Indemnity Cross-Claim: Defense Strategy in Legal Malpractice Cases

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Indemnity Cross-Claim Strategy as a Defense in Legal Malpractice Cases: Party-in the "Underlying Tortfeasor" and Reduce if not Eliminate Risk and Loss in Legal Malpractice Cases

By B. Casey Yim

An "indemnity" or "comparative fault" cross-claim is a "Sleeping Beauty" among legal malpractice defense strategies. Indemnity cross-claims are common in construction defect and product liability cases. They are regularly filed in these cases, and used primarily as a defense strategy to avoid or reduce liability exposure and loss. However it has been virtually completely overlooked as an defense strategy in legal malpractice cases.

Yet they are rarely used in legal malpractice cases. Most indemnity cross claims in legal malpractice cases are filed between prior and successor counsel for the same plaintiff-client. An indemnity claim against the underlying tortfeasor is a rarity. This article will demonstrate how an indemnity cross-claim strategy can be used to bring in the underlying tortfeasor thereby reducing, if not completely eliminating risk of LPL liability and loss for the alleged malpracticing attorney-defendant.

Let's say an attorney is sued for "blowing" the statute of limitations by failing to timely sue the negligent driver in a car accident injury case. It is among the more common kinds of legal malpractice case, and a "sure fire" automatic liability against the attorney. In effect, the attorney's negligence caused the loss of the injured plaintiff's damage claim against the negligent driver. Sure, the lawyer missed the statute which played a role in causing losing the client's damage claim. But the attorney did not cause the physical injuries. The true wrongdoing culprit, the negligent driver who caused the plaintiff's injuries, will get away "scott free", while the attorney defendant shoulders the entire burden of the damages.

"Not fair," you might say? Well, that "unfairness" is what triggers a potential equitable indemnity or "comparative fault" cross-claim by the attorney back against the underlying negligent driver. This can and should be pursued under the "granddaddy " American Motorcycle case, the California landmark case establishing "comparative fault" in California.\(^1\)

You might also ask, "what about the statute of limitations?" "Wouldn't the indemnity cross claim also be barred as well?" The answer is "no". In an "indemnity" cross-claim, accrual of the action commences when the putative indemnitee pays the "underlying" damages. Crouse v. Brobeck, Phleger & Harrison\(^2\). Hence, the attorney's "missed statute of limitations" for filing the client's underlying claim is in effect given a "re-newed life". To the same effect is the holding in People ex rel. Dept. of

\(^1\) (under American Motorcycle Assn. v. Superior Court (1979) 20 Cal.3d 570).

Transportation v. Superior Court\(^3\) ("... because the defendant's equitable indemnity claim is independent of the plaintiff's action, the defendant does not lose his right to seek equitable indemnity from another tortfeasor because the plaintiff's action may be barred by the statute of limitations. ...") (Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal.2d 834, 843; Card Constr. Co. v. Ledbetter (1971) 16 Cal. App. 3d 472, 480.)" (Italics added.) Numerous additional California authorities uniformly confirm "the rule that the period of limitations on the [equitable] indemnity claim begins when the claimant settles with the injured party." Id., at 751-52.\(^4\)

Background of Comparative Fault in California.

The doctrine of "comparative fault" had its beginnings in California in the cases of American Motorcycle, supra., and Li v. Yellow Cab Co.,\(^5\) in the mid 1970s and the early 1980s. Comparative fault law has since rapidly expanded, taking on a "life of its own", and acquiring widespread application in multiple differing litigation conditions and scenarios. Multiple parties, having different duties and liabilities to the plaintiff, causing either aggravation of the original injuries, or entirely different additional injuries, are now regularly embroiled as cross-defendants in indemnity cross-claims in all kinds of injury cases, with the jury to determine comparative fault between the cross-claiming parties using comparative fault principles.\(^6\)

