

Collectability of Legal Fees in a Legal Malpractice Case

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I. INTRODUCTION

The American Rule in litigation is that each party bears its own legal fees regardless of the outcome of the case. In a legal malpractice matter, a proper measure of damages is that which might have been recovered in the former action. McLennan v. Fuller, 226 Mass. 374, 379 (1917); Fishman v. Brooks, 396 Mass. 643, 647 (1986). When taken together, these principles can lead to an unjust result for a plaintiff in a legal malpractice case, even when he prevails at trial. For example, a plaintiff in a contingency fee case might have ultimately recovered his damages, minus 1/3 of the recovery, which he would have paid his attorneys. However, to prosecute a legal malpractice case, the plaintiff will have to pay his legal malpractice attorney 1/3 (often 40%) of the recovery thereby reducing his potential recovery to 1/3 of his damages. The discussion below will focus primarily on this situation, rather than cases in which an attorney's negligence required the plaintiff to enlist the services of another attorney to remedy or mitigate, which is typically recognized as recoverable.

Although many other states have analyzed this issue, there is only one decision analyzing it under Massachusetts law and it is at the Superior Court level. In Cintra v. Law Office of Dane H. Shulman, 28 Mass.L.Rptr. 271 (Hon. John C. Cratsley, April 28, 2011), plaintiff filed suit against his former attorney for failing to properly serve the complaint and exhausting the statute of limitations, resulting in the dismissal of the action. The jury awarded plaintiff's \$81,250 plus interest and the issue was then raised as to whether that verdict should be reduced by the 1/3 fee the plaintiff would have had to pay his attorney. Initially, the Court recognized that the majority of jurisdictions have rejected this offset approach for a number of reasons: the full measure of damages is determined by the size of judgment lost; the negligent lawyer should be prohibited from benefiting from the contract he violated; and the fee the lawyer would have paid the negligent lawyer is cancelled out by the attorney's fees he pays his malpractice lawyer. However, the Court also cited the fact that the 1st Circuit applying Maine law allowed such an offset (Moore v. Greenberg, 834 F2d 1105 (1st Cir. (Mass.) 1987) and that the MCLE Superior Court Jury Instructions, §18.7.3, actually provide an instruction requiring the jury to reduce the

award by the attorney's fee.¹ Ultimately, the Court refused to apply the offset as reflected in the law of the majority of jurisdictions.

Below is a discussion of how other jurisdictions have decided this significant legal malpractice issue.

II. AUTHORITY FOR NOT DEDUCTING FEES FROM A MALPRACTICE VERDICT - THE MAJORITY RULE

- 1. THE RESTATEMENT (3D) OF THE LAW GOVERNING LAWYERS (2000) §53, COMMENT C** - This is perhaps the most succinct treatment of the issue, citing the unfairness that would result in requiring a claimant to pay two legal fees and the inequity of rewarding an attorney for his malpractice.

§ 53. Causation And Damages

A lawyer is liable under [§ 48](#) or [§ 49](#) only if the lawyer's breach of a duty of care or breach of fiduciary duty was a legal cause of injury, as determined under generally applicable principles of causation and damages.

c. Action by a civil litigant: attorney fees that would have been due. When it is shown that a plaintiff would have prevailed in the former civil action but for the lawyer's legal fault, it might be thought that—applying strict causation principles—the damages to be recovered in the legal-malpractice action should be reduced by the fee due the lawyer in the former matter. That is, the plaintiff has lost the net amount recovered after paying that attorney fee. Yet if the net amount were all the plaintiff could recover in the malpractice action, the defendant lawyer would in effect be credited with a fee that the lawyer never earned, and the plaintiff would have to pay two lawyers (the defendant lawyer and the plaintiff's lawyer in the malpractice action) to recover one judgment.

Denial of a fee deduction hence may be an appropriate sanction for the defendant lawyer's misconduct: to the extent that the lawyer defendant did not earn a fee due to the lawyer's misconduct, no such fee may be deducted in calculating the recovery in the malpractice action. The same principles apply to a legal-malpractice plaintiff who was a defendant in a previous civil action. The appropriateness and extent of disallowing deduction of the fee are determined under the standards of [§ 37](#) governing fee forfeiture. In some circumstances, those standards allow the lawyer to be credited with fees for services that benefited the client. See [§ 37](#), Comment *e*.

