



by Kurt L. Schmalz

# DEFENSE Dilemma

## **Musser v. Provencher did little to reduce the risks for a defendant in a legal malpractice case in which liability could attach to multiple attorneys**

TO SUE OR NOT TO SUE? That is the question that many defendants in legal malpractice cases have to confront if they want to allocate a proportionate share of liability to other attorneys whom the plaintiff has chosen not to sue. Legally and strategically the question is not easy to answer and requires analysis of how to apply the unsettled law of equitable indemnity, contribution, and comparative fault.

Historically, courts have analyzed the allocation of damages among multiple tortfeasors in terms of two mutually exclusive doctrines: contribution and indemnity. The apportionment of loss between multiple tortfeasors was thought to present a question of contribution. Indemnity, on the other hand, dealt with whether a loss should be entirely shifted from one tortfeasor to another rather than apportioning the loss between the two.<sup>1</sup>

In 1957, the legislature enacted statutes that created, for the first time in California, a right of contribution among joint tortfea-

sors.<sup>2</sup> This contribution right limited the liability of each joint tortfeasor for a plaintiff's judgment to his or her pro rata share of the judgment. Thus, if a joint tortfeasor paid more than his or her pro rata share of the judgment, the tortfeasor who paid more had a right to recover the amount in excess of his or her pro rata share from the other tortfeasors.

In 1978, the California Supreme Court, in *American Motorcycle Association v. Superior Court*, merged traditional concepts of implied indemnity and contribution and established the doctrine of comparative indemnity.<sup>3</sup> It permitted the apportionment of comparative fault among multiple joint tortfeasors, allowing a joint tortfeasor to seek partial indemnity from other joint tortfeasors on a comparative fault basis. In addition to a comparative fault allocation between defendants, the plaintiff's conduct was also allocated a percentage of fault so that the total comparative fault among all plaintiffs and defendants

equaled 100 percent. Nonetheless, each tortfeasor whose negligence was a proximate cause of an indivisible injury to the plaintiff was individually liable for all proximately caused damages.<sup>4</sup>

After *American Motorcycle*, the distinction between the doctrines of equitable indemnity and contribution became almost indistinguishable. Many courts now refer to contribution or indemnity actions under the "partial indemnity" or "comparative indemnity" labels.<sup>5</sup> For simplicity, the two concepts may be generally referred to as indemnity unless differentiation between contribution and indemnity is essential.

For many years, the appellate courts seemed to be developing a bright-line rule that prohibited a legal malpractice defendant's

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indemnity claim against that defendant's cocounsel, concurrent counsel, or successor counsel.<sup>6</sup> However, that rule got blurry in *Musser v. Provencher*, in which the California Supreme Court confronted "whether considerations of public policy require the adoption of a blanket rule barring concurrent counsel or cocounsel from suing one another for indemnification of legal malpractice damages."<sup>7</sup>

In *Musser*, a family law attorney obtained the advice and services of a bankruptcy attorney in a divorce action. The bankruptcy attorney gave erroneous advice to the family law attorney that resulted in the family law attorney's improperly pursuing the wife's child support claim even though the husband had filed for bankruptcy. The pursuit of the claim for child support violated the automatic stay. Facing punitive damages, the wife settled with her husband for less than the original support order and sued the family law attorney for malpractice and breach of contract. The family law attorney filed an indemnity cross-complaint against the bankruptcy attorney and settled the malpractice case with the wife. The bankruptcy attorney refused to contribute to the settlement and ultimately obtained a judgment of nonsuit against the family law attorney on the indemnity claims. The court of appeal reversed the trial court's judgment and specifically found that the family law attorney's indemnity claim against cocounsel was not barred by public policy.<sup>8</sup>

The supreme court in *Musser* analyzed the numerous appellate cases involving lawyer indemnity claims, including *Kroll & Tract v. Paris & Paris*<sup>9</sup> and *Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker*,<sup>10</sup> both of which involved cocounsel indemnity claims that arose in insurance defense cases. The supreme court discussed a bright-line rule that generally barred indemnity claims by a predecessor attorney against the successor attorney in a legal malpractice case. Without expressly endorsing a blanket presumption against indemnification claims in "predecessor/successor cases" the court noted that the lower appellate courts, "with one much criticized exception, have barred indemnification."<sup>11</sup>

