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Gibson, Dunn & Crutcher v. Superior Court: The Attorney's Right to Cross-Complain for Equitable Indemnification From an Opposing Attorney

Joseph E. Thomas

Gibson, Dunn & Crutcher v. Superior Court: The Attorney's Right to Cross-Complain for Equitable Indemnification From an Opposing Attorney

The California Court of Appeal has held that a named attorney-defendant in a legal malpractice action has no right to cross-complain for equitable idemnity against another attorney who is subsequently retained by the plaintiff-former client to correct or minimize the effect of the named defendant's alleged negligence. The court's ruling is ostensibly based on the policy of protecting the attorney-client relationship from potential conflicts of interest. However, a critical analysis of the interests involved, viewed in light of controlling standards of professional legal conduct, creates serious doubts as to the necessity and propriety of such a rule.

I. INTRODUCTION

In the landmark decision of *American Motorcycle v. Superior Court*,[1] the Supreme Court of California held that a concurrent tortfeasor[2] enjoys a common law right to obtain partial indemnification from other concurrent tortfeasors on a comparative fault basis and that the governing provisions of the Code of Civil Procedure Section 428.10 clearly authorize a party defendant to seek indemnification from a previously unnamed party through such a cross-complaint.[3] Having concluded that a defendant may file a

1. 20 Cal. 3d 578, 578 P.2d 889, 146 Cal. Rptr. 182 (1978).

2. The term concurrent tortfeasors is used here as a term of art and is not meant to have a restrictive temporal meaning. *See* RESTATEMENT (SECOND) OF TORTS § 441, Comment d (1965), "[t]o be a concurrent cause, the effects of the negligent conduct of both the actor and third person must be inactive and substantially simultaneous operation." *See* RESTATEMENT (SECOND) OF TORTS § 430, Comment d (1965). "The words 'concurrent tortfeasors,' in a negligence sense, don't have a temporal connotation; rather they mean two or more persons, each of whose negligence was a proximate cause of the plaintiff's loss so that they are concurrently liable." *See also* Safeway Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978) where the supreme court extended the doctrine of equitable partial indemnity to a situation involving two successive tortfeasors.

3. American Motorcycle v. Superior Court, 10 Cal. 3d 578, 605, 578 P.2d 899, 146 Cal. Rptr. 182, 199 (1978).

> Section 428.10 reiterates the propriety of filing such a cross-complaint against a previously unnamed party and section 428.70 explicitly confirms the fact that a cross-complaint may be founded on a claim of total or partial indemnity by defining a "third-party plaintiff" as one who files a cross-complaint claiming the right to recover all or part of any amount for which he may be held liable on the original complaint.

See generally CAL. CIV. PROC. CODE § 428.10 (West Supp. 1978):

cross-complaint for partial indemnity, the Court noted several exceptons to this general rule.[4] The amount and extent of these exceptions have yet to be fully established.[5]

The principal case, *Gibson, Dunn & Crutcher v. Superior Court*,[6] fashions one such exception to the general rule of permitting indemnification among concurrent tortfeasors. Specifically, the court of appeal found that an attorney (hereinafter referred to as Lawyer II) who represents the victim (Client) of another attorney's malpractice (Lawyer I) may not be cross-complained against by Lawyer II for negligently mishandling the client's interests following Lawyer I's malpractice.

This note will discuss the *Gibson* decision in terms of its express and implicit holdings, its policy considerations and possible impact upon the development of comparative fault in light of the *American Motorcycle*[7] holding. This writing will also review the potential problems arising from insulating an attorney from possible claims of indemnification and seek alternative methods for safeguarding the attorney-client relationship.

II. FACTUAL BACKGROUND

In December 1972, Schlumberger Limited entered into a commercial transaction with Union Bank (Bank) to guarantee repayment of Bank's loan to Virtue Bros. Mfg. Co. Ltd. (VBM), a wholly owned subsidiary of Schlumberger. Schlumberger retained the law firm of Kindel & Anderson to consummate the deal. Three

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A party against whom a cause of action has been asserted . . . may file a cross-complaint setting forth . . . any cause of action he has alleged against to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction or occurence . . . as the cause brought against him or (2) asserts a claim, right or interest in the . . . controversy which is the subject of the cause brought against him.

4. 20 Cal. 3d at 607 n. 9, 578 P.2d at 922 n. 9, 146 Cal. Rptr. at 204 n. 9.