It has been long established, even before American Motorcycle, that a manufacturer of a defective machine may be a cross-defendant in an employer's or worker comp carrier's indemnity claim for injuries caused by the defective product to an injured employee, paid for by the employer. Similarly, a manufacturer of a defective automobile or component may be a cross-defendant in a cross-claim by the negligent driver, when sued by an injured plaintiff. Larsen v. General Motors, 391 F.2d 495 (8th Cir., 1968) The negligent driver of the automobile causing the initial injuries, may obtain indemnity and contribution from a subsequently malpracticing physician, even though the duties owed by each to the injured plaintiff are different, and the resulting injuries may also be different (e.g., malpracticing physician negligently amputates the wrong leg). Herrero v. Atkinson.\(^7\)

Under the modern case law allowing recovery for "Enhanced Injuries", it is common for two defendants, owing different duties to the plaintiff, to file comparative fault cross-claims against each other, even though they may have caused differing

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\(^3\) 26 Cal. 3d 744, 751-752 (1980).

\(^4\) Citing ... E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal.3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505.

\(^5\) (1975) 13 Cal.3d 804.

\(^6\) Restatement 2d, of Torts, sec. 886B.

\(^7\) (1964) 227 Cal.App.2d 69, 75.
injuries--an original injury from the "first collision" (e.g., the auto accident), and an "enhanced" additional injury (or aggravation) from the "second collision" arising from some product failure (e.g., failed seat belts). The "enhanced" second "injury" may manifest itself either in the form of an aggravation of the original injury from the "first collision", or it may be a completely different injury. Meekins v. Ford Motor Co.\textsuperscript{8} ("While some cases might have clearly distinguishable injuries as a result of the initial collision compared to injuries from the defect, most cases are not clear cut and involve "several acts of negligence, all of which might be proximate causes of the plaintiff's injuries."). See also, Soule v. General Motors Corp., 8 Cal. 4th 548, 559 (Cal. 1994) (". . . a manufacturer is liable for "enhanced" injuries caused by a manufacturing or design defect in its product while the product is being used in a foreseeable way.").\textsuperscript{9}

The comparative fault doctrine has since been applied in an expansive manner, to multi-tort contexts involving differing duties and liabilities among the competing comparative fault claimants. The American Motorcycle case itself applied comparative equitable indemnity between different negligent tortfeasors owing different duties to the injured plaintiff.\textsuperscript{10} Subsequent cases have allowed its application to different strictly liable defendants, and among negligent defendants and strictly liable defendants.\textsuperscript{11} The comparative fault principles apply when one party is negligent and the other is guilty of willful misconduct.\textsuperscript{12} And the doctrine has been applied to allow a negligent defendant to shift the loss to an intentional tortfeasor.\textsuperscript{13}

The entire foundation of comparative fault arises from the equitable principle of "unjust enrichment". Under the Restatement 2d, of Torts, the concept is described as follows:

"The basis for indemnity is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay."\textsuperscript{14}

\textsuperscript{8} 699 A.2d 339, 340 (Del Super. Ct., 1997)


\textsuperscript{10} American Motorcycle Ass'n., supra., 20 Cal.3d at p. 608.


\textsuperscript{13} ( Weidenfeller v. Star & Garter (1991) 1 Cal.App.4th 1. See also Gardner v. Murphy (1975) 54 Cal.App.3d 164.)

\textsuperscript{14} Rest.2d, of Torts, section 886B (Comment c).
The lead off jurisdiction to depart from the historic distinction between contribution and indemnity, and their "all or nothing" consequences, was New York in Dole v. Dow Chemical Co.\textsuperscript{15} There, the court declared that the concept of "indemnity" was judicially created and could be judicially adapted to provide "partial indemnity" and permit apportionment according to the fault of the parties without a joint judgment. California was soon to follow in American Motorcycle Ass'n, supra.,\textsuperscript{16} (negligent motorcycle race organizers allowed to seek indemnity from negligent parents of the injured minor plaintiff, for failure to provide adequate instruction or training on motorcycle riding safety). That case established that the concepts of partial indemnity and comparative fault and have since become permanently engrained into California law. In effect, the prior doctrines of contribution and indemnity were merged under American Motorcycle; with the court now determining the "comparative fault" of the competing tortfeasors.