Illustration:

¹ The MCLE Superior Court Civil Practice Jury Instruction §18.7.3 (drafted by noted defense attorney Allen N. David, Esq.) provides that: "If you find that the plaintiff is entitled to damages in this malpractice case, that amount must be reduced by the amount the defendant attorney would have received pursuant to the contingent fee agreement."

1. Plaintiff retains Lawyer to bring a contract action seeking to recover \$40,000, at a fee of \$150 per hour. After working 10 hours, Lawyer withdraws without cause just before the trial. As a result, Plaintiff's case is dismissed with prejudice. When Plaintiff then sues Lawyer for malpractice and shows that Plaintiff would have prevailed in the contract action but for Lawyer's withdrawal, Plaintiff is entitled to recover \$40,000. Lawyer is not entitled to deduct either attorney fees for hours devoted to the case before the withdrawal or hours that would have been devoted to the trial, for both were forfeited by Lawyer's improper and harmful withdrawal (see §§ 37 & 40, Comment e).

2. **CALIFORNIA** – California was the first state to deny a deduction for the amount of a contingency fee, because the damages could not be accurately flushed out. However, later California cases clearly hold that attorney's fees and costs do not get deducted from a legal malpractice recovery because “[c]rediting the defendant with a fee he has failed to earn not only rewards his wrongdoing, but places on plaintiffs’ shoulders the necessity of paying twice for the same service.”

Benard v. Walkup, 272 Cal.App.2d. 595 (1969)

“[Defendant] contends that if he is liable for breach of contract the \$7,500 awarded to plaintiff should be reduced by the amount of the contingency fee which he as attorney would have received under the contract if the original personal injury suit had been successfully litigated. He cites no authority which supports this view. In considering this contention we first note that, generally, the measure of damages for breach of contract is that which will compensate the aggrieved party for all the detriment proximately caused thereby [citations omitted] but a person cannot recover damages for breach of a contract in a greater amount than he could have gained by the full performance thereof on both sides. [citations omitted] The rule of [Civil Code section 3358](#) cannot be invoked, however, where there is no showing as to what the performance on both sides would have been. ...

In the instant case we have no way of knowing precisely what amount of damages plaintiff might have gained by full performance on the part of [defendant]. Investigation on the part of [defendant] might have uncovered greater damages than those proved to the court in the instant action for breach of contract. Or it is altogether possible that if [defendant] had proceeded properly under his contract, the matter might have been compromised before the cause was tried. In such a situation he would have received 33 1/3 percent under the contract. But if judgment in favor of plaintiff had been obtained, or if the matter had been compromised after the trial began, [defendant] would have received 40 percent of the amount payable to plaintiff. Clearly there is here no way in which we can ascertain what amount of damages would have been produced by full performance of the contract on both sides. Under the circumstances, therefore, the applicable rule is that which states that one whose wrongful conduct has rendered difficult the ascertainment of damages cannot complain because the court must make an estimate of damages rather than an actual computation. [citations omitted] Moreover, in the present case it was not established that [defendant] performed any part of the contract; nor did he cross-complain or counterclaim for any sums alleged to be due him under the agreement.”

Kane, Kane & Kritzer, Inc v. Altagen, 107 Cal.App.3d 36 (Cal.App., 1980)

“The more challenging issue concerns the court’s reduction of the \$1,355.31 award by the amount appellant normally would have paid respondent as attorney’s fees if the collection had been competently handled. Appellant claims an attorney should not be compensated for his own negligence. Respondent relies on cases from other jurisdictions that permit such a reduction and [Code of Civil Procedure section 1021](#). If the attorney’s fee is not deducted from the award, he claims appellant is indirectly recovering attorney’s fees in violation of the section.

As stated earlier, the decisional law is almost evenly divided and the two theories cannot be reconciled by compromise or modification. We believe the more modern cases [citations omitted] reach a more desirable result. The older cases that permit the deduction do so under the rationale that the client is entitled only to what would have been recovered had the attorney performed competently. [citations omitted] This logic, however, is somewhat self-destructing because the attorney has not handled the matter competently. We agree with the court’s conclusion, on this issue, in Andrews v. Cain, *supra* 406 N.Y.S.2d 168, where it stated: “Crediting the defendant with a fee he has failed to earn not only rewards his wrongdoing, but places on plaintiffs’ shoulders the necessity of paying twice for the same service.”

