half

interest in the property)[.] Woock v. Schlink, 81 Cal. App. 2d 12, 14 (Cal. Ct. App. 1947) (Adams, J.).

MADAM *See:* PROSTITUTION, PIMP (MADAM).

MADH'HAB The way, and the associated disciplines of Islamic law. Madh'hab, or Al-Madhaahib al-'Arba', is a collective of the methodological schools of Islamic jurisprudence, including the four Sunni schools — Hanafi, Shafi'I, Maliki and Hanbali — and the Shii Jafari school. Today, the Sunni schools also include the modern schools of the Ikhwan al-Muslimeen (the Islamic Brotherhood), which adopts the position of the Jamhoor or majority of the scholars, and the Salafi or Wahhabi school, which is an offshoot of the Hanbali school and accepts ahad and daif hadith and athaar as evidence over qiyas.

Derivation: . . . ("chosen way"): one of the four legitmate schools of Islamic jurisprudence. Karen Armstrong, Islam: A Short History 201 (The Modern Library, 2000).

MADRASAH A Muslim school or seminary. Madrasah is derived from d r s, to learn, and describes a place of learning. Although the scholarly sense of madrasah refers to higher education, the word may also refer to elementary and high schools, as long as the school provides religious education. Islamic parochial schools in the United States are often referred to as madrasah.

Derivation: A college of Muslim higher education, where ulama [Ulema] study such disciplines as fiqh or kalam. Karen Armstrong, Islam: A Short History 201 (The Modern Library, 2000).

MAFIA *See:* RACKETEERING, ORGANIZED CRIME, MAFIA (LA COSA NOSTRA).

MAGISTER Master. Magister, the Latin for master, may stand for several terms in English. It is the origin of magistrate.

Derivation: Bouvier, 1853, MAGISTER. A master, a ruler, one whose learning and position makes him superior to others, thus: one who has attained to a high degree, or eminence, in science and literature, is called a *master*; as, master of arts.

See also: MASTER; JUDGE, MAGISTRATE, MAGISTRATE-JUDGE (MAGISTRATE JUDGE).

MAGISTRATE *See:* JUDGE, MAGISTRATE.

MAGISTRATE JUDGE *See:* JUDGE, MAGISTRATE, MAGISTRATE-JUDGE (MAGISTRATE JUDGE).

MAGNA (MAGNUM OR MAGNUS) Large. Magnum means great or large, both in a physical and in a metaphorical sense. There is no difference in translation into English between magnum and magna, which are both forms of the same Latin word, magnus, and which varies according to the noun the adjective modifies.

Derivation: magnus, a, um . . . , great, large. I. Lit., of physical size or quantity, great, large; of things, vast, extensive, spacious, etc. . . . B. Esp. 1. Of measure, weight, quantity, great, much, abundant, considerable, etc. . . . II. Trop. A. In gen., great, grand, mighty, noble, lofty, important, of great weight or importance, momentous. Charlton T. Lewis & Charles Short, A Latin Dictionary, q.v. (Clarendon Press, 1879).

See also: CONSTITUTION, ENGLISH CONSTITUTION, MAGNA CARTA (MAGNA CHARTA OR GREAT CHARTER).

MAGNA CARTA *See:* CONSTITUTION, ENGLISH CONSTITUTION, MAGNA CARTA (MAGNA CHARTA OR GREAT CHARTER).

MAGNA CHARTA OR GREAT CHARTER *See:* CONSTITUTION, ENGLISH CONSTITUTION, MAGNA CARTA (MAGNA CHARTA OR GREAT CHARTER).

MAGNA CULPA A big mistake. The phrase magna culpa can be translated from Latin into English in a variety of ways but is most often used as a statement of contrition, the speaker confessing to having committed a mistake of great magnitude. Despite this use of culpa to express a sin of commission, the term becomes a sin of omission in the Roman maxim, "Magna culpa dolus est" which is translated to mean "great neglect is the same as fraud."

Derivation: A court of conscience does not sit to correct the evils of negligence. When it confronts laches, equity remains passive. The maxim is: Gross neglect is equivalent to fraud. Magna culpa dolus est. Troll v. City of St. Louis, 168 S.W. 167, 176 (Mo. 1914) (Lamm, C.J.).

culpa, ae, f. [kindr. in root with scelus; cf. Sanscr. skhal-, errare] I. crime, fault, blame, failure, defect (as a state worthy of punishment . . . B. In partic. 1. The crime of unchastity . . . 2. Mostly in jurid. Lat., the fault of remissness, neglect . . . II. Meton., any thing mischievous or injurious, mischief. . . . B. Of things, a fault, defect. Charlton T. Lewis & Charles Short, A Latin Dictionary q.v. (Clarendon Press, 1879).

magnus, a, um . . . I. Lit., of physical size or quantity, great, large; of things, vast, extensive, spacious, etc . . . B. Esp. 1. Of measure, weight, quantity, great, much, abundant, considerable. Charlton T. Lewis & Charles Short, A Latin Dictionary q.v. (Clarendon Press, 1879).

Usage: The sentiment also works for attorneys. For some reason, clients who hire lawyers to solve a problem often also have their own solution for getting it done. Even though they don't know Magna Carta from magna culpa, they're telling you how to litigate their matter. They've never seen a courthouse, but they know how a judge thinks. Phil Pattee, Client Chooses the Destination, But You Drive the Boat, 14 Nev. Law. 34, 34 (July 2006).

MAIL (POSTAL SERVICE OR POST) The correspondence delivery service of the government. The mail, or the mail service of United States Postal Service, is the official means of transmitting correspondence, owing to its control by the national government and participation in the international network of postal services, which is the Universal Postal Union. The federal government is tasked with the creation of a mail service under the Post Offices Clause of the Constitution.

Mail may be sent in a variety of categories depending upon handling, record manifests, and cost, such as first-class, second-class, registered, certified, or express. The rules for process usually require mail to be sent as registered mail or certified mail in order for the mail to satisfy the rules.

Derivation: Bouvier, 1853, MAIL. This word, derived from the French *malle*, a trunk, signifies the bag, valise, or other contrivance used in conveying through the post office, letters, packets, newspapers, pamphlets, and the like, from place to place, under the authority of the United States. The things thus carried are also called the mail.

2. The laws of the United States have provided for the punishment of robberies or wilful injuries to the mail; the act of March 3, 1825, 3 Story's Laws U.S. 1985, provides —

§ 22. That if any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not less than five years, nor exceeding ten years; and, if convicted a

second time of a like offence, he or they shall suffer death; or if, in effecting such robbery of the mail, the first time, the offender shall wound the person having the custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death. And if any person shall attempt to rob the mail of the United States, by assaulting the person having custody thereof, shooting at him, or his horse or mule, or threatening him with dangerous weapons, and the robbery is not effected, every such offender, on conviction thereof, shall be punished by imprisonment, not less than two years, nor exceeding ten years. And, if any person shall steal the mail, or shall steal or take from, or out of, any mail, or from, or out of, any post office, any letter or packet: or, if any person shall take the mail, or any letter or packet therefrom, or from any post office, whether with or without the consent of the person having custody thereof, and shall open, embezzle, or destroy any such mail, letter, or packet, the same containing any articles of value, or evidence of any debt, due, demand, right, or claim, or any release, receipt, acquittance, or discharge, or any other article, paper, or thing, mentioned and described in the twenty-first section of this act; or, if any person shall, by fraud or deception, obtain from any person having custody thereof, any mail, letter, or packet, containing any article of value, or evidence thereof, or either of the writings referred to, or next above mentioned, such offender or offenders, on conviction thereof, shall be imprisoned not less than two, nor exceeding ten years. And if any person shall take any letter, or packet, not containing any article of value, or evidence thereof, out of a post office, or shall open any letter or packet, which shall have been in a post office, or in custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets; or shall secrete, embezzle, or destroy, any such mail, letter, or packet, such offender, upon conviction, shall pay, for every such offence, a sum not exceeding five hundred dollars, and be imprisoned not exceeding twelve months.

3. — § 23. That, if any person shall rip, cut, tear, burn, or otherwise injure, any valise, portmanteau, or other bag, used, or designed to be used, by any person acting under the authority of the postmaster general, or any person in whom his powers are vested, in a conveyance of any mail, letter, packet, or newspaper, or pamphlet, or shall draw or break any staple, or loosen any part of any lock, chain, or strap, attached to, or belonging to any such valise, portmanteau, or bag, with an intent to rob, or steal any mail, letter, packet, newspaper, or pamphlet, or to render either of the same insecure, every such offender, upon conviction, shall, for every such offence, pay a sum, not less than one hundred dollars, nor exceeding five hundred dollars, or be imprisoned not less than one year, nor exceeding three years, at the discretion of the court before whom such conviction is had.

4. — § 24. That every person who, from and after the passage of this act, shall procure, and advise, or assist, in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishments as the persons are subject to, who shall actually do or perpetrate any of the said acts or crimes, according to the provision of this act.

5. — § 25. That every person who shall be imprisoned by a judgment of court, under and by virtue of the twenty-first, twenty-second, twenty-third, or twenty-fourth sections of this act, shall be kept at hard labor during the period of such imprisonment.

The term "mail" has been defined as the whole body of matter transported by postal agents, or any letter or package forming a component part of it. Gantt v. West, 11 Vet. App. 262, 263 (Vet. App. 1998).

Usage: . . . "for he is not to be hanged because he would not stay to be burnt." And we think that a like common sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction or retarding of the passage of the mail, or its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder. United States v. Kirby, 74 U.S. (7 Wallace) 482, 487 (1869) (Field, J.).

