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# LIABILITY AMONG ATTORNEYS IN LEGAL MALPRACTICE ACTIONS\*

## I. INTRODUCTION

In several recent malpractice cases, attorneys have attempted to lessen or avoid liability by claiming they should be entitled to contribution or indemnity from another attorney involved in the matter. Liability has been imposed when the attorney being sued was either a successor attorney or co-counsel. A referral attorney may also be subject to a legal malpractice action, although no cases have yet been decided involving this type of relationship.

This Note discusses the successor attorney, co-counsel, and referral attorney relationships and the desirability of allowing contribution or indemnity claims based on these relationships. The author concludes that liability should be imposed in referral and co-counsel situations, but not when the attorney is only a successor.

## II. FRAMEWORK OF RELATIONSHIPS: SUCCESSOR ATTORNEY, CO-COUNSEL, AND THE REFERRAL ATTORNEY

The three relationships upon which a legal malpractice action may be based are quite common. First, an attorney might seek contribution or indemnity from a successor attorney. For example, a client retains Attorney I in a personal injury matter. Attorney I negligently handles the case at trial. The client dismisses Attorney I and retains Attorney II, who handles the appeal. When the appeal is unsuccessful, Attorney II represents the client in a malpractice action against Attorney I. Attorney I cross-claims against Attorney II on theories of contribution or indemnity, claiming the actions of Attorney II in handling the appeal harmed the client.

An attorney might also seek contribution or indemnity

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against an associate attorney. For example, a client hires Attorney I to handle a divorce. Because the divorce involves complicated tax questions, Attorney I associates Attorney II, a tax specialist, to handle the tax aspects of the divorce. The tax specialist mishandles the case and the client sues Attorney I and Attorney II. Subsequently, Attorney I cross-claims against Attorney II seeking contribution or indemnity.

Finally, an attorney might seek contribution or indemnity from an attorney to whom a case was referred. For example, a client wishes to patent an invention. The client consults his usual attorney, Attorney I, who refers the matter to a patent expert, Attorney II. The patent expert fails to protect the client's interests and the client subsequently brings a malpractice action against Attorneys I and II. Again, Attorney I seeks contribution or indemnity from Attorney II.

### III. THEORIES OF RECOVERY: CONTRIBUTION AND INDEMNIFICATION

An attorney could rely on either the theory of contribution or of indemnity to shift liability to a successor attorney. Under the theory of contribution,<sup>1</sup> the former attorney would argue that even if he was negligent, the successor attorney's negligence contributed to the loss and, therefore, liability should be apportioned between the two.

Historically, there was no right of contribution among joint tortfeasors.<sup>2</sup> Gradually, the rule was modified to allow contribu-

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1. Contribution is an equitable doctrine requiring the sharing of a loss among joint tortfeasors. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 50 (4th ed. 1971) [hereinafter cited as PROSSER]; *RESTATEMENT (SECOND) OF TORTS* § 886A and Comment c (1977) [hereinafter cited as *RESTATEMENT*]; 18 AM. JUR. 2d *Contribution* §§ 1-3, (1965 and Supp. 1981). Usually, the loss is apportioned pro rata, but in some jurisdictions liability is allocated on a comparative fault basis. PROSSER, § 50 at 310; *RESTATEMENT* § 886A, Comment h. See also R. MALLIN & V. LEVITT, *LEGAL MALPRACTICE*, (2d ed. 1981) [hereinafter cited as MALLIN]; H. WOODS, *THE NEGLIGENCE CASE—COMPARATIVE FAULT*, §§ 13:5-13:10 and Appendix (1978) [hereinafter cited as WOODS]; UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, § 1, 12 U.L.A. 57 (1975) [hereinafter cited as *CONTRIBUTION ACT*].

South Carolina's comparative negligence statute, S.C. CODE ANN. § 15-1-300 (1976), applying only to motor vehicle accidents, was declared unconstitutional as violative of the equal protection clauses of the state and federal constitutions. *Marley v. Kirby*, 271 S.C. 122, 245 S.E.2d 604 (1978).

2. This bar against recovery originated in the English case of *Merryweather v.*

tion among negligent tortfeasors<sup>3</sup> and in favor of a tortfeasor only legally or technically liable.<sup>4</sup> For example, a businessperson hires a salesperson to represent the company to various customers throughout a state. While driving a company car to visit a customer, the salesperson causes a collision injuring a third party. Although not personally negligent, the employer is legally liable for all tortious injuries caused by the salesperson while the salesperson is acting within the scope of her employment. To mitigate the economic harshness of this rule, employers were allowed to seek contribution from negligent employees.

In many jurisdictions, the common law doctrine precluding contribution among tortfeasors has been abrogated by statute or judicial decision.<sup>5</sup> By 1979, over thirty jurisdictions allowed contribution.<sup>6</sup> Although most common law and statutory rules still preclude contribution among intentional tortfeasors,<sup>7</sup> some

Nixan, 101 Eng. Rep. 1337 (1799). In *Merryweather*, the court stated that the policy behind a bar to recovery by a joint tortfeasor on the theory of contribution was that courts should not allow an intentional tortfeasor to profit from a wrong. *Id.*

3. PROSSER § 50 at 306; RESTATEMENT § 886A, Comment a.

4. PROSSER § 50 at 306-08; RESTATEMENT § 886A, Comment a.

5. PROSSER § 50 at 307; RESTATEMENT § 886A, Comment a; 18 AM. JUR. 2d *Contribution* § 41 at 61 (1965); see generally, WOODS §§ 13:5-13:10 and Appendix (full discussion of comparative fault, contribution, the Uniform Contribution Among Tortfeasors Act, and a state by state outline of contribution statutes).

South Carolina follows the common law rule barring contribution among joint tortfeasors. *Atlantic C.L.R. Co. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963).

6. Some jurisdictions abrogated the no-contribution rule by judicial decision. *E.g.*, *Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949); *Best v. Yerkes*, 247 Iowa 800, 77 N.W.2d 23 (1956). Other jurisdictions adopted statutes allowing contribution. See, *e.g.*, ALASKA STAT. §§ 09.16.010 - .060 (1962); CAL. CIV. PROC. CODE 11 §§ 875-880 (West 1954); FLA. STAT. ANN. § 768.31 (West Supp. 1981); KY. REV. STAT. § 412.030 (1970); NEV. REV. STAT. §§ 17.225 - .305 (1973); see Note, *Contribution and Indemnity — An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts*, 5 WM. MITCHELL L. REV. 109, 121 (1979).

