

PROFESSIONAL LIABILITY UPDATE

September 20, 2001

Issue No. 109

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ATTORNEY TO ATTORNEY INDEMNITY

California Law

The First District Court of Appeal, Division Three has rejected cross-complaints for indemnity between co-counsel endorsing a bright line rule. By contrast, Division Two has rejected a bright line rule in favor of a case-by-case analysis. The California Supreme Court has accepted review in both cases.

by Jennifer A. Becker

**American Equity Insurance Co. v. Beck** 01 C.D.O.S. 5395 (rev. granted 9/19/01)

Michael and Robert Stephens hired Daniel Beck to represent them in a truck rollover case against General Motors. Beck associated L.L. McBee, a Texas attorney, for his expertise. Beck and McBee associated Ronald Wecht as local counsel in San Francisco.

During trial, General Motors offered six million dollars to settle the case and the Stephens directed McBee to accept. McBee failed to contact General Motors to discuss settlement and the jury returned a defense verdict. The Stephens sued McBee and Wecht. Both attorneys settled and Beck was paid \$224,000 out of the McBee settlement to satisfy Beck's claims against McBee.

Beck sued Wecht for the fee he would have recovered if the offer had been accepted. Wecht cross-complained for indemnity, breach of fiduciary duty, comparative fault and breach of the covenant of good faith and fair dealing. Wecht's insurer, American Indemnity,

sued Beck in subrogation, seeking a contribution for the settlement paid by Wecht to the Stephens. All three parties successfully moved for summary judgment of the others' claims.

The Court of Appeal held that Beck had no claim for his lost fee because Wecht had no fiduciary duty to him. The court considered *Pollack v. Lytle* (1981) 120 Cal.App.3d. 931, where one attorney was permitted to sue associated, concurrent counsel based on simple agency principles. The court found that the better reasoned case was *Sanders v. Weisburg & Aronsen* (1999) 74 Cal.App.4<sup>th</sup> 869, which held that concurrent associated counsel have no claim against each other on public policy grounds. The attorney's duty of undivided loyalty to the client should not be diluted by considerations of duty to co-counsel.

The court also rejected American Indemnity's complaint in subrogation

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against Beck. There are no fiduciary duties between co-counsel. This is true even if, as a practical matter, a lawsuit between co-counsel will not cause the attorneys to divulge client secrets or

violate their duty of loyalty to their client. Only by establishing a lack of fiduciary duty between co-counsel from the outset, can clients be assured of each attorney's undivided loyalty.

***Musser v. Provencher*** 01 C.D.O.S. 5821 (rev. granted 9/19/01)

Sandra Musser represented Pam Scott in her divorce action against Mark Scott. When Mark Scott declared bankruptcy, Musser retained Douglas Provencher, a bankruptcy attorney, to obtain relief from the automatic stay so she could proceed with a motion to set spousal and child support. Provencher failed to do so but advised Musser that she could proceed as long as entry of order was delayed until after the stay was lifted. This advice was erroneous and Pam Scott was forced to accept reduced support or face a punitive damages claim by Mark Scott.

Both Pam and Mark Scott sued Musser. After Provencher refused to contribute to any settlement, Musser filed a cross-complaint, alleging as damages fees paid to Pam and Mark Scott, fees waived by Musser, and expenses incurred in defending the actions. During trial motions *in limine*, the Trial Court ruled that damages pertaining to the Scott settlements were an unassignable claim by the Home. Musser was barred from seeking her waived fees and costs from Provencher because of the *res judicata* effect of her settlement with Pam Scott.

On appeal, the Court focused on the attorney to attorney indemnity issues in cases where an attorney sued for malpractice cross-complains against the

co-counsel she retained to advise her on the subject matter that is the basis of the legal malpractice claim.

The Court noted that *Pollack v. Lytle* (1981) 120 Cal.App.3d 931 allowed a lawsuit against concurrent, associated counsel based on simple agency principles. It weighed the effect of *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th, 1509, that held a successor law firm sued for malpractice may seek indemnity from a predecessor law firm who has also been sued by the client. The *Crouse* Court noted that the predecessor attorney sued by the client had no privileged communications or attorney work product to protect.

The Court considered *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, which prohibited an attorney sued for malpractice seeking indemnity against concurrent *Cumis* counsel due to the potential for conflicting interests during the representation where an insurance company has reserved its rights. The Court interpreted *Kroll* to approve of a case by case evaluation of the particular facts to determine if there were potential or actual conflicts in the role of concurrent counsel, a potential for violation of attorney-client privilege, or a conflict between the target

attorney's duties towards the client and his self-protective instincts.

The Musser Court interpreted both *Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker* (2000) 82 Cal.App.4th 768 and *Saunders v. Weissburg & Aronsen* (1999) 74 Cal.App.4th 869, to reject the proposed cross-complaints for indemnity based on the particular facts of each case, not an application of a bright line rule.

The Court found the factual setting was analogous to *Pollack* and *Crouse*. The joint client sued Musser for malpractice. Provencher was associated to perform a

particular task and Musser's complaint was based on simple agency principles. At no time during the representation was there a potential for conflict between Provencher's duty to Musser and his duty to Pam Scott. Pam Scott, as part of her settlement with Musser, expressly waived her attorney-client privilege with Provencher. The Court allowed the cross-complaint to proceed in these particular factual circumstances.

*Comment:* By accepting both cases for review, the Supreme Court has signaled that it will endorse one approach over the other: either a bright line rule or a case by case analysis.