Setting aside the "predecessor/successor" cases, the court held that the courts should carefully analyze, on a case-by-case basis, whether the public policy concerns of avoiding conflict of interest between attorney and client and protecting the confidentiality of attorney-client communications are present before the courts prohibit indemnification claims in concurrent or cocounsel cases.<sup>12</sup> The *Musser* court specified the public policy concerns that inform a case-by-case analysis as follows:

The first policy consideration is *avoiding conflicts of interest* between attor-

ney and client: The threat of an indemnification action would arguably create a conflict of interest between the successor attorney and the client because the greater the award the successor attorney managed to obtain for the client in the malpractice action, the greater the exposure to the predecessor attorney in indemnification action. The second policy consideration is *protecting confidentiality* of attorney-client communications: In order to defend against an indemnification action, the successor attorney might be tempted to compromise the confidentiality of communications with the client.<sup>13</sup>

The court in *Musser* also noted a third policy concern, which was to protect the right of clients to choose their attorneys. This policy concern was geared to reducing the risk that an indemnification action might discourage the successor attorney from representing the client in a malpractice action because the successor would be limited in defending the indemnification claim by the attorney's duty to maintain confidentiality of client communications.<sup>14</sup> The court, however, noted that this policy concern had been given little weight and was characterized as of "secondary importance" in some appellate cases.<sup>15</sup>

Ultimately, the supreme court affirmed the court of appeal and found that none of the public policy concerns was present in the family lawyer's indemnity action against the bankruptcy lawyer.<sup>16</sup> The public policy concerns discussed in *Musser*, which the court derived from several prior court of appeal cases, seem to apply most clearly in situations in which the successor attorney still represents the client in the malpractice case against the prior attorney. Yet the court of appeal has found, in both predecessor/successor and cocounsel cases, that the policy concerns can be present if an attorney other than successor or cocounsel represents the client in the malpractice action.<sup>17</sup>

The supreme court left undecided whether the rule prohibiting a malpractice defendant from suing successor counsel for indemnity is also subject to the case-by-case analysis.<sup>18</sup> Thus, if predecessor counsel, sued by a former client for legal malpractice, tried to sue successor counsel for indemnity, would the indemnity cross-complaint be allowed to stand when, as in *Musser*, neither of the two public policy concerns was present? This is not an easy question to answer. Many pre-*Musser* courts bar lawyer indemnity suits in legal malpractice cases against successor counsel if the client hired the successor attorney to extricate the client from the condition created by the original attorney. These courts appear to base their holdings on a presumption (rather than a fact-intensive analysis)

that public policy precludes the predecessor attorney from suing the successor attorney for indemnity.<sup>19</sup> When the successor counsel is also representing the client in the legal malpractice case against the predecessor attorney, the rule prohibiting indemnity cross-complaints clearly applies.<sup>20</sup>

After *Musser*, however, an argument can be made that other predecessor/successor cases may not so clearly invoke the public policy concerns to preclude attorney indemnity cross-complaints, especially if the indemnity claim does not raise conflict of interest or confidentiality issues with the successor counsel.<sup>21</sup> Nonetheless, substantial case law (mostly pre-*Musser*) supports a blanket rule to preclude indemnity claims in legal malpractice actions by the predecessor attorney against a successor attorney.

There is a dearth of published decisions in California on this issue after *Musser*. *Forensis Group, Inc. v. Frantz, Townsend & Faldenauer* is the leading post-*Musser* case discussing indemnity cross-complaints in malpractice litigation.<sup>22</sup> *Forensis*, however, dealt with the indemnity cross-complaint of nonlawyer expert witnesses who had been sued by the client for malpractice. The experts settled the malpractice case and sued the lawyers who represented the client in the underlying action. The lawyers had not been sued by the client in the malpractice case. The trial court granted summary judgment for the lawyers and dismissed the indemnity cross-complaint. The court of appeal, however, reversed and remanded and found that the indemnity cross-complaint should have been allowed.<sup>23</sup> The court in *Forensis* used an extensive analysis of whether the public policy concerns were present. This result is not surprising following *Musser* because the experts concurrently worked with the attorneys and the case could not be construed as a predecessor/successor attorney situation in which the successor attorney had been hired to extricate the client from a problem caused by the predecessor attorney.