Many of the state contribution statutes were adoptions of the Uniform Contribution Among Tortfeasors Act. CONTRIBUTION ACT, § 1, 12 U.L.A. 57. Originally adopted in 1939, the Act was revised in 1975. The Act allows contribution on a pro rata basis among persons who are jointly and severally liable for an injury. *Id.* §§ 1, 2, Commissioner's Prefatory Note (1939 Act); see also §§ 3-9. The main difference between the 1939 Act and the 1975 revised Act is in the allocation of loss. The 1939 Act contained an optional provision allowing proportionate allocation of loss. However, the 1955 revision states that "[i]n determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered. . . ." *Id.* § 2 at 87. For a discussion and list of jurisdictions following the 1939 Act and the 1955 revised Act, see *id.* Commissioner's Prefatory Note (1955 Revision and Supp. 1982). See also WOODS, *supra* note 1.

7. See CONTRIBUTION ACT, *supra* note 6, at § 1(c).

courts have interpreted statutes to allow contribution even among these tortfeasors.<sup>8</sup>

While contribution apportions the loss between two or more tortfeasors, indemnity shifts the entire loss from one only secondarily and legally liable, to one primarily and actually liable.<sup>9</sup> Again, the example of an employer's liability for the tortious acts of an employee illustrates this point.

Courts have developed two modifications of the pure theory of indemnity: equitable indemnity and partial indemnity. These modifications developed because of the unavailability of contribution in a particular jurisdiction coupled with the unfairness of a total shift of liability under the pure theory of indemnity.<sup>10</sup> Equitable indemnity refers to situations in which indemnification is allowed even though no contractual or legal relationship exists between the party seeking indemnification and the party from whom indemnification is sought. For example, courts have allowed indemnification if the negligence of a subsequent tortfeasor aggravates the harm caused by a prior wrongdoer.<sup>11</sup>

8. PROSSER § 50 at 308.

9. PROSSER § 51 at 310-11; RESTATEMENT § 886A subsection 4, Comment 1 and subsection 3, Comment j; WOODS § 13:11 at 236-37, 41 AM. JUR. 2d *Indemnity* § 1 at n.5 (1965). For a general discussion of the doctrines of contribution and indemnity, see Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941); Leflar, *Contributions and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932) [hereinafter cited as Leflar].

10. Indemnity traditionally has been an absolute remedy—either the tortfeasor was allowed indemnity or the wrongdoer received nothing. Courts readily expanded the theory, usually allowing indemnity rather than rejecting it. RESTATEMENT § 886A subsection (4), Comment [1] and § 886B, Comment 1. Furthermore, courts in some jurisdictions became increasingly frustrated with inequitable statutory restrictions on the right to contribution and the all or nothing harshness of indemnity. RESTATEMENT § 886B, Comment m. See *Ford Motor Co. v. Robert J. Poeschl, Inc.*, 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1971) (allowing action for indemnity by automobile dealer against manufacturer notwithstanding dealer's own breach of duty). Since the courts were unable to change the statutes, they judicially created the equitable doctrine of partial indemnity and declared the doctrine to be subject to further expansion if necessary to achieve justice. RESTATEMENT § 886B, Comment m.

11. Although the right to indemnification commonly arises out of contract, the right can also be enforced by operation of law. PROSSER, *supra* note 1, § 51, at 310; RESTATEMENT, *supra* note 1, § 886B Comment j. There is no right to indemnity if the parties are *in pari delicto*. PROSSER, § 51; WOODS, *supra* note 1, § 13:11, at 237; RESTATEMENT § 886B, Comment a. Noncontractual types of indemnity, often called “contracts implied by law,” were not based on consensual obligations to indemnity, but rather were based on principles of equity and fairness. Leflar, *supra* note 9, at 146. A person's liability for a tort comes under this principle of equitable indemnity. *Id.* The policy behind indemnity comes from restitution and the prevention of unjust enrichment. RESTATEMENT § 886B

Under the doctrine of partial indemnity, courts allocate the loss in proportion to the fault of the parties.<sup>12</sup> Partial indemnity may be available to a tortfeasor even when common law or statutory contribution is not available. For example, partial indemnity may be available to an intentional tortfeasor even in jurisdictions barring contribution among intentional tortfeasors. Additionally, partial indemnity may be available even after the statute of limitations has run on an action for contribution.<sup>13</sup> As a result of the expansion of the theories, they are often confused.<sup>14</sup>

#### IV. LIABILITY OF A SUCCESSOR ATTORNEY TO THE FORMER ATTORNEY

##### A. *Original View: Successor Attorney Not Liable on Theory of Contribution or Indemnity*

Because the growth of malpractice litigation against lawyers is of relatively recent origin, it is not surprising that the cases allowing contribution and indemnity among lawyers also are relatively recent. Almost all of the cases are from California, one of the frontiers of malpractice litigation. Early cases denied recovery by a former attorney against a successor, but some recent decisions allowed these claims.

In *Held v. Arant*,<sup>15</sup> Attorney I represented a client in negotiations and the drafting of an agreement with a third party. As a result of the negligence of Attorney I, the third party sued the client for misrepresentation. The client, represented by Attorney II, sued Attorney I for malpractice. Attorney I cross-complained

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Comment c. See generally, RESTATEMENT OF RESTITUTION § 76 (1937).

12. See, e.g., *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

13. For example, both the CONTRIBUTION ACT and the California contribution statute preclude contribution between intentional tortfeasors. CONTRIBUTION ACT, *supra* note 1, at § 1(c); CAL. CIV. PRO. CODE § 875(d) (West 1980). Additionally, the CONTRIBUTION ACT contains only a one year statute of limitations on an action to enforce a right of contribution. CONTRIBUTION ACT § 3(c). However, both the CONTRIBUTION ACT and the California statute state that nothing in the Act precludes any right to indemnity. CONTRIBUTION ACT § 1(f); CAL. CIV. PRO. CODE § 875(f) (West 1980).

14. PROSSER, *supra* note 1, § 51, at 310 n.89; WOODS, *supra* note 1, § 13:10, at 236.

15. 67 Cal. App. 3d 748, 134 Cal. Rptr. 422 (1977).

seeking indemnification from Attorney II.<sup>16</sup> The cross-complaint alleged that Attorney II had settled matters in the earlier suit by the third party in a way that damaged Attorney I and exposed him to liability for malpractice. Attorney I appealed the trial court's decision to sustain a general demurrer to the cross-complaint.

