Gibson, Dunn & (and) Crutcher v. Superior Court Revisited: A Critical Analysis and Proposal Respecting an Attorney Malpractice Defendant's Right to Cross-Complain for Comparative Indemnity Against the Former Clients Present Attorney

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GIBSON, DUNN & CRUTCHER V. SUPERIOR COURT REVISITED: A CRITICAL ANALYSIS AND PROPOSAL RESPECTING AN ATTORNEY MALPRACTICE DEFENDANT'S RIGHT TO CROSS-COMPLAIN FOR COMPARATIVE INDEMNITY AGAINST THE FORMER CLIENT'S PRESENT ATTORNEY.

Jerome I. Braun*

I. INTRODUCTION

California began its shift to a system of comparative negligence when the California Supreme Court abrogated the doctrine of contributory negligence in *Li v. Yellow Cab Co. of California.* Because *Li* dealt with the relatively simple fact situation of a single plaintiff suing a single defendant, the court expressly left open the questions of liability and damage apportionment among multiple defendants.

*American Motorcycle Association v. Superior Court* (AMA) provided some basic answers to those questions. In *AMA,* the supreme court held that the system of comparative negligence established in *Li* provided, in appropriate cases, the right of partial or comparative indemnity among multiple tortfeasors. *AMA* in effect permitted a negligent defendant to cross-complain for total or partial indemnity against an alleged joint or concurrent tortfeasor, whether already a party

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2. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
3. The terms "partial indemnity" and "comparative indemnity" are used interchangeably in the *AMA* decision. See 20 Cal. 3d at 583-84, 578 P.2d at 902, 146 Cal. Rptr. at 185.
4. The terms "joint tortfeasor" and "concurrent tortfeasor" at one time denoted relationships distinct from each other. Tortfeasors are joint when they "owe to an-
to the action or not. Like Li, however, AMA left many questions unanswered, including the applicability of the comparative indemnity rules to attorney malpractice actions.

Attorney malpractice suits are becoming increasingly common. Such suits, like negligence actions in general, present the potential for claims of joint liability among multiple defendants, including claims for indemnity by one lawyer against another. One of the more common situations for such a claim was presented in the relatively recent case of Gibson, Dunn & Crutcher v. Superior Court, in which the specific issue was whether an attorney sued for malpractice by a former client could file a cross-complaint for partial indemnity against the plaintiff's present attorney.

In Gibson, the California Court of Appeal, in a two to one decision, held that the lawyer defendant in a malpractice action cannot cross-complain for partial indemnity against the plaintiff-former client's attorney, even though the present attorney's conduct may have aggravated the plaintiff's damage. While it acknowledged that such a cross-complaint falls under the basic rubric of a comparative negligence indemnity claim, the majority cited certain policy considerations which it felt distinguished the attorney malpractice case from other negligence actions.

This Article argues that Gibson was wrongly decided.
Gibson flies in the face of the loss distribution principles of Li and AMA and reverses the trend in California denying special protection to attorneys in their role qua attorneys. This Article's thesis is that the particular conflict of interest considered by the Gibson court is no different than the other conflicts of interest which lawyers face daily. Such conflicts can, with the informed consent of the client, be dealt with under the existing rules of professional responsibility.

Following this Introduction, Part II discusses the facts of Gibson. Part III defines the conflict of interest which formed the basis for the Gibson holding, while Part IV summarizes rectifying it.

7. The following is a modest catalogue of decisions highlighting the trend:

(i) Statute of limitations: Originally the statute commenced to run from the date of the negligent act irrespective of the date of discovery of damages. Alter v. Michael, 64 Cal. 2d 480, 413 P.2d 153, 50 Cal. Rptr. 553 (1966); Yandell v. Baker, 258 Cal. App. 2d 308, 65 Cal. Rptr. 606 (1968). Thereafter, the accrual rule was judicially changed: the statute does not commence to run until discovery or the suffering of appreciable damage. Neel v. Magana, Olney, Levy, Cathcart & Gelfund, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); Budd v. Nixen, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971);


(iii) Vicarious liability: Blackmon v. Hale, 1 Cal. 3d 548, 463 P.2d 418, 83 Cal. Rptr. 194 (1970) (legal partnership liable for a tortious wrong or a contractual breach committed by a former partner subsequent to former partner's withdrawal);

(iv) Legal Research: Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (attorney liable for failure to perform research into question of community property character of plaintiff's husband's retirement benefits although law uncertain and research of questions would have produced no definitive answer);

(v) Attorney testifying in client's action: Comden v. Superior Court, 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9 (1978) (Where attorney is likely to be called as a witness the attorney and his firm must withdraw from representation of the client.). The Comden decision and its harsh consequences have been modified by Rule 2-111 of the California Rules of Professional Conduct.

(vi) Malicious prosecution: Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975) (There may be a cause of action for malicious prosecution against an attorney who prosecutes a claim which a reasonable attorney would not regard as tenable or proceeds with action by unreasonably neglecting to investigate facts and law. The court failed to identify the necessary element of malice, suggesting that something less than actual malice is required in a malicious prosecution action against an attorney.); and,

(vii) Liability to non-client testamentary beneficiaries: Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 987 (1962) (lack of privity between beneficiaries of will and attorney who drew will did not preclude beneficiaries from maintaining action against attorney for a negligently drawn will).

8. See note 67 infra.
the majority's holding in Gibson. The holding is then critically analyzed in Part V. Part VI discusses Gibson's impact, if its holding remains uncorrected, and offers an alternative suggestion for handling the Gibson conflict of interest. Part VII concludes the Article.

II. Gibson Facts

Gibson's indemnity issue had its genesis in a 1972 transaction in which Schlumberger Limited guaranteed to Union Bank repayment of the bank's loan to Schlumberger's then wholly owned subsidiary, Virtue Brothers Manufacturing Co. Inc. (VBM). The loan was purportedly secured by personal property of VBM. Schlumberger's legal counsel in the transaction was the law firm of Kindel & Anderson (Kindel).

When VBM subsequently defaulted, Schlumberger repaid Union Bank pursuant to its guaranty. Union Bank in return assigned to Schlumberger the security interests which VBM had purportedly conveyed to it.

When Schlumberger sought to enforce the security interests, VBM filed a petition for reorganization under the Bankruptcy Act. In the bankruptcy proceedings, VBM's other creditors challenged the validity of the security interests. To resolve this dispute, Schlumberger retained the law firms of Gibson, Dunn & Crutcher (hereinafter Gibson) and another firm. With Gibson's assistance, Schlumberger eventually settled the dispute.

Subsequently, Schlumberger, represented by Gibson, Dunn & Crutcher only, filed suit against Union Bank and against Schlumberger's prior counsel, Kindel. The complaint alleged that Union Bank and Kindel were negligent in failing to provide valid and enforceable security interests in connection with the 1972 transaction and in failing to advise Schlumberger of the risk that the security interests might not be enforceable. Schlumberger alleged that as a result of this negligence, it was forced to settle with VBM's other creditors for approximately $1,000,000 less than it would have received if the security interests had been valid and enforceable.

Union Bank and Kindel in turn filed a cross-complaint for comparative indemnity against Gibson. They charged that

9. All of the factual material in this part is drawn from the Gibson decision. 94 Cal. App. 3d at 349-51, 156 Cal. Rptr. at 327-28.
Gibson's representation of Schlumberger in the bankruptcy proceedings was negligent and that Gibson's negligence contributed to the loss which Schlumberger had allegedly sustained. In effect, Union Bank and Kindel alleged that the settlement between Schlumberger and VBM's other creditors was unreasonable, and that Gibson could have obtained a more favorable settlement, thereby obviating the need for a suit against Union Bank and Kindel, or at least diminishing their monetary exposure. The effect of these cross-claims was that the defendants sought indemnification from Schlumberger's present counsel, Gibson, Dunn & Crutcher.

Gibson demurred to Union Bank's cross-complaint on the ground that it failed to state a cause of action. That demurrer was overruled and Gibson sought a writ of mandate to compel dismissal of the cross-complaint. Pursuant to an agreement among the parties, Gibson did not respond to Kindel's cross-complaint. The appellate court, however, treated Kindel as a real party in interest since Kindel's cross-complaint presented the identical legal issues raised in Union Bank's cross-complaint.

