ETHICS WATCH

Assignment of Legal Malpractice Claims—When, if Ever?

By Nathan M. Crystal

In *Skipper v. Ace Property and Casualty Insurance Co.*, the S.C. Supreme Court answered the following question: "Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged malpractice arose?" The Court's answer was "No" for reasons of policy, but it is important to recognize that assignments of legal malpractice claims can occur in many contexts, not all of which violate the public policy concerns expressed in *Skipper*.

Skipper arose from an accident between Skipper's vehicle and a logging truck driven by Moors and owned by Specialty Logging. Specialty had a $1 million policy issued by Ace Insurance. Skipper's attorney wrote a demand letter to Ace offering to settle the case for Specialty's policy limits. Ace retained two lawyers to represent Specialty and Moors; through counsel Specialty and Moors offered to settle for $50,000.

Skipper and his wife rejected the offer and filed suit; additional settlement negotiations were unsuccessful. Unknown to Ace and its attorneys, Moors, Specialty, and Specialty's owner (collectively the "Specialty Parties") agreed to admit liability and to execute a confession of judgment for $4.5 million. The Specialty Parties also agreed to bring a malpractice suit against the attorneys hired by Ace to handle the case (joining Ace as co-defendant), with the Skippers receiving 85-90% of the proceeds of the action. In exchange the Skippers agreed not to execute the judgment so long as the Specialty Parties cooperated in the malpractice action.

The Skippers and the Specialty Parties then brought a legal malpractice suit against the attorneys hired by Ace; the case was removed to federal court. The defendants claimed that the assignment of the malpractice claim to the Skippers was invalid. The district court certified the question to the S.C. Supreme Court.

The Court accepted the certification and agreed with the majority of courts that the assignment was void as a matter of public policy. The Court gave several policy reasons for its decision. *First,* assignments of legal malpractice claims between adversarial parties pose a risk of collusion: "When an original defendant is essentially relieved of liability, there is little incentive for the consent judgment to reflect the actual loss." Because the consenting defendant will not have to pay, the parties can agree to artificially inflated damages. That appears to be the situation in *Skipper*.

Second, assignment of malpractice claims undermines the relationship between defense attorney and client by creating a conflict between their interests. Defendants can obtain freedom from liability by agreeing to a consent judgment and pursuit of a malpractice claim against their lawyers. Of course, no defense counsel could advise a client to follow such a strategy.

Third, if such assignments were allowed it would result in the parties taking the opposite positions in the malpractice case from the ones they took in the underlying tort action. This divergence arises because a legal malpractice case is a "case within a case." To win a legal malpractice action the plaintiff must show that the lawyer breached the standard of care and that this breach proximately caused damage. When the malpractice occurs in litigation, the plaintiff must provide that "but for" the lawyer's negligence the plaintiff would have prevailed in the litigation.

In the tort action the plaintiff's position would be that it should prevail over any defenses that might be raised. However, in the malpractice case, the plaintiff-assignee of the malpractice will argue that but for the negligence of the defendant's lawyer, the defendant-assignor would have prevailed in the tort litigation. Quoting from a Texas opinion, the Court said:

> For the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth.

The Court's decision seems to be solidly based in both precedent—the decision adopts the majority rule followed in other states—and in policy, but it is worth exploring the possible limitations of the decision.

An excellent vehicle for considering the limits of the *Skipper* decision is the decision of the California Court of Appeals in *White Mountains Reinsurance Company of America v. Borton Petrini, LLP,* 164 Cal. Rprt. 3d 912 (Ct. App. 2013), *rev. denied* Feb. 11, 2014. California has traditionally followed a strict prohibition on assignment of malpractice claims on the ground that a malpractice claim

was a "uniquely personal" right. See *Goodley v. Wank & Wank, Inc.*, 133 Cal Rptr. 83 (Cal. Ct. App. 1976). However, in *White Mountains* the court recognized a narrow exception to the California rule. In that case Modern Service Insurance Co. had issued an automobile policy with a $100,000 limit. The insured was involved in a serious accident; the victim brought suit and her attorneys served a demand for Modern's policy limits. Modern informed its claims administrator to direct the Borton firm to accept the offer, but Borton failed to accept the offer by the deadline. A few years later, while the accident case was still pending, Modern was acquired by another insurance company, and its name was changed to White Mountains. White Mountains ultimately settled the accident case for $1.86 million. White Mountains then brought suit against the Borton firm for malpractice.