There are, of course, a number of significant exceptions to this general rule. For example, when an employee is injured in the scope of his employment, Labor Code Section 3864 would normally preclude a third party tortfeasor from obtaining indemnification from the employer, even if the employer's negligence was a concurrent cause of the injury . . .

Similarly, as we have noted above such a partial indemnification claim cannot properly be brought against a concurrent tortfeasor who has entered a good faith settlement with the plaintiff, because permitting such a cross-complaint would undermine the explicit statutory policy to encourage settlements reflected by the provisions of section 877 of the Code of Civil Procedure. (citations omitted).

5. The supreme court denied certiorari to *Gibson* on August 22, 1979. *See generally*, George & Walkowiak, *Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action*, 8 SW. L. REV. 1, 2 (1976); Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264 (1977).

6. 94 Cal. App. 3d 347, 156 Cal. Rptr. 526 (1979).

7. *See* note 1, *supra*.

years later, VBM defaulted on the loan. Schlumberger paid off Bank pursuant to the loan guaranty in return for which Bank assigned, to Schlumberger, the security interests which it had received from VBM. When Schlumberger attempted to enforce these security interests, VBM filed a petition for reorganization under Chapter XI of the Bankruptcy Act.[8] During the bankruptcy proceedings other creditors of VBM challenged the validity of these security interests. Subsequently, Schlumberger retained two law firms, Gibson, Dunn & Crutcher and Shutan & Trost (Gibson), to assist in enforcing these rights and, with their assistance, settled its differences with the other creditors. Schlumberger claimed that this netted about $1 million less that it would have been entitled to receive if its security interests had been valid and enforced.

Schlumberger, through its attorneys, Gibson, Dunn & Crutcher, filed an action for damages against Union Bank and Kindel & Anderson, the law firm who had acted as legal counsel for Schlumberger in the 1972 loan transaction. The complaint alleged that Bank and Kindel were negligent for failing to provide valid and enforceable security interests and for failing to advise Schlumberger of the risk that these security interests would not be enforceable.

Bank and Kindel filed separate cross-complaints against Gibson and alleged that the firm negligently represented Schlumberger in the bankruptcy proceedings and that this negligence contributed to the losses suffered by Schlumberger. Bank's cross-complaint further alleged that the terms of the settlement "were unreasonable and disproportionate to the risk involved," and the cross-defendants "were further negligent in failing to promptly petition the Bankruptcy Court to lift its stay in the foreclosure

8. Chapter XI of the Bankruptcy Act is a consolidated chapter for all business reorganizations. It contains no special procedure for companies with public debt or equity security holders. However, an advisory role was provided for the Securities and Exchange Commission that will enable the court to balance the needs of public security holders against equally important public needs relating to employment and production. This approach is in contrast to former Chapter X, where the public interest was often determined only in terms of the interest of public security holders.

COMMERCE CLEARING HOUSE, INC., BANKRUPTCY REFORM ACT OF 1978 at p. 78 (1978).

reformation Schlumberger was entitled . . ."[9]

Gibson demurred to Bank's cross-complaint upon the ground that it failed to state a cause of action.[10] The superior court overruled the demurrer after which Gibson appealed to the California Court of Appeal.[11]

III. Implementing a System of Comparative Negligence—Procedural Aspects

Bank and Kindel asserted that their cross-complaints should be allowed because they fit within the rationale of *American Motorcycle v. Superior Court*[12] and *Li v. Yellow Cab*.[13] These cases support the availability of equitable indemnification, comparative or otherwise, as between parties who separately contributed to the plaintiff's loss. The appellate court, however, appeared to have been persuaded by the supreme court decision in *Comden v. Superior Court*[14] which defined a standard limiting the right of an

9. 94 Cal. App. 3d at 350, 156 Cal. Rptr. at 328 (1979).

10. "Pursuant to an agreement among the parties, Gibson has not yet responded to the cross-complaint of Kindel. Nevertheless, since that cross-complaint alleges issues identical with those raised by the bank, Kindel has been recognized as an additional real party in interest in this mandate proceeding." *Id.*

11. *See generally*, statement of facts, 94 Cal. App. 3d at 348-49, 156 Cal. Rptr. at 327-28.

