

PROFESSIONAL LIABILITY UPDATE

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ATTORNEY-TO-ATTORNEY INDEMNITY

California Law

The California Supreme Court has endorsed a case-by-case analysis in determining the propriety of attorney-to-attorney indemnity actions when an attorney seeks recovery for his or her malpractice losses against concurrent or co-counsel. Furthermore, the Court has ruled it is not an impermissible assignment for an insurer to succeed to such an indemnification claim. By contrast, when an attorney seeks recovery from another attorney for fees lost due to the other attorney's malpractice against a mutual client, the Court has determined that a bright line rule of "no duty" precludes recovery.

by Jennifer A. Becker and William L. Jacobson

Musser v. Provencher 02 C.D.O.S 5815

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 sums 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 Musser was barred from seeking her waived fees and costs from Provencher because of the *res judicata* effect of her settlement with Pam Scott. It also ruled that damages pertaining to the Scott settlements were an unassignable claim by the Home.

The Supreme Court decided two issues: whether concurrent counsel or co-counsel may sue one another for indemnification of malpractice damages and whether an attorney's insurer may be subrogated to the attorney's indemnity claim against co-counsel.

The Court noted that Courts of Appeal have generally precluded indemnification for malpractice in predecessor/successor counsel cases to avoid the creation of conflicts of interest

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and to protect confidential attorney-client communications.

In the context of allowing or precluding concurrent or co-counsel indemnification claims, the Court cited with approval the approach set forth in *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537. *Kroll* required an evaluation of the particular facts of each case to determine if there were potential or actual conflicts between the target attorney's duties towards the client and his self-protective instincts, or a potential for violation of the attorney-client privilege.

Neither concern was particularly strong under the facts in *Musser*. In contrast to the predecessor/successor cases, Provencher could not argue that his self-interest could interfere with his duty to his client due to a potential indemnification claim in the event his co-counsel was sued for malpractice.

The Court warned that protection of the attorney-client privilege, another bar to an indemnification claim between co-counsel, is to be liberally construed. However, Pam Scott had specifically waived her privilege with Provencher

when she settled her action against Musser.

Accordingly, the Court held that the policy considerations underlying the rule against attorney-to-attorney indemnification claims were not present in this particular concurrent counsel case. Therefore it would be unjust to bar Musser's claims for indemnification and contribution from Provencher.

As to the insurer's subrogation claim, the Court acknowledged that legal malpractice claims are not assignable due to policies favoring the protection of the integrity of the attorney-client relationship.

The Court found there was an important distinction between an insurer succeeding to one attorney's indemnification claim against co-counsel and a third party succeeding to the claim of a client. Protection of the attorney-client relationship is not implicated where an insurer seeks to succeed to one attorney's rights of indemnity for co-counsel's proportional fault in a malpractice case. Accordingly, the Court held that the rule against assignment and subrogation of legal malpractice claims did not apply.

***American Equity Insurance Co. v. Beck* 02 C.D.O.S. 5812**

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.

Beck sued Wecht for the fee he would have recovered if the offer had been accepted. Wecht successfully moved for summary judgment of Beck's claims. The Supreme Court accepted Beck's petition for review to decide whether an attorney with a fee interest in a case may sue another counsel for malpractice that reduced the fee.

The Supreme Court rejected the reasoning of *Pollack v. Lytle* (1981) 120 Cal.App.3d 931, which recognized a fiduciary duty between co-counsel under simple agency principles. The Supreme Court instead endorsed the reasoning of *Joseph A. Saunders, P.C. v.*

Weissburg & Aronson (1999) 74 Cal.App.4th 869, which rejected claims such as Beck's as being potentially inconsistent with the attorney's overriding duty to the client.

Although there may be situations where concerns about protecting client confidences and avoiding conflicts might not be presented by a suit between co-counsel over a diminished fee recovery, the Supreme Court opted for a bright line rule: Co-counsel do not have any fiduciary duty to each other to protect their prospective interests in attorneys' fees.