NO PUNITIVES AS CAUSE OF LPL CLAIM, CONT'D

tantly, Defendant attorneys are not the original wrongdoers and should not be punished for the alleged egregious conduct of an underlying alleged tortfeasor.

U.S. Supreme Court Jurisprudence

Punitive damages have long been an entrenched part of the American legal tradition. The U.S. Supreme Court has recognized that awards of punitive damages can violate constitutionally guaranteed protections such as due process when the purpose of punitive damages, namely to punish civil wrongdoers and to deter others, results in an excessive punitive damage award. *See Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1993).

In the U.S. Supreme Court's first review of a punitive damage award, the crew of the private armed American brig, Scourge, seized the cargo, crew and papers from the Amiable Nancy, a Haitian schooner. *Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 4 L. Ed. 456 (1818). When the Amiable Nancy arrived at St. John's Antigua without papers, she was seized by the British guardbrig Spider. *Id.* The Scourge's owner was ordered to pay damages for the real injuries and personal wrongs sustained by the owner of the Amiable Nancy, but the Scourge's owner was not liable for the vindictive damages. *Amiable Nancy,* 16 U.S. (3 Wheat.) at 559.

Justice Story, writing for a unanimous Court, stated:

> Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse…**And if this were a suit against the original wrong-doers, it might be proper to go yet further and visit upon them in the shape of exemplary damages, the proper punishment**…But it is to be considered that this is a suit against the owners of the privateer…who are innocent of the demerit of this transaction, having neither directed it or encountenanced it, nor participated in it in the slightest degree….they are not bound to the extent of vindictive damages. *Id.* at 559. Emphasis added.

Similar reasoning has been employed over the years to limit vicarious liability for punitive damages to situations in which the individual or corporate employer participated in or authorized the conduct that is the basis of the punitive damage award. Florida courts follow this complicity rule when faced with a claim for punitive damages under a theory of vicarious liability. *See, e.g.*, *Mercury Motors Express v. Smith*, 393 So. 2d 545 (Fla. 1981).

In 1852, the U.S. Supreme Court issued its first direct decision on the constitutionality of punitive damages in *Day v. Woodworth*, 54 U.S. (13 How) 363, 371, 14 L. Ed. 181 (1852). There, a unanimous Court held "a jury may find what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. *Id.* at 371.

In *Gertz v. Robert Welch, Inc.*, 418 U.S 323 (1974), it was argued that if punitive damages could be assessed against publishers for defamation, based upon negligent conduct, free speech would be unconstitutionally fettered. The U.S. Supreme Court held:

> "[p]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times (proof of actual malice) may recover only such damages as are sufficient to compensate him for actual injury. *Id.* at 350.

Defendant attorneys may make the similar argument that malpractice Plaintiffs in a legal malpractice action who establish liability under a less demanding negligence standard may only recover such damages as are sufficient to compensate them for actual injury.

Punitive Damages Exposure = Unconstitutional

Defendant attorneys may contend the Florida legislation which entitles a claimant to an award of punitive damages is unconstitutional as applied in legal malpractice actions.[7] An individual's right to equal protection is set out in the Basic Rights section of the Florida Constitution. Article I, Section 2 of the Florida Constitution states, "[a]ll natural persons are equal before the law." The equal protection provision of our state constitution is interpreted at least as broadly as the equal protection provision of the United States Constitution and may be given even broader meaning. *See Woodward v. Gallagher*, 1992 WL 252279, (Florida Circuit Court, Orange County). The Equal Protection Clause of the Fourteenth Amendment commands, "nor shall any State deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Id.*

Defendant attorneys may assert that Florida Statutes, section 768.73 is overbroad and creates a de facto classification of "attorneys" who, because of their profession, are singled out to be accountable for damages which are only legally justified when wrong-doers are punished. Other similarly situated professionals are subject to punitive damages only where they are guilty of the proscribed culpable conduct.

Florida Statutes, section 768.73, as applied to Defendant attorneys, unequally burdens attorneys with the irrational distinction between attorneys and other professionals and is overbroad.

"Punitive damages have long been an entrenched part of the American legal tradition."

MEDIATION/SETTLEMENT CONFERENCE CONFIDENTIALITY, CONT'D

custody), Gov't Code, §12984 (housing discrimination)).