In the court of appeal, Union Bank and Kindel argued that AMA's rule allowing partial indemnity among concurrent tortfeasors was controlling. Having alleged that Gibson's negligence contributed to Schlumberger's loss, Union Bank and Kindel argued that if found liable to Schlumberger, they were entitled to at least partial indemnity from Gibson. The majority of the court in Gibson refused to apply AMA's loss distribution principles because of a perceived conflict between those principles and the unique nature of the attorney-client relationship.

III. THE ISSUE DEFINED

Gibson involved a scenario in which a client hired an attorney (Lawyer II) to assist in extricating the client from a situation created in part by its former attorney (Lawyer I). Lawyer II then negotiated a settlement which resolved the problem created by Lawyer I. Thereafter, on the advice of Lawyer II, the client sued Lawyer I for malpractice. Lawyer I cross-complained for comparative indemnity against Lawyer II, alleging that Lawyer II was negligent in resolving the problem and that Lawyer II's negligence contributed to the client's
damage.\textsuperscript{10}

The majority of the court in \textit{Gibson} refused to permit the cross-complaint, stating that the existence of such a cause of action would create the potential for an intolerable conflict of interest on the part of Lawyer II. That conflict of interest would arise because Lawyer II has a duty to advise his client as to the various alternatives available for extricating the client from the situation created by Lawyer I. The possible alternatives, each of which will have certain attractions and certain drawbacks, will usually include, among others, a possible lawsuit against Lawyer I. Thus, the alternatives must be weighed by the client and by Lawyer II to determine which approach is in the best interests of the client.

If Lawyer II is faced with the possibility of a comparative indemnity claim by Lawyer I, a new factor may enter into Lawyer II's evaluation of the available alternatives: whether those alternatives may expose Lawyer II to a lawsuit and the concomittant burden of defending it. While this is a factor which is of extreme importance to Lawyer II, it is obviously irrelevant to the question of what approach best serves the client. Thus, Lawyer II's interest in avoiding personal exposure to a lawsuit creates a potential conflict with the client's best interest. It was this particular conflict of interest (hereinafter the consultative conflict) which concerned the \textit{Gibson} court.\textsuperscript{11}

\footnotesize{10. In \textit{Gibson}, the problem which Lawyer II was called upon to resolve was created both by Lawyer I and by Union Bank. In framing the issue, the \textit{Gibson} majority recognized that the issue is the same whether the cross-complainant is a lawyer or a non-lawyer. For convenience, the court labeled the cross-complainants "Lawyer I." 94 Cal. App. 3d at 352, 156 Cal. Rptr. at 329. Consequently, this discussion will follow that form.

11. There are several permutations of the \textit{Gibson} model. They are not dealt with here, but for purposes of symmetry, they should be mentioned. Thus, if the client sues Lawyer II (rather than Lawyer I, as was the case in \textit{Gibson}), and Lawyer II thereafter cross-complains against Lawyer I seeking comparative indemnity or equitable contribution, the consultative conflict which concerned the \textit{Gibson} court does not exist, since Lawyer I's representation has ceased. The problems of attorney-client privilege and confidential communication, however, remain and will have to be resolved by the pragmatics of litigation and whether or not the client, as the holder of the privilege, chooses to waive the privilege or whether some other exception to the privilege would apply.

Another model is where Lawyer I and Lawyer II are co-counsel and either or both are sued by the common client. These are presumably partnership or joint venture questions governed not by \textit{Gibson} or its rationale, but by the substantive law of partnerships. See Pollack v. Lytle, 120 Cal. App. 3d 931, 175 Cal. Rptr. 81 (1981)
IV. THE GIBSON COURT’S ANALYSIS

The majority in Gibson decided that the only way to avoid the consultative conflict was to preclude the possibility of a suit by Lawyer I against Lawyer II. In the words of the court: “Lawyer II should not be required to face a potential conflict between the course which is in his client’s best interest and the course which would minimize his exposure to the cross-complaint of [L]awyer I.”12 While the protection of the client from the effects of the consultative conflict is clearly warranted, Gibson went too far. There is no need to sacrifice the goal of AMA to obtain the goal of Gibson when an alternative exists which sacrifices neither.

The majority of the court in Gibson began its analysis by distinguishing AMA in two respects, one of which was viewed as critical. First, AMA dealt with a single indivisible injury. By contrast, the harm suffered by Schlumberger involved “successive acts, each of which had a discernible effect contributing to the ultimate loss.”13 The court concluded, however, that this factual difference was insignificant. In support of this conclusion, the court cited medical malpractice cases involving successive tortious acts in which partial indemnification had been permitted among parties who had made separate contributions to the same injury.14

The court’s second distinction concerned the effect of a cross-complaint on the attorney-client relationship and the essence of that relationship, viz, the attorney’s duty of undivided loyalty to the client in trying to resolve the problem created by the prior attorney.15 In formulating and analyzing the

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12. 94 Cal. App. 3d at 356, 156 Cal. Rptr. at 331.
13. Id. at 351, 156 Cal. Rptr. at 329.
15. Before focusing on the critical issue, the Gibson majority first noted that “[t]he most conspicuous consequence of a cross-complaint against the plaintiff’s lawyer [Lawyer II] is to preclude that lawyer from trying the case on behalf of the plaintiff.” 94 Cal. App. 3d at 352, 156 Cal. Rptr. at 329. Citing Comden v. Superior Court,
problem, the Gibson court relied heavily on the earlier supreme court decision in *Goodman v. Kennedy*\(^{16}\) and the appellate decision in *Held v. Arant*.\(^{17}\) Thus, to understand Gibson, both Goodman and Held must be reviewed.

*Goodman* presented the issue of whether an attorney's duty of care in advising the client extended to third persons with whom the client deals at arm's length. In *Goodman*, the plaintiffs sued the defendant-attorney, Kennedy, to recover losses which they had incurred on shares of stock purchased from Kennedy's clients, who were the principal officers of the corporation issuing the stock.\(^{18}\)

The plaintiffs claimed that Kennedy was professionally negligent in incorrectly advising the clients that the stock could be issued by the corporation and sold by them without adverse consequences to subsequent purchasers under Securities Exchange Commission regulations.\(^{19}\) The plaintiffs argued that Kennedy should be liable to them because his advice was directly related to a possible sale of the stock and thus the purchase and resultant injury were foreseeable consequences of the negligent advice.\(^{20}\) Essentially, plaintiffs' theory postulated that an attorney's duty of care in advising a client extends not only to the client, but also to those who foreseeably will be injured or damaged if the client follows the advice.

The California Supreme Court rejected the plaintiffs' theory, both on the facts and for policy reasons. The court found that Kennedy owed no duty to the plaintiffs. In that factual milieu, the court noted the lack of any allegation that Ken-

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\(^{16}\) 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976).


\(^{18}\) 18 Cal. 3d at 339, 556 P.2d at 740, 134 Cal. Rptr. at 378.

\(^{19}\) *Id.*

\(^{20}\) *Id.* at 344, 556 P.2d at 742, 134 Cal. Rptr. at 380.
nedy's advice had ever been communicated to the plaintiffs, thereby making untenable any claim that the plaintiffs relied on the advice in purchasing the stock.\textsuperscript{21} In addition, the court pointed out that Kennedy did not give the advice for the purpose of enabling his clients to discharge some obligation to the plaintiffs. Accordingly, the court found that there was no relationship between Kennedy and the plaintiffs which could give rise to any duty to plaintiffs.\textsuperscript{22}

Despite these factual reasons for denying the cause of action, the plaintiffs argued that they were, in effect, intended beneficiaries of Kennedy's advice because the advice was "intended to affect" them as purchasers and because harm to them was foreseeable. The court also rejected this factual argument on the ground that the arm's length nature of the transaction precluded a finding that the plaintiffs were intended beneficiaries of Kennedy's advice.\textsuperscript{23}

A close reading of the \textit{Goodman} opinion, however, reveals that the court based its decision primarily on the policy goal of protecting the attorney-client relationship. Extending an attorney's liability for negligent advice to those with whom the client deals at arm's length would, in the words of the court,

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in other words, the court in \textit{Goodman} sought to prevent the potential conflict of duty which would likely arise if the attor-
ney had both a duty to advise the client and a duty to protect those with whom the client later deals at arm's length on the basis of that advice. 25

The second case relied upon by the Gibson court was Held v. Arant, 26 which bears a striking factual resemblance to Gibson. Like Gibson, Held involved the attorney's duty to a client and the question of whether an attorney, sued for malpractice by the client, has a right of indemnity against the client's subsequent attorney.