3. **COLORADO** - Colorado courts have recognized the unfairness that would result in requiring a claimant to pay two legal fees for the same service and the inequity of rewarding an attorney for his malpractice, and have held that as a matter of policy, a negligent attorney should be precluded from recovery his fee.

McCafferty v. Musat, 817 P.2d 1039, 1045 (Colo.App. Dec 13, 1990)

“Musat next contends that the trial court erred in denying his motion to amend the judgment by reducing the amount of the judgment by the amount of the contingency fee McCafferty was contractually obligated to pay Musat. We disagree.

The “majority and generally more recent line of cases” hold that such a deduction should not be made from a legal malpractice award. [citations omitted] We adopt that line of cases and the reasoning set forth therein.

One reason for so holding is that deduction of attorney fees from damage awards would constitute a “[failure] to compensate plaintiffs fully for their loss of jury verdicts or settlements, since any fee which plaintiffs may have had to pay the defendant had he [or she] successfully prosecuted the suit is canceled out by the attorney’s fees plaintiffs have incurred in retaining counsel in the present action.” [citations omitted]

Despite views contrary to the above analysis, [citations omitted], our conclusion is bolstered by “an alternate, and more fundamental ground,” for holding that Musat is not entitled to a deduction of the amount of their original fee from the legal malpractice award. This ground is that “the negligent attorney is to be considered precluded from recovering his attorneys’ fee.” Therefore, “the total amount of the initial recovery [is] awardable” in this and similar cases. [citations omitted]

Here, the record reflects that McCafferty's present counsel is entitled to a 50% contingent fee as a result of the appeal of this matter. Were we to allow Musat to deduct the 33.3% he would have received absent his malpractice, the result would be that McCafferty would recover a total of only 33.3% of his damages-an amount equal to both the off-set by Musat and less than the fee paid to his present attorney.

Because we agree that "crediting the defendant with a fee he failed to earn not only rewards his wrongdoing, but places on plaintiff's shoulders the necessity of paying twice for the same service," [citations omitted] we conclude that Musat is not entitled to a set-off of the fees he would have retained had he settled the action and received for McCafferty the ultimate \$801,600 award. Therefore, the trial court did not err in denying Musat's motion for postjudgment relief."

4. **CONNECTICUT** - a Connecticut District Court has held that a legal malpractice case was ripe to be brought, even before the underlying litigation was complete, because the cost of additional litigation to recover on the original claim is an element of claimant's damages.

New Falls Corp. v. Lerner, 2006 WL 2801459 (D.Conn. Sep 28, 2006)

"However, "[i]n legal malpractice actions, clients' damages include the cost of additional litigation in order to recover on their original claim." Lorenzetti v. Jolles, 120 F.Supp.2d 181 (D.Conn.2000) (summarizing Winter v. Brown, 365 A.2d 381, 386 (D.C.1976)); see also Knight v. Furlow, 553 A.2d 1232, 1235 (D.C.1989) (holding that "[i]t is not necessary that all or even the greater part of the damages have to occur before the cause of action [for legal malpractice] arises. Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue. We conclude that attorney's fees and costs expended as a result of an attorney's alleged malpractice constitute legally cognizable damages for purposes of stating a claim for such malpractice.") (citations and quotations omitted). In this case, plaintiff seeks "[c]osts and expenses, including reasonable attorneys' fees." *Compl.* p. 9, ¶ 3. Those damages will include the costs, expenses and attorneys' fees that plaintiff has already spent to litigate the bankruptcy action, additional litigation that it is pursuing to recover on its original claim against the Oleshes. Therefore, plaintiff has already allegedly suffered a certain and compensable injury because it claims to have already spent money to remedy Lerner's alleged malpractice."

5. **DISTRICT OF COLUMBIA** – the District of Columbia does not deduct attorney's fees from an award, simply because the plaintiff will incur additional attorney's fees to pursue the legal malpractice claim.

Winter v. Brown, 365 A.2d 381 (D.C. 1976)

"Turning to another point raised by appellants, we conclude the trial court did not err when it refused to reduce the recovery by the amount of the contingent attorney fees. The damages sustained by appellees include the cost of additional litigation in order to recover on their original claim. [citations omitted] Those additional attorney's fees cancel out any attorney's fees

that appellees might have owed appellants had they successfully prosecuted the case against the hospital. [citations omitted]”

6. **ILLINOIS** – Illinois courts refuse to reward an attorney who commits malpractice by deducting the fees from the verdict and they also recognize that the plaintiff will incur additional attorney’s fees to pursue the legal malpractice claim.