3. *Evid. Code*, §1119, subd. (c).) Subdivisions (a) and (b) of section 1119 forbid the disclosure or discovery in various civil, criminal, and administrative proceedings, or writings prepared as part of a mediation, as well as of evidence of anything said or any admissions made as part of a mediation. Subdivision (c) deals with the related and broader subject of confidentiality.

4. Arkansas, Missouri, Nebraska, Nevada, South Dakota, Texas, and Wisconsin.

5. Sources: Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 Ohio St. J. Disp. Resol. 239 (2002); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. Rev. 715 (1997).

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ATTORNEY-CLIENT PRIVILEGE: COMMUNICATING WITH THE LAW FIRM'S IN-HOUSE COUNSEL BY: DONALD PATRICK ECKLER, ESQ.

The Supreme Court of Oregon has joined the Supreme Court of Georgia and the Massachusetts Supreme Judicial Court in holding that under certain circumstances an attorney representing a current client can confidentially communicate with counsel regarding potential liability to that current client. This trend continues unabated since coming to the fore just a couple of years ago and requires attention by all firms to ensure the appropriate steps are taken to protect communications from disclosure should litigation with the current client ensue. In evaluating these issues the firm must consider whether the particular jurisdiction has a codified or common law source of the attorney-client privilege and whether the jurisdiction follows the majority *Upjohn* "subject matter test" or the significant minority "control group" test.

Current State of Fiduciary Duty Exception

Recently, several courts have addressed whether the law should extend the attorney-client privilege to protect communications between a law firm's in-house counsel, seeking advice from other firm lawyers on how to handle a client's potential malpractice claim against the firm. *Crimson Trace Corporation v. Davis Wright Tremaine LLP*, 355 Or. 476, 326 P.3d 1181 (2014); *Hunter, Maclean, Exley, & Dunn v. St. Simons Waterfront, LLC*, 317 Ga. App. 1, 730 S.E.2d 608 (2013); *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 991 N.E.2d 1066 (2013); *Garvy v. Seyfarth & Shaw,* 966 N.E.2d 523 (Ill. App. 2012); *MDA City Apartments, LLC v. DLA Piper* LLP, 967 N.E.2d 424 (Ill. App. 2012). Those communications arguably fall within attorney-client privilege as the lawyer accused of malpractice turned to in-house counsel for legal advice on how to handle the malpractice issue. This exception to the attorney-client privilege is commonly referred to as the fiduciary duty exception. Each of these cases, for sometimes different reasons, has rejected the application of the fiduciary duty exception to the attorney-client privilege and has protected the disputed communications from disclosure to the former client.

Before this recent development, courts often required the production of communications involving a client's malpractice claim, even though the communications arguably fell within the purview of attorney-client privilege. *Koen Book Distributors v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 285-286 (E.D. Pa. 2002); *Bank Brussels Lambert v. Credit Lyonnais, S.A.*, 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002); *SonicBlue, Inc. v. Portside Growth and Opportunity Fund*, 2008 Bankr. LEXIS 181, at *26 (Bankr. N.D. Cal. Jan. 18, 2008); *Thelen Reid & Priest, LLP v. Marland*, 2007 U.S. Dist. LEXIS 17482 (N.D. Cal. Feb. 21, 2007); *TattleTale Alarm Systems v. Calfee, Halter & Griswold,*

"[U]nder certain circumstances an attorney representing a current client can confidentially communicate with counsel regarding … liability to that current client."

PRIVILEGE: IN-HOUSE COUNSEL COMMUNICATIONS, CONT'D

LLP, 2011 U.S. Dist. LEXIS 10412 (S.D. Ohio, Feb. 3, 2011).