Consequently, a custodian may not exercise his authority under N.J.S.A. 47:1A-7(f)(1) in a manner that would impose an unreasonable obstacle to the transmission of a request for a governmental record, such as, for example, by requiring any OPRA request to be hand-delivered. However, there is no basis for concluding that East Orange's form, which only prohibits submission of OPRA requests by fax, but allows submission by mail or "electronically," imposes any undue burden upon parties who seek the disclosure of government records under OPRA. Paff v. City of E. Orange, 407 N.J. Super. 221, 414, 970 A.2d 409 (N.J. Super. Ct. App. Div. 2009) (Skillman, J.A.D.).

MAIL FRAUD *See:* FRAUD, MAIL FRAUD.

ELECTRONIC MAIL (E-MAIL) A person-to-person message sent from computer to computer. Electronic mail is an electronic message sent through a network for the distribution of messages to computers for humans to read, including systems integrated into web pages and social networking sites that generate messages transmitted via an intranet or internet. E-mail also describes a group of such messages. Individuals may contract or license communications between themselves by electronic mail as sufficient both to satisfy notice requirements and to serve as a valid offer or a binding acceptance. Rules and statutes requiring service by mail, notice by mail, or other use of the mail are presumptively not satisfied by the use of electronic mail. Following the service of the complaint (or other initial pleading), however, service of documents is allowed in most courts according to specific court procedures, as long as either the serving party has confirmation that the receiving party in fact receives the document or the serving party has no evidence that the receiving party did not receive the document.

Derivation: "Electronic mail" means an electronic message that is transmitted between two or more computers or electronic terminals, whether or not the message is converted to hard copy format after receipt and whether or not the message is viewed upon transmission or stored for later retrieval. "Electronic mail" includes electronic messages that are transmitted through a local, regional, or global computer network. Colo. Rev. Stat. Ann. § 24-72-202(c)(1.2) (1996).

Commercial electronic mail message (A) In general. The term "commercial electronic mail message" means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose). (B) Transactional or relationship messages. The term "commercial electronic mail message" does not include a transactional or relationship message. 15 U.S.C. § 7702(2) (2004).

Usage: [U]nlike the price quotation letters [elsewhere] . . . the e-mails, while containing a description of the allegedly infringing wafers, do not contain any price terms. Accordingly, on their face, the e-mails cannot be construed as an offer which Samsung Austin could make into a binding contract by simple acceptance. MEMC Electronic Materials, Inc. v. Mitsubishi Materials Silicon Corp., 420 F.3d 1369, 1376 (Fed. Cir. 2005) (Schall, J.).

A detective posing as a 13-year-old girl named "Gracie" had engaged in email conversations with Mannava during which Mannava had sought to persuade "her" to have sex with him (also to fondle herself in a sexual manner) and they had arranged to meet at an ice cream parlor. United States v. Mannava, 565 F.3d 412, 414 (7th Cir. 2009) (Posner, J.).

Gerst invoked the Fifth Amendment throughout the deposition and refused to explain how and when he had intercepted these emails, whether he had help doing so, and whether he continued to have the ability to intercept privileged internal and attorney-client email communications. Eagle Hospital Physicians, LLC v. SRG Consulting, Inc., 561 F.3d 1298, 1302 (11th Cir. 2009) (Kravitch, J.).

See also: INTERNET (WEB OR WORLD WIDE WEB).

MAILBOX RULE A mailed letter is presumptively received. The mailbox rule is one of several rules related to mailboxes, and in its most generic sense is a presumption that a document or other material that is properly and timely mailed is received by the addressee within a reasonable and customary time. This presumption can be rebutted by evidence, but in the absence of such evidence, delivery of the mail is presumed.

The mailbox rules for the transmission of offers, acceptance, and payment are not presumptions of receipts but rules of effectiveness, such that these events are considered to have occurred at the time the offers, acceptances, or payments are committed irreversibly to the United States mail. Even so, the effect of the rule in such cases may be rebutted by evidence of the receiving parties' prior and controlling intention to use the time of receipt to rather than the time of transmission in determining the effectiveness of the communication.

Derivation: The mailbox rule provides that the proper and timely mailing of a document raises a rebuttable presumption that the document has been received by the addressee in the usual time. It is a settled feature of the federal common law. . . . As a rebuttable presumption, it does not operate as a rule of construction, dictating that a requirement of receipt should be read as a requirement of timely mailing. Rather, it is a tool for determining, in the face of inconclusive evidence, whether or not receipt has actually been accomplished. Schikore v. BankAmerica Supplemental Retirement Plan, 269 F.3d 956, 961 (9th Cir. 2001) (Reinhardt, J.).

The common law "mailbox rule," which has long been the law of this Commonwealth, provides that the depositing in the post office of a properly addressed letter with prepaid postage raises a natural presumption that the letter reached its destination by due course of mail. Thus, under the "mailbox rule," evidence that a letter has been mailed ordinarily will be sufficient to permit a fact-finder to find that the letter was, in fact, received by the party to whom it was addressed. In order for the presumption of the receipt of a letter to be triggered, the party who is seeking the benefit of the presumption must adduce evidentiary proof that the letter was signed in the usual course of business and placed in the regular place of mailing . . . a presumption that a letter was received cannot be based on a presumption that the letter was properly mailed. In re Rural Route Neighbors, 960 A.2d 856, 861 (Pa. Commw. Ct. 2008) (Friedman, J.).

Usage: [T]he application of the mailbox rule is consistent with the purposes of ERISA, the central purpose of which is to protect the interests of participants in employee benefit plans and their beneficiaries. Aetna Life Insurance Co. v. Montgomery, 286 F. Supp. 2d 832, 840 (E.D. Mich. 2003).

We acknowledge there are situations where the mailbox rule might apply to render a payment timely on the date of mailing. However, we agree that neither exception applies in this case. The contract was silent with regard to mailing, and the parties had no established pattern of mailing as this was the first time a payment had been attempted under the forfeiture clause. Therefore, we are not comfortable relying on the mailbox rule in this particular instance. Cortez v. Cortez, 203 P.3d 857 (N.M. 2009) (Bosson, J.).

1. Electronic Communication The mailbox rule applies to e-mail in many courts, but not all courts and not all agencies, such that e-mail is presumed to have been received if sent. Thus, if A sent an electronic communication to B via a reliable means, and there is no reason of evidence to believe that B did not receive the communication, then presumptively B received it. B can rebut the presumption by demonstrating that no such communication was received or bypass the presumption by arguing that the presumption should not apply in a given case.

Derivation: [A] presumption of delivery should apply . . . there is no principled reason why a jury would not be able to make the same inference regarding other forms of communication — such as facsimiles, electronic mail, and in-house computer message systems — provided they are accepted as generally reliable and that the particular message was properly dispatched . . . [T]he appellants have made a sufficient showing to at least be entitled to an evidentiary hearing on the issue of whether they have adequately rebutted the presumption. American Boat Co., Inc. v. Unknown Sunken Barge, 418 F.3d 910, 914 (8th Cir. 2005) (Melloy, J.).

Although the "mailbox rule" applies to mailings via the post office, the Department's regulation at 34 Pa. Code § 101.82(b)(4) controls emailed appeals. Roman-Hutchinson v. Unemployment Comp. Bd. of Review, 972 A.2d 1286, 1289 (Pa. Commw. Ct. 2009) (Friedman, J.).

Usage: A commentator on English contract law has argued that the "mailbox" rule is an anomaly that should not be extended to electronic transactions. "[I]t is difficult to find sound reason to extend the 200 year old exception to the general rule of notification of acceptance to email. Attempting to apply the postal acceptance rule to this mode of communication is like flogging a dead horse." Howard O. Hunter, Modern Law of Contract, quoting Hill, Flogging a Dead Horse — The Postal Acceptance Rule and Email, 17 J. Contract L. 151 (2001).

Since it is well established in common law systems that the mailbox rule is not applicable when the offeree uses means of communication other than the mail or telegraph, a contract is concluded "upon receipt" of the acceptance when the offeree uses means of instantaneous communication (i.e., telex, fax, electronic data interchange (EDI), and electronic mail (E-mail)). Maria del Pilar Perales Viscasillas, The Formation of Contracts and the Principles of European Contract Law, 13 Pace Int'l L. Rev. 371, 395 (2001).

2. Fax Proof of a sent fax might establish a presumption of receipt if the evidence is very strong that the fax was sent and if the evidence is corroborated in some manner. Still, many courts have limited the use of the mailbox rule when a document is sent only by telephone facsimile, either refusing to apply the rule at all or only doing so when receipt of the fax can be confirmed, such as by a confirmation telephone call or a fax receipt confirmation message.

Derivation: Unlike the "mailbox rule," evidence of transmission of a document by fax, such as the "FAXED" stamp here, does not create a presumption of receipt. See Riley & Ephriam Constr. Co. v. United States, 408 F.3d 1369, 1372 (Fed. Cir. 2005) ("[W]e cannot infer receipt from evidence of transmission. Proof of message exit from a transmitting machine cannot serve as a proxy for proof of actual receipt of the sent message by a remote receiving terminal."). Without deciding the issue, the Court notes that the evidence that might have given rise to a presumption of receipt includes: (i) a fax confirmation sheet or (ii) a telephone call to the O'Brien Firm confirming receipt. Schaffers's office, however, employed neither of those methods. In re Gunter, 389 B.R. 67, 73 (Bankr. S.D. Ohio 2008) (Preston, B.J.).

We find no prohibition to Williams's filing of the appeal bond by fax. Based on Stokes, we hold that Williams invoked the "mailbox rule" as to the filing of her appeal bond and perfected her appeal by mailing her appeal bond on August 22, 2002 and by ensuring that the clerk received a faxed copy of the appeal bond on August 27, 2002. Williams v. Schneiber, 148 S.W.3d 581, 585-86 (Tex. App. 2004) (Gardner, J.).

