POINTING FINGERS AND SHARING THE PAIN: CONTRIBUTORY NEGLIGENCE, COMPARATIVE FAULT AND APPORTIONMENT IN LEGAL MALPRACTICE ACTIONS

ABA National Legal Malpractice Conference
Young Professionals Program
Chicago, September 22, 2016

MELISSA M. LESSELL, MODERATOR, DEUTSCH KERRIGAN, L.L.P., NEW ORLEANS
DAVID P. ATKINS, PULLMAN & COMLEY, LLC, BRIDGEPORT, CONNECTICUT
NOAH D. FIELDER, HINSHAW & CULBERTSON LLP, MILWAUKEE
JOCELIN SINGER, CNA LAWYERS PROFESSIONAL LIABILITY CLAIMS, NEW YORK
Contributory Negligence – ancient rule of tort (now abolished in most jurisdictions) in which a plaintiff was completely barred from recovery if partially at fault, even if fault was insubstantial.

Comparative Negligence/Fault – allocating damages when two or more parties (including the plaintiff) are at least somewhat at fault (“pure”).

**Variations:**

- No recovery if the plaintiff’s fault is equal to or exceeds the percentage of fault of each defendant.
- No recovery if the plaintiff’s fault exceeds the percentage of fault of each defendant.

Apportionment – See definition of Comparative Negligence/Fault.
DEFINITIONS: THE BASICS IN MOST (NOT ALL) JURISDICTIONS

**Contribution** – an independent action (usually statutory) in which one tortfeasor seeks reimbursement from a co-tortfeasor for the latter’s proportional-fault.

“A contribution claim . . . lies against an independent tortfeasor who has separately breached his own duty to the plaintiff, as long as that breach of duty aggravates the same damages of the plaintiff” whether the co-tortfeasor is “‘concurrent’, ‘successive’ or ‘independent’” *Bolton v. Weil, Gotshal & Manges LLP*, 806 N.Y.S. 2d 443 (N.Y. Sup. Ct. 2005)

- Most states permit a settling co-tortfeasor to seek contribution from a non-setting co-tortfeasor
- Some states do not allow contribution claim absent a judgment already in place against co-tortfeasor seeking contribution

**Indemnification** – an independent, post-judgment action by a co-tortfeasor (typically authorized by common law) seeking full reimbursement from the more “active” co-tortfeasor.
Dexter Dimwit engaged Olivia Wagstaff, Esq. to represent him in his withdrawal from a business partnership. Because Dimwit and his partner each had signed personal guaranties on a credit line extended by the business’s bank, prior to retaining Wagstaff, he sent written notice to the bank – by first class mail – of his cancellation of his guarantee.

Dimwit’s partner later defaulted on the business’s loan obligation and filed for bankruptcy. The bank, denying it ever received Dimwit’s cancellation notice, then sued Dimwit for the entire amount of the debt. After paying the bank to settle the debt action, Dimwit sues Wagstaff for legal malpractice.

He claims that Wagstaff, who was told of the delivery of the notice by U.S. mail, was negligent in failing to advise him to re-send the notice to the bank by certified mail.

Wagstaff wants you to assert a comparative negligence defense.

Should you do so?
YOUR ADVICE TO THE LAWYER SHOULD BE?

A. Yes. Even if prior to representation, the client hindered Wagstaff’s ability to adequately protect the client’s interest and so the client is 100% at fault for his own injuries.

B. No. Whatever mistake the client committed occurred prior to the representation, so the court will reject a comparative negligence defense against the plaintiff as insufficient as a matter of law.

C. Yes. Even if Wagstaff was aware the client had sent the notice by regular rather than certified mail, the standard of care did not require her to recommend re-delivery of the notices by certified mail.

D. No. Contributory negligence defense, even if it might result in a set off of damages, is not worth pleading because it will anger the jury.
SUCCESSOR COUNSEL AT FAULT

Theresa Teasdale engaged Hungadinger & Hungadinger LLP to file a wrongful death action arising from a multi-car highway crash in which her son perished.

Based on H&H’s failure to prosecute the action with diligence, the court dismissed the action without prejudice.