12. *See* note 1, *supra*. The supreme court held that adoption of comparative negligence did not warrant the abolition or contraction of the established joint and several liability doctrine. The court also held under the governing provisions of the Code of Civil Procedure, a named defendant is authorized to file a cross-complaint against any person, whether a party to the action or not, from whom the defendant seeks to obtain total or partial indemnity. *See* discussion in Sears, Roebuck and Co. v. International Harvester Co., 82 Cal. App. 3d 492, 142 Cal. Rptr. 262 (1978). *See also* Adler, *Allocation of Responsibility After American Motorcycle Association v. Superior Court*, 6 Pepperdine L. Rev. 1 (1978).

13. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). The plaintiff and defendant were both negligent in *Li*. Under the traditional contributory negligence doctrine, applied by the trial court, the plaintiff's negligence was a complete bar to her cause of action. The California Supreme Court reversed, adopting the doctrine of comparative negligence wherein the plaintiff's cause of action was not barred but diminished by her proportion of total fault. The landmark of *Li* has been commented upon in numerous law review articles. *See* Englard, *Li v. Yellow Cab Co. - A Belated and Inglorious Centennial of the California Civil Code*, 65 Calif. L. Rev. 4 (1977); Brawn, *Contribution: A Fresh Look*, 50 Cal. St. B. J. 166 (1975); Rosenburg, *Anything Legislatures Can Do Courts Can Do Better?* 62 A.B.A. J. 587 (1976); Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 Pac. L. J. 747 (1976); Note, *Third Party and Employer Liability After Nga Li v. Yellow Cab Company for Injuries to Employees Covered by Workers' Compensation*, 50 S. Cal. L. Rev. 1029 (1977).

14. 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9 (1978). In an action for breach of a distributorship contract and for an injuction refraining the distributor from continuing business activities in plaintiff's name, the trial court ordered the law firm representing plaintiff to withdraw from the case, on the ground that one of its members might be called as a witness in violation of California Rules of Professional Conduct, No. 2-111(A)(4). The supreme court denied plaintiff's petition

attorney to litigate cases arising out of business matters in which he or his firm participated. What the court felt pertinent here was the effect upon the relationship between Lawyer II (Gibson, Dunn & Crutcher) and the client (Schlumberger) when the client's alternatives were under consideration. Lawyer II should not be forced to face a potential conflict between the course which is in his client's best interests and the course which would minimize his exposure to the cross-complaint of Lawyer I.[15]

The *Gibson* court held that in a malpractice action against Kindel, by Schlumberger, Kindel could not cross-complain for partial indemnity against Gibson, even though Schlumberger's claim for malpractice damages against Kindel had been enhanced as a result of the alleged malpractice committed by Gibson.

In reaching this decision, the court relied heavily upon policy considerations stated in *Goodman v. Kennedy*[16] and carved out an additional exception to the general rule announced in *American Motorcycle*, stating "[t]o expose the attorney to actions for negligence brought by parties other than the client, 'would inject considerable self-protective reservations into the attorney's counselling role and tend to divert the attorney from single-minded devotion to his client."[17]

Of further importance to the court's holding was the decision of *Held v. Arant*.[18] Inasmuch as the appellate court decision in *Held* was subsequent to the court of appeal ruling, but prior to the supreme court decision in *American Motorcycle*, the decision did not raise issues of comparative equitable indemnification. However, the court felt it squarely decided that the preservation of the attorney-client privilege precluded a cross-action by Lawyer I against Lawyer II for equitable indemnification. The *Held* court

for a writ of mandate to compel the trial court to vacate its order requiring plaintiff's attorney to withdraw from the case.

15. 94 Cal. App. 3d at 356, 156 Cal. Rptr. at 331.

16. 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976).

17. 94 Cal. App. 3d at 353, 156 Cal. Rptr. at 331.