Hence, there should be no impediment to carrying forward the well established "comparative fault" principles into the arena of legal malpractice litigation. Where the malpracticing attorney causes loss of a client's underlying tort claim against a wrongdoing third party, the attorney should be permitted to seek a comparative fault recovery based on "apportionment" against the underlying actual wrongdoer who caused the original injuries. Such a result is squarely in keeping with the strong public policies under American Motorcycle, supra., and its progeny, that a wrongdoing tortfeasor should not get away "scot free", while someone having a lesser level of "fault" pays the full amount of his damages.\textsuperscript{17}

American Motorcycle has been cited as succinctly describing this critical "anti-scot free" policy by the following oft-quoted passage:

"[W]e concur with Dean Prosser's observation in a related context that 't]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were . . . unintentionally responsible, to be shouldered onto one alone, while the latter goes scot free.' (Prosser, Law of Torts [(4th ed. 1971)] § 50, p. 307.) . . . [W]e have progressed to the more refined stage of permitting the jury to apportion liability in accordance with the tortfeasors' comparative fault. . . ."\textsuperscript{18}

\textsuperscript{15} 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).


\textsuperscript{17} American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578, 607-08; and, Musser v. Provencher, 28 Cal. 4th 274, 279-280 (Cal. 2002).

\textsuperscript{18} Musser v. Provencher, 28 Cal. 4th 274, 279-280 (Cal. 2002), quoting from the original American Motorcycle Ass'n., case, supra., at pp. 607-608.
Herrero v. Atkinson, supra., is a classic example where comparative fault was applied to two different torts and "duties owed" to the injured party (negligent driver vs. malpracticing physician). The court in Herrero, in allowing the cross-claim, followed basic "comparative fault" equitable principles: "Although the original negligence of Herrero may be regarded in law as a proximate cause of the damages flowing from the subsequent malpractice of the cross-defendants, and the plaintiff may recover a joint and several judgment against all who are found liable, there is no reason why the ultimate burden of damages should not be distributed among the various defendants, and each be made to bear that portion of the judgment which in equity and good conscience should be borne by him."19

Surprisingly, the indemnity case law in legal malpractice litigation is mixed. In California, for example, there are two cases coming to diametrically opposing conclusions. In Munoz v. Davis (1983) 141 Cal.App.3d 420, the court held that an attorney who missed the statute of limitations could not sue for indemnity or contribution against the negligent driver in the ensuing legal malpractice case by the client. By contrast, in Platt v Caldwell Banker Residential Real estate Services (1990) 217 Cal.App. 3d 1439, the court reached the exact opposite result, allowing an attorney, sued for legal malpractice in connection with preparing contract documents in a certain real property transaction, to cross-claim against the client's real estate investment advisors and brokers who provided faulty information and negligent advise concerning the investment.

Munoz was Based on Flawed Reasoning

There is no logical basis for the difference in the two decisions. The court in Munoz denied an indemnity cross-claim by the malpracticing attorney merely because the duties of indemnitor and indemnitee to the injured plaintiff were different. As a threshold matter, Munoz cites no case law authority for its denial of the indemnity cross-claim. The decision in Munoz also erroneously focused on the differences in the "duties owed" by the attorney and negligent driver respectively to the injured plaintiff. According to Munoz, the negligent attorney's duty to protect the client's legal claim, was different from the negligent driver's duty to operate his car in a safe manner, and therefore there could be no basis for a contribution claim as between the two because having different duties, there could be no "joint tort". The Munoz court's reasoning is contrary to the American Motorcycle "comparative fault" doctrine which does not require that the two cross-claiming parties be "joint tortfeasors," or that their duties be the same. The cross-claim in the American Motorcycle case itself involved two differing "duties" owed by the indemnitor and indemnitee respectively, to the injured plaintiff.20 The

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20 Under the facts of American Motorcycle itself, the cross-claiming parties were alleged to have owed different duties to the injured plaintiff—defendant AMA was sued for negligence in maintaining a safe motorcycle racing course, whereas the cross-
Herrero case similarly involved different duties, negligent driver vs. malpracticing physician and hospital. The differing duties did not prevent the indemnity cross-claims in these historic cases, even though the competing tortfeasors owed different duties to the injured plaintiff, why should it prevent the same cross-claim by the malpracticing lawyer against the true wrongdoing tortfeasor in a legal malpractice case?