In Held, the plaintiff-client Held had retained defendant-attorney Arant (Lawyer I) to represent him in a business transaction with Nova-Tech. The transaction aborted and Nova-Tech sued Held for misrepresentation. Held settled the suit by Nova-Tech with the assistance of subsequent counsel (Lawyer II). On the advice and with the further assistance of Lawyer II, Held then brought suit against Lawyer I for malpractice. Lawyer I in turn cross-complained against Lawyer II, asserting that Lawyer II had committed malpractice in representing Held in the settlement, thereby exacerbating, rather than reducing, Held's initial loss. Lawyer I thus sought indemnity from Lawyer II in the event Lawyer I was found liable to Held. 27

The court affirmed the dismissal of Lawyer I's cross-complaint, noting that "the lawyer's duty of care extends only to the intended beneficiaries of his action." 28 Since the cross-complaint on its face showed that Lawyer I was not an intended beneficiary of Lawyer II's representation of the client, Lawyer II therefore owed no duty to Lawyer I. 29

Because Arant (Lawyer I) raised no other theory, the court could have disposed of the case on the ground that Lawyer II owed no duty to Lawyer I. The court, however, considered the factual issues to have broad implications for the attorney-client relationship. Therefore, it requested argument

25. The conflict of duty which the court sought to avoid in Goodman should not be confused with the conflict of interest which was the focus of Gibson. See text accompanying notes 61-63 infra.
27. Id. at 750-51, 134 Cal. Rptr. at 422-23.
28. Id. at 751, 134 Cal. Rptr. at 423.
on the critical issue of whether successive acts of legal malpractice should give rise to a cause of action for equitable indemnity between attorneys.\textsuperscript{30}

Expressly noting that the parties had waived any question of comparative indemnity,\textsuperscript{31} the court focused on the doctrine of equitable indemnity, which permits a passively negligent tortfeasor to seek full indemnity from an actively negligent tortfeasor.\textsuperscript{32} Specifically, the court addressed the applicability of certain personal injury cases involving medical malpractice to the legal malpractice scenario presented in \textit{Held}.

The court noted that in personal injury actions, the originally negligent tortfeasor is entitled to equitable indemnity from the subsequent treating physician for that portion of damage caused by the physician's negligence.\textsuperscript{33} The questionable rationale for allowing such indemnity in medical malpractice cases is that the possibility of a suit for indemnity supposedly does not inhibit the physician's performance of his professional duty to his patient. In other words, the threat of a later indemnity claim for malpractice does not influence either the physician's choice of treatment or the quality of his

\textsuperscript{30} 67 Cal. App. 3d at 751-52, 134 Cal. Rptr. at 423.

\textsuperscript{31} \textit{Id.} at 751 n.2, 134 Cal. Rptr. at 423 n.2. The lack of a comparative negligence issue in \textit{Held} obviously prevents that case from fitting precisely into the \textit{Gibson} mold. Nevertheless, as suggested below, the two cases are similar enough that both must be discussed and analyzed in detail.


\textsuperscript{33} 67 Cal. App. 3d at 751-52, 134 Cal. Rptr. at 423. Note that in this situation the negligent acts of the original tortfeasor and the subsequent treating physician must be separate and distinct. See Niles v. City of San Rafael, 42 Cal. App. 3d 230, 240, 116 Cal. Rptr. 733, 738. As to the initial tortious act, the original tortfeasor alone is liable. As to the aggravation of the injury caused by the treating physician, the original tortfeasor is secondarily or passively liable while the physician is primarily or actively liable. Thus, the original tortfeasor is entitled to full equitable indemnity, but only for that portion of the injury caused by the physician.

Likewise, in \textit{Held}, Lawyer I sought full equitable indemnity only for that portion of the client's damage for which Lawyer II was primarily liable. Thus, \textit{Held} did not involve the precise \textit{AMA} goal of loss distribution based on pure comparative fault. Nevertheless, it did involve a balancing of the general concept of equitable loss distribution and the goal of avoiding the consultative conflict. Accordingly, the \textit{Held} decision was considered virtually dispositive in \textit{Gibson}. See \textit{Gibson, Dunn \& Crutcher v. Superior Court}, 94 Cal. App. 3d at 347, 355, 156 Cal. Rptr. 326, 331. It is argued herein that both \textit{Held} and \textit{Gibson} suffer from the same flaw: the failure to consider less drastic ways of protecting the client from the effects of the consultative conflict.
performance. In the words of the Held court: "Whatever may be the effect of exposure to malpractice suits upon the performance of good medicine, it exists irrespective of the indemnity potential." Implicit in this rationale is the belief that the physician's performance of his duties in accordance with professional standards will protect him from liability.

The court in Held concluded that legal malpractice cases warrant a contrary result. The court stated that the possibility of an indemnity claim against Lawyer II could "impinge upon the individual loyalty owed by counsel." The court perceived that the potential for an indemnity claim would present Lawyer II with a conflict of interest.

Lawyer II was faced with a professional consultative choice between possible courses of conduct. Where one alternative in that choice leads to the possibility of an indemnity suit against Lawyer II and the other alternative does not, the court expressed concern that the lawyer's judgment regarding the client's interest could be influenced by the lawyer's self protective concerns.

34. This conclusion is, at the very least, highly suspect. Studies in the medical malpractice field suggest that physicians face a conflict very similar to the consultative conflict which faced Lawyer II in Gibson. The fear of malpractice suits by patients has resulted in the practice by physicians of "defensive medicine." Tancredi & Barondess, The Problem of Defensive Medicine, 200 Science 879 (1978) [hereinafter Tancredi]; Garg, Gliebe & Elkhatib, The Extent of Defensive Medicine: Some Empirical Evidence, 6 Legal Aspects of Med. Practice 25 (February 1978); U.S. Dep't of H.E.W., Medical Malpractice: Report of the Secretary's Commission on Medical Malpractice, Publication No. (05) 73-39, 38-40 (1973) [hereinafter H.E.W. Medical Malpractice]. Defensive medicine actually encompasses two different patterns of conduct. "Positive" defensive medicine involves "the over-utilization of diagnostic and treatment procedures which are medically unjustified." Id. at A38; see Shavell, Theoretical Issues in Medical Malpractice, (1978) The Economics of Medical Malpractice 49 (S. Rottenberg ed.); Schwartz & Komesar, Doctors, Damages and Deterrence, 298 New Eng. J. Med. 1282 (1978); Note, The Medical Malpractice Threat: A Study of Defensive Medicine, 5 Duke L.J. 939 (1971). "Negative" defensive medicine involves "the withholding of diagnostic or therapeutic techniques that might be medically justified in light of the patient's physical condition but are accompanied by more than the usual risk of an adverse outcome . . . ." Tancredi at 879; see H.E.W. Medical Malpractice at A38. With both types of defensive medicine, the purpose is the same: avoidance of a medical malpractice claim. Tancredi at 879; H.E.W. Medical Malpractice at A38. Thus, contrary to the conclusion of the Gibson and Held courts, physicians (like lawyers in the position of Lawyer II) are faced with the conflict of choosing between the course which is best for the patient (client) or choosing the course which best avoids a lawsuit.

35. 67 Cal. App. 3d at 752, 134 Cal. Rptr. at 424.
36. Id.
37. In characterizing the position of the lawyer as being fraught with conflict
Thus, in the Held court’s judgment, Lawyer II, unlike the physician, must do more than perform well. Attorney II must make a professional evaluation whether to sue the previous lawyer or pursue other alternatives and make a recommendation as to which alternative to pursue. Lawyer II can, therefore, avoid an indemnity suit by choosing not to sue Lawyer I regardless of whether or not that choice is in the client’s best interest. Thus, because an indemnity claim would have an adverse effect on the attorney-client relationship, the court in Held concluded that Lawyer I should not be allowed to seek indemnity from Lawyer II.