3. Private Carrier The mailbox rule generally applies to letters consigned to private carriers. Although the presumption of delivery is allowed when there is sufficient evidence that a document is consigned to a private carrier, such as Federal Express or UPS, a rule expressly requiring use of the U.S. mails for its application does not apply to private carriers.

Derivation: Because we came by the mailbox rule for postjudgment motions by analogy to Rules 11, 12, and 373 and section 1.25, the way those provisions treat a document consigned to a private carrier is the way a court should treat a postjudgment motion consigned to a private carrier. Baca v. Trejo, 902 N.E.2d 1108, 1112 (Ill. Ct. App. 2009) (Jorgensen, J.).

See also: ACCEPTANCE, ACCEPTANCE AS ACCEPTANCE OF AN OFFER, MAILBOX RULE.

PRISON MAILBOX RULE Prisoners' mail is effectively mailed when given to the prison staff. The prisoner's mailbox rule provides a presumption that delivery is received once the prisoner delivers any outgoing mail to an appropriate corrections official for the purpose of processing and mailing.

Derivation: When it applies, the prison mailbox rule provides that an incarcerated pro se petitioner's papers are considered filed when they are deposited in the prison mail system. Howland v. Quarterman, 507 F.3d 840, 844 (5th Cir. 2007) (Per Curiam).

Usage: This "prison mailbox" rule is justified by the litigant's dependence on the prison mail system and lack of counsel to assure timely filing with the court. Noble v. Kelly, 246 F.3d 93, 97 (2d Cir. 2001) (Per Curiam).

[A] pro se prisoner's notice of appeal is "filed" at the moment of delivery to prison authorities for forwarding to the district court. Allen v. Culliver, 471 F.3d 1196, 1198 (11th Cir. 2006) (Per Curiam).

MAIM

MAIM AS INJURE (MAIMING) To injure a body part, rendering it useless. To maim a person is to harm a body part or an organ to such an extent that this portion of the body is rendered incapable of meaningful use or of the performance of its function. A maimed person is one who has suffered such a maiming.

Derivation: *Bouvier, 1853,* TO MAIM, *crim. law.* To deprive a person of such part of his body as to render him less able in fighting or defending himself than he would have otherwise been. Vide *Mayhem.*

The word "maim" has been defined more widely in early use as meaning to disable, wound, cause bodily hurt or disfigurement to the body. Commonwealth v. Farrell, 322 Mass. 606, 619 (Mass. 1948) (Dolan, J.).

The term "maim" means to cripple or inflict an injury that deprives the victim of the effective use of any limb or member of the body. Dean v. Maryland, 325 Md. 230, 240 (Md. 1992) (Karwacki, J.).

Usage: In the Joe McDonie Case it was held that to maim means to violently inflict a bodily injury upon a person so as to make him less able to defend himself or annoy his adversary. West Virginia v. McDonie, 123 S.E. 405, 407 (W. Va. 1924) (Miller, J.).

See also: MAYHEM (MAIM).

MAINPRISE (MAINPERNOR OR MAINPRIZE) A form of bail with surety held by a third party. Mainprise, or mainprize, was a form of release on bail given by a surety for the appearance of another person in the medieval common law. Mainprise differs from bailment, in that bailment was a pledge by the defendant while mainprise was a pledge made by a third party either for the defendant to appear at a hearing or to make good on the debt. It is a precursor to the modern sense of releasing a prisoner on bail posted by another party.

Derivation: *Bouvier, 1853,* MAINPERNORS, *English law.* Those persons to whom a man is delivered out of custody or prison, on their becoming bound for his appearance.

2. Mainpernors differ from bail: a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are merely sureties for his appearance at the day; bail are only sureties that the party be answerable for all the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever. 3. Bl. Com. 128; vide Dane's Index, h.t.

Bouvier, 1853, MAINPRISE, *Engl. law.* The taking a man into friendly custody, who might otherwise be committed to prison, upon security given for his appearance at a time and place assigned. Wood's Inst. B. 4, c. 4.

2 Mainprise differs from bail in this, that a man's mainpernors are barely his sureties, and cannot imprison him themselves to secure his appearance, as his bail may, who are looked upon as his gaolers, to whose custody he is committed. 6 Mod. 231; 7 Mod. 77, 85, 98; Ld. Raym. 606; Bac. Ab. Bail in Civil Cases; 4 Inst. 180. Vide *Mainpernors; Writ of Mainprise;* and 15 Vin. Ab. 146; 3 Bl. Com. 128.

MAINSTREAMING Integrating special needs students into the classrooms of their peers. Mainstreaming is the practice of educating disabled and other special needs students in the same room and environment as students with no special needs or apparent disabilities, the goals being to enhance the social integration of the students, to minimize the stigma of the needs or disabilities, and to ensure that all students cover the curriculum of the general course. The individual education plan of a mainstreamed student must ensure that the student's unique educational requirements are met via a combination of services provided in the mainstreamed class and services provided in out-of-classroom therapy or instruction.

Derivation: Although we have not definitively resolved the proper role of the mainstreaming requirement when considering parental placements, contrary to the hearing officer's approach, it is clear that requirement should not be applied in the strictest sense. Morgan v. Greenbrier County West Virginia Bd. of Education, 83 Fed. Appx. 566, 572 (4th Cir. 2003) (Williams, J., concurring and dissenting in part).

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Bay Shore Union Free School Dist. v. T. ex rel R., 405 F. Supp. 2d 230, 240 (E.D.N.Y. 2005) (Weinstein, J.).

See also: DISABILITY, PERSONAL DISABILITY, AMERICANS WITH DISABILITIES ACT.

MAINTAINORS *See:* MAINTENANCE, MAINTENANCE IN LITIGATION, MAINTAINORS.

MAINTENANCE (MAINTAIN) To support another person, property, or activity. Maintenance is the keeping or supporting of anything or anyone, especially by regular assistance.

Derivation: Maintenir, to hold, to keep, to maintain. Maintenus, held, kept. E. Nutt and H. Gosling, The Law-French Dictionary, q.v. (2d ed., 1718).

Usage: Section 20-70(c) (1) required maintenance declarations to be executed in substantially the same form as Appendix XIV. Here, the Maintenance Declaration, which mirrored the language found in the NCCC Appendix XIV, provided in relevant part: 1. In order that the Private Open Spaces shall be maintained in good and proper condition, fit for their intended purposes, according to the provisions of Sections 20-70(c) and (d) of the New Castle County Code, Declarant shall organize a maintenance corporation (hereinafter "the Corporation") whose Members shall be the record Owners of the Lots. 2. Prior to the conveyance of the first Lot to any Owner, Declarant shall incorporate under the laws of the State of Delaware the Corporation referred to in paragraph I hereof as a nonprofit corporation to be known as a "maintenance corporation" for the benefit of all Owners, which Corporation shall be charged with the duty of maintaining the Private Open Spaces in the condition required by the aforesaid laws of New Castle County, and all other applicable laws

and covenants, and by the Corporation's Charter and By-Laws. Newtowne Village Service Corp. v. Newtowne Road Development Co., 772 A.2d 172, 174 (Del. Super. Ct. 2001) (Per Curiam).

MAINTENANCE BOND *See:* BOND, MAINTENANCE BOND.

MAINTENANCE CALL *See:* MARGIN, BUYING ON MARGIN, MARGIN CALL (MAINTENANCE CALL).

MAINTENANCE IN GROSS *See:* ALIMONY, SEPARATE MAINTENANCE, MAINTENANCE IN GROSS.

MAINTENANCE OF A SEAMAN *See:* SEAMAN, MAINTENANCE OF A SEAMAN (CURE AND MAINTENANCE).

MAINTENANCE IN LITIGATION Providing unjustified assistance to a party to civil litigation. Maintenance, in the context of civil litigation, is the crime of unjustified or unreasonable assistance of a party (or a potential party) to a civil action, whether the assistance is given in funds, advice, or assistance in providing counsel. There is no clear line between justified and unjustified assistance, but maintenance is likely to be found if an unrelated person or entity provides assistance to a litigant when the assisting person or entity has no interest at all in the case or any relationship to the party, when the party provides assistance for a reason contrary to public policy, when the party seeks to induce litigation for the private ends of the unrelated person or entity, when the assisting party creates a burden for the plaintiff that would otherwise not exist, or when the assisting party appears to be acting deliberately to vex the defendant.

Many forms of support for litigation are not maintenance. The decision by a person or entity to assist a litigant who is a member of the same family or who is a neighbor or other person with a prior relationship is not maintenance, nor is a charitable action with no direct benefit to the assisting party. Similarly, agreements of representation in which the attorney bears the risk of litigation and bears certain expenses and fees as an investment against payment by a contingent fee is not maintenance.

An attorney is not immune from maintenance and may not pay a fee to a client. A contract that amounts to an agreement to provide maintenance is unenforceable as a matter of public policy.

Derivation: *Bouvier, 1853,* MAINTENANCE, *crimes.* A malicious, or at least, officious interference in a suit in which the offender has no interest, to assist one of the parties to it against the other, with money or advice to prosecute or defend the action, without any authority of law. 1 Russ. Cr. 176.