On appeal, Attorney I argued that privity was no longer required in an action for malpractice and therefore an attorney was "liable for his negligence to anyone who foreseeably may be damaged by it."<sup>17</sup> However, the California Court of Appeal held that even though privity was no longer a prerequisite, an attorney's liability was limited to the intended beneficiaries of his action.<sup>18</sup> The court found that Attorney I was not an intended beneficiary of the actions of Attorney II.<sup>19</sup>

After deciding the cross-complaint could not be sustained on the grounds of duty or privity, the court addressed the issue of a subsequent tortfeasor's liability for aggravation of an injury.<sup>20</sup> The court noted, without explanation, that in the case of a physician aggravating an injury caused by a negligent prior tortfeasor, the possibility that the second physician might be sued by the original tortfeasor would not inhibit the second physician in the performance of his duties.<sup>21</sup> Conversely, when Attorney II is retained to represent a client against Attorney I, allowing Attorney I to cross-complain against Attorney II "could impinge upon the undivided loyalty owed by counsel."<sup>22</sup> The

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16. Attorney II, who had also represented the client in the negotiations with the third party, was the client's sole counsel in the malpractice action. No claim of co-counsel liability was argued. *See infra* notes 71-75 and accompanying text.

17. 67 Cal. App. 3d at 751, 134 Cal. Rptr. at 423 (citing *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961)).

18. 67 Cal. App. 3d at 751, 134 Cal. Rptr. at 423 (citing *National Auto. and Cas. Ins. Co. v. Atkins*, 45 Cal. App. 3d 562, 565, 119 Cal. Rptr. 618, 619 (1975)) (holding attorneys had no duty toward insurance company, for which attorney procured attachment bonds, to prosecute action against defendant); *Norton v. Hines*, 49 Cal. App. 3d 917, 921, 123 Cal. Rptr. 237, 239 (1975); *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 110, 128 Cal. Rptr. 901, 906 (1975) (holding attorney liable to potential creditor of client for failure to give material information about client's business partnership).

19. 67 Cal. App. 3d at 751, 134 Cal. Rptr. at 423.

20. *Id.*

21. This reasoning has been questioned. *See Parker v. Morton*, 117 Cal. App. 3d 751, 755 n.1, 173 Cal. Rptr. 197, 199 n.1 (1981).

22. 67 Cal. App. 3d at 752, 134 Cal. Rptr. at 424.

Court of Appeals concluded that the nature of the attorney-client relationship required that an attorney not be subjected to a possible action for indemnification from a potential adversary. The court reasoned that an attorney's ability to counsel a client about alternative courses of action should not be inhibited by the fact that the client's choice of one course of action over another could subject the attorney to a claim for indemnification from a former attorney of the client.<sup>23</sup>

Following the *Held* decision, the California Supreme Court in *American Motorcycle Ass'n v. Superior Court*<sup>24</sup> broadened the doctrine of indemnity in California<sup>25</sup> to allow for partial indemnity. California had recognized an action for proportionate indemnity only when the actions of a subsequent tortfeasor aggravated the injuries already suffered by the injured parties.<sup>26</sup> In *American Motorcycle*, the court stated that "a concurrent tortfeasor may obtain partial indemnity from co-tortfeasors on a comparative fault basis."<sup>27</sup>

23. *Id.*

24. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). For a full discussion of *American Motorcycle*, see McCay, *American Motorcycle Association v. Superior Court: From Comparative Negligence to Comparative Indemnity*, 5 ORANGE COUNTY BAR J. 180 (1978).

25. California's equitable indemnity rule was first announced in *Peters v. City & County of San Francisco*, 41 Cal. 2d 419, 260 P.2d 55 (1953) and first applied in *City & County of San Francisco v. Ho Sing*, 51 Cal. 2d 127, 330 P.2d 802 (1958).

26. See, *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974); *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964).

27. 20 Cal. 3d at 608, 578 P.2d at 918, 146 Cal. Rptr. at 201. In *American Motorcycle*, a minor was injured in a motorcycle race sponsored by two motorcycle associations. The minor, through a guardian *ad litem*, sued the motorcycle association alleging that the racetrack was negligently designed and managed and that the defendants had negligently solicited entrants for the race. The defendants asserted that the minor's injuries were caused by his own negligence. The association also alleged that the minor's parents failed to exercise their power of supervision over the minor and sought "declaration of the 'allocable negligence' of [the minor's] parents . . ." *Id.* at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186. The association based its claim for declaratory relief on the assumption that California's comparative negligence law had abrogated the requirement of joint and several liability and replaced it with proportionate liability. Under the proportionate liability theory, each tortfeasor could be held liable for only a portion of the injury determined on a comparative fault basis. *Id.* at 585-86, 578 P.2d at 903, 146 Cal. Rptr. at 186. The trial court rejected that defendant's claim and denied the association's motion to cross-complain against the parents. *Id.* at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186.

The court began its analysis by rejecting the notion that California's comparative negligence law abolished the requirement of joint and several liability. The court stated that joint and several liability meant different things in different situations. In the case of concurrent negligence, joint and several liability meant that:



Although the *American Motorcycle* decision did not involve legal malpractice, the general shift in the California law should have signaled easier availability of indemnity in all tort cases, including legal malpractice. However, subsequent California decisions continued to hold that a defendant attorney could not recover from a client's subsequent attorney on either a contribution or indemnity theory.<sup>28</sup> In *Gibson, Dunn & Crutcher v. Superior Court*,<sup>29</sup> an attorney was sued for malpractice for failing to perfect an enforceable security interest. The attorney represented a client who guaranteed a bank loan to a third party company. In return, the company conveyed security interests in personal property to the bank. The company defaulted and the client paid off the loan. The bank assigned the security interests to the client, but when the client tried to enforce the interests, the company filed for bankruptcy. In the bankruptcy proceedings, other creditors challenged the validity of the client's interest in the property. A second law firm representing the client in the bankruptcy proceedings entered into a settlement with the other creditors and filed suit against the bank and the former attorney for failing to create enforceable interests and for failing

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a tortfeasor is liable for any injury of which his negligence is a proximate cause. Liability attaches . . . not because he is responsible for the acts of other independent tortfeasors who may also have caused the injury, but because he is responsible for all damages of which his negligence was a proximate cause.

*Id.* at 586, 578 P.2d at 904, 146 Cal. Rptr. at 187. The court stated that because fault could be apportioned on a comparative fault basis did not "render an indivisible injury 'divisible' for the purpose of 'joint and several liability.'" *Id.* at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188. A concurrent tortfeasor was still liable for the total injury reduced only "in proportion to the amount of negligence attributable to the person recovering." *Id.* at 590, 578 P.2d at 906-07, 146 Cal. Rptr. at 189-90.