Bloome v. Wiseman, Shaikewitz, McGivern, Wahl, Flavin & Hesi, P.C., 664 N.E.2d 1125, 1134, 279 Ill.App.3d 469, 482, 216 Ill.Dec. 197, 206 (Ill.App. 5 Dist. May 01, 1996)

“Finally, defendants claim that the trial court erred because it failed to reduce the award by the amount of defendants' attorney fees which plaintiff would have been obligated to pay to defendants had they successfully prosecuted plaintiff's medical malpractice action. This issue has not yet been decided in Illinois. A minority of states allow the reduction. In Foster v. Duggin, 695 S.W.2d 526, 527 (Tenn.1985), the court applied the majority approach and stated:

“[T]he majority view...holds that no credit is due the attorney since he has breached the contract by performing negligently, and since deduction of his fee would not fully compensate the client who has incurred additional legal fees in pursuing the malpractice action. These additional fees are said to cancel out any fees which the plaintiff would have owed the attorney had he performed competently.”

A legal malpractice plaintiff is only entitled to recover those sums which he would have recovered if his underlying suit was successfully prosecuted. Albright v. Seyfarth, Fairweather, Shaw & Geraldson, 176 Ill.App.3d 921, 926, 126 Ill.Dec. 321, 324, 531 N.E.2d 948, 951 (1988), appeal denied, 125 Ill.2d 563, 130 Ill.Dec. 478, 537 N.E.2d 807 (1989). We elect to follow the majority rule. To apply the rule suggested by defendants serves to penalize the legal malpractice plaintiff. Under defendants’ proposed calculation, a legal malpractice plaintiff’s verdict is reduced by his malpractice attorney fees and by the amount of fees plaintiff would have incurred had the original attorneys performed competently. The majority approach is much more equitable and operates under the assumption that the attorney fees of the first and second sets of attorneys are essentially equal. By only reducing the legal malpractice verdict by the attorney fees owed to the second set of attorneys, the injured plaintiff is in the same position he would have been in but for the negligence of the first set of attorneys. Therefore, the trial court did not err in refusing to apply the setoff requested by defendants.”

7. **INDIANA** – Indiana courts have taken a ‘middle of the road’ approach holding that a defendant attorney is not entitled to a deduction of a legal malpractice award based on his contingency fee, only a reduction for the *quantum meruit* he can prove benefited the claimant. Of course, in a case such as ours, or in any case in which an attorney fails to file a claim on time, there is no benefit to the plaintiff and no *quantum meruit* reduction.

Schultheis v. Franke, 658 N.E.2d 932, 940 (Ind.App. Dec 05, 1995)

“Schultheis finally contends that the award of damages in this case should be reduced by the amount of attorney’s fees Franke would have incurred if Schultheis had prevailed in the underlying medical malpractice action

The theory of *quantum meruit*, relied upon in several of the decisions adopting the middle-road approach, has been applied in Indiana where an attorney institutes an action for recovery of attorney's fees. An attorney who is discharged by a client with or without cause may recover the reasonable value of the services rendered before his discharge on the basis of *quantum meruit*. Kelly v. Smith (1993), Ind., 611 N.E.2d 118; Estate of Forrester v. Dawalt (1990), Ind.App., 562 N.E.2d 1315, *reh'g denied*. We find this approach persuasive and appropriate for the facts of this case. We hold therefore that an attorney who renders services for a client and is thereafter sued for malpractice is entitled to a deduction in the malpractice award equal to the reasonable value of his or her services on a theory of *quantum meruit*. This approach will avoid a windfall to the client where the attorney has provided services beneficial to the client. Conversely, a client will not be forced to pay twice for the same services because counsel in the legal malpractice action presumably will prove only those portions of the underlying case that were not already completed by the negligent attorney. Nor will the negligent attorney be rewarded for his or her shoddy workmanship as fees will be deducted only for legal services which actually benefited the client.”

8. **MINNESOTA** – Minnesota courts hold that since a plaintiff must pay his attorneys in the subsequent malpractice action, disregarding the original lawyer’s fee when calculating damages cancels out the extra cost.

Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980)

“Decisions from other states have divided in their resolution of the instant question. The cases allowing the deduction of the hypothetical fees do so without any detailed discussion or reasoning in support thereof. [citations omitted] The courts disapproving of an allowance for attorney fees reason, consistent with the dicta in Christy, supra, that a reduction for lawyer fees is unwarranted because of the expense incurred by the plaintiff in bringing an action against the attorney. [citations omitted]

We are persuaded by the reasoning of the cases which do not allow a reduction for a hypothetical contingency fee, and accordingly reject defendants’ contention.”

9. **NEW HAMPSHIRE** – New Hampshire courts refuse to deduct they original attorney’s fees and costs from a malpractice verdict recognizing that such a rule would not make a claimant whole.

Carbone v. Tieney, 151 N.H. 521 (2004)

“Some jurisdictions that have addressed this issue have held that the verdict should be reduced by the amount of the contingency fee because only then would the verdict reflect what the plaintiff would have recovered had the defendant performed competently in the underlying action. [citations omitted]

We disagree that reducing the verdict by the amount of the contingency fee puts the plaintiff in the same position that he or she would have been in if the defendant had performed competently in the underlying action. If we were to hold that the verdict must be reduced by the amount of the contingency fee, at the conclusion of the malpractice action, the verdict would be reduced by the amount of the contingency fee, *and* the plaintiff would have to pay his or her new attorney for the services that the new attorney provided in the prosecution of the malpractice action. We think this is an inequitable result.

On the other hand, if the defendant is barred from reducing the verdict to reflect the contingency fee, the plaintiff is in the same position he would have been in if the defendant had performed competently in the underlying action. The plaintiff will still be required to compensate his or her new attorney for the services the attorney provided in pursuit of the malpractice action. The plaintiff, however, will not be penalized for having to employ two attorneys to get the result the plaintiff should have obtained in the original action. Accordingly, we hold that, in a legal malpractice action, the verdict should not be reduced to reflect the amount of a contingency fee agreement. Our holding is consistent with a number of other jurisdictions that have addressed this issue. [citations omitted]

We additionally recognize that, in what appears to be a recent trend, several jurisdictions have applied the doctrine of *quantum meruit* to determine whether a verdict should be reduced to reflect a negligent attorney's fee. [citations omitted]. Under this approach, the damage award is reduced by the amount the negligent attorney would have been compensated for services that were actually rendered. [citations omitted] If we were to adopt this approach, the jury would be required to decide whether the first lawyer provided services that ultimately benefited the plaintiff. If the jury found that the lawyer did provide services that benefited the plaintiff, the jury would then be required to assign a value to those services and reduce the damage award accordingly. We think, as a practical matter, that it would be difficult for a jury to assign a value to the services provided by the first lawyer, particularly where there is considerable disagreement about whether those services benefited the client in any meaningful way. Consequently, we decline to adopt the *quantum meruit* approach.

In the present case, Carbone hired Tierney to represent him in an action against his son. Carbone agreed to pay Tierney one-third of the amount he recovered in the underlying action. When Carbone later brought suit against Tierney alleging legal malpractice, Tierney argued that the jury verdict should be reduced by one-third to reflect the contingency fee agreement. The trial court rejected Tierney's argument and stated that she "did not provide any services for Mr. Carbone for which she is entitled to a deduction in the malpractice award on a theory of *quantum meruit*." As a result, the court denied Tierney's motion to reduce the verdict to reflect the contingency fee.

As we explained above, we reject the application of a *quantum meruit* approach to determine whether the verdict should be reduced by the amount of the contingency fee. Instead, we hold that Tierney is not entitled to have the verdict reduced. Although the trial court employed a different theory than the one that we adopt today, it reached the correct result. We thus conclude that the court did not err in denying Tierney's motion to reduce the jury verdict."

10. **NEW JERSEY** – New Jersey courts refuse to deduct the original attorneys fees and costs from a malpractice verdict, but “envison cases where on a *quantum meruit* basis the efforts of a defendant attorney may have so benefited a plaintiff or other circumstances exist that it would be unfair to deny all or part of the offset.”