2. But there are many acts in the nature of maintenance, which become justifiable from the circumstances under which they are done. They may be justified, 1. Because the party has an interest in the thing in variance; as when he has a bare contingency in the lands in question, which possibly may never come in esse. Bac. Ab. h.t. 2. Because the party is of kindred or affinity, as father, son, or heir apparent, or husband or wife. 3. Because the relation of landlord and tenant or master and servant subsists between the party to the suit and the person who assists him. 4. Because the money is given out of charity. 1 Bailey, S.C. Rep. 401. 5. Because the person assisting the party to the suit, is an attorney or counsellor: the assistance to be rendered must, however, be strictly professional, for a lawyer is not more justified in giving his client money than another man. 1 Russ. Cr. 179. Bac. Ab. Maintenance: Bro. Maintenance. This offence is punishable by fine and imprisonment. 4 Black. Com. 124; 2 Swift's Dig. 328; Bac. Ab. h.t. Vide 3 Hawks, 86; 1 Greenl. 292; 11 Mass. 553, 6 Mass. 421; 5 Pick. 359; 5 Monr. 413; 6 Cowen, 431; 4 Wend. 306; 14 John. R. 124; 3 Cowen, 647; 3 John. Ch. R. 508; 7 D.&R. 846; 5 B.&C. 188.

Different rules may apply to the assignment of litigation claims. Such an assignment may be contrary to public policy if it is deemed to amount to "maintenance" or "champerty." Maintenance occurs when a person assists a party to litigation, even though they have no interest in the litigation, or any other reasons recognized by law that justifies their interference. Champerty is an aggrieved form of maintenance where assistance is given in return for the promise of a share of the litigation proceeds. Generally speaking, maintenance may be found to exist where the Courts consider that an assignee has no genuine commercial interest in taking the assignment and enforcing it. Denis Ferland, Discussion on Claim Purchasing, 25 Banking & Finance L. Rev. 75, 79 (2009).

Usage: Interference might be inferred by repeated unnecessary visits to the property, or distracting conduct not reasonably related to maintenance activities, or an unreasonably prolonged presence on the property. Schisel v. Schisel, 762 N.W.2d 265, 274 (Minn. Ct. App. 2009) (Shumaker, J.).

See also: CHAMPERTY (CHAMPERTOUS); BARRATRY (BARRATOR).

MAINTAINOR One who maintains an action between others. A maintainor is a person, especially an attorney, who engages in maintenance, supporting a cause by one person against another.

Derivation: *Bouvier, 1853,* MAINTAINORS, *criminal law.* Those who maintain or support a cause depending between others, not being retained as counsel or attorney. For this they may be fined and imprisoned. 2 Swift's Dig. 328; 4 Bl. Com. 124; Bac. Ab. Barrator.

In recent years, champerty and maintenance have lain dormant in Ohio courts. Historically, champertors and maintainors were attorneys, and these practices by attorneys have been regulated by DR 5-103 of the Code of Professional Responsibility. Nonetheless, the codification of these doctrines for attorney discipline did not remove them from the common law. "[T]he doctrines of champerty and maintenance appear in numerous Ohio cases as contract defenses." Rancman v. Interim Settlement Funding Corp., 99 Ohio St. 3d 121, 124, 789 N.E.2d 217, 220 (Ohio, 2003) (O'Connor, J.).

MAINTENANCE OF A DEPENDENT The provision of food, needs, and care to another as required by law. Maintenance is the support of another person by the provision of food, shelter, clothing, and physical needs in compliance with a legal obligation to provide such support on the basis of a family relationship, a guardianship, or another relationship. Although maintenance traditionally described the support of a bread-winning parent for the other spouse as well as any children the couple had, the contemporary trend is to use support in reference to children and maintenance in reference to a spouse.

Derivation: *Bouvier, 1853,* MAINTENANCE, *quasi contracts.* The support which one person, who is bound by law to do so, gives to another for his living; for example, a father is bound to find maintenance for his children; and a child is required by law to maintain his father or mother, when they cannot support themselves, and he has ability to maintain them. 1 Bouv. Inst. n. 284-6.

Usage: In Crouch v. Easley, 192 S.E. 690 (W. Va. 1937), this Court specified that in a divorce suit which does not involve minor children, maintenance or property rights, a decree of divorce a vinculo terminates the suit because the marital relation is the only subject before the court. Zikos v. Clark, 588 S.E.2d 400, 403 (W. Va. 2003) (Per Curiam).

Baumgart agrees with Rohde-Giovanni's statement of the requisite standard in order to modify maintenance, including the "unjust or inequitable" facet, but states that modification was justified in this case because he satisfied the standard. Baumgart further agrees that the fairness objective applies during modifications of maintenance

awards. Baumgart also agrees with Rohde-Giovanni that this standard applies, regardless of whether the original maintenance award was stipulated to or contested by the parties. In re Marriage of Rohde-Giovanni v. Baumgart, 676 N.W.2d 452, 461 (Wis. 2004) (Crooks, J.).

MAJOR An adult. As a noun in law, a major is a person who has reached the age of majority. As an adjective, major is comparative, usually being compared to something denoted as minor, and suggests the older or more important between the two people or things compared.

Derivation: Bouvier, 1853, MAJOR, *persons.* One who has attained his full age, and has acquired all his civil rights; one who is no longer a minor; an adult.

magnus, a, um . . . I. . . . adj.; comp. mâjor, us; sup. maxĭmus.., a, um [root magh–; Sanscr. mahat, mabâ, great; Gr. megas . . .], great, large. Charlton T. Lewis and Charles Short, A Latin Dictionary q.v. (Clarendon Press, 1879).

Usage: A competent major has procedural capacity to sue. La. C.C.P. art. 682. Colon v. Colon, 6 So. 3d 304, 307 (La. Ct. App. 2009) (Drew, J.).

See also: JUVENILE; MINOR.

MAJOR FEDERAL ACTION *See:* ENVIRONMENT, NATIONAL ENVIRONMENTAL POLICY ACT, MAJOR FEDERAL PROJECT (MAJOR FEDERAL ACTION).

MAJOR FEDERAL PROJECT *See:* ENVIRONMENT, NATIONAL ENVIRONMENTAL POLICY ACT, MAJOR FEDERAL PROJECT (MAJOR FEDERAL ACTION).

MAJOR LIFE ACTIVITY *See:* DISABILITY, MAJOR LIFE ACTIVITY; ACTIVITY, MAJOR LIFE ACTIVITY.

MAJORITY The greater number, or more important segment. Majority has a variety of senses important to law, the most important being the greater number among a group of people divided into groups for some reason, such as by the vote cast on an issue or any other aspect of identity or behavior, such as the number who live in a city in a given neighborhood. Though the sense of numerical superiority is important in law, majority in law also connotes other, older senses of majority as superiority or sufficiency. Thus, majority in age represents the age sufficient to engage fully in legal and political life. Majority in a partnership may mean the greater share in proportion to the shares of other partners. The adjectival form, major, makes clear that majority is as often a mark of significance or importance as it is a mark of the larger or more numerous.

When majority represents the larger number of people who have voted, the majority is usually subject to additional rules affecting the vote. These include rules that might require the vote to be taken from a quorum of those eligible to vote and others that would specify whether an abstention counts toward or against a resolution or candidate. In the absence of a specified meaning to the contrary, a majority in any group is one person more than half, or one person more than 50 percent of those eligible, sometimes stated as 50%+1.

AGE OF MAJORITY *See:* MAJORITY, AGE OF MAJORITY; ADULT, AGE OF MAJORITY (LEGAL AGE).

MAJORITY OPINION *See:* OPINION, JUDICIAL OPINION, MAJORITY OPINION.

MAJORITY RULE *See:* RULE, MAJORITY RULE (MINORITY RULE).

MAJORITY RULE OR MOBOCRACY OR MOB RULE *See:* GOVERNMENT, FORMS OF GOVERNMENT, OCHLOCRACY (MAJORITY RULE OR MOBOCRACY OR MOB RULE).

MAKE BOOK *See:* BOOKIE (MAKE BOOK).

MAKE-WHOLE RELIEF *See:* STATUS, STATUS QUO ANTE (MAKE-WHOLE RELIEF).

MAKER The promissor of a note. The maker of a note is the person who signs it or otherwise authorizes the note by undertaking the promise to pay it. A maker may by signed by more than one person, the signers then being co-makers.

Co-makers are presumed to be jointly and severally liable to the holder even if the instrument does not express such terms (although an express agreement to the contrary made between the co-makers may enforce indemnity or contribution between themselves). If, however, one maker is not a maker but only an accommodation maker (a party who signs an instrument to benefit another and who receives no benefit from doing so), the accommodation maker has recourse against the maker.

Derivation: Bouvier, 1853, MAKER. This term is applied to one who makes a promissory note and promises to pay it when due. He who makes a bill of exchange is called the drawer, and frequently in common parlance and in books of Reports we find the word drawer inaccurately applied to the maker of a promissory note. See *Promissory note.*

[T]here is no definition of the term contained in the UCC, although it does define "maker" as "a person who signs or is identified in a note as a person undertaking to pay." Suncor Energy (USA), Inc. v. Aspen Petroleum Products, Inc., 178 P.3d 1263, 1267 (Colo. Ct. App. 2007) (Casebolt, J.).

[T]he status of accommodation makers differs significantly from that of makers. Under KRS 355.3–415, an accommodation party does not lose his status as such even though he executes the instrument as a maker. In such a case, the holder may proceed directly against the maker, the accommodation maker, or both. Upon payment of the instrument, however, the accommodation maker has recourse against the maker and may prove his status as an accommodation maker by oral evidence. KRS 355.3–415(3) and (5). From the foregoing, it is apparent that an important distinction exists between makers and accommodation makers. While either has primary liability to the holder, upon payment the accommodation maker has recourse upon the instrument against the maker. Co-makers, however, are limited to asserting claims for contribution upon an express or implied contract. Schmuckie v. Alvey, 758 S.W.2d 31, 34 (Ky. 1988) (Lambert, J.).

Usage: "Maker" is defined in the Note as "DALE DAVISON, an individual dba CinemaCal Enterprises." . . . Therefore, under the Note, the parties agreed that only Redwood has the right to attorney's fees. Debtor has no such right. In re Davison, 289 B.R. 716, 725 (B.A.P. 9th Cir. 2003) (Ryan, B.J.).