The doctrine of comparative fault has historically been applied to tortfeasors having different duties to the injured plaintiff. In Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital, the term "indemnity" was described as follows:

"'It is a right which enures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable.' " (Alisal Sanitary Dist. v. Kennedy, supra, 180 Cal.App.2d at p. 75.)

Distinctions between "active" and "passive" fault, "primary" and "secondary" liability, and similar characterizations of the relationship between or among concurrent tortfeasors served as the theoretical underpinnings of equitable indemnification and guided its application. Western Steamship Lines, supra, at 108, citing and quoting from Ford Motor Co. v. Robert J. Poeschl, Inc. (1971) 21 Cal.App.3d 694, 696-697, 98 Cal.Rptr. 702.

Note, there is no requirement that the duties owed by each of the competing tortfeasors to the injured tortfeasor must be the same. See also, Western Steamship Lines, supra., which involved an indemnity claim based on different torts--negligence by the steamship company in operating an "unseaworthy vessel" based on Admiralty tort law vs. subsequent medical malpractice by cross-defendant physicians and hospital in intubating the patient the following day, causing unconsciousness and a heart attack, ultimately resulting in the patient's death.

The court in Munoz erroneously confused the concept of "comparative fault", with the concept of "contribution" among "joint tortfeasors". The difference between contribution and comparative fault has been described as follows: "Indemnity is distinguished from the related doctrine of contribution in that the latter "presupposes a common liability shared by the joint tortfeasors on a pro rata basis." 8 Cal. 4th, at 108, citing Alisal Sanitary Dist. v. Kennedy (1960) 180 Cal.App.2d 69, 75. The difference in the duties owed to the injured plaintiff, or even the differences in the injuries, are irrelevant in comparative fault cases, because the key issue is the extent or degree of relative "fault", or of damages caused, by each tortfeasor, not common liability for the defendant parents of the injured plaintiff, were alleged to have improperly supervised and trained their minor-plaintiff son in proper and safe techniques of motorcycle racing, two distinct and separate duties.

21 8 Cal. 4th 100, 108 (1994)
same duties owed. Herrero, supra., at 75 ("Under such circumstances it is equitable and just that indemnity be allowed Herrero, and that the cross-defendant doctors and hospital bear that portion of the damages caused by their own negligent conduct.")

The California Supreme Court in Prince v. Pacific Gas & Electric Co.\textsuperscript{22} also describes the difference between "contribution" and "comparative fault"-- a "joint tort" is not required under "comparative fault" principles:

"Contribution and indemnity are related doctrines, but contribution "presupposes a common liability which is shared by the joint tortfeasors on a pro rata basis." (Western Steamship, supra, 8 Cal.4th at p. 108, fn. 6, italics added.)

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"[J]oint and several liability in the context of equitable indemnity is fairly expansive." (BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc. (2004) 119 Cal.App.4th 848, 852 [14 Cal. Rptr. 3d 721].) It extends beyond the term "joint tortfeasor" and may "apply to acts that are concurrent or successive, joint or several, as long as they create a detriment caused by several actors."\textsuperscript{23}

The Munoz court also incorrectly required that the "injury" be the same in order for comparative fault to apply. Again, this too is wrong. Comparative fault indemnity is fully available as between tortfeasors causing different injuries. E.g., Western Steamship, supra. (operation of an "unseaworthy" vessel causing the patient to become ill and unstable, vs. malpracticing physicians performing negligent intubation, causing brain damage and heart failure)\textsuperscript{24} Comparative fault determination apportioning a percentage to the different levels of fault or injury caused is commonly accomplished by an impartial jury.\textsuperscript{25}

Cases from other jurisdictions have demonstrated equally divergent results in legal malpractice cases involving an attorney defendant indemnity claim as against a party in an underlying transaction or litigation. In the New York case of Comi v Breslin &

\textsuperscript{22} 45 Cal. 4th 1151, 1162 (2009)

\textsuperscript{23} Prince, supra. at 1158.