18. 67 Cal. App. 3d 748, 134 Cal. Rptr. 422 (1977). This case is factually analogous to *Gibson*. In this case Held employed Arant (Lawyer I) to draft an agreement with Nova-Tech, Inc. When litigation arose between the parties Held retained another law firm (Lawyer II) to represent him, under the guidance of Lawyer II, Held paid Nova-Tech a substantial amount in settlement. Held sued Lawyer I for negligence. Lawyer I filed a cross-complaint against Lawyer II and alleged that by way of settlement legally defensible claims had been lost, and asked for indemnification if Lawyer I should be found liable to the plaintiff. The trial court dismissed the cross-complaint and the court of appeal affirmed.

summarized its holding stating that " . . .[b]ecause reasons of policy peculiar to the tripartite relationship of attorney-client-adversary override the principle of equitable indemnity enunciated in such cases as *Herraro* . . . and *Niles* . . . we conclude the first lawyer has no requirement of indemnity from the second."[19]

The *Gibson* court recognized the need for safeguarding the attorney-client relationship in cases where the attorney might be required to face a potential conflict between a course of professional conduct which is in his client's best interest, and a different course, which would minimize his exposure to the cross-complaint of another lawyer. The court fashioned a limited solution to this dilemma by insulating Lawyer II from cross-complaints of Lawyer I.

Mr. Justice Jefferson wrote a vigorous dissent in which he viewed *Goodman* and *Held* as unpersuasive inasmuch as both cases had been decided prior to the supreme court's decision of *American Motorcycle*. In addition *Goodman* was clearly distinguishable, in facts and reasoning, and *Held* was not binding on *Gibson* because it had not been decided by the California Supreme Court.[20]

The result of this decision, in light of *American Motorcycle*, was to create a judicially favored class of citizens, shielded from potential cross-complaints for indemnity which would otherwise be permissible.[21] Public policy considerations peculiar to the attorney-client relationship were dictated to the court of appeal, carving out a new exception to the rule of *American Motorcycle*.

IV. Protecting the Attorney-Client Relationship

The initial impact of *Gibson* is to define an additional exception to the rule announced in *American Motorcycle* limiting an attorney's right to secure indemnity. The court bases their decision on the sound tenets of preserving the attorney-client relationship. However, a closer look at the practical effects of this decision reveals that it does not eliminate a conflict between attorney and client but perpetuates other sources of conflict.[22] To understand

19. 67 Cal. App. 3d at 750, 134 Cal. Rptr. at 422 (1977). *See also* Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 369 P.2d 937, 20 Cal. Rptr. 321 (1962).

20. *Compare* the appellate court decision of American Motorcycle Association v. Superior Court, 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977) with the supreme court decision in American Motorcycle Association v. Superior Court, *See* note 1, *supra*.

21. The importance of having all tortfeasors before the court to secure a defendant's right of indemnity is being subverted to preserve a real or feigned constraint on the attorney-client relationship.

22. *See* Friedenthal, *Joinder of Claims, Courterclaims, and Cross-Complaints: Suggested Revision of the California Provisions* 23 Stan. L. Rev. 1, 13 (1970).

why, one must take a closer look at the relationships existing between Lawyer II and client.

The court, in its desire to protect the attorney-client relationship, fails to make a crucial distinction involving that relationship. There are two separate and distinct relationships between Lawyer II and Client. The initial relationship (relationship A) begins when Client retains Lawyer II to extricate himself from the dilemma caused by Lawyer I's alleged negligence. The second relationship (relationship B) is the fundamental relationship wherein Client retains Lawyer II to sue Lawyer I for malpractice. Since the court failed to distinguish between these two situations, a question arises regarding which relationship the court was attempting to protect. For purposes of this analysis relationships A and B will be examined separately in light of the policy considerations enumerated by the court.

A. Lawyer II's Settlement of Client's Initial Claim—Policy Considerations

In seeking to preserve relationship A the court protects Lawyer II from all cross-complaints seeking indemnification by Lawyer I. The court believes exposing the attorney to actions for negligence brought by parties other than the client would inject undesireable self-protective reservations into the attorney's counselling role. This, the court feels would tend to divert the attorney from his single-minded devotion to his client.[23] It is this untested hypothesis we must now examine to see if it warrants limiting an attorney's liability for damages he improvidently causes.

Upon entering relationship A, Lawyer II is liable to Client for any damage resulting from his negligence and to any third person for damage as a result of acts of fraud or malice.[24] This principle

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The general policy favoring resolution of all related causes in a single action, coupled with the fact that California's narrow definition of a cause of action makes res judicata less effective than it is in most other jurisdictions as a force for compulsory joinder, requires revision of section 427 to provide specifically for mandatory joinder of claims arising out of a single set of transactions or occurrences.

23. 94 Cal. App. 3d at 356, 156 Cal. Rptr. at 331.