ACCOMMODATION MAKER (ACCOMMODATED PARTY OR ACCOMMODATION PARTY) A maker of an instrument for the benefit of another party and not for the party's own benefit. An accommodation maker of an instrument is a person who endorses an instrument in order to accommodate the borrower, lender, or another maker of the instrument and not in order to realize any direct benefit to the accommodation maker. The borrower, lender, or maker in such circumstances is the accommodated party, and the accommodation maker is the

accommodation party. The accommodation party may be required by the holder to honor the instrument, but the accommodation party has recourse against the accommodated party. The accommodated party has no recourse against the accommodating party.

Derivation: (a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation." (b) An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to subsection (d), is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation. 6 Del. C. § 3-419 (2010).

1. Section 3-605, which replaces former Section 3-606, can be illustrated by an example. Bank lends $10,000 to Borrower who signs a note under which Borrower is obliged to pay $10,000 to Bank on a due date stated in the note. Bank insists, however, that Accommodation Party also become liable to pay the note. Accommodation Party can incur this liability by signing the note as a co-maker or by indorsing the note. In either case the note is signed for accommodation and Borrower is the accommodated party. Rights and obligations of Accommodation Party in this case are stated in Section 3-419. Suppose that after the note is signed, Bank agrees to a modification of the rights and obligations between Bank and Borrower. For example, Bank agrees that Borrower may pay the note at some date after the due date, or that Borrower may discharge Borrower's $10,000 obligation to pay the note by paying Bank $3,000, or that Bank releases collateral given by Borrower to secure the note. Under the law of suretyship Borrower is usually referred to as the principal debtor and Accommodation Party is referred to as the surety. Under that law, the surety can be discharged under certain circumstances if changes of this kind are made by Bank, the creditor, without the consent of Accommodation Party, the surety. Rights of the surety to discharge in such cases are commonly referred to as suretyship defenses. Section 3-605 is concerned with this kind of problem in the context of a negotiable instrument to which the principal debtor and the surety are parties. But Section 3-605 has a wider scope. It also applies to indorsers who are not accommodation parties. Unless an indorser signs without recourse, the indorser's liability under Section 3-415(a) is that of a guarantor of payment. If Bank in our hypothetical case indorsed the note and transferred it to Second Bank, Bank has rights given to an indorser under Section 3-605 if it is Second Bank that modifies rights and obligations of Borrower. Both accommodation parties and indorsers will be referred to in these Comments as sureties. The scope of Section 3-605 is also widened by subsection (e) which deals with rights of a non-accommodation party co-maker when collateral is impaired. U.C.C. Comment to § 3-605 (2001), in Mich. Code L. Ann. § 440.3605 (2010).

MAKRUH Something that is good to avoid. Makruh, derived from k r h, means something to be hated or detested. It is one of the five Hukm Shari', the omission of which is commendable, and the commission of which is detestable but not sinful.

Derivation: Makruh is a demand of the Lawgiver which requires the mukallaf to avoid something, but not in strictly prohibitive terms. Mohamad Hashim Kamali, Principles of Islamic Jurisprudence (1991).

MALA *See:* MALUM (MALUS OR MALA OR MALO OR MALE OR MAL-).

MALA FIDES *See:* MALUM, MALA FIDES; FAITH, BAD FAITH (MALA FIDES).

MALA IN SE *See:* MALUM, MALUM IN SE (MALA IN SE).

MALA PROHIBITA *See:* MALUM, MALUM PROHIBITUM (MALA PROHIBITA).

MALEFICIUM A civil theft, or any wrongful act. Maleficium is a general term for a wrongful act and includes the abuse of office and the destruction of property, including the taking of property rights. At common law, maleficium is the tort of theft or conversion. In a civil law jurisdiction, maleficium is the act of waste regarding a property when one has no right to commit waste.

Derivation: *Bouvier, 1853,* MALEFICIUM, *civil law.* Waste, damage, torts, injury. Dig. 5, 18, 1.

The word maleficium is very close in meaning to delict, that is, a wrong or an evil deed. Because the "male" part of the word means evil, maleficium means a deed that is evil in and of itself. In the Institutes of Justinian, maleficium refers to judicial bias. Marie Adornetto Monahan, The Problem of "The Judge Who Makes the Case His Own": Notions of Judicial Immunity and Judicial Liability in Ancient Rome, 49 Cath. U. L. Rev. 429, 446 (Winter 2000).

The tort of conversion "may consist of the wrongful deprivation of the use of goods, and it is not necessary to show a conversion to the use of the defendant." In Kirby v. Porter, 144 Md. 261, 263, 125 A. 41 (1923), . . . the appellee sufficiently stated a cause of action for conversion because in Chitty, Pleading, vol. 1, page 135 (5th Am. Ed.), it is said: The injury lies in the conversion and deprivation of the plaintiff's property, which is the gist of the action, . . . and the fact of the conversion does not necessarily import an acquisition of property in the defendant; . . . and it is for the recovery of damages to the value of the thing converted, and not the thing itself, which can only be recovered by action of detinue or replevin. . . . No damages are recoverable for the act of taking, all must be for the act of converting. This is the tort of maleficium and to entitle the plaintiff to recover, two things are necessary: 1st, property in the plaintiff; 2ndly, a wrongful conversion by the defendant. Humphrey v. Herridge, 103 Md. App. 238, 247-48, 653 A.2d 491, 495-96 (Md. App. 1995) (Bishop, J.).

mălĕfĭcĭum, ĭi, n. [maleficus]. . . . I. an evil deed, misdeed, wickedness, offence, crime. B. In partic. . . . Fraud, deception, adulteration. . . . 2. Enchantment, sorcery. . . . II. Transf., mischief, hurt, harm, injury, wrong inflicted . . . Hence, transf. (abstr. pro concr.), a noxious insect, vermin. Charlton T. Lewis & Charles Short, A Latin Dictionary, q.v. (Clarendon Press, 1879).

Usage: In the latter countries, however, it is held to mean the wrongful, injurious, and fraudulent conduct of the master and crew (maleficium) towards the owner, as relates to the vessel and cargo. Stewart v. Tennessee Marine & Fire Insurance Co., 20 Tenn. 242 (Tenn. 1839) (Reese, J.).

MALEFICIO *See:* TRUSTEE, TRUSTEE EX MALEFICO (MALEFICIO).

MALFEASANCE *See:* FEASANCE, MALFEASANCE (MAL FEASANCE OR MAL-FEASANCE).

MALICE (MALICIOUS, MALICIOUSNESS) The intent to harm, or knowing indifference to the harm one might cause. Malice is a state of mind in which a person acts in a manner intended to cause harm to someone or something or acts in a manner as a person would who intends harm but does so with no regard for the risk of harm being created, and has no valid justification or excuse for doing so. Malice may be established by a person's recollection of

their thoughts at the time of an action, or it may be presumed from the person's conduct in the light of that person's knowledge at the time of the act. Malice is the mental state required for the commission of some crimes, and it is an alternative mental state to intentionality that is required for other crimes. Malice is also a mental state that may be pled in many jurisdictions to raise claims of a serious breach of duty, one greater than mere negligence though not rising to a level of intent. In such civil actions, malice may require more specific evidence than recklessness, though the mental states are similar. When malice is an element of a tort, it is usually proved by clear and convincing evidence, a more difficult burden for the plaintiff to prove than the usual proof by a preponderance of the evidence.

Derivation: *Bouvier, 1853,* MALICIOUS. With bad and unlawful motives; wicked.

Malice is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." Fraher v. Surydevara, No. 1:06-cv-01120-AWI-GSA PC, 2009 WL 1371829, 1 (Cal. 2009) (Austin, M.J.).

Actual malice is defined as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." Wilson v. Columbus Board of Education, 589 F. Supp. 2d 952, 973 (Ohio 2008) (Marbley, J.).

"Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others. Nev. Rev. Stat. Ann. § 42.001.

Implied malice is defined by [Penal] section 188 as "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." As often expressed by our appellate courts: "Malice is evidenced by circumstances indicating that the killing was proximately caused by an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. People v. Mills, 1 Cal. App. 4th 898, 919 (Cal. App. 1991) (Merrill, J.).

He would challenge the correctness of the judge's charge which included the following: . . . Malice is the word suggesting wickedness, hatred, and a determination to do what one knows to be wrong without just cause or excuse or legal provocation. Malice is a term of art; a techical term importing wickedness and excluding just cause or excuse. It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent upon mischief. . . . Malice is said to be expressed where there is manifested a violent, deliberate intention unlawfully to take away the life of another human being. . . . The charge on malice, read in its entirety, has the approval of this court. Singletary v. South Carolina, 281 S.C. 444, 447, 316 S.E.2d 369, 371 (S.C. 1984) (Littlejohn, C.J.).

Usage: Wisconsin jury instructions define "malicious" acts as those resulting from hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. Unified Catholic Schools of Beaver Dam Educational Ass'n v. Universal Card Services Corp., 34 F. Supp. 2d 714, 718 (Wis. 1999) (Adelman, J.).

In the view we take of this case we do not find it necessary to consider the authorities cited, or the views pressed pro and con as to whether a malicious act, such as is complained of in this case, is within the terms of this article of the Code. Fernandez y Perez v. Perez y Fernandez, 202 U.S. 80, 93 (1906) (Day, J.).

ACTUAL MALICE Knowledge or recklessness that a libelous statement one makes is false. Actual malice is the standard used for the defamation or libel of a public figure. It requires the victim to show that the author (or publisher) of the libel wrote something the author knew was false, knowingly put the victim in a false light, or acted with disregard for the truth of the matter. Actual malice became a constitutional protection of the freedom of speech and the press against suits of actions for defamation, following New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Malice in other contexts may be termed "actual malice" as a matter of emphasis, in which case the malice implied is usually express malice — deliberate or intentional intent to harm a person's reputation, rather than recklessness.