After examining the California courts' struggle with the harsh all-or-nothing rule of equitable indemnity, the California Supreme Court held that the California equitable indemnity rule should be modified to allow a concurrent tortfeasor to obtain partial indemnity. The court reasoned that nothing in the California contribution statute precluded such a ruling, and nothing in the Code of Civil Procedure precluded a cross-complaint for partial indemnity. *Id.* at 599-607, 578 P.2d at 912-18, 146 Cal. Rptr. at 195-201. *Cf. Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) (expanding New York law to allow a tortfeasor to seek partial indemnification). For a full discussion of *Dole*, see *Torts — New York Civil Practice: A Joint Tortfeasor Accorded Unlimited Right to Implead a Co-Tortfeasor For Partial Indemnification Based on Comparative Responsibility in Negligence — Dole v. Dow Chemical Co.*, 47 N.Y.U.L. Rev. 815 (1972).

28. MALLIN, *supra* note 1, at 164.

29. 94 Cal. App. 3d 347, 156 Cal. Rptr. 326 (1979).

to tell the client that the interests may not be enforceable.<sup>30</sup>

The bank and the first law firm filed separate cross-complaints for equitable partial indemnity alleging the second law firm was negligent in its representation of the client during the bankruptcy proceedings. The second firm demurred. The superior court overruled the demurrer and the second firm appealed.<sup>31</sup>

On appeal, the California Court of Appeal acknowledged the expansion in the law of equitable indemnity, but made two important factual distinctions between the *Gibson* and *American Motorcycle* cases.<sup>32</sup> Relying almost exclusively on the *Held* reasoning, the court concluded that imposing liability on a successor attorney would create a conflict of interest. In the words of the court:

What is pertinent here is the effect upon the relationship between lawyer II and the client when the client's alternatives are under consideration. Lawyer II should not be required to face a potential conflict between the course which is in client's best interest and the course which would minimize his exposure to the cross-complaint of lawyer I.<sup>33</sup>

An almost identical conclusion was reached in *Commercial Standard Title Co. v. Superior Court*.<sup>34</sup> In *Commercial Standard*, an attorney represented a client in a real estate transaction with a third party.<sup>35</sup> An agent of the third party told the attorney that the title to the land to be conveyed to the client

30. *Id.* at 349-50, 156 Cal. Rptr. at 327-28.

31. *Id.* at 350, 156 Cal. Rptr. at 328.

32. In *American Motorcycle*, the court believed that the effect of a cross-complaint on the relationships in the case before it would be less serious than the effect on the attorney-client relationship. In addition, the court noted that *American Motorcycle* dealt with a single indivisible harm. *Id.* at 351-52, 156 Cal. Rptr. at 328-29.

33. *Gibson*, 94 Cal. App. 3d at 356, 156 Cal. Rptr. at 331. In his dissent, Justice Jefferson distinguished *Goodman*, *Held* and *Morton*, concluding that *Gibson* fell within the *American Motorcycle* rationale. Justice Jefferson stated that the policy reasons behind *American Motorcycle* are more important than a public policy protecting attorneys from liability to a person who deals with an attorney's client. Furthermore, he saw no conflict of interest and would have allowed an action for equitable indemnity. *Id.* at 357-61, 156 Cal. Rptr. at 332-34, (Jefferson, J., dissenting).

34. 92 Cal. App. 3d 934, 155 Cal. Rptr. 393 (1979).

35. In the transaction, the client and a third party agreed to exchange parcels of land. Escrows were prepared and submitted to a title insurance company. *Id.* at 937, 155 Cal. Rptr. at 396.

was unencumbered and that a title company had issued a report indicating the status of the land. The representative of the third party gave the attorney a lot book guarantee issued by two title companies. After the exchange, the client discovered the property he received in exchange was subject to a trust deed for which he had not bargained. The client sued the title companies for issuing a defective lot book guaranty, and the title companies cross-complained against the attorney for advising the client to rely on the guaranty. The title companies based their cross-complaint on the partial indemnity rule announced in *American Motorcycle*.<sup>36</sup>

The appellate court did not find the expansion of the law under *American Motorcycle* persuasive on the facts of *Commercial Standard*. Although recognizing the expansion, the *Commercial Standard* court also noted that the expansion was not intended as a panacea for all tort claimants. The court noted the new doctrine applied only in appropriate cases, quoting a list of exceptions included in a footnote in *American Motorcycle*.<sup>37</sup> The court found two reasons why the attorney in *Commercial Standard* was not a concurrent tortfeasor for the purposes of the expanded indemnity doctrine. First, the attorney could not be held liable for a whole indivisible injury. Second, the attorney's wrong arose independently and not from a violation of a common duty.<sup>38</sup> The court also relied on the *Held* rationale to deny the cross-complaint, stating that the threat of a lawsuit could inhibit attorney-client communications and could allow an attorney being sued by his original client for malpractice to require the second attorney to disqualify himself.<sup>39</sup>

The Supreme Court of Utah, in *Hughes v. Housley*,<sup>40</sup> reached a similar conclusion. In *Hughes*, two persons and a corporation entered into an escrow agreement under which one of the three persons was to act as escrow agent and hold stock certificates. Later, a disagreement arose between the corporation, the plaintiff Hughes, and a third party, Glenn, over the ownership of the stock. The escrow agent instituted an interpleader

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36. *Id.* at 938, 155 Cal. Rptr. at 396.

37. *Id.* at 940, 155 Cal. Rptr. at 397.

38. *Id.* at 943, 155 Cal. Rptr. at 399.

39. *Id.* at 945-46, 155 Cal. Rptr. at 400-01.