The Gibson majority, in reaching the same conclusion as Held, relied on those aspects of the Goodman and Held cases discussed above. Expanding on Goodman’s prohibition against attorney malpractice claims by a client’s arm’s length adversary, the Gibson majority characterized the important policy considerations as follows:

[T]o expose the attorney to actions for negligence brought by parties other than the client, ‘would inject undesirable self-protective reservations into the attorney’s counselling role’ and tend to divert the attorney from single-minded devotion to his client’s interests.

In adopting the Held rationale in toto, the Gibson court expressed the view that the Held rationale is even more persuasive in a comparative negligence situation than it was in Held’s equitable indemnity situation. As stated by the Gibson

the court said:

[If it (Lawyer II) chooses the course of resistance of the claim, it will be immune from liability to the one adversary absent malicious prosecution (Daly v. Smith) (1963) 220 Cal. App. 2d 592, 604, 33 Cal. Rptr. 920), while if it chooses the course of prosecuting the client’s claim for malpractice against a prior attorney it may be subject to a claim to indemnify that attorney.

67 Cal. App. 3d at 752, 134 Cal. Rptr. at 424.

38. The question of whether there is, in fact, a difference in the conflict presented to the physician and that presented to the attorney is discussed at note 34 supra. Nevertheless, the purported distinction is relevant at this juncture to highlight the concerns, whether valid or not, in Held and Gibson.

39. Furthermore, as alluded to in Gibson, even if Lawyer II acquires his duty to the client by choosing to sue Lawyer I, there may be an indemnity suit by Lawyer I, who is likely to cross-complain against Lawyer II regardless of the merits of the cross-claim.

40. 67 Cal. App. 3d at 752-53, 134 Cal. Rptr. at 424.

41. 94 Cal. App. 3d at 353, 156 Cal. Rptr. at 330.
What was said in *Held v. Arant* is quite as applicable to indemnification under the comparative negligence standards. Since *American Motorcycle* has greatly expanded the opportunities for defendants in negligence cases to seek indemnification from parties whom the plaintiff did not choose to sue, the hazard to the attorney-client relationship could now be vastly greater than it was under the substantive law previously in effect.

In an effort to dissuade the court in *Gibson* that *Goodman* and *Held* should not be followed, the cross-complaining parties (the bank and Lawyer I) urged that their cross-complaints would not impinge on the attorney-client relationship because all they sought was to acquit Lawyer II's duty to the client. In rejecting this argument, the majority stated:

> The problem is not that Lawyer II may be found liable to his client for malpractice. It is that in satisfying the needs and desires of his client, lawyer II may be exposing himself to the not insubstantial cost of defending an action by his client's opponent.

A client seeking to extricate himself from a situation caused by the negligence of lawyer I may find his options limited both by legal constraints and practical considerations. The client's perception of his own best interests, after obtaining sound legal advice, may dictate a course which lawyer I may fairly characterize as 'unreasonable and disproportionate to the risk involved.' What effect a settlement so motivated would have on the client's claim against lawyer I is not before us. What is pertinent here is the effect upon the relationship between lawyer II and the client when the client's alternatives are under consideration. Lawyer II should not be required to face a potential conflict between the course which is in his client's best interest and the course which would minimize his exposure to the cross-complaint of lawyer I.

Finally, Lawyer I argued that its cross-complaint should be permitted because suits for malpractice are a risk of professional life which "should not be regarded as a serious inhi-
bition upon professional loyalty and objectivity."

With respect to malpractice claims by dissatisfied clients, the Gibson court agreed. With respect to claims by client's adversaries, however, the court disagreed, choosing to rely on the rationale of Goodman and Held that "exposure to the client's potential adversaries 'would prevent [Lawyer II] from devoting his entire energies to his client's interests.'"

Accordingly, the majority in Gibson found that the relationship between attorney and client merits special protection from the apparent juggernaut of an unlimited comparative indemnity system. The court chose to protect the client from the effects of the consultative conflict by precluding the existence of the conflict. The trade-off for this result was the abandonment of the important loss distribution goals of AMA. That trade-off was neither wise nor necessary.

V. ANALYSIS OF THE GIBSON RATIONALE

The Gibson court essentially engaged in a balancing of two policy goals, namely the equitable loss distribution goal of AMA and the goal of avoiding the potentially adverse effects of the consultative conflict. In the majority's view, these two goals conflicted. After weighing the supposedly competing policies, the court decided that AMA's equitable loss distribution principles must give way to the goal of protecting the client from the conflict of interest which a potential cross-complaint thrusts upon the client's attorney (Lawyer II).

Although the discussion that follows argues that Gibson was wrongly decided, it is important initially to recognize that the Gibson court's mistake was not in its weighing of the respective goals. The court's mistake was its perception that those goals are irreconcilably competing. This Article does not disagree with the Gibson court's assumption that the client must be given reasonable protection from the effects of the consultative conflict. Protection of the attorney-client relationship from any potential conflict of interest is necessary if such a relationship is to retain its value in an adversarial system of justice. Such protection, however, can be achieved without sacrificing the goal of equitable loss distribution. The total preclusion of otherwise legitimate indemnity claims is

45. Id. at 356, 156 Cal. Rptr. at 331.
46. Id. at 356, 156 Cal. Rptr. at 331-32.
too high a price to exact for such protection when less drastic, but equally effective, alternatives exist.

A. The Equitable Loss Distribution Goal

The AMA case involved the equitable distribution of an indivisible loss among joint or concurrent tortfeasors.\textsuperscript{47} The crux of the AMA decision is that a joint or concurrent tortfeasor may obtain partial indemnity on a comparative fault basis against any fellow joint or concurrent tortfeasors, whether or not a party to the initial action. The purpose of this holding is to implement fully the goal of \textit{Li v. Yellow Cab}: the achievement of "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault."\textsuperscript{48} While the court in AMA recognized that there were exceptions to the general principles of comparative fault loss distribution,\textsuperscript{49} it is nonetheless clear that those general principles embody a policy goal of extreme importance and general, widespread application.\textsuperscript{50}

\begin{footnotesize}
\textsuperscript{47} The Gibson court also recognized that the principles of AMA apply to successive tortfeasors, so long as the injury or loss is indivisible. See text accompanying notes 13 & 14 supra. If successive tortfeasors cause distinct and separable injuries, equitable loss distribution is achieved through the pre-AMA rules relating to equitable indemnity. See notes 30-33 and accompanying text supra.

\textsuperscript{48} 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975).

\textsuperscript{49} The AMA court expressly mentioned two such circumstances. The first is where an employee is injured in the scope of his employment. In such a case, California Labor Code § 3864 would, in the words of the court, "normally preclude a third party tortfeasor from obtaining indemnification from the employer, even if the employee's negligence was a concurrent cause of the injury." 20 Cal. 3d 578, 607 n.9, 578 P.2d 899, 917 n.9, 146 Cal. Rptr. 182, 200-01 n.9. The second exception noted by the AMA court was where one concurrent tortfeasor has entered into a good faith settlement with the plaintiff. To allow a cross-complaint in that situation would "undermine the explicit statutory policy to encourage settlements reflected by the provisions of § 877 of the Code of Civil Procedure." \textit{Id.} When and under what circumstances one can attack a settlement as not in "good faith" is another subject beyond the scope of this article. For the most recent word on the subject, see Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981). \textit{But see}, the dramatic decision of \textit{Baget v. Shepard} (decided Feb. 2, 1982) (Cal. Ct. App.) holding, with one judge dissenting, that aside from and notwithstanding the "good faith" exception of § 877 (a) of the Code of Civil Procedure, the plaintiff's recovery should be reduced "by the percentage amount of responsibility attributable to the settling tortfeasors' tortious conduct" rather than by the "amount stipulated by the release" (emphasis in original).