Strauss v. Fost, 213 N.J. Super. 239, 517 A.2d 143 (1986)

“We find no New Jersey authority either mandating or precluding the deduction of the attorney’s fees which would have been charged or assessed in the underlying claim, the loss of which is the subject of a legal malpractice action. General statements abound. Plaintiff must be put “in as good a position as he would have been had the defendant kept his contract.” [citations omitted] A client “may recover for losses which are proximately caused by the attorney’s negligence or malpractice.” [citations omitted] This issue, however, is whether a client is made whole when the attorney’s fee he would have paid in the initial action is deducted and he then must pay a second fee to collect even the reduced amount in a suit against his original attorney. There is a split in authority as to whether there should be a deduction for the unearned attorney’s fee. ...

Awarding of the full amount of the initial claim, undiminished by the unearned attorney’s fees, in most cases will “put a plaintiff in as good a position as he would have been had” there been no malpractice. [citations omitted] Relying upon the better-reasoned of the authorities just cited, we could find that “the damages sustained ... include the cost of additional litigation in order to recover on [plaintiff’s] original claim ... [and such] additional attorney’s fees cancel out any attorney’s fees that [plaintiff] might have owed [defendant] had [he] successfully prosecuted the case ...” Winter v. Brown, supra, 365 A.2d at 386. As otherwise stated in Christy v. Saliterman, supra, the parties themselves may well have assumed “that the element of attorneys’ fees, which plaintiff might have had to pay defendant had he successfully prosecuted the suit, was canceled out by the attorneys’ fees plaintiff incurred in retaining counsel to establish that defendant failed to prosecute a recoverable action.” 179 N.W.2d at 307. While not strictly constituting an award of an attorney’s fee in the second suit, application of this theory has an equitable appeal.

We prefer, however, to rest our decision upon the proposition that a negligent attorney in the appropriate case is not entitled to recover his legal fees. See Kane, Kane & Krizer, Inc. v. Altagen, supra, 107 Cal.App.3d at 43-44, 165 Call.Rptr. at 538, although the court there also applied the offset rationale. We prefer not to establish a hard and fast rule that in no case can a negligent attorney be entitled to any portion of his legal fees. We can envision cases where on a *quantum meruit* basis the efforts of a defendant attorney may have so benefited a plaintiff or other circumstances exist that it would be unfair to deny all or part of the offset. The general rule should be that the negligent attorney is to be considered precluded from recovering his attorney’s fee and, therefore, the total amount of the initial recovery would be awardable. A court should determine on a case-by-case basis whether the general rule should be applied and may relax the rule and permit the deduction for the initial attorney’s fee where the interests of justice so dictate.”

11. **NEW YORK** – New York courts have changed their position and now hold with the majority rule. New York courts have held that deducting a contingency fee fails to compensate plaintiffs fully for their loss, since any fee which plaintiffs may have had to pay the defendant is canceled out by the attorney’s fees and costs plaintiffs have incurred in retaining counsel and prosecuting a malpractice action. A later oft-cited decision also holds that as a matter of policy a negligent attorney is to be considered precluded from recovering his attorney’s fee.

Andrews v. Cain, 62 A.D.2d 612, 406 N.Y.S.2d 168 (1978)

“Plaintiffs seek recovery for defendant’s negligence in failing to prosecute two negligence cases on their behalf stemming from accidents occurring on October 8, 1965 and June 27, 1967. The parties had executed a retainer agreement after the first accident providing that defendant’s fee would be 25% of any settlement, or 33 1/3% of any sum recovered pursuant to litigation. The same agreement as to fees was orally made between the parties after the second accident. In the only case on the issue, the court in *Childs v Comstock* (69 App Div 160) reduced plaintiff’s recovery against his attorney by the 25% contingency fee the defendant would have received had he fulfilled his part of the bargain. The defendant urges on the court that the rule adopted in *Childs v Comstock (supra)* is consonant with the general rule as to the measure of damages in seeking legal redress for a wrong; that is, legal expenses are not awarded to a successful litigant in the prosecution of an action as general or special damages. We find the contrary viewpoint articulated in *Duncan v Lord* (409 F Supp 687), to be more logically sound and in keeping with contemporary legal opinions (e.g., *Benard v Walkup*, 272 Cal App 2d 595; *Winter v Brown*, 365 A2d 381, 386). We conclude that deducting a hypothetical contingency fee fails to compensate plaintiffs fully for their loss of jury verdicts or settlements, since any fee which plaintiffs may have had to pay the defendant had he successfully prosecuted the suit is canceled out by the attorney’s fees plaintiffs have incurred in retaining counsel in the present action. Crediting the defendant with a fee he has failed to earn not only rewards his wrongdoing, but places on plaintiffs’ shoulders the necessity of paying twice for the same service. As a further consideration, we note that, since the contract was not fulfilled, it was impossible to determine what the deduction from plaintiffs’ award would have been. Since the difficulties of proof were of his own creation, defendant should not be permitted to benefit from them.”