Teasdale discharged H&H and engaged substitute counsel J. Cheever Loophole to restore the case to the docket or to commence a new action.

Although Teasdale’s claim was not time barred when she engaged Loophole as successor counsel, Loophole never re-initiated the action and the SOL now has lapsed.

At Teasdale’s request, Loophole brings a legal mal action on her behalf against H&H.

The client wants you to file a third party apportionment complaint against Loophole. Should you do so?
YOUR ADVICE TO THE LAW FIRM CLIENT SHOULD BE:

A. Yes. Loophole could have completely remedied the consequences of H&H’s negligence, thereby requiring the jury to apportion 100% of fault to him.

B. No. Public policy bars apportionment claims against successor counsel engaged to fix the mistakes of predecessor counsel.

C. No. Public policy bars apportionment claims against successor counsel if the successor is likely to be a witness at trial.

D. Yes. But under tort law principles of mitigation, the jury merely will reduce its damages award against its H&H, not allocate 100% fault to Loophole.
COMPARATIVE FAULT CLAIMS AGAINST SUCCESSOR COUNSEL NOT ALLOWED: THE PUBLIC POLICY RATIONALES


● A successor attorney must be free to exercise judgment and “should not be required 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 predecessor counsel. *Gibson, Dunn & Crutch v. Superior Court*, 156 Cal. Rptr. 326, 331 (Cal. Ct. App. 1999.)

● Successor counsel “would be unable to use privileged information gained in the course of the professional relationship with the client to defend him or herself unless the client waived the attorney-client privilege.” *Holland v. Thacher*, 245 Cal. Rptr. at 251

  ● Why not able to use? Doesn’t the implied waiver and “self-defense” exception to A-C privilege apply?
COMPARATIVE FAULT CLAIMS AGAINST SUCCESSOR COUNSEL ALLOWED: THE RATIONALES

● Otherwise “substitute counsel, no matter how egregious their conduct would be immunized from suit simply because the client whom they continue to represent chooses not to sue her current counsel.” Goran v. Glieberman, 659 N.E. 2d 56, 61 (Ill. Ct. App. 1995)

● “While we too are concerned with protecting the attorney-client privilege and the attorney-client relationship, this Court is reluctant to exempt a potential joint tortfeasor from accepting the blame for its negligent actions.” Parler & Wobber v. Miles & Stockbridge, P.C., 756 A. 2d 526, 541 (Md. Ct. App. 2000)

● Public policy concerns “cut both ways.” “. . . It would hardly be in the client’s best interest to be represented by counsel that was negligent in causing an injury to the client, but who failed to disclose the negligence to the client or take responsibility for the action. This dominant position leaves us uneasy accepting the notion that successor counsel should be left to its potential self-dealing.” Id. at 544-45
Russell Bell sues his long standing business lawyer Maurice (Maury) Levy for having failed to adequately protect his interests in a loan Bell had made to the Endrun Corporation on which Endrun later defaulted. Among other things, Bell accuses Levy of failing to advise him to retain a financial advisor to examine the merits of the loan transaction and to warn him of any risks of doing business with Endrun.

In extending his loan, Bell had relied principally upon financial statements of Endrun signed under oath by its C.E.O. Avon Barksdale and audited by Endrun’s outside accountant James McNulty, C.P.A., C.F.A.

In addition to defending on the merits and asserting a comparative negligence claim against the plaintiff-client, Levy wants you to file and serve a third-party complaint for apportionment against both Barksdale and McNulty.

Should you?
YOUR ADVICE TO THE LAWYER CLIENT SHOULD BE:

A. Yes. As to both because a jury likely would allocate a much higher percentage of fault to Barksdale and McNulty collectively than to Levy (even if Barksdale is judgment proof).

B. Yes. As to McNulty (the CPA), but no as to Barksdale (the Endrun insider) because the latter is judgment proof and it’s better to have the jury allocate/apportionment as much fault as possible onto the co-tortfeasor who is solvent.

C. Yes. As to McNulty (the CPA), but no as to Barksdale (the Endrun insider) because the latter’s conduct was intentional.

D. No. The only claims for which a tort defendant may seek apportionment under statute are claims against the first party defendant for “personal injury, wrongful death or damage to property.”