Accordingly, the first issue the attorney defendant must confront when considering whether to sue or not is whether the indemnity cross-complaint has any legal viability following *Musser* and case law prohibiting indemnity claims by predecessor counsel against successor counsel. An indemnity cross-complaint will undoubtedly bring a demurrer or other dispositive motion. This motion practice could further complicate and prolong the malpractice case and increase the lawyer's litigation expenses. Indeed, an insurer defending a lawyer in a legal malpractice case would probably not fund a cross-action by the lawyer defendant for indemnity. The lawyer might have to self-fund the action.

The lawyer defendant should, therefore,

# MCLE Test No. 247

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. The doctrine of comparative indemnity was established by the California Supreme Court in *American Motorcycle Association v. Superior Court*.

True.  
False.

2. The doctrine of contribution was established in California when the legislature enacted Sections 875 through 878 of the Code of Civil Procedure in 1957.

True.  
False.

3. In *Musser v. Provencher*, the California Supreme Court confronted the issue of whether successor counsel can sue predecessor counsel for indemnification of legal malpractice damages.

True.  
False.

4. *Musser v. Provencher*:

- A. Rejected a bright-line, or blanket rule on lawyer indemnity claims.
- B. Adopted a case-by-case public policy analysis to determine whether a lawyer defendant could sue cocounsel for indemnity in a legal malpractice action.
- C. Left open whether the rule prohibiting a malpractice defendant from suing successor counsel for indemnity was also subject to a case-by-case analysis.
- D. All of the above.

5. The two primary policy concerns that the *Musser* court analyzed to determine whether to prohibit indemnification claims between cocounsel were 1) avoiding conflicts of interest between attorney and client, and 2) protecting the confidentiality of attorney-client communications.

True.  
False.

6. *Kroll & Tract v. Paris & Paris* and *Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker* both involve:

- A. Cocounsel indemnity claims.
- B. Predecessor/successor indemnity claims.
- C. Post-*Musser* lawyer indemnity cases.
- D. None of the above.

7. Many published appellate cases in California support a “blanket” or “bright-line” rule to preclude indemnity claims in legal malpractice actions by a predecessor attorney against a successor attorney.

True.  
False.

8. The appellate courts in California have issued many published opinions since *Musser* to analyze a lawyer’s claims against other lawyers for indemnification in legal malpractice cases.

True.  
False.

9. *Forensis Group, Inc. v. Frantz Townsend & Foldenauer* dealt with:

- A. A predecessor lawyer suing successor lawyer for indemnification.
- B. Cocounsel suing each other for indemnification.
- C. A bright-line or blanket rule against lawyer indemnification claims in legal malpractice actions.
- D. Expert witnesses who were sued by the client for malpractice bringing indemnity claims against the client’s lawyers.

10. There is no strategic downside to a lawyer defendant adding lawyer cross-defendants for indemnity in a legal malpractice case.

True.  
False.

11. A cause of action for implied indemnity does not accrue or come into existence until the defendant has suffered actual loss through payment.

True.  
False.

12. A lawyer defendant’s indemnity claim against other lawyers not joined in the malpractice action is automatically time-barred if the client’s action against those other lawyers is barred by the statute of limitations.

True.  
False.

13. A viable strategy for a lawyer defendant in a legal malpractice action is to wait for the malpractice case to conclude before suing the plaintiff’s other lawyers for indemnity.

True.  
False.

14. Concurrent tortfeasors’ claims for partial indemnity or contribution are barred if not filed in the main action brought by the plaintiff.

True.  
False.

15. One risk of a lawyer defendant not joining cocounsel to the malpractice action on an indemnity cross-complaint is potential joint and several liability for 100 percent of the malpractice damages.

True.  
False.

16. Proposition 51 protection against deep-pocket joint tortfeasor defendants generally does not apply in legal malpractice cases.

True.  
False.