\textsuperscript{24} "The duty to indemnify may arise, and indemnity may be allowed in those fact situations where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought. The right depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him." Herrero, supra., at 74.

\textsuperscript{25} Id.
Breslin attorneys, representing the buyer of stock, were sued for malpractice for failing to discover misrepresentations in connection with a stock sale transaction. The court permitted a cross-complaint to seek contribution from the selling parties who purportedly made the misrepresentations. In a Pennsylvania case, Gordon v. Sokolow, a lawyer representing a seller was sued for malpractice based on a missed subordination clause in a contract he drafted. The lawyer was allowed to cross-complain against the underlying buyer in the transaction who made mis-representations of the parties agreement (that the subordination clause was agreed to).

In Fisher v. Milwaukee Electric Ry. & Light Co., 173 Wis. 57 [180 N.W. 269], plaintiff sued defendant for negligence in an PI case. Defendant filed a cross-complaint against the treating doctor for alleged malpractice aggravating plaintiff's injuries. The court determined that plaintiff would be entitled to a judgment against all defendants, and that the original negligent defendant would be entitled to judgment against the negligent doctor for the aggravation of damages caused by the medical malpractice. Other New York cases have reached the same result. Primes v. Ross (Sup.Ct.) 123 N.Y.S.2d 702 and Clark v. Halstead, 275 App.Div. 17, 93 N.Y.S.2d 49.

In Rezza v. Isaacson, 13 Misc.2d 794 178 N.Y.S.2d 481, the deceased fell on a negligently maintained sidewalk. She entered a hospital for medical care where she received negligent treatment, and died from her multiple injuries. When sued for wrongful death, the property owner filed a cross-complaint seeking indemnity from the hospital and doctors. The cross-complaint could stand.

Unfortunately, the cases are not consistent. In an earlier New York case, Alexander v. Callanen, attorneys were denied the opportunity to assert claims of indemnity or contribution from the tortfeasor they failed to sue. Likewise, a Minnesota case, Vessely, Otto, Miller & Keefe v. Blake, similarly denied indemnity and contribution to attorneys against the negligent physician who they failed to sue. Both the New York Alexander case, and the Minnesota Blake case were decided in the early 1980s, during the early stages of the still developing law of comparative fault. This may explain their use of outmoded and incorrect reasoning— requiring a "joint tort" or breach of the "same duty", or identical injury. The more recent cases in the legal malpractice setting uniformly allow indemnity cross-claims even when based on different torts or duties owed to the injured plaintiff, such as Comi, (1999) 257 A.D.2d 754, 683 N.Y.S.2 345, and Platt, supra. (both decided in the 1990s). These modern cases were decided long after the comparative fault principles had become well established as a fixture in modern principles of basic comparative fault jurisprudence.
Under modern case law, different duties owed, and even different resulting injuries or damage, are found in multiple different indemnity and comparative fault cases. The negligent driver has been permitted to seek indemnity from the subsequently malpracticing physician. Herrero, supra; Western Steamship Lines, supra.; Niles v. City of San Rafael (1974) 42 Cal.App.3d 230. The manufacturer of a tractor unit was allowed indemnity against the manufacturer of its brake system. Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965). Retailers of chattels may recover indemnity against their suppliers. Frank R. Jelleff Inc. v. Pollak Bros., 171 F.Supp. 467 (N.D.Ind.1959). An owner of premises may recover indemnity from contractor who makes improvements or repair. Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co., 10 F.2d 769 (9th Cir. 1926). Manufacturer allowed indemnity cross-claim against user of chattel, Lane v. Celanese Corp. of America, 94 F.Supp. 528 (N.D.N.Y 1950); The injured PI plaintiff's medical insurance carrier may obtain indemnity from the wrongdoing negligent driver causing injuries for medical expenses paid; The negligent driver deft is entitled to an indemnity claim against a manufacturer of defective auto product, either for causing the accident itself, or for causing "Enhanced Injury" damages. Meekins v. Ford, supra.; Montag v Honda Motor Co., 75 F.3d 1414 (10th Cir., 1966).; and Egbert v. Nissan Motor Co. 228 P.2d 737 (Utah, 2010); equitable indemnity action is allowed against an insurance carrier with a policy covering same risk as paying carrier.