\textsuperscript{50} See American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 607-08, 578 P.2d at 918, 146 Cal. Rptr. at 201. See also Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978); Sears, Roebuck & Co. v. International
Because *Gibson* involved an indivisible injury among allegedly successive tortfeasors, the court focused exclusively on the comparative indemnity principles of *AMA*. As exemplified by *Held*, however, the consultative conflict can arise in other than an *AMA* context. *Held* involved an allegedly divisible injury caused by successive tortfeasors.\(^5\) Thus, the *Held* court was concerned with total equitable indemnity rather than comparative (or partial equitable) indemnity.

Nevertheless, in both *Held* and *Gibson*, the essential goal being weighed was that of equitable loss distribution. That goal is equally important, whether the injury is divisible or indivisible. In the context of the consultative conflict analysis, therefore, *Gibson* and *Held* presented the same issue. While the majority in *Gibson* apparently recognized this identity of issues,\(^6\) it made the same mistake as did the *Held* court in abandoning the goal of equitable loss distribution.\(^7\)

### B. The Goal Of Avoiding The Consultative Conflict

In *Gibson*, the professional choice of whether to sue Lawyer I or pursue other alternatives was central to the delineation of the *Gibson* consultative conflict. The court's concern in *Gibson* was based on the assumption that Lawyer II is more likely to be exposed to suit if Lawyer II recommends actions against Lawyer I, than if Lawyer II recommends pursuit of other alternatives.

There are two reasons for this concern. First, the likelihood of the client bringing a separate malpractice action against Lawyer II may be lessened where Lawyer II has recommended alternatives other than suit against Lawyer I because the client is unaware of the possibility of such a mal-

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51. *See* note 33 *supra*.
52. *Id*.
53. The post-*AMA* decision in *Commercial Standard Title Co., Inc. v. Superior Court*, 92 Cal. App. 3d 934, 155 Cal. Rptr. 393, *hearing denied*, (1979), also seems to ignore the principles of equitable loss distribution in the face of a possible cross-complaint against the plaintiff's attorney. In fact, *Commercial Standard* presents a situation materially different from *Gibson* and *Held*. *Commercial Standard* raised the question of whether the plaintiff's *prior* attorney can be subjected to a cross-complaint, while *Gibson* and *Held* involved a cross-complaint against the plaintiff's *present* or *subsequent* attorney. The difference is that in the *Commercial Standard* situation, the consultative conflict does not exist. *See* note 11 *supra*. 
practice action. If Lawyer I were sued, on the other hand, Lawyer I would presumably be forced to explore all possible defenses, including a potential cross-complaint against Lawyer II. Second, client inertia may also present an impediment to an action brought by the client against Lawyer II. Even if the client becomes fully aware of the potential for action against Lawyer II, the client may decide against such an action because of the expense and inconvenience of instituting a second lawsuit. Accordingly, consultative conflict is only found in the situation of a direct juxtaposition of two choices for Lawyer II, one of which includes suit against a previous lawyer and one of which does not.

This is underscored by Parker v. Morton, decided subsequent to Gibson. Parker produced a loss sharing result consistent with AMA, while distinguishing Gibson as being inapplicable. In Parker, the client brought an action against Lawyer I for alleged negligence in failing to litigate in a marriage dissolution action the client's community property interest in her husband's vested military pension. Lawyer I filed a cross-complaint for total or partial indemnity against the second attorney who, after being hired by the client, allegedly was negligent in failing to remedy the problem of the unlitigated and undisposed military pension. Though Parker involved a suit against Lawyer I for negligence in the underlying action, the cross-claim specified that the charges against Lawyer II were not aimed at Lawyer II's choice of whether or not to sue Lawyer I. Lawyer II had no choice in the classic Gibson sense of whether or not to pursue alternatives other than suit against Lawyer I. It was clear that even though suit was brought against Lawyer I, other actions to mitigate the client's damage should have been pursued. Thus, Lawyer II's

54. See The Attorney's Right, supra note 6, at 182. The consequences of the client remaining unaware of claims against Lawyer II are diminished by the provisions of CAL. CIV. PROC. CODE § 340.6 (West 1954 & Supp. 1981). Most importantly, the statute provides several exceptions to the limitations period for an action against an attorney. If the attorney wilfully conceals facts known to the attorney which constitute the attorney's wrongful act, and if the client does not know and has no reason to know of those facts, the limitation period is tolled. In addition, so long as the attorney continues to represent the plaintiff regarding the matter in which the alleged wrong occurred, the statute is tolled. Consequently, the statute of limitations minimizes the harsh result of the client being time barred because of the client's ignorance of a possible cause of action against Lawyer II.

failure to pursue those alternatives could not have been affected by a conflict of interest.  

The reasoning in the Parker case is remarkable in its similarity to the physician-successive tortfeasor paradigm which the courts in Gibson and Held refused to follow. In terms of that model, the Parker decision found Lawyer II to be in the position of the physician. Lawyer II's duty was not subject to choice. It is important to note that the lack of choice relied upon by the Parker court was not the lack of any available alternatives for resolving the client's dilemma. In Parker, Lawyer II's duty was diligent prosecution of the client's unlitigated and undisposed claims. Within those boundaries of Lawyer II's duty obviously lay a multitude of choices as to how to proceed. The choice that was conspicuously missing in Parker, but which was present in Gibson and Held, was the "either-or" professional choice of whether to pursue alternatives other than suit against Lawyer I or to bring suit against Lawyer I.57

As noted above in Part IV, the majority in Gibson re-

56. Id. at 760, 173 Cal. Rptr. at 202-03. Another case reaching the same conclusion is Sigel v. Superior Court, 173 Cal. Rptr. 261 (Ct. App.), hearing denied, opinion ordered decertified (1981). In Sigel, Lawyer I failed to effect service of a complaint on the driver of an offending vehicle and failed otherwise to prosecute diligently the suit in the course of representing an injured automobile passenger. When sued by the client for malpractice, Lawyer I sought to cross-complain against Lawyer II, alleging that Lawyer II had also not been diligent in prosecuting the suit and effecting service. As with Parker, the duty of Lawyer II in Sigel was found to be clear and independent of any choice to sue Lawyer I. Lawyer II was duty bound to serve process on the client's opponent regardless of whether suit was brought against Lawyer I. While Sigel has no precedential value following its decertification, it is perhaps significant that the supreme court denied a hearing.

57. Parker v. Morton, 117 Cal. App. 3d 751, 173 Cal. Rptr. 197 (1981). Rowell v. Trans Pacific Ins. Co., 94 Cal. App. 3d 818, 156 Cal. Rptr. 679, hearing denied, (1979), is at first glance similar to Gibson, which it followed. In Rowell, the defendant carrier was charged with misconduct in delaying payments under a disability insurance policy. The carrier sought to file a cross-complaint against the plaintiff's current attorneys, alleging that the dilatory conduct of the attorneys and their failure to present proper supporting documents caused the delay of payment. The court in Rowell, with little discussion, followed Gibson and Held.

While the court in Rowell addressed the consultative conflict, it appears to be wrongly decided. Rowell was similar to Parker in that the plaintiff's attorney in Rowell was not faced with a professional either-or choice of recommending suit against the carrier or pursuing other alternatives. The plaintiff's attorneys in Rowell had a duty to the client to pursue vigorously payment of the client's disability claims and to sue the carrier if those payments were not forthcoming. No conflict could effect the lawyer's performance because there was no choice. The Rowell decision, therefore, appears contrary to the subsequent Parker case and logically incorrect.
solved this conflict by concluding that Lawyer I's comparative indemnity cross-complaint should not be allowed. In so doing, Gibson relied heavily on the earlier decisions in Goodman and Held. Because Held presented the same issue as Gibson, it does not assist the present analysis to dissect Held. The Gibson court merely followed Held without extending it in any significant way.

The Goodman case, however, involved a situation dramatically different from Gibson. Given the importance of Goodman in the Gibson majority decision, it is important to explore the philosophical and policy underpinnings of Goodman. As demonstrated below, those underpinnings are sufficiently different from Gibson to render Goodman irrelevant in dealing with the consultative conflict as presented in Gibson.