17. A lawyer defendant in a legal malpractice action is legally barred from pleading comparative fault defenses as to the plaintiff and cocounsel.

True.  
False.

18. *Holland v. Thacher* is noteworthy because it suggests that a lawyer defendant could use a comparative fault defense to impute the negligence of the other nondefendant attorneys to the plaintiff to reduce the recovery of plaintiff based upon an agency theory.

True.  
False.

19. A lawyer defendant who is found liable for a client’s malpractice damages may file a second lawsuit for contribution or indemnity against any culpable cocounsel not joined in the original malpractice action.

True.  
False.

20. In the 13 years since *Musser*, the appellate courts and legislature have done little to clarify the law governing attorney indemnification cross-complaints in legal malpractice cases.

True.  
False.



## DEFENSE DILEMMA

Name \_\_\_\_\_

Law Firm/Organization \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State/Zip \_\_\_\_\_

E-mail \_\_\_\_\_

Phone \_\_\_\_\_

State Bar # \_\_\_\_\_

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Los Angeles Lawyer  
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Make checks payable to Los Angeles Lawyer.

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| 2.  | <input type="checkbox"/> True | <input type="checkbox"/> False |                            |                            |
| 3.  | <input type="checkbox"/> True | <input type="checkbox"/> False |                            |                            |
| 4.  | <input type="checkbox"/> A    | <input type="checkbox"/> B     | <input type="checkbox"/> C | <input type="checkbox"/> D |
| 5.  | <input type="checkbox"/> True | <input type="checkbox"/> False |                            |                            |
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| 7.  | <input type="checkbox"/> True | <input type="checkbox"/> False |                            |                            |
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| 19. | <input type="checkbox"/> True | <input type="checkbox"/> False |                            |                            |
| 20. | <input type="checkbox"/> True | <input type="checkbox"/> False |                            |                            |

inquire whether there is an advantage to expanding the complexity and scope of the malpractice case by bringing in one or more attorney cross-defendants. Strategically, the lawyer defendant's adding lawyer cross-defendants could be a defense nightmare. The plaintiff in a legal malpractice case would like nothing more than to have two or more lawyers pointing fingers at one another and, in essence, making the plaintiff's case. Certainly, the lawyer-versus-lawyer sideshow could derail the usual attorney defenses of statute of limitations or lack of causation and damages. A lawyer indemnity cross-complaint against another attorney in a legal malpractice case could, if it is not carefully drafted, validate the existence of malpractice or a breach of the standard of care without the plaintiff's doing much of anything. At a minimum, the lawyer's squabbles with other lawyers over indemnity can provide a road map to a plaintiff who otherwise might struggle to prosecute a legally viable malpractice claim.

### Three Options

So what should the lawyer defendant do? The following three options involve varying risks. The first is to wait for a resolution of the malpractice case before raising indemnity issues. This option avoids expanding the scope of the malpractice action and the potential for finger-pointing by other lawyer defendants. Concurrent tortfeasors are not required to litigate their claims for partial indemnity or contribution in the main action. A cause of action for implied indemnity does not accrue or come into existence until the defendant has suffered actual loss through payment.<sup>24</sup> Because the lawyer indemnity claims usually accrue long after the client's malpractice claim accrues and expires, the client's malpractice claims against the other lawyers may be barred by the statute of limitations, and this may be the reason why the client did not sue the other lawyers. However, the defendant lawyer's indemnity claim against the other lawyers would still be timely and could breathe new life into an otherwise dead malpractice claim.<sup>25</sup>

Waiting for the malpractice action to conclude is not without risk, but delaying the filing of indemnity cross-complaints is a good option if the lawyer defendant has strong defenses that could result in summary judgment or if plaintiff's malpractice allegations appear weak or are difficult to prove. Indeed, if the lawyer defendant can win the malpractice case outright, there is no need to sue any indemnity cross-defendants. Similarly, the lawyer defendant who settles the malpractice action but still believes that other lawyers are fully or partially responsible for these damages can bring a subsequent action for indemnity and/or contribution against those other attorneys without the risk and com-

plication of helping the disgruntled former client establish a legal malpractice case. This is similar to the option that the defendant attorney and her insurer chose in *Musser*.<sup>26</sup>