Compelling Policy Supports a Comparative Fault Cross-Claim in the Legal Malpractice Context

So deeply engrained are the policies of unjust enrichment underlying comparative fault, that exceptions should not be considered absent some higher level of compelling policy. In the legal malpractice context, the policy protecting the attorney-client relationship has prevented an indemnity claim where the putative cross-defendant (indemnitor) is the attorney who still continues to represent the injured plaintiff. Gibson, Dunn & Crutcher v. Superior Court (1979) 94 Cal.App.3d 347, 354-355)("... Because reasons of policy peculiar to the tripartite relationship of attorney-client-adversary override the principle of equitable indemnity enunciated in cases such as Herrero... and Niles... we conclude that the first lawyer has no right of indemnity from the second." Id., at 354 (citing Held v. Arant (1977) 67 Cal.App.3d 748, 750)31 The significance here is that absent such a compelling and overriding policy, such as the sanctity of the attorney-client relationship, the equitable indemnity cross-complaint must be allowed.

That concept is further illustrated in Parker v. Morton (1981) 117 Cal. App. 3d 751, 756, where the successor attorney was not exempt from an indemnity cross-claim at a point when he no longer represented the plaintiff (hence, there was no potential “interference” into an ongoing attorney-client relationship). Thus, an indemnity cross-complaint was allowed in the legal malpractice case, even as between a prior and successor attorney, in Parker, supra.

Nevertheless, even in those cases where some overriding public policy may apply, such as MICRA in medical malpractice cases, comparative fault apportionment principles still apply, albeit limited by the MICRA “cap” on non-economic damages, which was the result in Western Steamship Lines, supra.

While the early decisions recognized that standards governing equitable indemnity was sometimes vague and imprecise, “the restitutionary nature of indemnification clearly emerged as a common thread.” That is, “[t]he basis for indemnity is restitution, and the concept [is] that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay.” (Ibid.)

In Prince v. Pacific Gas & Electric Co., supra., 1163-1164 (Cal. 2009), the court outlined the equitable principles underlying the equitable indemnity doctrine as follows:

"As originally conceived, equitable indemnity was a doctrine that sought to prevent a more culpable tortfeasor from escaping liability altogether when a less culpable tortfeasor was involved. As an “all-or-nothing” rule, however, at times it operated to shift the entire loss to a party who was simply slightly more culpable than another. (American Motorcycle, supra, 20 Cal.3d at pp. 583, 594.) Recognizing this inequity, American Motorcycle modified the equitable indemnity rule to permit a concurrent tortfeasor to obtain partial indemnity from other co-tortfeasors on a comparative fault basis. (Id. at pp. 607–608.).”

The "Enhanced Injury" line of cases plainly demonstrate that comparative fault principles do not depend on whether the two torts are the same, or were committed "jointly", or that the injuries were the same. The concept is also advanced under traditional equitable indemnity cases. In Henry v. Superior Court, 160 Cal. App. 4th

32 Western Steamship, supra, 8 Cal.4th at 108.
33 Prince, supra., 45 Cal. 4th 1151, 1163-1164 (Cal. 2009).
34 See p.2 for discussion and explanation of "Enhanced Injury".
35 E.g., "Herrero was liable because of 'a unique rule of causation more analogous to imputed negligence than joint feasance'; as a passive tortfeasor, Herrero (footnote continued)
440, 452 (2008) the court observed that even prior to Proposition 51 in 1986, the rule holding a tortfeasor responsible for an accident includes any additional injuries suffered during medical treatment following the accident was one of joint and several liability for the enhanced injuries, if the medical care provider was negligent. (Blecker v. Wolbart (1985) 167 Cal. App. 3d 1195, at 1202–1203 [concept of partial indemnity among joint tortfeasors on comparative fault basis, approved in American Motorcycle, applies to successive tortfeasors as recognized in Ash]; Kitzig v. Nordquist (2000) 81 Cal.App.4th 1384, 1398 [97 Cal. Rptr. 2d 762] (Kitzig) [original tortfeasor “is also jointly and severally liable for injuries occurring during medical treatment”]; Marina Emergency Medical Group v. Superior Court (2000) 84 Cal. App. 4th 435, 438–439.).36

Rather, the issue determined by the jury is the relative value, or extent of fault (expressed as a percentage), to be attributed to each negligent act or wrongdoing tortfeasor, causing the same or differing injuries. Since this function is performed all the time by lay juries, and is incorporated into modern jury verdict forms, there is no reason why it should not apply to legal malpractice cases.