Goodman presented the issue of whether an attorney's duty of care in advising the client extended to third persons with whom the client deals at arm's length. The Goodman court concluded that no such duty of care exists. In the same vein as Goodman was Norton v. Hines in which the issue was whether an attorney's duty of care in advising and representing the client extended to the client's adversary in litigation. In Norton, the client, through attorney Hines, sued Norton. Norton obtained a dismissal of the action and sued the client for malicious prosecution. Norton also sued attorney Hines for negligent advice to the client which foreseeably caused injury to Norton. The suit against Hines was based on a claimed duty owed directly from Hines to Norton.

The Norton court held the lawyer immune to suit by the client's adversary on negligence grounds in a situation where the client was to be judged only by the more rigorous requirements for a malicious prosecution action. A contrary result would impel an attorney to counsel against the pursuit of otherwise viable actions, which, if lost, would only subject the client to an action for malicious prosecution while the lawyer could be found liable on simple negligence grounds.

It is obvious that if an attorney is subjected to a duty of care to those whom the client sues or deals with, an advisory conflict will arise. Such a conflict, however, is quite different

58. See text accompanying notes 18-25 supra.
60. See id. at 923, 123 Cal. Rptr. at 241.
from the consultative conflict in Gibson. In the Goodman and Norton situation, the advisory conflict is created by the inconsistent requirements of two asserted separate duties of care owed by the lawyer, one to the client and one to the client’s adversary. In the Gibson situation, the consultative conflict is created by the co-existence of the attorney's duty of care to the client and the attorney's personal interest in avoiding a lawsuit.

Thus, Goodman and Norton present the possibility for extension of the lawyer's duty beyond the lawyer-client relationship, whereas in Gibson, Lawyer II is faced with only a single duty—representing the client. In short, Goodman and Norton involved a conflict of duty, while Gibson involved a conflict of interest.

In the Goodman-Norton context of conflict of duty, there may be no viable option for the lawyer because the two duties (one to the client and the ostensible one to the third party) may be mutually exclusive. In other words, whichever duty the lawyer performs, he breaches the other. As correctly concluded by the Goodman and Norton courts, the only way to avoid this conflict of duty is to refuse to recognize the existence of a duty to the client’s adversary.

By contrast, in the Gibson context of conflict of interest, Lawyer II always has a viable option: Lawyer II can perform the single duty to the client as well as possible and ignore any parochial concern for personal exposure to Lawyer I’s potential cross-claim.

Obviously, the existence of this option does not mean that Lawyer II will always, in fact, set aside personal interests. Moreover, the potential conflict of interest exists, even if Lawyer II does what is best for the client. Nevertheless, the existence, in the Gibson situation, of a viable option, together with the absence of any conflict of duty, makes the Goodman-Norton approach irrelevant.61 Furthermore, these distinctions render the Gibson conclusion highly suspect.

Admittedly, the goal of the Goodman and Gibson courts is a worthy one. The courts and the legal profession in general should strive to avoid situations which may prevent an attor-

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61. Obviously, Goodman and Norton are also distinguishable from Gibson in that they did not involve any question of equitable loss distribution and thus no balancing of possibly competing policies.
ney “‘from devoting his entire energies to his client’s interests.’”62 In so doing, however, the majority in Gibson failed to delve deeply enough into either the ramifications of its holding or the possibility of a less draconian solution to the consultative conflict which it faced.

VI. AN EXTENDED ANALYSIS OF THE GIBSON CONSULTATIVE CONFLICT AND A PROPOSAL FOR ITS RESOLUTION.

The majority in Gibson implicitly (and correctly) decided that when they are irreconcilable, the interests of the client should prevail over the interests of Lawyer I and Lawyer II. The court, however, went too far in concluding (1) that the interests of the client and the lawyers are necessarily irreconcilable, and (2) that the client’s interest is best served by precluding Lawyer I’s cross-complaint against Lawyer II.

In the Gibson factual model, four separate interests will potentially be affected by the outcome of the case: the interests of Lawyer I, Lawyer II, the client and the court system. The effect upon each of these groups should be taken into account in addressing the validity of the Gibson court’s conclusions. Whether it is possible to accommodate satisfactorily all of those interests is debatable. Any solution should, however, have them in mind.

A. Lawyer I

The resolution of the Gibson consultative conflict has little more than procedural consequence for Lawyer I. If the cross-complaint against Lawyer II is permitted, either pursuant to the comparative indemnity rule of AMA or the more general rules of equitable loss distribution, the result is that Lawyer I’s exposure will be reduced by the extent of Lawyer II’s responsibility.

The result for Lawyer I will not be significantly different, however, if the cross-complaint against Lawyer II is not permitted. Under the general rules of agency, Lawyer II will ordinarily be regarded as an agent of the client. Thus, in a suit by the client against Lawyer I, Lawyer I can impute Lawyer II’s

62. Goodman v. Kennedy, 18 Cal. 3d at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381; Gibson, Dunn & Crutcher v. Superior Court, 94 Cal. App. 3d at 353, 156 Cal. Rptr. at 329.
negligence to the client. If Lawyer II’s negligence is imputable to the client, then Lawyer I can defend against the client by claiming that the comparative negligence of the client (including Lawyer II’s imputed negligence) was at least partially responsible for the client’s injury. Thus, in the absence of a cross-complaint against Lawyer II, Lawyer I’s exposure to the client would still be limited by the extent of Lawyer I’s actual responsibility. To Lawyer I, then, it should make little difference how the Gibson consultative conflict is resolved.

B. Lawyer II

Lawyer II has two parochial interests to protect in the Gibson situation. First, Lawyer II wants to avoid actual liability to either the client or Lawyer I for any breach of duty to the client. Second, Lawyer II wants to avoid being involved in any lawsuit, whether or not it is meritorious.

The first concern has no relevance to the resolution of the consultative conflict. Lawyer II can avoid actual liability to the client or Lawyer I by performing all duties to the client in a reasonable and professional manner. In the context of advising the client as to how to escape from the situation created by Lawyer I, this means that Lawyer II, among other things, must set aside any personal interest and do what is best for the client. Additionally, Lawyer II must make a full and fair disclosure to the client. This duty exists whether or not the

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63. In Rowell v. Trans Pacific Ins. Co., 94 Cal. App. 3d 818, 156 Cal. Rptr. 679, hearing denied, (1979), the court assumed that Lawyer II’s negligence could be imputed to the client on the basis of agency principles.

To the extent that the cross-complainants may be successful in proving at trial that action of the persons it seeks to name as cross-defendants contributed to the original injury, cross-complainants’ liability to plaintiff will be reduced by the principles of comparative fault. The proposed cross-complaint shows on its face that the fault with which appellants seek to charge cross-defendants was committed, if at all, in the course of their employment as agents for the plaintiff.


64. One factor which could conceivably cause Lawyer I to prefer a cross-complaint against Lawyer II to imputed negligence against the client is the emotions of the jury. It is possible that a jury’s feelings of sympathy for the client or antipathy towards lawyers might result in a hesitancy to saddle the client with Lawyer II’s negligence. While such action by a jury would technically be improper, it would not be surprising and would be virtually impossible to establish. Thus, Lawyer I might prefer the tactically safer route of cross-complaining against Lawyer II.
Gibson ban against Lawyer I's cross-complaint stands. If the cross-complaint is permitted, then Lawyer II must make a full and fair disclosure to the client that a suit against Lawyer I carries with it the risk of a cross-claim against Lawyer II. The consequences of that potential cross-claim, relating to continued representation, must also be explained to the client. This is no greater burden to Lawyer II than the existing duties under the Gibson rule. Even if Lawyer I is not permitted to cross-complain against Lawyer II, Lawyer II must inform the client of the possibility of a comparative negligence defense by Lawyer I and the concomitant possibility that Lawyer I will seek to impute Lawyer II's alleged negligence to the client.