A second option is to add the other culpable attorneys to a special verdict form for apportionment of damages. The lawyer defendant may plead comparative fault defenses and seek to include a comparative fault jury instruction with a special verdict asking the jury to assign comparative fault to those lawyers who arguably are responsible for plaintiff's damages.<sup>27</sup> The lawyer defendant would have to bring a motion to add a nondefendant to the special verdict and to prove to the court that the nondefendant was negligent.<sup>28</sup>

One court suggested that the defendant lawyer could use a comparative fault defense to impute the negligence of the other nondefendant attorneys to reduce the recovery of the plaintiff based upon an agency theory.<sup>29</sup> This strategy would lessen the risk of not suing other culpable attorneys in the malpractice action; however, there is no published authority in the legal malpractice context to support this court's suggestion that the negligence of the nondefendant attorneys could be allocated to the plaintiff on an agency theory.

A third option is suing other culpable attorneys for indemnity in the malpractice action. While the other options militate strongly against adding other attorneys to the malpractice action on indemnity claims, there are risks to leaving a potentially liable attorney tortfeasor out of the malpractice case. For example, assume that the lawyer defendant decides not to join (or cannot join) cocounsel to the malpractice action on an indemnity cross-complaint and that the lawyer defendant is able to put nonparty cocounsel on the special verdict form for an apportionment of negligence. If the jury finds that the lawyer defendant is 10 percent comparatively negligent and that the nonparty cocounsel is 90 percent negligent, and the jury awards the plaintiff \$1 million in damages, the lawyer defendant who is only 10 percent negligent in the jury's estimation is liable for the entire judgment if liability is joint and several. Of course, if the lawyer defendant can get the judge or jury to assign all of the other nonparty lawyer's negligence to the plaintiff on a comparative fault defense, then this horrible result could be avoided.

This result obliges the lawyer defendant to file a postjudgment action for indemnity or contribution against cocounsel to recover the difference between the lawyer's 10 percent liability and the remainder of the judgment, plus costs. Unless the nonparty cocounsel was heavily involved in the malpractice action (which is unlikely given the assumed facts), the jury's finding of 90 percent liability for cocounsel will not be collateral estoppel

against the nonparty.<sup>30</sup> It is possible the unfortunate lawyer defendant turned judgment debtor will have to prove cocounsel's liability all over again in a second lawsuit.

There may, though, be a postjudgment summary proceeding in the trial court to enforce the jury's finding regarding allocation of fault. One option would be to use a Code of Civil Procedure Section 187 postjudgment proceeding to add a judgment debtor and allocate a percentage of fault to the newly added judgment debtor, provided the court had or could obtain jurisdiction over the newly added judgment debtor.<sup>31</sup> The courts have mostly used Section 187 to add a nonparty as an additional judgment debtor in situations in which the new party and judgment debtor are alter egos or in which the new party was added merely to correct the name of the real defendant.<sup>32</sup> Nonetheless, "even if all the formal elements necessary to establish alter ego liability are not present, an unnamed party may be included as a judgment debtor if 'the equities overwhelmingly favor' the amendment and it is necessary to prevent injustice."<sup>33</sup> Thus, one way for the court to get around the jurisdictional hurdle in a Section 187 proceeding would be to allocate the other nondefendant attorney's percentage of fault to the plaintiff in the malpractice action on the agency theory suggested by the court of appeal in *Holland v. Thacher*.<sup>34</sup>

The dilemma for the lawyer defendant gets worse if the cocounsel who was found to be 90 percent at fault is impecunious or otherwise judgment-proof. In that scenario, the defendant who is 10 percent culpable would have to bear the entire amount of the judgment, and any indemnity claim against a judgment-proof cocounsel would be worthless.