Derivation: Because the Constitution used the term "actual malice," and not merely the term "malice" or "implied malice," we found that the term "actual malice" denoted "express malice or malice in fact." In this regard, Black's Law Dictionary defines "express malice" as "[t]he intent to kill or seriously injure arising from a deliberate, rational mind." In Merrow, we also concluded that actual malice was something more than implied malice, which, we noted, had been defined "to mean conduct exhibiting a 'reckless disregard for human life.'" Finally, we stated that "'actual malice' requires a deliberate intention to do wrong." Phillips v. Hanse, 637 S.E.2d 11, 12-13 (Ga. 2006) (Sears, C.J.).

"Actual malice" has been defined as "ill will, malevolence, grudge, spite, wicked intention, or a conscious disregard of the rights of another." Adkins v. Crown Auto, Inc., 488 F.3d 225, 234 (4th Cir. 2007) (King, J.).

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (Brennan, J.).

Actual malice in a defamation case is a term of art. Unlike common-law malice, it does not include ill-will, spite, or evil motive. Rather, to establish actual malice, a plaintiff must prove that the defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was true or not." Huckabee v. Time Warner Entertainment Co. L.P., 19 S.W.3d 413, 420 (Tex. 2000) (Phillips, C.J.).

Usage: As further evidence that the Second Article was written and published with actual malice, Medure offers the fact that Hart did not interview certain individuals when writing the story. Medure v. New York Times Co., 60 F. Supp. 2d 477, 491 (W.D. Pa. 1999) (Cohill, J.).

If we were to reverse, we might hold that the speech at issue in this case is subject to suit only if made with actual malice, thereby inviting respondent to amend his complaint to allege such malice. Nike, Inc. v. Kasky, 539 U.S. 654, 659 (2003) (Stevens, J., concurring).

Ill-will, improper motive or personal animosity plays no role in determining whether a defendant acted with "actual malice." Standing alone, however, evidence of ill will is not sufficient to establish actual malice. Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163, 183 (2d Cir. 2000) (Weinstein, J.).

See also: DEFAMATION, DEFAMATION OF A PUBLIC FIGURE; RECKLESSNESS, RECKLESS DISREGARD FOR THE TRUTH (KNOWING DISREGARD FOR THE TRUTH); MALICE, EXPRESS MALICE.

EXPRESS MALICE An intention to cause a wrongful result by one's action. Express malice is a specific intent to cause a specific wrongful harm. Express malice is malice arising from an intent and not from recklessness or callous disregard for the results that might flow from one's actions. Express malice in torts is sufficient to warrant punitive damages even for tortious conduct that otherwise would give rise only to actual damages.

In actions for libel or defamation, express malice is the intent that an individual's reputation in fact be harmed through the association of a false claim or story with that individual. Evidence of express malice is necessary to overcome a privilege that would otherwise bar discovery or production of the libelous or defamatory text. Actual malice is sometimes used interchangeably with this sense of express malice.

Derivation: While CALJIC No. 8.11 defined express malice as "an intention unlawfully to kill a human being," CALJIC No. 8.20 defined premeditation as "considered beforehand." Gomez v. Ryan, 2007 WL 2109168 (E.D. Cal. 2007) (Beck, M.J.).

Usage: However, Plaintiff has not alleged "express malice" in the defamation count. "Express malice" has been defined as "ill will, hostility, and evil intention to injure and defame." Demby v. English, 667 So. 2d 350, 353 (Fla. 1st DCA 1995). The factual allegations in this count state only that incorrect — i.e., untrue — statements were made, and Plaintiff alleges that each alleged defamer acted either with negligence or with reckless disregard, or, in a few instances, maliciously, (see TAC ¶ ¶ 173, 175, 210, 264, 267, & 270); in other words, malice is alleged only as to a few Defendants, and even as to those few it is alleged alternatively to negligence and recklessness. This alternative pleading does not equate to an allegation of "express malice." Thus, because of the common law qualified privilege, the defamation claims are not sufficiently pleaded and are due to be dismissed. Pierson v. Orlando Reg'l Healthcare Sys., Inc., No. 6:08-cv-466-Orl-28GJK, 2010 WL 1408391, at *10 (M.D. Fla. Apr. 6, 2010) (Antoon, J.).

In other words, if you are reasonably satisfied from the evidence that the Defendants imputed the charge of perjury to the Plaintiff, of which he was not guilty, then you may infer that it was maliciously made and it is not necessary to prove any express malice or ill-will in order to warrant a verdict for punitive damages in favor of the Plaintiff. Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 298 (1971) (Stewart, J.).

See also: EXPRESSION (EXPLICIT OR EXPRESS); MALICE, ACTUAL MALICE.

GENERAL MALICE (UNIVERSAL MALICE) An unfocused intent to do harmful things or allow harmful events. General malice is an intent to do something harmful and unjustified without specificity as to the act itself. General malice is similar to the common law idea of a depraved heart or to extreme or depraved indifference, the attitude of a person who acts without care toward others, with knowledge that harm is likely to result from the action, or with an intent that such harms will result but without an intent to harm a particular victim.

Universal malice is a form of general malice adopted in some jurisdictions to define first-degree murder.

Derivation: General malice is wickedness, a disposition to do wrong, a "black and diabolical heart, regardless of social duty, and fatally bent on mischief." Elmore v. Atlantic Coast Line Railroad Co., 127 S.E. 710, 715 (N.C. 1925) (Clarkson, J.).

A person commits the crime of murder in the first degree if: . . . (d) Under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another . . . Colo. Rev. Stat. Ann. § 18-3-102 (2009).

Universal malice is evinced by acts that are calculated to put the lives of many persons in danger, without being aimed at anyone in particular. People v. Candelaria, 107 P.3d 1080, 1088 (Colo. Ct. App. 2004) (Graham, J.).

Usage: Defendant first contends the trial court erred in denying his motion for judgment of acquittal on the attempted extreme indifference murder count. He asserts that, because his alleged conduct had been directed specifically at his stepdaughter, the evidence failed to establish the "universal malice" necessary for a conviction of attempted extreme indifference murder. People v. Perez, 972 P.2d 1072, 1073 (Colo. Ct. App. 1998) (Briggs, J.).

A drunk can open a knife deliberately, yet strike another with it motivated by only general malice or even just acting recklessly. In this regard, we note that this court has upheld the provision of a lesser included general intent instruction in an intoxication case even though the defendant had loaded a gun, charged a police officer, and fired several shots. U.S. v. Abeyta, 27 F.3d 470, 475 (10th Cir. 1994) (White, J.).

See also: MURDER, EXTREME-INDIFFERENCE MURDER (DEPRAVED-HEART MURDER OR DEPRAVED MIND MURDER).

IMPLIED MALICE Malice implied from events. Implied malice is a construction of a person's state of mind derived not from the person's statements or evidence before or during an act but is construed from the act itself in light of the evidence of the person's knowledge at the time of the action.

Derivation: The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them, is merely to adopt another fiction, and to disguise the truth. The truth was, that his failure or inability to predict them was immaterial, if, under the circumstances known to him, the court or jury, as the case might be, thought them obvious. Commonwealth v. Pierce, 138 Mass. 165, 178 (Mass. 1884) (Holmes, J.).

Usage: "Malice," as used by courts and lawyers in the last century, was a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings. As the dissent correctly states, post, in some instances (especially when it was modified by terms such as "actual" or "express," or in criminal law, where terms were generally more strictly construed than in civil law), it meant what the dissent says it meant — actual ill will, spite, or intent to injure. On the other extreme, in tort law, it was often used without modification to mean what was sometimes called "implied malice" — a purely fictional malice that was conclusively presumed to exist whenever a tort resulted from a voluntary act, even if no harm was intended. The term was sometimes, though not often, used in this fictional sense as a ground for punitive damages. Smith v. Wade, 461 U.S. 30, 41 (1983) (Brennan, J.).

MALICE AFORETHOUGHT Premeditation of a wrongful act. Malice aforethought is the existence of an intent to commit some harmful act that a person has prior to acting on that intention. Malice aforethought need not be specific to a particular harm that results, as it is a general intention to commit the act rather than an intention to cause a specific result. Malice aforethought is still used to describe premeditation in some jurisdictions for indictments for intentional or premeditated crimes. It was famously the mental state required under the common law to commit murder.

Derivation: *Bouvier, 1853,* MALICE AFORETHOUGHT, *pleadings.* In an indictment for murder, these words, which have a technical force, must be used in charging the offence; for without them, and the artificial phrase *murder,* the indictment will be taken to charge manslaughter only. Fost. 424; Yelv. 205; 1 Chit. Cr. Law, *242, and the authorities and cases there cited.

2. Whenever malice aforethought is necessary to constitute the offence, these words must be used in charging the crime in the indictment. 2 Chit. Cr. Law, *787; 1 East, Pl. Cr. 402; 2 Mason, R. 91.

In a prosecution for murder the presence of sufficient provocation or heat of passion negates the existence of the requisite malice

aforethought. In the usual case, this instruction supplements the self-defense instructions. Thus, in a prosecution for murder, even though the defense of self-defense fails, as it might for excessive retaliation by the defendant, the jury might still find the original attack sufficient to constitute provocation, which would preclude a finding of malice aforethought and reduce the crime to manslaughter. Since the refusal to instruct on provocation would be erroneous in a prosecution for murder, it was erroneous here. People v. St. Martin, 463 P.2d 390, 393 (Cal. 1970) (Peters, J.).