40. 599 P.2d 1250 (Utah 1979).

action seeking a court declaration as to the ownership of the stock. Hughes retained Attorney I to represent him in the interpleader action. The Corporation and Glenn filed an answer claiming that Hughes had no right or interest in the certificates. However, the answer was never served on Hughes or Attorney I, and Attorney I did not file a responsive pleading. A default judgment was entered against Hughes.<sup>41</sup>

Hughes terminated his relationship with Attorney I and retained Attorney II. Attorney II filed a motion to set aside the default judgment, but the motion was denied. Subsequently, Attorney II filed a complaint against Attorney I alleging that Attorney I was negligent in allowing the entry of a default judgment and failing to have the judgment set aside. Attorney I filed a third-party complaint alleging that Attorney II was negligent in failing to have the default judgment set aside. Alternatively, Attorney I claimed Attorney II aggravated the client's damages and therefore Attorney I was entitled to indemnification.<sup>42</sup> Attorney II then moved to dismiss the third-party complaint on the basis that the complaint did not state a cause of action upon which relief could be granted. The trial court dismissed the complaint and Attorney I appealed.<sup>43</sup>

In deciding the trial court did not err in dismissing Attorney I's complaint, the Utah Supreme Court rejected Attorney I's claim that the alleged negligence of Attorney II aggravated the client's injuries. Although the court acknowledged the appeal of the analogy to the case of a successor physician aggravating an injury, the court noted a flaw in the analogy: "assuming arguendo that [Attorney II] was negligent in his handling of the case, his negligence cannot be said to have aggravated Hughes' injury or added to the damage."<sup>44</sup> The court stated that by the time the client retained Attorney II, the damage was complete.<sup>45</sup>

The Utah Supreme Court also agreed with the trial court that the third-party complaint failed to state a cause of action against Attorney II for negligence. The court stated that no duty existed between Attorney II and Attorney I. Additionally, the

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41. *Id.* at 1252.

42. *Id.*

43. *Id.*

44. *Id.* at 1253.

45. *Id.*

court rejected the negligence claim on policy grounds. Using analysis similar to that applied in *Held*, the court reasoned that “[t]o impose such a duty [on a successor attorney in favor of a former attorney] would be to subject the second attorney to potential conflicts of interest in trying to serve two masters.”<sup>46</sup>

*B. Recent View: Liability of Successor Attorney on Theory of Contribution and Indemnity*

As in the cases outlining the historical restrictions on actions for contribution or indemnity, California furnishes the recent leading decisions allowing actions for contribution and indemnity in legal malpractice actions. According to these cases, actions for contribution and indemnity might be allowed if the case does not involve a choice between alternative courses of action requiring professional judgment.

*Parker v. Morton*<sup>47</sup> is the leading case permitting an action for contribution or indemnity in a legal malpractice case. In *Parker*, Attorney I represented the wife in a dissolution of marriage proceeding. During the proceeding, Attorney I failed to litigate the wife’s community property interests in her husband’s vested military pension.<sup>48</sup> Subsequently, the wife retained Attorney II to correct the problem of the unlitigated pension rights. Attorney II apparently also failed to pursue properly the wife’s claim to her former husband’s pension. The wife sued Attorney I for legal malpractice. Attorney I cross-complained against Attorney II for total or partial indemnity.<sup>49</sup> Attorney II based his defense on the principle that an attorney sued for malpractice “may not successfully cross-complain against the client’s successor attorney retained to remedy the problem created by the alleged negligence of the first attorney.”<sup>50</sup>

The court of appeal noted that although there was authority for the rule relied on by Attorney II,<sup>51</sup> the policies upon which

46. *Id.* at 1254.

47. 117 Cal. App. 3d 751, 173 Cal. Rptr. 197 (1981).

48. Under the prevailing California law, military pensions were considered community property. *Id.* at 754, 173 Cal. Rptr. at 198. Military pensions are no longer considered divisible community property. *McCarty v. McCarty*, 449 U.S. 1122 (1981).

49. *Parker*, 117 Cal. App. 3d at 751, 173 Cal. Rptr. at 198.

50. *Id.* at 754, 173 Cal. Rptr. at 198-99.

51. *Id.* (citations omitted).

the court had based its decisions in the *Held* line of cases were inapplicable to *Parker*.<sup>52</sup> The court stated that to deny the cross-complaint "would be inconsistent with long established legal principles, themselves, founded on important public policy considerations."<sup>53</sup> The long-established legal principle referred to by the court was the rule that a subsequent tortfeasor who aggravates damages previously suffered by the injured party may be held liable for all damages.<sup>54</sup> The court reasoned that this principle was also based on important policy considerations and should not be departed from without compelling reasons.<sup>55</sup> The court of appeal concluded that denial of contribution or indemnity might be proper in cases involving an attorney's choice between alternative courses of action<sup>56</sup> requiring the exercise of professional judgment. The court, however, found unpersuasive the argument that allowing actions for contribution or indemnity could result in subsequent attorneys disqualifying themselves because of the potential conflict of interest. The court recognized the strong policy in favor of free choice of legal representation, but stated that this policy was not "a complete shield to the attorney's being responsible for the consequences of his negligent conduct."<sup>57</sup>

In *Sigel v. Superior Court*,<sup>58</sup> a California Court of Appeal again denied an attorney's motion for summary judgment on a second attorney's cross-complaint for indemnity. In *Sigel*, the client was injured in a car accident and hired Attorney I to represent her in a personal injury action. Attorney I failed to determine that the other driver was uninsured, failed to file within a reasonable time after being retained, and failed to serve process on the other driver. The client later substituted Attorney II as the attorney of record. Attorney II also failed to prosecute the uninsured motorist claim. The client, represented by Attorney II, sued Attorney I for malpractice and Attorney I claimed

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52. *Id.* at 756-67, 173 Cal. Rptr. at 200-06.

53. *Id.* at 755, 173 Cal. Rptr. at 199.

54. *Id.* at 756, 173 Cal. Rptr. at 199 (citations omitted).

55. *Id.* at 756, 173 Cal. Rptr. at 200.

56. *Id.* at 767, 173 Cal. Rptr. at 206-07.

57. *Id.* at 766, 173 Cal. Rptr. at 206.

58. 118 Cal. App. 3d 226, 173 Cal. Rptr. 261 (1981). The opinion for *Sigel v. Superior Court* was deleted from the official reporter by order of the California Supreme Court, dated June 17, 1981. See 118 Cal. App. 3d at 226.

against Attorney II for equitable indemnity. Attorney II filed a general demurrer which was overruled. After the client substituted a third attorney for Attorney II in the malpractice case, Attorney II answered the cross-complaint.<sup>59</sup>

In support of his motion for judgment on the cross-complaint, Attorney II relied on *Gibson*.<sup>60</sup> The court, however, distinguished *Gibson* and *Held* based on differences in the nature of the services rendered in those cases and *Sigel*.<sup>61</sup> In *Gibson* and *Held*, the *Sigel* court noted that Attorney II came into the cases to extricate the client from the situation caused by the negligence of Attorney I, and that in attempting to resolve the problem, Attorney II could not be expected to worry about how the choice of action would look in a cross-complaint for equitable indemnity.<sup>62</sup> However, in *Sigel* the negligence of Attorney II was the failure to serve process.<sup>63</sup> When Attorney II took over the case, he inherited an independent duty to prosecute the case. There was no choice of remedies and no conflict. Attorney II had to take action on the case in order to escape personal responsibility for malpractice.<sup>64</sup>

### C. Critique

In summary, the following general rule seems to be supported by the cases: a prior attorney generally cannot obtain contribution or indemnity from a subsequent attorney unless the subsequent attorney violated a clear duty to a client that did not involve a choice between alternative courses of action. The case law thus adopts what could be called an intermediate approach. Claims for contribution or indemnity are allowed, but only under limited circumstances.

