

## May Co-Counsel Sue for Damages?

by

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Rule 1.5(e) of the Minnesota Rules of Professional Conduct allows lawyers who are not in the same firm to work together on a case and share the fee. If the division of the fee is other than in proportion to services rendered, each lawyer must agree to assume "joint responsibility for the representation." This usually means that the lawyers are responsible for each other's mistakes. If one of the lawyers commits malpractice, the client has a potential claim against both lawyers.

In such a situation, if the client receives a recovery (whether by judgment or settlement) because of a mistake by one of the lawyers, may the non-negligent lawyer recover from co-counsel?

This issue arose in a case recently decided by the Washington Supreme Court. In *Mazon v. Krafchick*, 144 P.3d 1168 (Wash. 2006), the court characterized the matter as a dispute between two attorneys who had co-represented a client in a personal injury action. The client's lawsuit was dismissed after one of the attorneys failed to timely serve the complaint and the statute of limitations expired. The client brought a claim for malpractice against both attorneys, which was settled for \$1.3 million.

The dispute arose when attorney Michael Mazon sued his co-counsel Steven Krafchick (the negligent lawyer), seeking to recover for the loss of his expected contingency fee, for the amount his insurance company paid to settle the client's lawsuit, for his out of pocket insurance deductible and for the costs he advanced in the client's lawsuit.

Relying on California precedent, the Washington Supreme Court held that Mazon could not recover from his negligent co-counsel. The court refused to impose a duty on lawyers to protect co-counsel's interest in the prospective fee. "Imposing a duty to protect prospective fees would create potential impermissible conflicts with the duty of loyalty the attorneys owe their clients," the court wrote in *Mazon*.

The court noted that it was concerned with the following issues:

- A lawyer may have an impermissible interest in preserving co-counsel's claim for the prospective fee at the expense of the client's interest;
- The existence of such a claim could be difficult to ascertain;
- Tactical decisions ordinarily made by a lawyer in the course of representation could form the basis of a claim; and

- Having lawyers battle over the possibilities of a concluded lawsuit, particularly if the client is not dissatisfied, would not be in the public interest.

The court found this overriding public policy interest superseded the non-negligent lawyer's traditional theories of recovery against the tortfeasor. In *Mazon*, there was no actual conflict of interest between the interests co-counsel would have in protecting each other's right to recovery and the client's interests in the matter. Both interests required the complaint to be served timely. Nevertheless, the court disallowed the claims.

The courts specifically rejected Mazon's contribution claim, seeking to recover the amount he (and his insurance carrier) contributed to the settlement of the client's malpractice claim. In this matter, no judgment had been entered against either lawyer. "Therefore, they were not held jointly and severally liable, and Mazon is not entitled to contribution," the court determined.

The Director's research revealed no Minnesota appellate decision addressing this specific Rule 1.5(e) issue. But in another case involving fee splitting, *Christensen v. Eggen*, 557\* N.W.2d 221 (Minn. 1998), the Supreme Court held that a lawyer could not recover his share of the fee from co-counsel when the fee-splitting agreement was oral. The court reasoned that Rule 1.5(e) requires fee-splitting agreements to be written, and so the agreement that violated the rule was unenforceable.

This does not suggest with certainty whether the Minnesota appellate courts would reach the same result as the Washington Supreme Court reached if faced with the issue of recovery from negligent co-counsel.

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\*577 N.W.2d 221 (Minn. 1998).