Thus, regardless of whether the cross-complaint is permitted, Lawyer II will have a duty to inform the client that a suit against Lawyer I involves a risk that Lawyer I will charge Lawyer II with concurrent or successive negligence in order to reduce Lawyer I's liability to the client. Likewise, if such a claim is made (whether by way of cross-complaint against Lawyer II or by way of an imputed negligence defense), Lawyer II must explain the consequences of the claim to the client and obtain written consent for the continued representation of the client.65

In short, if all duties to the client are performed in a professional manner, including his duties of disclosure, Lawyer II will be insulated from liability by whomever asserted. Thus, the Rules of Professional Responsibility adequately cover Lawyer II's concern relating to actual liability.66

Lawyer II's other personal interest is to avoid being named as a defendant in litigation regardless of merit. This is a concern of every lawyer (and client for that matter) involved

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65. CAL. CIV. & CRIM. CT. RULES pt. 2 (Rules of Professional Conduct) § 5-102(A) (West 1981), provides:
A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment. A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment.

66. CAL. BUS. & PROF. CODE § 6076 (West 1974 & Supp. 1981). Rule 5-102 of the California Rules of Professional Conduct, as presently written, would seem to be sufficient to prescribe Lawyer II's course of conduct when faced with a consultative conflict. It would be a simple task, in any event, to modify Rule 5-102 to encompass specifically the consultative conflict.
in the litigation process. The Gibson model is not unique in that regard. The law of malicious prosecution may be of some comfort to Lawyer II where the suit brought against Lawyer II is thoroughly groundless. The possibility of exposure to suits which are not groundless, but will prove ultimately non-meritorious, however, is a professional risk that attaches to the practice of law in general and in undertaking specific representation of any particular client.67

Thus, Lawyer II's concern over being sued by Lawyer I is not sufficient, by itself, to justify the Gibson rule precluding such a suit. Indeed, the Gibson majority's decision was not based on any concern for Lawyer II's interest in avoiding Lawyer I's cross-claim; rather it was based on fear that Lawyer II's interest would interfere with the performance of his duty to the client. In other words, it is implicit in the Gibson rationale (and not disputed here) that Lawyer II's interest in avoiding a suit is not as important as the client's interest in obtaining competent professional legal services. Lawyer II's interest in avoiding Lawyer I's cross-claim is only relevant if the threat of such a cross-claim actually creates a consultative conflict which can only be avoided by precluding the cross-claim. While the Gibson majority concluded that such a threat does exist, the analysis below belies that conclusion.

C. The Client

The client has two basic interests which must be protected. First, the client desires the best advice possible from Lawyer II. To insure that such advice will be received, it is necessary to minimize or eliminate (if possible) any potential conflict of interest which might interfere with Lawyer II's duty to the client. Second, after the decision is made to sue Lawyer I, the client desires to obtain the maximum possible recovery. While Gibson purports to protect these interests by removing the possible barrier of Lawyer II's self-interest, the rule of Gibson actually makes matters worse for the client.

The Gibson majority assumed that by precluding Lawyer

67. As with the physician in the medical-legal distinction of Held, Lawyer II in Gibson can avoid actual liability to any party by performing Lawyer II's duty well. It is of no consequence to the medical-legal distinction in Held that part of Lawyer II's duty is a full and fair disclosure of a potential conflict. Like the hypothetical physician in Held, Lawyer II cannot avoid groundless lawsuits. That professional risk attaching to the practice of law also attaches to the practice of medicine.
I's cross-complaint against Lawyer II, Lawyer II would not be tempted by self-interest to give short shrift to the client's interest. In fact, the consultative conflict persists despite the Gibson ruling. Although the effect of precluding Lawyer I's cross-complaint in Gibson was to eliminate the possibility of exposing Lawyer II to suit if Lawyer II chooses to recommend suit against Lawyer I, Gibson did not eliminate the problem of consultative conflict. Instead, it merely changes the focus of Lawyer II's self-interest from avoidance of Lawyer I's cross-claim to (1) avoidance of Lawyer I's defensive use of Lawyer II's negligence and (2) avoidance of a later malpractice suit by the client. The Gibson majority's analysis was faulty in its failure to consider these other self-interests of Lawyer II and their impact on the client.

Lawyer II's desire to avoid Lawyer I's defensive use of Lawyer II's negligence, and the potential of a malpractice suit by the client, differs little from his desire to avoid Lawyer I's cross-complaint. At most, Lawyer II's concern over the cross-complaint may be more immediate, since the cross-claim

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68. See The Attorney's Right, supra note 6, at 176. The refusal in Gibson to allow the Lawyer I cross-complaint does solve the problem of Lawyer II's use of privileged information in defense of that cross-complaint. If the cross-complaint were allowed, Lawyer II, under existing rules, would not, absent client waiver, be permitted to use privileged information gained in the course of a professional relationship with the client to defend against that cross-complaint. Jeffery v. Pounds, 67 Cal. App. 3d 6, 136 Cal. Rptr. 373 (1977). Lawyer II's defense would consequently be seriously handicapped because many, if not all, of the facts pertinent to Lawyer II's defense may be privileged. Under the Gibson ruling, on the other hand, any suit against Lawyer II would have to be brought directly by the client. In this situation, Lawyer II would be unconstrained in the use of privileged information because of the waiver of privilege inherent in a suit brought by a client against that client's attorney. CAL. EVID. CODE § 958 (West 1966).

Perhaps the solution is to put the client to an election. If Lawyer I's cross-complaint against Lawyer II is successful, Lawyer II will be forced to pay a portion of the judgment. The result from the client's standpoint will be the same as if he had sued both lawyers and waived the privilege: the client will have a full recovery. Likewise, Lawyer II will be in the same position as if the client had sued him and waived the privilege: he will have a judgment against him. Thus, it does not seem unfair to require the client either to waive the privilege or assume responsibility in the present suit (on an imputed negligence theory) for any judgment against Lawyer II. In other words, the client can choose to preserve the privilege at the expense of being able to recover from Lawyer I only that portion of the damages caused by Lawyer I's negligence.

In any event, consideration of attorney-client privilege issues provides little support for the Gibson exception to the historic AMA shift toward allowance of cross-complaints for partial indemnity.
would require the expenditure of defense costs by Lawyer II.69

In any event, however, Lawyer II is faced with a consultative conflict in advising the client, even if the potential cross-claim of Lawyer I is prohibited. Analysis of the problem, therefore, must focus on which of the potential conflicts is least detrimental to the client. In this context, it is necessary, of course, to find an effective approach for encouraging Lawyer II to set aside his self-interest in advising his client.

Under the Gibson rule precluding Lawyer I's cross-complaint, Lawyer I can be expected to defend against the client's claim by asserting the negligence of Lawyer II.70 If Lawyer I successfully limits liability to the client on this theory, the client's recovery from Lawyer I will be diminished. Whether or not Lawyer I succeeds, the client will be alerted to the potential malpractice claim (and the predicate for it) against Lawyer II.

Where the Lawyer I cross-complaint is prohibited, the client can obtain complete recovery for all injuries only by choosing one of the following courses: (1) join Lawyer II as a defendant in the present suit against Lawyer I, or (2) wait for the outcome of the present suit against Lawyer I, and then, if necessary, bring suit for malpractice against Lawyer I in a separate action. Unfortunately, neither of these alternatives provides much comfort to the client.

Under the first alternative, the client is forced to replace Lawyer II, thereby incurring, to a limited extent, a third set of attorney's fees.71 While this circumstance is not pleasant for the client, it is not very different from the situation the client faces if the Lawyer I cross-complaint is permitted. If the cross-complaint is filed against Lawyer II, it will usually be in the client's best interest to discharge Lawyer II. Thus, if the client wants to assure complete recovery in one action, it makes little or no difference whether the Lawyer I cross-complaint is permitted.

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69. Whether Lawyer II is attacked directly (by Lawyer I's cross-complaint) or indirectly (by Lawyer I's defensive use of negligence) similar problems are faced with regard to possible recusal. See note 15 supra.

70. See the discussion of Lawyer I's defensive use of Lawyer II's negligence based on agency principles at note 66 supra and accompanying text.