The Oregon Ruling

Most recently, in *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or. 476, 326 P.3d 1181 (2014), the Supreme Court of Oregon reversed the holding of the trial court and, relying upon the language of the codified attorney-client privilege, found that the privilege applied to protect communications, between the former lawyers of the plaintiff and their in-house counsel, and that the exception did not apply. Davis Wright Tremaine ("DWT") was engaged by Crimson Trace to prosecute certain claims related to a patent infringement dispute with LaserMax. As the litigation turned poorly for Crimson Trace, based upon a counterclaim in the patent litigation brought by LaserMax that the patent, that was the basis for the patent infringement claim, was invalid, a dispute arose between DWT and Crimson Trace. DWT had prepared the original patent application and therefore, a potential conflict of interest arose between DWT and Crimson Trace. A settlement was ultimately reached between Crimson Trace and LaserMax in the patent litigation. That agreement was to be confidential. However, DWT, acting as counsel for Crimson Trace, disclosed part of the settlement agreement in a way that implied that LaserMax had conceded liability. LaserMax complained and the court required that the entire agreement be disclosed. A legal malpractice lawsuit brought by Crimson Trace against DWT ensued.

Once the dispute between DWT and Crimson Trace arose, the lawyers representing Crimson Trace consulted with the Quality Assurance Committee ("QAC") at the firm. The QAC was a small group of lawyers at DWT that had been specifically designated by the firm as in-house counsel. During the course of the legal malpractice claim, Crimson Trace sought the communications between the lawyers who represented Crimson Trace in the underlying litigation and the QAC. Finding that the attorney-client privilege did not apply because of the conflict of interest by the QAC in representing members of the firm in conflict with clients of the firm, and in spite of the fact the communications were kept confidential, the trial court ordered that DWT produce the communications.

In reversing the trial court's opinion, the Supreme Court of Oregon first addressed whether the attorney-client privilege applied at all to this situation. Oregon's attorney-client privilege is codified in Oregon Evidence Code Section 503. The Court viewed its task as determining what the legislature intended in codifying the attorney-client privilege. Similar to most states there are three elements for the attorney-client privilege to apply in Oregon: 1) the communication is between the client and lawyer, 2) the communication was confidential, and 3) the communication was made for the purpose of obtaining advice. The Court rejected Crimson Trace's argument that there is a fourth requirement: the reasonable expectations of the parties that an attorney-client relationship existed.

The Court rejected this argument on two bases. First, the Court stated that there was no support in the statute for such a requirement. Second, the Court rejected the attempt by Crimson Trace to apply lawyer discipline cases regarding disputes about whether an attorney-client relationship existed, holding that the reasonable expectation of the client as to the existence of a relationship has nothing to do with the issues in this case in which the attorney and client agree that there was an attorney-client relationship.

After rejecting the existence of a fourth element, the Court turned to the first element of whether there was an attorney and client at all in this case. The Court first stated that there was no dispute that if the DWT lawyers had consulted outside counsel there would be no dispute. The Court stated that nothing in the statute could by construed to preclude an in-house lawyer from being an attorney and the lawyer in the same firm as being the client in an attorney-client relationship. The Court rejected the argument that allowing attorneys within a firm to be counsel for other lawyers in the same firm would undermine the attorney-client relationship by holding that it does not matter.

Looking at the second element, whether the communications were confidential, the Court held that the communications were confidential despite having been made with lawyers in Washington, who Crimson Trace argued, were subject to the more stringent restrictions of Washington law. The Court rejected this argument and relied upon the requirement that Oregon applies its own law to determine evidentiary issues.

As to the third element, while acknowledging the trial court's finding that the attorney-client privilege would apply but for the fiduciary duty exception, the Court found that the communications were for the purpose of obtaining legal advice as to the fulfillment of professional responsibilities to Crimson Trace. *Id*. at 492

Having concluded that the attorney-client privilege applied, the Court then considered whether any exceptions to the privilege applied. After looking at the exceptions to the attorney-client listed in the applicable statute, and determining that none of those applied, the Court turned to the fiduciary duty exception. The Court ruled that because the fiduciary duty exception is not listed as an exception to the attorney-client privilege in the statute it could not be applied in Oregon.

The Supreme Court of Oregon's analysis is entirely reliant on the language of the statute codifying the attorney-client privilege. As most states have codified their attorney-client privilege in statute (*see* Multi-

> "[T]he Court found that the communications were for the purpose of obtaining legal advice … ."

NO PUNITIVES AS CAUSE OF LPL CLAIM, CONT'D

> conduct. The Florida policy of allowing punitive damages to punish and deter those guilty of aggravated misconduct would be frustrated if such damages were covered by liability insurance. *Id.* at 1064 and other cases cited.