One reason for denying an attorney the right to recover under a theory of contribution or indemnity against a successor attorney is essentially doctrinal. For example, in the *Commercial Standard* case the court refused to allow indemnity because in the court's opinion the subsequent attorney was not a co-

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59. *Id.* at \_\_\_, 173 Cal. Rptr. at 262.

60. *Id.* at \_\_\_, 173 Cal. Rptr. at 262.

61. *Id.* at \_\_\_, 173 Cal. Rptr. at 262-63.

62. *Id.* at \_\_\_, 173 Cal. Rptr. at 262-63.

63. *Id.* at \_\_\_, 173 Cal. Rptr. at 263.

64. *Id.* at \_\_\_, 173 Cal. Rptr. at 262.

tortfeasor.<sup>65</sup> A doctrinal basis for denying such claims, however, appears unsound. Formal barriers to the use of contribution and indemnity have fallen if relief is justified as a matter of public policy.<sup>66</sup> Focusing on the policy reasons for denying these claims seems more appropriate.

A second argument against allowing a contribution or indemnity claim against a successor attorney is the basic rationale of the *Held* decision: allowing such a claim could create a conflict of interest by interfering with a lawyer's independent judgment.<sup>67</sup> The interference with the successor attorney's independent judgment could occur in either of two ways. If a malpractice claim is being contemplated against the former attorney, a successor attorney may have a tendency to handle the case in a way that would minimize the likelihood of being exposed to a claim for contribution and indemnity. Second, because of the possibility of becoming involved in the litigation, a successor attorney might be more reluctant to recommend that a client file a malpractice claim against a former attorney of the client.

These claims of interference with the successor attorney's independent judgment are difficult to evaluate. The court in *Parker* pointed out that if the attorney is not faced with a realistic choice between alternative courses of action, the conflict of interest argument does not seem persuasive.<sup>68</sup> However, this conclusion focuses on only the first possible interference with an attorney's independent judgment. The analysis ignores the second possible situation, that the lawyer might be prone not to advise the client to bring a malpractice action. Once courts recognize any exception to the general rule barring contribution and indemnity in malpractice actions, the possibility of a claim for contribution or indemnity becomes a factor that the successor attorney takes into account in his decisionmaking.<sup>69</sup>

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65. See *supra* notes 34-39 and accompanying text.

66. See *supra* notes 3-13 and accompanying text.

67. See *supra* notes 15-23 and accompanying text.

68. See *supra* note 57 and accompanying text.

69. The liability of lawyers for malicious prosecution is comparable to legal malpractice liability. In *Manson v. Linnick*, 255 Cal. App. 2d 589, 63 Cal. Rptr. 340 (1967), an attorney who knowingly used false testimony in prosecuting his client's claim and delivery action was held to have maliciously prosecuted the action. Thus, in malicious prosecution actions there is an exception to the rule allowing attorneys general immunity from



A third reason for denying the right of a former attorney from seeking contribution or indemnity from a successor attorney focuses on the impact that allowing these claims will have on the efficiency of the judicial system. Suppose an attorney represents a client in a malpractice action against the client's former attorney and the court allows a cross-claim for contribution or indemnity. On the one hand, the successor attorney's duty to his client would require him to act zealously to establish the malpractice of the former attorney. Yet in doing so, the successor attorney would be establishing an essential element of the claim of the former attorney against himself. Thus, the successor attorney would have conflicting interests in the litigation. As a result, the lawyer would be disqualified from representing the client.<sup>70</sup> Therefore, as a consequence of allowing claims for contribution or indemnity, the former attorney would have a weapon available to disqualify the successor attorney. This would interfere with the client's right to choose counsel and certainly would disrupt the legal system.

Ways exist, of course, to deal with this problem. First, disqualification of Attorney II is not required merely because Attorney I files a cross-complaint for contribution or indemnity. The court could hold a preliminary hearing on the probable merits of the claim for contribution or indemnity. If the court found the complaint potentially valid, the court could allow the

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liability, but the exception is narrower than that recognized in contribution and indemnity actions. In the malicious prosecution situation, the attorney is liable only if he acts intentionally or in bad faith. *See also* Annot. 27 A.L.R.3d 11, 13 (1969 and Supp. 1982).

70. According to the MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(A), 5-105(B) (1979), an attorney must decline employment or discontinue representation pursuant to DR 2-110 if the exercise of his independent professional judgment will be or is likely to be impaired. If an attorney has conflicting financial interests in a case, certainly his professional judgment is likely to be impaired.

The case of *Jedwabny v. Philadelphia Transp. Co.*, 390 Pa. 231, 135 A.2d 252 (1957), *cert. denied*, 355 U.S. 966 (1958) illustrates the problem of an attorney representing conflicting interests. The *Jedwabny* case arose out of a collision between an automobile and a streetcar. An attorney represented the automobile driver and his passengers in a suit against the owners of the streetcar. The defendant owners joined the driver of the automobile as an additional defendant. The court found that the conflict of interest between the passengers and the driver of the automobile was sufficient to preclude the same attorney from representing both parties. 390 Pa. at 233-36, 135 A.2d at 253-55.

In a dissenting opinion, Justice Bell argued that the defendant automobile driver need not have separate counsel if the driver made "an informed choice." *Id.* at 237, 135 A.2d at 255 (Bell, J., dissenting).

case to proceed against Attorney II and require that a new lawyer represent the client. If, however, the court found the complaint not valid, Attorney II could proceed with his representation of the client. Alternatively, courts could require claims for contribution or indemnity to be brought in a subsequent proceeding of Attorney I against Attorney II. While this would prevent the issue from directly interfering with the proceeding, it could continue to affect Attorney II's judgment because he may have the subsequent litigation in mind during his representation of the client. Moreover, the use of subsequent proceedings could create *res judicata* and collateral estoppel problems as well.