24. *See* Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976). Where the court held to make an attorney liable for mere negligence, as opposed to fraud or malice, to a third party, would inject undesirable, self-protective reservations into the attorney's role and cause a dimunition in the quality of legal services received by the client.

was established in *Goodman v. Kennedy*[25] wherein plaintiff's action was prohibited because it was based upon an alleged duty of an attorney to a person not his client.[26] In the present case however, Lawyer I concedes that Lawyer II had no duty to him. Rather, Lawyer I asks Lawyer II to contribute to damages that he caused Client through his negligence. The court correctly points out the *Goodman Case* is factually distinguishable, yet they rely upon those policy considerations in denying Lawyer I's cross-complaint.[27]

Left unanswered, is the question regarding the possible effect Lawyer I's cross-complaint will have on relationship A. Lawyer II owes a duty of care to Client upon entering relationship A. If Lawyer I were permitted to enforce this recognized duty it would not involve an expansion of Lawyer II's existing duty. No additional burden would be placed on the attorney-client relationship since Lawyer II's duty remains solely to his Client. Therefore, Lawyer II would be free to act reasonable, and ethically, with respect to the settlement of Client's case. It merely permits Lawyer I to benefit from the principles of comparative equitable indemnification established in *American Motorcycle*.

The policy consideration seeking assurance that Lawyer II would be able to devote his full energies to Client evaporates under the circumstances found in the instant case. The comparative fault principles, set forth in *American Motorcycle*, are supported by more reasonable policy considerations than a rule of law which protects a lawyer from liability to his client's potential adversaries. Hence, there is no rational basis for denying Lawyer I's cross-complaint to protect relationship A.

B. Lawyer II's Prosecution of Client's Malpractice Claim Against Lawyer I

Relationship B arises when Client retains Lawyer II to sue Lawyer I for Lawyer I's alleged act of malpractice. The court held, that by denying the cross-complaint, this relationship would be better protected because Lawyer II would not be in a position to place his own interests before that of his clients. In addition, the court held that denial of Lawyer I's cross-complaint would assure that Client would avoid the considerable expense involved in

25. *Id.*

26. *Cf.*, Lucas v. Hamm, 56 Cal. 2d 583, 483 P.2d 818, 94 Cal. Rptr. 121 (1956) where the court did away with the privity requirement to sue an attorney for negligence, whether an attorney will now be held for damages is a matter of policy which involves the balancing of various factors.

27. *Id.*

hiring and educating new counsel after Lawyer II had been forced to withdraw.

However, these policy arguments break down under close scrutiny of the potentialities in each situation. In the principal case, it would be imperative for Client to prove that Lawyer II's settlement was sufficiently reasonable to establish that the alleged negligence of Lawyer I was a proximate cause of the damage he claims. Hence, the issue of Lawyer II's negligence *Vel Non* will be litigated as part of the case-in-chief, and will become a customary part of the defense raised in the litigation against Lawyer I.

Whether or not Lawyer I is precluded from filing a cross-complaint against Lawyer II, it can be anticipated that Lawyer I will assert, in his defense, that the damages claimed are a proximate result of Lawyer II's negligence. Relying upon principles of agency and comparative negligence, Lawyer I will also contend that Lawyer II's negligence can be imputed to the client to proportionally reduce or extinguish any claim for measurable damages in the client's pleadings. Such assertions will necessarily place the reasonableness of Lawyer II's settlement into issue.[28]

Since Lawyer II's settlement will be at issue, he may be called upon to justify the advice given. The calling of Lawyer II as a defense witness would require Lawyer II to withdraw from the case.[29] The result of this withdrawal would be that Lawyer II would be protected from claims of indemnification by Lawyer I while Client is still forced to hire and educate a new attorney. The rationale of the court is undermined (preservation of the at-

28. It is important to note from the discussion above whether or not a cross-complaint against Lawyer II is permitted so long as the reasonableness of Lawyer II's settlement is at issue, Lawyer II cannot try the case on behalf of the plaintiff. *See* Comden v. Superior Court, 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9. *Cf.* Gibson, Dunn & Crutcher v. Superior Court, 94 Cal. App. 3d 347, 156 Cal. Rptr. 326 (1979), wherein the court of appeal noted that if Lawyer II was named as cross-defendant he would be unable to try the case on behalf of the plaintiff.