The appellate court, reversing the decision of the trial court, found that the malpractice claim *could be assigned* because on these facts the policy reasons for prohibiting assignment of malpractice claims did not apply:

> Specifically, a cause of action for legal malpractice is transferable when (as here) (1) the assignment of the legal malpractice claim is only a small, incidental part of a larger commercial transfer between insurance companies; (2) the larger transfer is of assets, rights, obligations, and liabilities and does not treat the legal malpractice claim as a distinct commodity; (3) the transfer is not to a former adversary; (4) the legal malpractice claim arose under circumstances where the original client insurance company retained the attorney to represent and defend an insured; and (5) the communications between the attorney and the original client insurance company were conducted via a third party claims administrator. Under the circumstances set forth above, the public policy concerns that have been determined in other cases to weigh against the assignment of legal malpractice claims do not arise.

Courts in other jurisdictions have allowed assignment of malpractice claims when the assignment is part of a larger commercial transaction, as in *White Mountains*. See, e.g., *Richter v. Analex Corp.*, 940 F. Supp. 353 (D.D.C. 1996); *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani (In re Order Certifying Question to Idaho Supreme Court)*, 293 P.3d 661 (Idaho 2013).

The decision in *White Mountains* seems sound as a matter of policy because none of the concerns expressed in *Skippper* are present in an assignment that is part of a commercial transaction: no possibility of collusion, no conflict of interest because the assignment is a separate transaction from the litigation, and no change of positions in litigation. *White*

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Bar Bytes

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thing about technology. She will be teaching three sessions: Cloud Computing, Software Must-Haves and her Top 7 Finance Related Tips.

Bar members welcomed legal research provider Fastcase to the member benefit fold last year; however, not all lawyers are familiar with it yet. Therefore, the LPM-TECH conference will have a session introducing Fastcase basics by company CEO Ed Walters, who will then jump to the Advanced track to teach Advanced Legal Research Using Fastcase for lawyers ready to take Fastcase a step further.

Also in the Advanced track, Larry Port of Rocket Matter will speak with Columbia lawyer Dave Maxfield on using "Lean and Agile" practices to grow your firm, and then he will speak solo on what makes for a compelling law firm website. Professor Greg Adams will share important encryption essentials for lawyers and, lastly, the CLE portion of the conference finishes with a panel of speakers sharing their favorite "Amazing Apps, Practical Practice Pointers, Terrific Tech Tips & Wonderful Websites." This session is always a crowd favorite!

In addition to the great CLE content, lawyers will enjoy the networking opportunities, which include a seated lunch with topic tables (choose a table with your practice area or an interest or hobby to meet like-minded colleagues), and then after the last session of the day, a networking reception will be held on the Roof Garden of the Meridian Building (attendees only; your name badge is your ticket).

The conference provides a unique opportunity to experience both practice management and technology CLE in one place, plus networking opportunities with other lawyers and vendors. Special early bird pricing is available, as is a discount for Solo & Small Firm Section members, non-lawyers and students. For more information go to www.scbar.org/LPMTECH. ⚖

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Mountains and *Skipper* are consistent because *Skipper* was limited to assignments "between adversaries in litigation" and the commercial assignment in *White Mountains* is not between adversaries.

However, a number of other fact patterns involving assignments of legal malpractice claims may arise, and the application of the public policy concerns may not be as clear-cut as they are in a *White Mountains* type of case. In *White Mountains* the court, in reviewing previous California decisions, highlighted other fact patterns that lawyers and courts in South Carolina may face. What should the result be in these situations?

- The assignment of a claim against the attorney is not a legal malpractice claim but some other type of claim such as fraud or breach of fiduciary duty;
- The assignment is a transfer on the death of the client to a beneficiary of the estate, or perhaps a sale by the estate to a third party;
- The claim is being brought by a trustee in bankruptcy, or the trustee seeks a court-ordered sale of the claim;
- The claim is being assigned to the owners of an entity as part of a dissolution or other restructuring of an entity;
- An insurance company as subrogee of its insured is bringing a malpractice claim against the lawyer who represented the insured.

These situations highlight the complexity of the issue of assignment of legal malpractice claims. The Supreme Court was wise to limit its decision to assignments between adversaries. In some or perhaps all of these other fact patterns, an analysis of policy considerations may lead to a different result than in *Skipper.* ⚖