The passage of Proposition 51, the Fair Responsibility Act of 1986,<sup>35</sup> eliminated the foregoing nightmare scenario for certain tortfeasors with regard to apportionment of fault for noneconomic damages in actions alleging personal injury, property damage, or wrongful death.<sup>36</sup> In those cases, the defendant who is found by the jury to be 10 percent at fault would only be responsible for 10 percent of the judgment as it related to noneconomic damages (e.g., compensation for pain and suffering). Unfortunately, in virtually all legal malpractice cases, the plaintiff's malpractice claim is not for personal injury, property damage, or wrongful death. Moreover, recoverable damages in legal malpractice cases are economic damages rather than noneconomic damages. Thus, Proposition 51 protection generally does not apply in legal malpractice cases.<sup>37</sup>

Despite questionable legal viability and numerous strategic reasons against indemnity cross-complaints in legal malpractice cases, the worst-case scenario described above could easily drive a decision by a lawyer defendant

to file one or more indemnity cross-complaints against other attorneys who may have contributed to plaintiff's alleged damages. Well-planned and executed legal strategies generally should not be upended by worst-case scenarios or contingencies that are unlikely to arise. Nonetheless, the lawyer defendant's decision on whether "to sue or not to sue" remains a judgment call that could have serious repercussions in any legal malpractice case in which liability could attach to multiple attorneys.

In the years since *Musser*, the appellate courts and legislature have done little to clarify the law governing attorney indemnification cross-complaints in legal malpractice cases. Moreover, nothing has been done to eliminate the risk that a defendant in an legal malpractice case found to be minimally negligent by a jury would have to pay the entire malpractice judgment because the lawyer defendant did not sue the more negligent attorneys for indemnity in the malpractice action—assuming the lawyer could have done so in the first place. Until such clarification is given, the question whether "to sue or not to sue" will remain a difficult call for the lawyer defendant. ■

<sup>1</sup> American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 591-92 (1978) (discussing historical evolution of indemnity and contribution concepts in California).  
<sup>2</sup> CODE CIV. PROC. §§875-78. See also *id.* at 592, 600-04.

<sup>3</sup> American Motorcycle Ass'n, 20 Cal. 3d at 582-84, 590.

<sup>4</sup> *Id.* at 607-08.

<sup>5</sup> Far West Fin. Corp. v. D & S Co., 46 Cal. 3d 796, 808 (1988).

<sup>6</sup> See, e.g., *Kroll & Tract v. Paris & Paris*, 72 Cal. App. 4th 1537 (1999) (cocounsel); *Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 82 Cal. App. 4th 768 (2000) (cocounsel); *Held v. Arant*, 67 Cal. App. 3d 748 (1977) (successor counsel); *Gibson, Dunn & Crutcher v. Superior Court*, 94 Cal. App. 3d 347 (1979) (successor counsel). *But see Parker v. Morton*, 117 Cal. App. 3d 751 (1981) (indemnity claim allowed against successor counsel). *Parker*, however, is an anomaly; as one court noted. See, e.g., *Shaffery*, 82 Cal. App. 4th at 761.

<sup>7</sup> *Musser v. Provencher*, 28 Cal. 4th 274, 274-76 (2002).  
<sup>8</sup> *Id.* at 277-79.

<sup>9</sup> *Kroll & Tract v. Paris & Paris*, 72 Cal. App. 4th 1537.

<sup>10</sup> *Shaffery*, 82 Cal. App. 4th at 768.

<sup>11</sup> *Musser*, 28 Cal. 4th at 280-81.

<sup>12</sup> *Id.* at 284-85.

<sup>13</sup> *Id.* at 281 (citations omitted) (emphasis in original).

<sup>14</sup> *Id.* at 281 n.3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 285.

<sup>17</sup> See *Kroll & Tract v. Paris & Paris*, 72 Cal. App. 4th 1537, 1542 (1999), and *Shaffery v. Wilson, Elser, Moskowitz, Edelman & Kicker*, 82 Cal. App. 4th 768, 770 (2000), for examples of cocounsel cases in which neither attorney represented the client in the malpractice action. In *Musser*, however, the client who brought the malpractice action expressly waived the attorney-client privilege for the malpractice action so the policy concern regarding confidentiality of client information in the indemnity action did not apply. *Musser*, 28 Cal. 4th at 284.

<sup>18</sup> In a concurring opinion, Justice Kennard noted that the scope of indemnity between predecessor and successor counsel was "not an issue in this case." *Musser*, 28 Cal. 4th at 287.