71. Arguably, those fees would not be as extensive as if Lawyer II continued to represent the client and the client had to hire Lawyer III to handle a later, separate action.
The second alternative, however, creates a greater detriment to the client. If, in the absence of the Lawyer I cross-complaint, the client decides not to jettison Lawyer II in the present suit and Lawyer I is successful in diminishing the client's recovery by the amount of Lawyer II's negligence, then the client can recover fully only by bringing a separate suit for malpractice against Lawyer II. From the client's point of view this is undesirable in two respects. First, the institution of a separate suit against Lawyer II, as opposed to treating the entire three-way problem in a single proceeding, is obviously costly. Second, the client faces the possibility of inconsistent results in the separate lawsuits. In the first suit Lawyer I may succeed in diminishing the client's recovery by the percentage of Lawyer II's negligence, while in a separate action Lawyer II may be successful in escaping all or part of the potential liability. In that eventuality, the client would gain only a par-

72. A further client problem with the Gibson result is that the possibility of settlement is diminished where all parties concerned are not present in a single proceeding.

73. The possibility of inconsistent findings concerning Lawyer II's negligence or percentage thereof is a function of the doctrine of collateral estoppel. The issue is whether or not, assuming Lawyer II was not a party to the client-Lawyer I litigation, Lawyer II nonetheless is in a "sufficiently close" relationship with the client and the issues litigated in the prior litigation so as to warrant under due process standards the application of the collateral estoppel doctrine against Lawyer II. See Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 587 P.2d 1098, 151 Cal. Rptr. 285 (1979), which states;

    In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.

    Id. at 875, 587 P.2d at 1102, 151 Cal. Rptr. at 289. In the Gibson fact situation, the question is whether Lawyer II (not a party to the action) will be bound in a later action by a finding that Lawyer II's negligence was a cause of the client's loss. No California decision has been found applying collateral estoppel in the context of the problems here under discussion. Presumably, both the client and Lawyer II (whether or not representing the client in the litigation against Lawyer I), as well as any lawyer succeeding Lawyer II, will urge the non-negligence of Lawyer II in order to prevent a diminution of the client's recovery. Whether or not this meets the community of interest and adequacy of representation criteria quoted above is an open question.

    Also unresolved is the question of whether the client can use the doctrine of collateral estoppel affirmatively against Lawyer II. Recent decisions seem to signal an increasingly expansive view toward offensive use of collateral estoppel. Nevertheless, those decisions differ from the situation under discussion here, in that they have generally involved plaintiffs who were not parties to the prior action and defendants who were parties to the prior action. E.g., Parklane Hosiery Co., Inc. v. Shore, 439 U.S.
tial recovery.

By contrast, if the Lawyer I cross-complaint is permitted, the two primary deterrents to suit by the client, unawareness and inertia, are overcome to a great extent. When Lawyer I files the cross-complaint, the client is immediately alerted to possible claims against Lawyer II. Client inertia would be somewhat diminished by the fact that a separate lawsuit, and its incumbent costs and inconvenience, could be avoided if Lawyer II was joined in the initial lawsuit against Lawyer I.\textsuperscript{74}

Thus, the Gibson rule precluding Lawyer I's cross-complaint prejudices a client more than it helps. While the client may ultimately be reimbursed fully under the Gibson rule for the negligence of both Lawyer I and Lawyer II, the cost to the client may be prohibitive. A second lawsuit may be required with a third set of lawyers. Moreover, if under the law of collateral estoppel, inconsistent findings could result, the client may not be adequately compensated. Accordingly, the client's interests are better served if the Gibson rule is overturned and the Lawyer I cross-complaint permitted.

The only remaining question, from the client's standpoint, is how to protect against the effect of the consultative conflict.\textsuperscript{75} In fact, the effect of the consultative conflict on the client is no different than the effect on the client of any other conflict of interest facing a lawyer representing a client. The lawyer has a duty to disclose fully to the client any interest


To the extent that any of these questions remain open, there is a risk that the doctrine will not be applied and the client could, therefore, be subject to inconsistent adjudications and a failure to be made whole.

\textsuperscript{74} Obviously these deterrents to client action may also be overcome, although probably to a lesser degree, if Lawyer I asserts Lawyer II's negligence by way of a comparative negligence defense against the client.

\textsuperscript{75} As discussed at text accompanying notes 71 & 72 supra, a consultative conflict exists regardless of whether the Lawyer I cross-complaint is permitted. One possible way of avoiding the conflict and encouraging Lawyer II to be more frank with the client even in the face of Lawyer I's potential cross-claim, is modification of the rules relating to attorney fee awards. In the Gibson model, it is Lawyer II's concern with the burden of defending the cross-claim (and not the threat of actual liability) which supposedly creates the consultative conflict. It would be a relatively simple matter (though admittedly a break from tradition) for the legislature to fashion a rule awarding attorney's fees to Lawyer II in the event Lawyer I is not successful in prosecuting the cross-claim. Such a rule would seem to be far better than the Gibson court's decision to abandon the principles of equitable loss distribution in the Gibson situation.
that the lawyer may have in the subject matter of the representation as to which there is a potential conflict.

In the Gibson factual model, prior to Lawyer II making a recommendation to the client either to bring action against Lawyer I or to pursue other alternatives, Lawyer II would have a duty to inform the client of (1) the possibility of a cross-claim by Lawyer I against Lawyer II, (2) the possibility that Lawyer I will allege Lawyer II negligence as a defense to the suit, and (3) that if either (1) or (2) occur, the client will have to decide whether to discontinue the services of Lawyer II and whether to sue Lawyer II in the same or separate action. If Lawyer II fails to disclose these possible conflicts of interest, then the client may have a malpractice claim against Lawyer II.76

In short, the consultative conflict is no different from the numerous mundane conflicts which lawyers face everyday and deal with according to the well-established principles of professional responsibility.

D. The Court System

Considerations pertaining to the court system and the administration of justice are also relevant to the Gibson question. In the pre-Gibson climate it was likely that the tripartite controversy among Lawyer I, Lawyer II and the client would be resolved at one sitting. If Lawyer I was sued, Lawyer I could bring a cross-complaint in that suit against Lawyer II. Indeed, if Lawyer I was ever going to raise the issue of Lawyer II's negligence, it would likely be in the same action in which Lawyer I was sued.

In the post-Gibson milieu, Lawyer I is precluded from bringing a cross-complaint, but can raise the alleged Lawyer II negligence as a defense against the client. At that stage, the client is faced with a choice. The client can join Lawyer II in the suit against Lawyer I and the controversy can again be resolved in a single proceeding. The client may, however, choose to embrace Lawyer II in spite of the negligence allegations and continue to retain Lawyer II in the suit against

76. See note 55 supra for a discussion of the statute of limitations in attorney malpractice actions and the diminished consequences of the client remaining unaware of any claims the client may have against Lawyer II.
If the client chooses this alternative, should Lawyer I win, any subsequent claims of the client against Lawyer II necessitate a second and separate suit, perhaps following protracted and expensive appeals of the initial case against Lawyer I. The requirement of a second suit imposes an undue burden on the court system. Taxpayers would pay the cost of two lawsuits, including appeals, rather than one, in what is essentially a single controversy. Other litigants would suffer corresponding additional delays. Further, and finally, if the client refuses to join Lawyer II in the first lawsuit, settlement negotiations would be hampered by the absence in the negotiations of one member of the tripartite relationship. Accordingly, the strong public policy favoring out of court settlements suggests that the Gibson result is counter-productive.

VII. CONCLUSION

An adversarial system of justice requires that the attorney-client relationship be protected from potentially destructive conflicts of interest. This article has focused on one such conflict of interest, the consultative conflict presented by the Gibson case. Analysis of the Gibson decision has shown that its solution to the consultative conflict is both ineffective and excessive: refusal to allow a cross-complaint for partial indemnity between lawyers does not prevent the consultative conflict from arising.

A more reasonable remedy would be to handle the consultative conflict within the framework of the present Rules of Professional Conduct. Under those rules, full and frank disclosure between attorney and client provides the ultimate protection for the attorney-client relationship. Furthermore, avoidance of Gibson's harsh remedy is more in keeping with the strong public policy, expressed in AMA, of distributing loss according to fault.

77. See note 15 supra for a discussion of the possible requirement that Lawyer II be recused from the lawsuit if Lawyer II is to be called as a witness adverse to the client in that suit.