A final consideration in analyzing the policy reasons for allowing claims for contribution or indemnity against a successor attorney deals with the interests of the former attorney in asserting such claims. Normally, attorneys will be covered by malpractice insurance. Thus, in a typical case the interest in asserting these claims is the interest of the malpractice insurance carrier in shifting at least part of the loss to the malpractice insurance carrier of the successor attorney. When considered in light of the impact on the judicial system, the client's right to choose counsel, and the impact on the successor attorney's independent judgment, this interest seems relatively unimportant. Furthermore, malpractice carriers could adjust easily to the absence of such a right by increasing their premiums.

On balance, then, allowing claims for contribution or indemnity against successor attorneys in any situation, even those involving what the *Parker* court referred to as cases not involving choices between alternative courses of action, does not seem wise. Even in these situations, there could be an impact on the successor attorney's independent judgment resulting in the disruption of the efficient functioning of the judicial system. Furthermore, the interest in pursuing these claims is essentially the interest of the malpractice insurance carrier in shifting part of the loss to another malpractice insurance carrier, an interest which does not seem particularly strong in light of the counter balance provided by the other policy considerations.

## IV. LIABILITY OF CO-COUNSEL

A. *Theories—Application of Agency Law*

In cases involving successor attorneys, no contractual relationship exists between the successor and prior attorney. Hence, liability is founded on the equitable principles of contribution or indemnity. When lawyers are co-counsel, however, a different basis of liability can be used in a claim by one co-counsel against the other—agency or breach of fiduciary duty.

To determine how the principles of agency affect recovery, it is important to distinguish between three types of relationships: agency, sub-agency, and co-agency. An agent is a person appointed by another (the principal) to act on the behalf of the principal, subject to his direction and control.<sup>71</sup> A sub-agent is a person appointed by an agent, pursuant to the authority of the principal, to perform duties undertaken by the agent for the principal and for whose actions the agent is responsible.<sup>72</sup> A co-agent is an agent appointed by the principal to handle one aspect of a matter on behalf of the principal while another co-agent handles another aspect of the matter. Both co-agents operate under the direction and control of the principal.<sup>73</sup> Generally, neither co-agent is responsible to the other.<sup>74</sup>

The co-agency situation poses little problem. Under agency law, co-agents are not responsible to one another.<sup>75</sup> Furthermore, claims among co-agents are unlikely to arise because co-agents normally have little contact with each other but instead operate

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71. RESTATEMENT (SECOND) OF AGENCY § 1(1), 1(3) (1957) [hereinafter cited as AGENCY].

72. AGENCY, *supra* note 71, at § 5(1).

73. *Id.* Comment a. See also *id.* § 5(1) Comment c (distinguishing a sub-agent from an agent for an agent and an agent for a principal).

74. See *id.* §§ 363-67, 373-74. In multiple attorney situations, both co-agency and sub-agency relationships can exist. For example, suppose an insurance company is the products liability carrier for an asbestos manufacturer who is a defendant in asbestosis suits. The insurance company might coordinate its legal representation in one of two ways. First, the company might hire a number of law firms to handle the cases in different parts of the country. Each of the law firms would be a co-agent of the insurance company. Second, the company might hire one large law firm to have overall responsibility for coordinating the litigation. This law firm, in turn, might hire other law firms to handle the matters for them in various parts of the country. The second law firms would be sub-agents of the larger firm.

75. *Id.*

under the direct control of the principal or the principal's agent.

A conflict between a sub-agent and agent is more likely to arise. For example, suppose a New York law firm with an insurance carrier client hires a South Carolina law firm to handle local asbestos litigation. The South Carolina firm commits malpractice and the insurance carrier client brings suit against the New York and South Carolina firms. Does the New York firm, the agent, have a right of recovery against the South Carolina firm, the sub-agent? On the other hand, suppose the New York firm directs the South Carolina firm to go to trial in one of the asbestos cases and the jury returns a large plaintiff's verdict. The insurance carrier brings a suit against both the New York and South Carolina firms claiming that they were negligent in deciding to take the case to trial. May the South Carolina firm, assuming the firm properly handled the litigation, recover from the New York law firm?

Both general agency law and the one case which has considered the question<sup>76</sup> support the right of agents and sub-agents to recover from one another. Under agency law a sub-agent is responsible to an agent for negligence in performance of his duties.<sup>77</sup> Thus, in the first example, the New York firm should have a right of recovery against the South Carolina firm. Similarly, a sub-agent has a right of indemnification against the agent if the sub-agent suffers a loss while acting under the direction of the agent.<sup>78</sup> Therefore, in the second example, the South Carolina firm should have a right of indemnification against the New York firm.

### B. Case Law

In *Pollack v. Lytle*,<sup>79</sup> a client retained an attorney to handle the client's medical malpractice action against a doctor. Attorney I referred the case to Attorney II.<sup>80</sup> Attorney II discovered that the action required expert testimony by a neurosurgeon,

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76. *Pollack v. Lytle*, 120 Cal. App. 3d 931, 175 Cal. Rptr. 81 (1981). See *supra* notes 79-91 and accompanying text.

77. AGENCY, *supra* note 71, § 459.

78. *Id.* §§ 438(1), 438(2)(b). See also *id.* § 439 (specific instances when an agent has a duty to indemnify a sub-agent).

79. 120 Cal. App. 3d 931, 175 Cal. Rptr. 81 (1981).

80. *Id.* at 947, 175 Cal. Rptr. at 90 n.1 (Johnson, J., dissenting).

but that a neurosurgeon would be extremely reluctant to testify. Before trial, a third attorney (Attorney III) contacted Attorney II and falsely represented that he was associated with a firm specializing in medical malpractice and was a personal friend of a certified neurosurgeon. Attorney III offered to have the surgeon review the client's records and examine the client. Attorney III later falsely stated that in the surgeon's expert opinion, the client's doctor had violated standard medical practice. Attorney III further offered to obtain the expert's testimony at trial in exchange for being associated on the case. Attorney II agreed and continued to advance funds for all expenses in return for a fifty percent contingency fee.<sup>81</sup> However, prior to the conclusion of the case and the payment of the contingency fee, Attorney III induced the client to discharge Attorney II.<sup>82</sup>