29. T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY — 1979 CALIFORNIA SUPPLEMENT 148 R. 2-111:

> A(4) If upon or after undertaking employment, a member of the STATE BAR knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial . . .
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> A(5) If, after undertaking employment in contemplated or pending litigation, a member of the STATE BAR learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue representation until it is apparent that his testimony is or may be prejudicial to his client.

torney-client relationship) while Lawyer I is now unjustifiably prevented from making a proper claim of indemnification against Lawyer II.

It becomes obvious from the above discussion that even where the cross-complaint is denied, Lawyer II will still acquire interests adverse to Client. Without fear of the cross-complaint, Lawyer II's settlement will be at issue, thereby placing Lawyer II in a compromising position with respect to his client's interests. The court, by insulating Lawyer II, implicitly approves the placement of Lawyer II into such a position. In so doing, the court fails to resolve the principal issues in this case.[30] Why encourage or permit Lawyer II to litigate a malpractice claim of which he is inextricably a part? Why afford special protection to a relationship encumbered with adverse interests when, in reality, Client's malpractice claim could and should be litigated by a disinterested attorney? The court's answer lies in the policy considerations enumerated above, yet, as previously discussed, they achieved little of what was intended.

V. INTEGRITY PROBLEMS: THE ATTORNEY-CLIENT RELATIONSHIP AND PROFESSIONAL ETHICS

The attorney-client relationship is protected and regulated by the rules of Professional Conduct in California[31] and in some states by the ABA Code of Professional Responsibility.[32] The California Rules of Professional Conduct prescribe the minimum standards of conduct which an attorney must observe while the ABA Code of Professional Responsibility is designed to be both

30. The sanctity of this relationship is no more sacred than the public policy calling for family harmony involved in *American Motorcycle*. *See also* Gibson v. Gibson, 3 C.3d 914, 916, 479 P.2d 648, 650, 92 Cal. Rptr. 288, 290 (1971), where a parent was allowed to be joined as a tortfeasor for purposes of indemnity in his own child's action. The court stated:

> That decision, announced 40 years ago, was granted on the policy that an action by a child against his parent would bring discord into the family and disrupt peace and harmony of the household. If this rationale ever had any validity it has none today. We have concluded that parental immunity has become a legal anachronism, riddled with exceptions and seriously undermined by recent decisions of this court.
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> . . . .
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> In deciding to abrogate parental immunity, we are also persuaded by several policy factors. One is the obvious but important legal principle that 'when there is negligence, the rule is liability, immunity is the exception.'

See also Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Muskopf v. Corning Hospital District, 55 C.2d 211, 359 P.2d 457, 11 Cal. Rptr 89 (1961).

31. *See, e.g.*, CALIFORNIA RULES OF PROFESSIONAL CONDUCT, No. 2-111, 4-101, 5-101, 5-102.

32. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-101 to 107 and EC 5-1 to 18.

an inspirational guide to the members of the bar as well as a basis for disciplinary action. The disciplinary rules found therein are mandatory in character while the ethical considerations are aspirational.

The minimum standard of conduct required by the California Rules of Professional Conduct, where an attorney accepts employment with interests adverse to those of the client, are set forth by rules 4-101[33] and 5-101.[34] These standards require, among other things, an attorney to inform a client of the nature of his interest, permit the client an opportunity to seek the advice of independent counsel and requires the attorney to obtain the client's consent in writing before assuming the duties as the client's counsel.

The court in *Gibson* seems to regard these professional safeguards as insufficient to maintain the integrity of the attorney-client relationship. The court feels compelled to insulate Lawyer II from cross-complaints of indemnification rather than have Lawyer II conduct this relationship in accord with the professional standards set by law. This note will now examine the consequences of permitting a cross-complaint and having Client retain Lawyer II to litigate his malpractice claim in light of these professional standards.[35]

In the factual setting of *Gibson*, if Lawyer II was to bring Client's malpractice claim against Lawyer I, while aware of a possi-

33. T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY — 1979 CALIFORNIA SUPPLEMENT, *supra* note 27, at 150.

> A member of the State Bar shall not accept employment adverse to a client or former client, without the formal and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.

34. A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto. Derivation ABA Code DR 5-104 A.

Id. at 150-151.