The point is illustrated by the court's discussion in Marina, supra.

". . . the original tortfeasor is liable for the subsequent tortfeasor's aggravating medical negligence, and that the jury is to be instructed accordingly, no more and no less. ( Id. at p. 1606.) It does not hold that evidence of the subsequent tortfeasor's negligence is inadmissible, or that the jury cannot be asked to allocate fault between the original and subsequent tortfeasors. It does not consider Proposition 51 or the effect of section 1431.2, subdivision (a), on this issue. . . ."

The cross-claimant in Marina Emergency, as the original malpracticing tortfeasor, had a number of options available: ". . . she could have but was not obligated to pursue a cross-complaint for equitable indemnity in Charno's tort action. ( American Motorcycle Assn. v. Superior Court, supra, 20 Cal. 3d at pp. 604-607; Evangelatos v. Superior Court, supra, 44 Cal. 3d at pp. 1197-1198.) She was equally entitled to do what she tried to do--to have the jury in this action allocate fault between the two doctors so that the liability for noneconomic damages to be borne by each will be in

was entitled to indemnity for the damages caused by the other [malpracticing] defendants." Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 239.

36 "it had long been settled that a tortfeasor who caused personal injuries was liable to the injured party not only for the original injury but also for any aggravation caused by a physician or surgeon whose services were secured by the injured party with reasonable care. ( Dewhirst v. Leopold (1924) 194 Cal. 424, 432-433 [229 P. 30]; see also Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1607-1609 [28 Cal. Rptr. 2d 62] [the rule is the same when the original tort is medical malpractice].) Marina Emergency Medical Group v. Superior Court (2000) 84 Cal. App. 4th 435, 438.
direct proportion to his or her fault. (§ 1431.2, subd. (a).)" Marina Emergency Medical Group v. Superior Court, supra, 439-440.

The same comparative fault principles are equally applicable in the context of legal malpractice. The malpracticing attorney who misses the statute of limitations, causes plaintiff to lose his "cause of action" (i.e., his "day in court") to recover the damages from the wrongdoing tortfeasor. The equitable indemnity cross-claim will restore that loss to the plaintiff, and hold the wrongdoing tortfeasor responsible for paying for that portion of the damages caused by him. This promotes the long-established policies underlying equitable indemnity which seek to prevent the wrongdoing tortfeasor who caused the injuries to plaintiff from "going scott free", while others having lesser levels of responsibility end up shouldering the entire burden of the loss. Remember, the attorney did not cause the physical injuries to the injured plaintiff in the first place.

The only damages caused by the malpracticing attorney might be the added burden and expense involved (if any) of having pursue recovery through a two-step legal malpractice case, rather than by a single PI case directly against the negligent driver. That proportionate share can be evaluated and determined by the jury under comparative fault jury instructions. The key benefit is that by allowing the defendant attorney to party-in the true injury-causing wrongdoer under an indemnity cross-claim, the burden of damages for the actual physical injuries is placed right where it belongs---on the wrongdoing tortfeasor who was entirely responsible for causing all of the plaintiff's physical injuries.

Comparative fault principles have been consistently applied, in comparative cross claims involving different duties, and different injuries. There is no reason, or authority, why it should not be applied in a legal malpractice claims setting where the alleged malpracticing attorney seeks indemnity from the truly wrongdoing tortfeasor whose negligence caused the injuries to the plaintiff. This route is the only way to ensure that the actual wrongdoing tortfeasor does not escape "scott free", the very evil sought to be prevented by the comparative fault doctrine.

Benefits of using the Indemnity Cross-Complaint as a Defense Strategy in Legal Malpractice cases.