Attorney III's continued misrepresentation and negligence caused the client to lose any opportunity for pretrial settlement or success at trial.<sup>83</sup> Attorney III ultimately induced the client to bring a malpractice action against Attorney II. Attorney II then brought an action against Attorney III for fraud, breach of fiduciary duty, breach of contract, legal malpractice, and declaratory relief in the form of indemnity.<sup>84</sup> Attorney II appealed the lower court's order of dismissal.<sup>85</sup>

The California Court of Appeal reversed and remanded the case. The court found that Attorney II pled sufficient facts to prove an agency relationship between Attorney II and Attorney III. The court reasoned that the agency relationship was a fiduciary relationship requiring "the fullest disclosure of all material facts which might affect his principal's decision-making."<sup>86</sup> The court stated that the breach of the fiduciary duty by Attor-

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81. The fee agreement was that "[Attorney I] agreed to advance all necessary expenses in return for a 50% contingency fee and reimbursement for expense advances made. Reimbursement was not contingent upon the recovery of damages." *Id.* at 936, 175 Cal. Rptr. at 83. Apparently, the attorney's fee was contingent upon recovery; he would receive 50% of the damage award. But reimbursement for his expenses incurred in prosecuting the case was not contingent; he would receive all expenses regardless of the verdict. All three attorneys were to share the 50% contingency fee. *Id.* at 936-38, 175 Cal. Rptr. at 83-84.

82. *Id.* at 938, 175 Cal. Rptr. at 84.

83. *Id.*

84. *Id.* at 939, 175 Cal. Rptr. at 85.

85. *Id.* at 936, 175 Cal. Rptr. at 83.

86. *Id.* at 940, 175 Cal. Rptr. at 85 (citations omitted).

ney III was the proximate cause of Attorney II's injuries.<sup>87</sup>

The appellate court noted the line of California cases holding "as a matter of public policy, that a successor attorney owes no duty to his predecessor,"<sup>88</sup> but distinguished the roles of successor and associate attorneys. According to *Pollack*, a successor attorney has a duty of undivided loyalty to review the client's case without being threatened by liability to a prior attorney. The *Pollack* court held that "in contrast, an associate attorney acting as the agent of the principal replaces no one, but acts at the behest of his principal."<sup>89</sup>

The *Pollack* court also found that an associate attorney's primary duty to act in the best interests of the client created no conflict of interest. If an associate attorney believes a course of action is contrary to a client's best interests, she is obligated to disclose that information to the client. If the principal attorney chooses to ignore the disclosure, and the associate attorney remains convinced the conduct is wrong, she may withdraw as counsel.<sup>90</sup> Because an associate attorney owes the same duty of care, skill, and diligence to the client as she does to her principal, the *Pollack* court concluded that to hold that an associate owes a duty only to the client could create conflicts in defining the client's best interest and would be against public policy. The court also indicated that under agency principles, it would be unfair to relieve an associate attorney from liability to the principal attorney. The court, therefore, determined that the principal attorney had stated a claim for declaratory relief in the form of indemnity.<sup>91</sup>

#### V. ABILITY OF AN ATTORNEY TO OBTAIN CONTRIBUTION OR INDEMNITY FROM AN ATTORNEY TO WHOM A CASE IS REFERRED

With the move toward specialization, more attorneys will be referring clients to other attorneys who practice in specialized areas of the law. If the client is dissatisfied with the new attorney, he might bring an action against the first attorney for negli-

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87. *Id.* at 941-42, 175 Cal. Rptr. at 86.

88. *Id.* at 942, 175 Cal. Rptr. at 86-87.

89. *Id.* at 942, 175 Cal. Rptr. at 87.

90. Withdrawal, of course, poses ethical problems. See *supra* note 70 and accompanying text.

91. *Pollack*, 120 Cal. App. 3d at 943, 175 Cal. Rptr. at 87.

gent referral. As a result, the first attorney may seek contribution or indemnity from the second attorney. For example, a client comes to Attorney I with a complex tax matter. Attorney I is not a tax attorney and, therefore, refers the client to Attorney II, a tax specialist. Attorney II handles the matter improperly. The client then brings a malpractice action against both Attorney I for negligent referral and Attorney II for malpractice. Does Attorney I have a right to contribution or indemnity from Attorney II?

Although the courts have yet to answer this question, an action for contribution or indemnity should be allowed. The policy arguments against allowing contribution or indemnity do not apply in this situation as they do against a successor attorney. A third attorney would handle the malpractice and negligent referral action against Attorneys I and II; therefore, allowing an action for contribution or indemnity would not interfere with Attorney II's exercise of professional judgment. There would be no need to disqualify the attorney handling the malpractice case because he would have no malpractice exposure. Thus, the judicial system would not be inconvenienced and allowing these claims would not greatly increase the complexity of the case. The only issue to be resolved is whether Attorney II committed malpractice, the same issue that must be resolved in the client's case against Attorney II. Further, allowing the referring attorney to obtain contribution or indemnity will encourage attorneys to refer cases. Assuming that it is desirable to have general practitioners refer cases to specialists, allowing the referring attorney to seek contribution or indemnity makes sense.

## VI. CONCLUSION AND SUMMARY

This paper has examined relationships in which an attorney might seek contribution or indemnity from another attorney. These relationships are (1) the successor attorney against a prior attorney, (2) associate attorney against another associate attorney, and (3) a prior attorney against an attorney to whom a case has been referred.

In a successor attorney relationship, the *Parker* approach should be rejected and a rule adopted barring an action for contribution and indemnity against a successor attorney. This conclusion is justified for several reasons. First, once courts allow

actions for contribution and indemnity in some situations, the judgment of successor attorneys will be affected. Second, allowing claims for contribution or indemnity create problems of conflict of interest, and although there may be procedural remedies for the problem, the remedies are complex. Third, cross-claims for contribution or indemnity increase the complexity of malpractice litigation. The only real benefit of a rule allowing claims for contribution or indemnity is the protection of former attorneys. Since most of these cases will be covered by malpractice insurance, this protection seems too insignificant a benefit to justify the rule. Therefore, in the successor attorney situation, there should be no right to contribution or indemnity.

Under agency law and case law, a sub-agent is responsible to an agent for harm caused by his neglect or malpractice. Similarly, case law supports the right of the sub-agent to recover from the agent if the sub-agent suffers harm as a result of actions taken under the direction of the agent.

Contribution or indemnity should be allowed in the referral situation. These claims will not undermine the independent judgment of the attorney to whom the case was referred, will not require disqualification of trial counsel, and will not substantially increase the complexity of malpractice claims. In fact, allowing actions for contribution or indemnity promotes the social policy of encouraging general practitioners to refer cases to specialists.

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