While we are mindful of previous opinions from the appellate courts of this state which have treated intent to kill and malice as separate requirements, we, much like both parties and the trial judge below, fail to discern any significant difference between general intent to kill and malice aforethought as they pertain to ABIK. Since the definition of malice aforethought encompasses general intent to kill, we find it difficult to reconcile a manner in which one could find malice aforethought and yet not find general intent to kill. South Carolina v. Kinard, 646 S.E.2d 168, 170 (S.C. Ct. App. 2007) (Short, J.).

"Malice aforethought" is a fixed purpose or design to do some physical harm to another which exists before the act is committed. It does not have to exist for any particular length of time. Iowa v. Bentley, 757 N.W.2d 257, 265 (Iowa 2008) (Cady, J.).

So long as the actor is not precluded by his belief from possessing a state of mind that amounts in fact to malice aforethought, and does indeed possess a state of mind of that sort. I understand the majority to refer to implied malice aforethought when they use the phrase "conscious disregard for life." And I understand them to refer to express malice aforethought when they use the phrase "intent to kill." As I have explained in the text, bare intent to kill is not enough for express malice aforethought, since it is neither deliberate nor wrongful. People v. Blakeley, 999 P.2d 675, 686 (Cal. 2000) (Kennard, J.).

Malice aforethought is defined as: a fixed purpose or design to do some physical harm to another existing prior to the act complained of; it need not be shown to have existed for any length of time before, . . . ; it is sufficient if such purpose was formed before and continued to exist at the time of the injury. Iowa v. Loeum, 728 N.W.2d 60 (Table), 1 (Iowa Ct. App. 2006) (Huitink, J.).

Usage: A defendant acts with malice aforethought when he engages in "conduct which is reckless and wanton, and a gross deviation from a reasonable standard of care, of such a nature that the jury is warranted in inferring that [the] defendant was aware of a serious risk of death or serious bodily harm." United States v. Leonard, 439 F.3d 648, 651 (10th Cir. 2006) (McConnell, J.).

The substance of this instruction is that the intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing, but that it may spring up at the instant, and may be inferred from the fact of killing. Allen v. U.S., 164 U.S. 492, 495 (1896) (Brown, J.).

See also: PREMEDITATION (PREMEDITATE).

MALICIOUS ARREST *See:* ARREST, MALICIOUS ARREST.

MALICIOUS DEFENSE *See:* DEFENSE, MALICIOUS DEFENSE.

MALICIOUS MISCHIEF *See:* MISCHIEF, CRIMINAL MISCHIEF (MALICIOUS MISCHIEF).

MALICIOUS PROSECUTION *See:* PROSECUTION, MALICIOUS PROSECUTION.

MALO ANIMO *See:* MALUM, MALO ANIMO.

MALPRACTICE Harm caused by a professional's wrongful or unskillful act or omission. Malpractice describes any action, omission, or series of actions by a member of a profession or trade that harms the interests of the person served by the professional (or, in some cases, threatens the interests of persons served by the profession) and that does not conform to the generally accepted standards for such actions in the profession or trade. Malpractice was once commonly regulated as a crime, and while this is still occasionally true, the more important effect in criminal law is to bar the use of a defense that might be raised to a criminal charge for which professional practice might otherwise be a defense.

Malpractice is generally a basis for civil liability, both as the basis for a claim in negligence and, in the case of members of certain professions, a claim of breach of fiduciary duty. To be a basis for a civil claim, the malpractice must have been a proximate cause of demonstrable harm to the plaintiff. Malpractice in some professions and trades is regulated by professional boards, such as the state bar or a cosmetology board. Although various codes or rules may establish minimum standards of performance for the practice of a trade or profession, these codes or rules are not the measure of malpractice, which depends upon the generally accepted standards for such actions in the profession or trade. The standard for the knowledge and skill expected of a practitioner of a profession or trade will therefore vary according to the state of the practice. The standards of malpractice are not intended to bar innovation or progress, and the mere fact that an experimental procedure is not received by the leaders of a profession or trade as generally accepted does not mean that the procedure constitutes malpractice, but a failure both to test properly and fully such a procedure by means that are generally accepted and to use the utmost care to avoid harm from such a procedure to the person the practitioner serves may amount to malpractice. Note: Bouvier considers this to be a Latin expression, but it is an Anglicized hybrid of Latin and Greek.

Derivation: *Bouvier, 1853*, MALA PRAXIS, *crim. law.* A Latin expression, to signify bad or unskilful practice in a physician or other professional person, as a midwife, whereby the health of the patient is injured.

2. This offence is a misdemeanor (whether it be occasioned by curiosity and experiment or neglect) because it breaks the trust which the patient has put in the physician, and tends directly to his destruction. 1 Lord Raym. 213. See forms of indictment for mala praxis, 3 Chitty Crim. Law, 863; 4 Wentw. 360; Vet. Int. 231; Trem. P.C. 242. Vide also, 2 Russ. on Cr. 288; 1 Chit. Pr. 43; Com. Dig. Physician; Vin. Ab. Physician.

3. There are three kinds of mal practice. 1. Wilful mal practice, which takes place when the physician purposely administers medicines or performs an operation which he knows and expects will result in danger or death to the individual under his care; as, in the case of criminal abortion.

4. — 2. Negligent mal practice, which comprehends those cases where there is no criminal or dishonest object, but gross negligence of that attention which the situation of the patient requires: as if a physician should administer medicines while in a state of intoxication, from which injury would arise to his patient.

5. — 3. Ignorant mal practice, which is the administration of medicines, calculated to do injury, which do harm, and which a well educated and scientific medical man would know were not proper in the case. Besides the public remedy for mal practice, in many cases the party injured may bring a civil action. 5 Day's R. 260; 9 Conn. 209. See 31. & Rob. 107; 1 Saund. 312, n. 2; 1 Ld. Raym. 213; 1 Briand, Méd. Lég. 50; 3 Watts, 355; 9 Conn. 209.

Medical malpractice is defined as the unwarranted departure from generally accepted standards of medical practice resulting in injury to a patient, including all liability-producing conduct arising from the rendition of professional medical services. To prevail in a medical malpractice action, a plaintiff must establish a duty owed by the physician to the patient, a breach of that duty by the physician, that the breach was the

proximate cause of the harm suffered, and the damages suffered were a direct result of the harm. Smith v. Friends Hospital, 928 A.2d 1072, 1075 (Pa. Super. Ct. 2007) (McCaffery, J.).

However, in Willis, the Texas Supreme Court held a legal malpractice claim is in the nature of a tort for purposes of determining the statute of limitations, but it did not hold that legal malpractice is a personal injury action. Taylor v. Wilson, 180 S.W.3d 627, 630 (Tex. App. 2005) (Anderson, J.).

This court has concluded that legal malpractice is "premised upon an attorney-client relationship, a duty owed to the client by the attorney, breach of that duty, and the breach as proximate cause of the client's damages." As a general rule, a legal malpractice action does not accrue until the plaintiff knows, or should know, all the facts relevant to the foregoing elements and damage has been sustained. Hewitt v. Allen, 43 P.3d 345, 347–48 (Nev. 2002) (Becker, J.).

praxis . . . A. doing, transaction, business . . . 2. result or issue of a business, esp. good result, success . . . II. doing . . . 2. action, exercise . . . 3. euphem. for sexual intercourse . . . 4. magical operation, spell . . . III. action, act, . . . IV. doing, faring well or ill, fortune, state, condition . . . V. practical ability 2. practice, i.e. trickery, treachery, . . . VI. exaction of money, recovery of debts, arrears, etc. . . . 2. exaction of vengeance, retribution . . . VII. public office . . . VIII. discourse, lecture of a rhetorician or philosopher. Henry George Liddell & Robert Scott, A Greek-English Lexicon q.v. (Sir Henry Stuart Jones & Roderick McKenzie, eds., Clarendon Press 1940).

mālus, a, um. bad, in the widest sense of the word, evil, wicked, injurious, destructive, mischievous, hurtful. Charlton T. Lewis & Charles Short, A Latin Dictionary q.v. (Clarendon Press, 1879).

Usage: Medical malpractice is negligence of a healthcare professional in the diagnosis, care, and treatment of a patient. A medical malpractice claim is an action for professional negligence, requiring proof of (1) the existence of a duty; (2) a breach of that duty; (3) injury; and (4) a causal connection between the duty breached and the injury suffered. Perkins v. Susan B. Allen Memorial Hospital, 146 P.3d 1102, 1104 (Kan. Ct. App. 2006) (Rulon, C.J.).

In this medical malpractice case, the infant plaintiff is severely retarded and his right leg has been amputated at the hip level, including one-half of his hip. Edwards v. Our Lady of Lourdes Hospital, 526 A.2d 242, 243 (N.J. 1987) (Coleman, J.A.D.).

In other words, the right to sue for legal malpractice is not "connected with or growing out of" the relationship between the mortgagor and mortgagee; rather, the legal malpractice claim is connected to and grows out of the separately established relationship between the attorney and the client. Law Office of David J. Stern, P.A. v. Security National Servicing Corp., 969 So. 2d 962, 969 (Fla. 2007) (Bell, J.).

Any examiner of title who knowingly and fraudulently makes any false report to the court as to any matter relating to any title which is sought to be registered under this article, as to any matter affecting the same, or as to any other matter referred to him under this article or who fraudulently conspires with any other person or persons to use this article in defrauding any other person or persons, firm, or corporation or who is guilty of any willful malpractice in his office shall be guilty of a felony and be punished by imprisonment for not less than one nor more than ten years. Ga. Code Ann. § 44-2-46 (2009).

See also: PRACTICE, MALPRACTICE, LAWYER MALPRACTICE; ETHICS, LEGAL ETHICS, MALPRACTICE.

MALPRACTICE DAMAGES *See:* DAMAGES, MALPRACTICE DAMAGES, LOSS-OF-CHANCE DOCTRINE (LOST CHANCE).