The indemnity cross-complaint if used correctly can have enormous benefits for attorneys sued in legal malpractice cases. As a threshold matter, most if not all legal malpractice cases (at least all which arise from underlying litigation) require the trial of two cases: (1) the legal malpractice case; and, (2) the "underlying case" to be re-tried anew—in the "case-within-a-case". The California Supreme Court in Viner v. Sweet, has recognized that the "case-within-a-case" is necessary to prove damages under the heightened standard of "but for" causation required in legal malpractice cases. Id.

Since the underlying case must be tried anyway, why not allow that part of the trial to include the simultaneous "trial" of the indemnity cross-claim as well. It would be a virtual "no-lose" situation for the defendant attorney, and a "win-win" for the legal mal plaintiff:

(1) If the plaintiff-client "wins" the "underlying" case trial (which is his burden to prove anyway in the legal mal case), and recovers a damage award, the attorney is also "wins", i.e., defenses the legal malpractice case, because the plaintiff recovers all of his provable damages from the actual tortfeasor from the indemnity claim. Plaintiff-client has no true "loss" if he recovers and is made whole from the underlying tortfeasor. The plaintiff is fully compensated for his "loss" by an affirmative recovery in the indemnity case.

(2) If the plaintiff-client "loses" the underlying case trial, then the attorney-defendant in the legal mal case again "wins"—the actual "defense" verdict in the underlying case means only that it was "meritless" all along.

(3) If plaintiff-client wins the underlying action, but the cross-defendant (underlying tortfeasor) has insufficient assets or insurance to pay the judgment, then the attorney again "wins" the legal malpractice case based on "non-collectability", an essential element for plaintiff to prove in all malpractice cases.

The importance of this strategy is that the true tort wrongdoer causing plaintiff's injuries must pay his fair share of the damages to the injured plaintiff in the indemnity cross-complaint, thus promoting the equitable policies of restitution and preventing unjust enrichment. American Motorcycle, supra.

The underlying tortfeasor as cross-defendant must hire his own counsel to aggressively defend the underlying claim (litigated as part of the combined malpractice "underlying case", and the attorney's indemnity cross-claim). The underlying defendant will also have a real personal and pecuniary interest in the litigation, and would be fully "vested" in defending the underlying case. In the usual legal malpractice case, the underlying defendant does not even appear at trial, is much less cooperative with the attorney who attempted to sue him, and doesn't care about the result.

As a matter "tactics", attorneys do not fare well before juries. It will be a thousand times more beneficial to the attorney defendant to have the real wrongdoing tortfeasor sitting in the defendants' chair at the malpractice trial, actively defending himself. This is equally more preferable than having the attorney "defend" the underlying case, a position which will be revealed as embarassingly inconsistent with his original representation of the plaintiff. Some plaintiffs' attorneys have heard to say that a "bad" plaintiffs case turns into a virtual "gold mine" when the attorney is sitting in the defendants' chair in the legal malpractice case. It literally makes a "silk purse out of a sou's ear". Not only does the indemnity cross-claim promote the underlying principles of equitable indemnity, and reduce the risk of LPL liability, it will also serve as major "tactical" benefit to the defense of the LPL case.
From the carriers’ standpoint, adding an indemnity cross-claim should not involve added costs to litigate. The "underlying case" would have to be tried anyway in the malpractice case. More importantly, since the plaintiff-client carries the burden of proof (and of litigating) the "underlying case", and related trial costs (incl. Experts), and the impleaded cross-defendant will be forced to carry the burden of defense, there might even be a reduction in defense costs. Further, any possible added costs will be more than offset by the overall economic benefit of the "win-win" outcome-- eliminating or at least minimizing any possible damage (win or lose in the indemnity cross-claim case).

Carriers and their defense panel counsel must take an aggressive look at using the indemnity cross-claim as an affirmative defensive strategy in defending LPL cases. Since "blown statutes" are one of the main sources of legal malpractice cases, if used consistently the equitable indemnity cross-claim could substantially reduce, if not eliminate LPL losses across the board, bringing down LPL premiums for litigation attorneys, even those with high-end risk.