By contrast, the majority view among states which have considered the issue is that punitive damages, regardless of whether assessed vicariously or directly, are insurable.[4] (*See* Blatt, Richard, "A Guide to the Insurability of Punitive Damages in the U.S. and its Territories") Arizona, the leading jurisdiction cited by most Plaintiffs as persuasive authority, is among the majority of states which permit insurability of directly assessed punitive damages.

In the leading Arizona case, *Price v. Hartford Accident and Indemnity Co.*, 502 P.2d 522 (Ariz. 1972), the Arizona Supreme Court upheld an automobile liability insurance policy which provided coverage for punitive damages directly assessed against a minor driver who injured someone while drag racing. The Arizona Court stated:

> It is our holding that the premium has been paid and accepted and the protection has been tendered, and that under the circumstances, public policy would best be served by requiring the insurance company to honor its obligation. *Id*. 502 P.2d at 525.

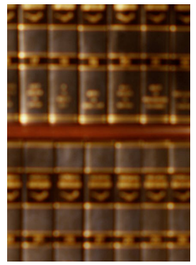
Faced with two competing public policies, one which justifies the award of punitive damages and another which requires an insurance company to honor its obligations, the Supreme Court of Arizona tilted the balance toward the latter. The Supreme Court of Florida, on the other hand, has consistently determined that the public policy reasons which constrain certain aspects of punitive damage awards are more compelling. Florida precedent dictates that the underlying policy justification for punitive damages, to punish wrong-doers, is sound public policy.

Malpractice Plaintiffs also strongly rely on an Arizona intermediate appellate decision. *Elliot v. Videan,* 791 P.2d 639 (Ariz. App. 1990), is the only case in which the proper measure of compensatory damages was even at issue.[5] In that case, the Arizona Court of Appeals quoted a New Mexico Court of Appeals as authority for its holding that punitive damages were properly collected as an item of compensatory damages in a subsequent legal malpractice action. *See Elliot v. Videan, supra,* at page 645 where the Arizona Court quoted *George v. Caton*, 600 P.2d 822, 830 (N.M. App. 1979) for the following proposition:

> In a malpractice negligence action…the measure of damages is the value of the lost claims, i.e., the amount that would have been recovered by the client except for the attorney's negligence.

The Arizona court's use of this language as precedent for its holding that punitive damages can be assessed against an attorney where the attorney was not the original wrong-doer is completely disingenuous. The New Mexico case from which this language was quoted decided only the inappropriateness of summary judgment where a question of fact existed with respect to, "the existence or non-existence of an attorney-client relationship." *George v. Caton,* 600 P.2d at 825.

Even more disturbing, the New Mexico court quoted this exact language from *Freeman v. Rubin*, 318 So. 2d 540, 542-43 (Fla. 3d DCA 1975), a decision from the Court of Appeals for the Third District of Florida. See *George v. Caton*, 600 P.2d at 830. The Third District's holding in *Freeman v. Rubin* **does not** stand for the proposition that punitive damages become an item of compensatory damages for which a party who was not the original wrong-doer must pay. Neither the Florida court which the New Mexico court relied upon, nor the New Mexico court which the Arizona court relied upon mentioned the issue of punitive damages as an element of compensatory damages.



Florida Statute, section 768.73 passed constitutional muster because a claimant has no property right to punitive damages under prevailing Florida law; "[t]he very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. The legislature, in the exercise of that discretion, may place conditions upon such a recovery or even abolish it altogether." *Gordon v. State*, 608 So. 2d at 801. Moreover, the Third District considered a Georgia court's ruling in *McBride v. General Motors, Inc.* and found it completely unpersuasive. *See* Footnote No. 9, *Gordon v. State*, 585 So. 2d 1033 (Fla. 3d DCA 1991), aff'd, *Gordon v. State,* 608 So. 2d 800 (1992).

Indeed, the Florida Legislature has both provided for, and limited[6] the award of punitive damages in Article 768 of the Florida Statutes. The language set forth in Florida Statutes, section 768.73 (1)(a) is unambiguous and specifically requires that a claimant show "willful, wanton or gross misconduct." Despite this clear statement by the Florida Legislature, malpractice Plaintiffs insist that an attorney should be held responsible for punitive damages which might have been assessed against an underlying wrong-doer but for the attorney's alleged negligent prosecution of the underlying case.