<sup>19</sup> See *Major Clients Agency v. Diemer*, 67 Cal. App. 4th 1116, 1130 (1998) (For sound policy reasons, cross-complaints for indemnity by predecessor counsel against successor attorney hired to extricate client from condition caused by predecessor counsel are prohibited.); *Holland v. Thacher*, 199 Cal. App. 3d 924, 929-30 (1988) ("the clear weight of judicial authority prohibits the first attorney from cross-claiming for indemnity against the second attorney").

<sup>20</sup> *Held v. Arant*, 67 Cal. App. 3d 748, 750 (1977).

<sup>21</sup> *Gibson, Dunn & Crutcher v. Superior Court*, 94 Cal. App. 3d 347, 356 (1979). However, Justice Jefferson's dissenting opinion seems to foreshadow the fact-intensive case-by-case analysis by the California Supreme Court in *Musser*.

<sup>22</sup> *Forensis Group, Inc. v. Frantz, Townsend & Foldenauer*, 130 Cal. App. 4th 14 (2005).

<sup>23</sup> *Id.* at 18-20.

<sup>24</sup> *E.L. White, Inc. v. City of Huntington Beach*, 21 Cal. 3d 497, 506 (1978).

<sup>25</sup> *Crouse v. Brobeck, Phleger & Harrison*, 67 Cal. App. 4th 1509, 1541-44 (1998).

<sup>26</sup> The attorney's insurer, to the extent it paid the settlement to the malpractice plaintiff, could have a subrogation claim, based on the defendant attorney's indemnity claim against the other culpable attorney. See *Musser v. Provencher*, 28 Cal. 4th 274, 285-87 (2002). The other important holding in *Musser* was that an insurer could be subrogated to the insured attorney's indemnity claim against cocounsel without violating the rule against assignability of legal malpractice claims. *Id.*

<sup>27</sup> *Henry v. Superior Court*, 160 Cal. App. 4th 440, 455 (2008) (In a slip-and-fall case, the property owners were

allowed to admit evidence regarding malpractice of medical providers, even though neither the plaintiff nor the defendant had named the providers.). See also *Kroll & Tract v. Paris & Paris*, 72 Cal. App. 4th 1537, 1545 (1999) (The lawyer defendant can show that the negligence of other nonparty lawyer was the cause of the plaintiff's injury through the affirmative defense of comparative negligence, thereby reducing personal liability.).

<sup>28</sup> *Wilson v. Ritto*, Cal. App. 4th 361, 369 (2003). See also *Da Fonte v. Up-Right, Inc.*, 2 Cal. 4th 593, 603 (1992) (Damages must be apportioned among the "universe of tortfeasors," including "non-joined defendants.").

<sup>29</sup> *Holland v. Thacher*, 199 Cal. App. 3d at 929-30 ("[B]ecause a successful affirmative defense would reduce the client-plaintiff's recovery, cross-complaints have a superficial appeal.").

<sup>30</sup> There is no collateral estoppel of the jury's finding as to a nonparty who did not have an incentive or opportunity to litigate the issue of liability among joint tortfeasors. *Bostick v. Flex Equipment Co.*, 147 Cal. App. 4th 80, 90 (2007).

<sup>31</sup> See CODE CIV. PROC. §187.

<sup>32</sup> See *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.*, 75 Cal. App. 4th 110, 116-17 (1999) (nonparty insurer could not be added as judgment debtor to judgment against insured pursuant to Section 187).

<sup>33</sup> *Carolina Casualty Ins. Co. v. L.M. Ross Law Group, LLP*, 212 Cal. App. 4th 1181, 1188-89 (2012) (quoting *Carr v. Barnaby's Hotel Corp.*, 23 Cal. App. 4th 14, 20-22 (1994)).

<sup>34</sup> *Holland*, 199 Cal. App. 3d at 929-30.

<sup>35</sup> CIV. CODE §§1431.1 *et seq.*

<sup>36</sup> CIV. CODE §1431.2.

<sup>37</sup> *Brandon G. v. Gray*, 111 Cal. App. 4th 29, 39 (2003).

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