LEGAL MALPRACTICE A careless or unskillful act or omission committed by an attorney at law. Legal malpractice is an attorney's failure to perform the office and services of an attorney with the degree of skill and care generally accepted as the standard required by an ordinary member of the bar that injures a client or person who similarly would have been served by the attorney or who foreseeably would have been injured by an injury to the client or person served. The failure to perform may occur either by failing to do something that a competent and careful lawyer would do or by doing something in a manner that a competent and careful lawyer would not do. Legal malpractice is the basis for a cause of action against an attorney by a client who is injured as a result of that attorney's malpractice. Owing to the frequency with which attorneys practice as members of partnerships, the liability of one partner for malpractice ordinarily results in the liability of the entire partnership. Regardless of any civil action that may be brought for an incident of legal malpractice, it is also the basis for the discipline of an attorney by the bar or other licensing authority according to which the attorney is (or would be) licensed to practice law, as well as by any court or administrative body before which the attorney practices in which practice the attorney commits malpractice.

Derivation: Legal malpractice is defined as the failure by an attorney to "exercise that degree of skill commonly exercised by an ordinary member of the legal community." Gonzalez v. Ellenberg, 799 N.Y.S.2d 160 (N.Y. 2004) (Schmidt, J.).

In order to recover for malpractice, plaintiffs generally must establish that the lawyer's inadequate performance was a "but for" cause of quantifiable damage. Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method (Aspen Law & Business, 1998).

A claim for legal malpractice is stated when the plaintiff alleges there was an attorney-client relationship, the attorney was guilty of negligence or professional impropriety in his relationship with the client, and the attorney's misconduct caused the client some loss. (citations omitted). . . . The proper method of determining whether an attorney's malpractice is a cause in fact of damage to his client is whether the performance of that act would have prevented the damage. Prestage v. Clark, 723 So. 2d 1086, 1091 (La. Ct. App. 1998) (Parro, J.).

Usage: It is true that in States that do not allow malpractice actions against HMOs the fiduciary claim would offer a plaintiff a further defendant to be sued for direct liability, and in some cases the HMO might have a deeper pocket than the physician. Pegram v. Herdrich, 530 U.S. 211, 235–36 (2000) (Souter, J.).

While a state limitations period for legal malpractice is the closest state-law analogy for the claim against the union, application of such a limitations period would not solve the problem caused by the too-short time in which the employee could sue the employer, and would preclude the relatively rapid resolution of labor disputes favored by federal law. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 152 (1983) (Brennan, J.).

MEDICAL MALPRACTICE (MED. MAL. OR MED/MAL) A careless or unskillful act or omission committed by a medical professional. Medical malpractice is the failure by a doctor, hospital or other provider of medical services to provide that service with the degree of skill and care generally accepted among providers of such services as the standard required in providing it that either injures a person who would have been served by the provider or risks injury to a person in the position of that person. A civil action in medical malpractice may arise for an injury or harm sustained as a result of malpractice in tort, particularly as a claim in negligence. A civil action in medical malpractice may arise in contract both for an injury and for a failure to provide services contracted, and in certain circumstances in which fiduciary reliance exists, a civil action may arise from medical malpractice for breach of fiduciary duty. Medical malpractice is also the basis for discipline by a medical

licensing board or by the accrediting agency of an institution, such as a hospital, in which malpractice occurs. Medical malpractice may occur either by failing to do something that a competent and careful medical services provider would do in a given circumstance or by doing something in a manner that a competent and careful medical services provider would not do.

Derivation: An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. Todd v. Johnson, 965 So. 2d 255, 256 (Fla. Dist. Ct. App. 2007) (Benton, J.).

Usage: In the circumstance of medical malpractice, where the cry for a discovery rule is loudest, the Court has been emphatic that the justification for such a rule does not extend beyond the injury. Rotella v. Wood, 528 U.S. 549, 550 (2000) (Souter, J.).

CAPTAIN OF THE SHIP DOCTRINE (DOCTRINE OF THE CAPTAIN OF THE SHIP) A team leader's vicarious liability for negligence by medical staff. Under the captain of the ship doctrine, a doctor is potentially liable for any negligent care provided by members of a medical staff reporting to that doctor. It is another term for vicarious liability for medical malpractice.

Derivation: Finally, Dr. Shane's invocation of the doctrine of "the captain of the ship," a concept that makes a physician vicariously liable for the negligence of others who were involved in caring for the same patient, but were not under the doctor's control or supervision, has been expressly rejected in New Jersey. We now reaffirm our rejection of this doctrine as incompatible with our State's tort jurisprudence. C.W. v. Cooper Health System, 906 A.2d 440, 454 (N.J. Super. Ct. App. Div. 2006) (Fuentes, J.A.D.).

Usage: The jury found that under the Pennsylvania "captain of the ship" doctrine, Dr. Lipshutz was vicariously liable for Kohn's negligence. Mazer v. Security Insurance Group, 507 F.2d 1338, 1340 (3d Cir. 1975) (Gibbons, J.) (en banc).

See also: LIABILITY, VICARIOUS LIABILITY.

PROFESSIONAL MALPRACTICE A careless or unskillful act or omission by a member of a profession or trade. Professional malpractice is the failure of any member of a profession or trade that harms the interests of the person served by the professional or tradesperson (or in some cases threatens the interests of persons served by such people) and that varies from the generally accepted standards for such actions in the profession or trade.

Professional malpractice may occur by the principal or any agent or employee of the principal in the profession or trade, and the liability for professional malpractice is generally to be ascribed to the principal, to the agent or employee, and to any firm or entity that employs or associates the principal for the provision of such services to others.

The determination of what endeavors amount to a profession is straightforward in certain lines of work customarily known as professions or designated as professions in the common law, such as lawyers and doctors. Yet what amounts to a profession is broader than that and includes many practices that customarily have been thought to be both trades and practices, such as banking, accounting, and financial counseling, as well as practices that have become regulated, such as cosmetology, barbering, and realty. The defining elements of what amounts to a profession are whether it is performed according to common body of knowledge and skill known to its practitioners but not generally to members of the public, and whether there is a customary or mandated process for a person to acquire and to demonstrate a minimal competence in that body of knowledge and skill that is required prior to the commencement of practice in the field.

Derivation: Idaho Code § 5-219(4) defines "professional malpractice" as "wrongful acts or omissions in the performance of professional services by any person, firm, association, entity or corporation licensed to perform such services under the law of the state of Idaho." Nerco Minerals Co. v. Morrison Knudsen Corp., 140 Idaho 144, 148 (Idaho, 2004) (Kidwell, J.).

Usage: Professional malpractice actions, for example, question the defendant's integrity and competence and may affect his professional standing. Rush v. Savchuk, 444 U.S. 320, 331 (1980) (Marshall, J.).

See also: PROFESSION.

MALUM (MALUS OR MALA OR MALO OR MALE OR MAL) Evil, wicked, or wrong. Malum is a form of malus, the ancient designation for anything wrong, whether as a manifestation of evil or as a matter of inconvenience or prohibition. From malus come many phrases incorporating a variant of the word as well as words derived from it in whole, such as malice, and words with a derivation as a prefix, such as malpractice.

Derivation: mālus, a, um, adj. [Sanscr. mala, dirt; Gr. melas, black; cf. macula; Germ. mal in Mutter-mal, etc.]. — I. . . . a, um, bad, in the widest sense of the word (opp. bonus), evil, wicked, injurious, destructive, mischievous, hurtful; of personal appearance, ill-looking, ugly, deformed; of weight, bad, light; of fate, evil, unlucky, etc. . . . 1. mālum, i, n., any thing bad, an evil, mischief, misfortune, calamity, etc. . . . B. In partic. (a). Punishment; hurt, harm, severity, injury . . . (b). Wrong-doing . . . (g). As a term of abuse, plague, mischief, torment . . . 2. māle, adv., badly, ill, wrongly, wickedly, unfortunately, erroneously, improperly, etc. Charlton T. Lewis and Charles Short, A Latin Dictionary q.v. (Clarendon Press, 1879).

MALA FIDES Bad faith. Mala fides is bad faith, or an action made with an intent to mislead or to harm. Though it is the opposite of good faith, because both terms are matters of intent, the absence of good faith, by itself, is not enough to amount bad faith.

Derivation: *Bouvier, 1853,* MALA FIDES. Bad faith. It is opposed to *bona fides,* good faith.

Bad faith in fact, or mala fides, is the opposite of good faith, and consists in guilty knowledge, or willful ignorance, showing a vicious or evil mind . . . Burnham Loan & Investment Co. v. Sethman, 64 Colo. 189, 171 P. 884, 887 (1918), quoted in Myers v. Lashley, 44 P.3d 553 (Okla. 2002) (Opala, J.).

mālus, a, um, adj. [Sanscr. mala, dirt; Gr. melas, black . . .] I. . . . bad, in the widest sense of the word (opp. bonus), evil, wicked, injurious . . . Charlton T. Lewis & Charles Short, A Latin Dictionary q.v. (Clarendon Press, 1879).

fīdo, fisus sum . . . 3, v. n. [root in Sanscr. bandh, unite; Gr. peithô, persuade . . .], to trust, confide, put confidence in . . . Charlton T. Lewis & Charles Short, A Latin Dictionary q.v. (Clarendon Press, 1879). fĭdes, ĕi, . . . f. . . . II. Transf., that which produces confidence or belief . . . Charlton T. Lewis & Charles Short, A Latin Dictionary q.v. (Clarendon Press, 1879).

See also: FIDUCIARY, FIDUCIARY DUTY, DUTY OF GOOD FAITH.

MALO ANIMO Malice or evil intention. Malo animo, literally Latin for a wicked purpose, is malice implied from