Both the Third District and the Supreme Court's reasoning in *Gordon v. State, supra*, for upholding Florida Statute, section 768.73 as constitutional should settle the question. Punitive damages are justified as a punishment to deter wrong-doers and others inclined to engage in similar activity. Malpractice Plaintiffs have no vested right to recover punitive damages. Most impor-

> "Malpractice Plaintiffs have no vested right to recover punitive damages."

PRIVILEGE: IN-HOUSE COUNSEL COMMUNICATIONS, CONT'D

agent's advisory role was such that the corporate principal would not normally have made a decision without the agent's advice; and (3) the agent's opinion or advice in fact formed the basis of the final decision made by those with actual authority within the corporate principal. *Archer Daniels Midland Co. v. Koppers Co., Inc.*, 138 Ill. App. 3d 276, 279-280, 485 N.E.3d 1301 (1st Dist. 1985).

Most conceptions of the control group test are similar to Illinois' and when identifying the in-house lawyers who are to be consulted in a situation in which the firm is exposed to liability, these requirements should be considered. This is where close consultation with the rules of the particular language of the case law or statute that creates the attorney-client privilege in a given jurisdiction is important.

Once the nature of the applicable law is considered, there is good guidance from the court in *Hunter, Maclean, Exley, & Dunn v. St. Simons Waterfront, LLC*, 317 Ga. App. 1, 730 S.E.2d 608 (2012). In that case, that the Georgia Court of Appeals, sitting in a state which has not decided whether the subject matter or control group test applies, held that to determine whether an attorney-client relationship existed in this context, the court looked at several facts regarding the nature of the legal relationship. Those factors included (a) whether the firm maintained a designated in-house attorney for purposes of handling the firm's malpractice claims; (b) whether the firm maintained separate files for the client's legal work and the firm's malpractice defense work; (c) whether the firm billed the client for the malpractice defense work or billed the defense work to the file; and (d) whether the in-house attorney designated to handle the malpractice claim for the firm had worked for the client. *Hunter, Maclean, Exley, & Dunn*, 317 Ga. App. at 2-4.

Regarding the maintenance of confidentiality element, the court said that intra-firm communications regarding the malpractice must only involve "in-house counsel, firm management, firm attorneys, and other personnel with knowledge about the representation that is the basis for the client's claim against the firm;" otherwise communications about the malpractice claim may not be subject to protection. *Id*.

These suggestions should be coupled with additional steps to be taken. First, while it is preferable to have outside counsel for claims against the firm that may arise, in-house counsel should be identified to the lawyers in the firm. Depending on the size of the firm more than one in-house lawyer should be identified in the event that the primary lawyer has had direct contact with the client. Second, the in-house lawyer and any fees paid to outside counsel must not be paid by or billed to the client with whom the firm is in conflict. As articulated by the Supreme Court that would vitiate the protection. In order to comport with the requirements of the "control group" test any communications regarding the issue should only be shared with the executive level of the firm. Indeed, in identifying the lawyer within the firm from whom advice regarding a conflict is sought, the firm should attempt to identify an individual on the firm's executive committee or other group charged with making decisions for the firm. Finally, any communications regarding the dispute with the client must specifically identify that they are intended for that purpose and not for the purpose of the client's interests. The easiest way to do this, and to prevent billing to the client, is likely to open a separate file for the dispute with the client.

Conclusion

This is an issue that must be addressed by firms of all sizes and by their insurers. Risk management strategies for law firms should involve taking steps to have confidential communications to mitigate or eliminate disputes with clients and avoid conflicts of interest that could increase the liability.

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"Finally, any communications regarding the dispute with the client must specifically identify that they are intended for that purpose … ."

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SETTLING THE LPL/TORT CLAIMS SIMULTANEOUSLY, CONT'D

liability had been signed and the settlement check for the policy limits had been returned to the insurance company. The suit against the tortfeasor remained viable and the Plaintiff was still able seek a full recovery of his damages. Further, there had been no determination that an extra-contractual claim was no longer viable under the circumstances.