35. For purposes of this example the author assumes that Lawyer II ascribes merely to the minimum standard of conduct as set by law. However, he must reiterate these are minimum standards and many attorneys will conduct themselves by higher standards.

ble claim of indemnification, he would first have to inform Client of Lawyer I's possible claim for indemnification. Second, he would make sure Client had a reasonable opportunity to seek the advice of independent counsel. Finally, if Client should accept after full disclosure, Lawyer II would have to obtain Client's consent in writing, in order to proceed.

There are several important considerations arising from the comportment of the attorney-client relationship in accordance with the California Rules of Professional Conduct. Initially, prior to any action on the attorney's part and on behalf of Client, Client is informed of a possible claim of indemnification by Lawyer I and the potential for the creation of an interest adverse to Client.[36] Lawyer I must make it understood, at the outset, that Client has the opportunity to seek the advice of independent counsel. If Client avails himself of this opportunity, he may find that he has a cause of action against Lawyer II for malpractice. Client would then retain another attorney and name both Lawyer I and Lawyer II in his cause of action, avoiding the necessity of changing counsel after proceedings have begun, should Lawyer I cross-complain.

The court overlooks this situation. In an effort to preserve the attorney-client relationship, by insulating Lawyer II the court at the same time gives rise to a situation where Client is prevented from seeking independent legal advice.[37] Under the *Gibson* holding, Client would not seek independent legal adivce and would remain unaware of a possible malpractice action he might have against Lawyer II.[38]

Another argument enunciated by the court for insulating Lawyer II was to ensure that Client could retain the attorney of his own choosing. The court's presumption being that a client would choose the attorney best suited to litigate the matter. However, this policy argument breaks down under an analysis and comparison of the potential situations. Which Client would be in a better position to select his attorney? One who was fully informed of all possible adverse interests arising from a potential cross-complaint with access to independent legal advice (or at least aware of his need for it) or a client who chooses his attorney comforted

36. By insulating Lawyer II from cross-complaints of Lawyer I, he no longer has an interest adverse to client and is not required to inform client of his need for independent legal advice.

37. It should be noted here that in any given situation Lawyer II could be predominately responsible for Client's damages and, as such, should not be counselling client on a possible malpractice action.

38. The only time a client may find out of a possible malpractice action against Attorney II, when such a cross-complaint is denied, is when the issue is litigated and the client receives an award for less than he asked.

by the knowledge that his attorney is secure from such a cross-complaint. The informed client, after seeking independent legal advice, would undoubtedly be in a better position to select the attorney best suited to litigate the matter.

In this light it is important to examine the standards promulgated by the ABA Code of Professional Responsibility.[39] The relevant standards, as set forth by the ABA, are DR 5-104[40] and EC 5-2.[41] The minimum level of conduct required by the disciplinary rules calls for a full disclosure of interests adverse to the client. A somewhat less rigorous standard than required by the California Code of Professional Responsibility. The concomittant ethical consideration require Lawyer II to refuse employment if he feels he might compromise his responsibility or duty to the client.[42] It appears the ABA offers a similar solution to the same problem. The ABA approach requires the attorney to inform the client and permit him to make the decision to hire another attorney, or in the alternative, to have Lawyer II realistically evaluate the problem and refuse the case.

Admittedly, the ethical considerations are an aspired goal and the disciplinary rules are not always maintained. Yet, these are judicially recognized rules of conduct based upon the sound tenets of the attorney-client relationship. To insulate an attorney in this type of situation does not preserve these professional standards but, conversely, provides a means of undermining the recognized duty Lawyer II owes to his client.

VI. CONCLUSIONS

In summation, the appellate court's rationale for preserving the attorney-client relationship is misplaced. It attempts to protect a relationship that is neither seeking nor deserving of additional protection. It promotes a fundamental injustice by denying Lawyer I's claim for indemnification without proper justification.

39. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-101, DR 5-104 & EC 5-2.

40. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-104 (A). "A lawyer shall not enter into a business transaction with a client if they have differing interests and if the client expects the lawyer to excercise professional judgement therein for the protection of the client, unless the client has full disclosure."

41. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-2 "A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability they will, affect adversely the advice to be given or services to be rendered the prospective client."

42. *See* text acompanying note 39, *supra*.

In addition, the rationale is not only misplaced but it inflicts harm. It permits Client, in certain instances, to remain unaware of a possible malpractice claim he may have against Lawyer II. The California Rules of Professional Conduct or the ABA Code of Professional Responsibility offer a much more feasible solution to the *Gibson* problem.

JOSEPH E. THOMAS