In Florida, causes of action for legal malpractice do not accrue until some redressable harm has been established. *See, e.g., Bierman v. Miller*, 639 So. 2d 627 (Fla. 3d DCA 1994). Typically, filing a lawsuit for legal malpractice prior to the existence of a redressable harm creates an inchoate claim that cannot be pursued. In fact, the Florida Supreme Court has explained that, "[i]f a negligence/malpractice action is filed prior to the time that a client's right to sue in the related or underlying judicial proceeding has expired, or if a negligence/malpractice action is filed during the time that a related or underlying judicial proceeding is ongoing, then the defense can move for an abatement or stay of the claim on the ground that the negligence/malpractice action has not yet accrued." *Blumberg v. USAA Casualty Insurance Co.*, 790 So. 2d 1061, 1065 (Fla. 2001). *See also Perez-Abreu v. Taracido*, 790 So. 2d 1051, 1054 (Fla. 2001). This means simply that where a viable underlying cause of action still exists, the underlying cause of action must first be compromised prior to instituting the cause of action for legal malpractice.

As no redressable harm had yet been established, a motion to stay the legal malpractice claim pursuant to *Blumberg* was filed and ultimately granted, pending the resolution of the claim with the tortfeasor. The plaintiff then filed suit against the tortfeasor seeking compensation for the damages incurred as a result of the motor vehicle accident.

Despite prevailing on the motion for stay, the perplexing problem of the potential legal malpractice claim remained a critical issue. However, by forcing the Plaintiff to litigate the automobile negligence case first, counsel for Lawyer "C" had additional time to develop theories to reduce the liability of Lawyer "C" for the alleged malpractice. Further, counsel for Lawyer "C" began working with the lawyer for the tortfeasor in the underlying cause of action to assist with building additional defenses to the plaintiff's claim. As a result of the strategic advantage, counsel for Lawyer "C" was able to establish sufficient facts to demonstrate to Plaintiff that allegations of legal malpractice were spurious at best. For example, Lawyer "C" demonstrated that the Plaintiff alleged in his complaint that he never provided his consent to settle the case for the available policy limits. Without the Plaintiff's consent to settle for policy limits, no bad faith claim could have existed against the insurer. The potential bad faith claim outlined by the Plaintiff was based on the premise that the insurer company failed to tender the policy limits and thereby settle the case when the opportunity presented itself. However, if the Plaintiff was never willing to accept the policy limits, then the insurance company never had the opportunity to settle the case for the available policy limits. *See generally General Acc. Fire & Life Assur. Corp., Ltd. v. American Cas. Co. of Reading, P.A.*, 390 So. 2d 761 (Fla. 3d DCA 1980).

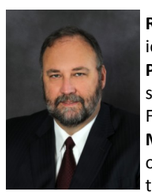
Following discovery in the action against the tortfeasor, including retention of an expert by the underlying carrier, a mediation was held bringing together the attorneys, adjusters and clients for claims against the tortfeasor, the carrier, and Lawyer "C". The weakness of the original motorcyclist's claim against the tortfeasor, and the absence of a claim again the underlying carrier were demonstrated. All parties settled. The legal malpractice cause of action was settled for a minimal payment on behalf of Lawyer "C" and the lawsuit was dismissed without further legal expense.

Conclusion

As a legal malpractice defense attorney, it is important to be willing to work with other attorneys in order to limit exposure to your client. The simultaneous effort by a multitude of attorneys working behind the scenes can ultimately work in the best interests of your client. Further, the willingness to work through a premature claim may bring the matter to a resolution in a more cost effective and efficient manner than pushing the matter to litigation.

Endnote

1. A perfusionist operates the heart-lung machine during cardiac surgery.
2. On March 13, 2014 the Florida Supreme Court held that the cap on wrongful death noneconomic damages provided in section 766.118, Florida Statutes was unconstitutional as it violated the Equal Protection Clause of the Florida Constitution. *Estate of McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014). However, at the time of the scenario described in this article, the cap on the wrongful death noneconomic damages was still a valid statutory provision.



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"Typically, filing a lawsuit for legal malpractice prior to the existence of redressable harm creates an inchoate claim that cannot be pursued."

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