Campagnola v. Mulholland, Minion & Roe, 543 N.Y.S.2d 516, 148 A.D.2d 155 (N.Y.A.D. 2 Dept. Jul 10, 1989)

“Nevertheless, there is an alternate, and more fundamental ground, for holding that the defendants are not entitled to a deduction of the amount of their original fee from any legal malpractice award. This alternate ground, which we find persuasive, was expressly advanced by the court in *Strauss v. Fost, supra*, 517 A.2d at 145:

“We prefer however, to rest our decision upon the proposition that a negligent attorney in the appropriate case is not entitled to recover his legal fees * * * The general rule should be that the negligent attorney is to be considered precluded

from recovering his attorneys' fee and, therefore, the total amount of the initial recovery would be awardable." (*cf.*, *Martin Van De Walle v. Yohay*, App.Div., 539 N.Y.S.2d 797)." "

12. **OHIO** – Ohio courts refuse to deduct attorney's fees and costs from an award because "crediting the defendant with a fee he has failed to earn not only rewards his wrongdoing, but places on plaintiff's shoulders the necessity of paying twice for the same service."

Neebuhr v. Axner, 1983 WL 4144 (Ohio App. 9 Dist. Jun 29, 1983)

"...the trial court determined that the defendant was not entitled to the one-third contingency fee, stating:

"...Case law as to this point is divided. However, the court finds the better reasoned view to be that the plaintiff's damages in the malpractice action need not be reduced by any contingent fee a defendant might have earned had he responsibly and successfully carried out his obligations to the plaintiff.

'Deducting a hypothetical contingent fee fails to compensate plaintiff fully for the cost of a...verdict...which plaintiff might have had to pay defendant had he successfully prosecuted the suit [is] cancelled out by the attorney fees plaintiff incurred in retaining counsel to establish that defendant failed to prosecute a recoverable action.' *Duncan v. Lord*, 409 F.Supp. 687, 291-92 (E.D. Pa 1976).

The court agrees with the reasoning in *Andrews v. Cain*, 406 N.Y.S.2d 163, 169 (1978), and *Kane, Kane & Kritzer v. Altages*, 165 Call.Rptr. 534-538 (1980) wherein the court stated:

'Crediting the defendant with a fee he has failed to earn not only rewards his wrongdoing, but places on plaintiff's shoulders the necessity of paying twice for the same service.' ...

This court adopts the reasoning of the trial court. Therefore, this assignment of error is overruled."

13. **PENNSYLVANIA** – Pennsylvania courts have held that not deducting the negligent attorney's fees and costs leads to a fairer result. Deducting a contingent fee fails to compensate plaintiff fully for her loss since any fee which plaintiff might have had to pay defendant had he successfully prosecuted the suit is canceled out by the attorney's fees incurred in retaining counsel to establish that defendant failed to prosecute a recoverable action

Duncan v. Lord, 409 F.Supp. 687 (D.Pa. 1976)

"...although the case law, scant as it is, divides on the question, we feel the better reasoned cases, reaching a fairer result, hold that plaintiff's damages in the malpractice action need not be

reduced by any contingent fee a defendant might have earned had he responsibly and successfully carried out his obligations to plaintiff. Deducting a hypothetical contingent fee fails to compensate plaintiff fully for her loss of a jury verdict or a settlement in state court since any fee which plaintiff might have had to pay defendant had he successfully prosecuted the suit (is) canceled out by the attorneys' fees plaintiff incurred in retaining counsel to establish that defendant failed to prosecute a recoverable action."

14. **TENNESSEE** - Tennessee courts changed their position and now hold with the majority rule. However, the decision below leaves open the door for a defendant attorney to recover some his legal "expenses" if they ultimately benefited the plaintiff.

Foster v. Duggin, 695 S.W.2d 526 (Tenn. 1985)

"In determining whether or not a malpractice award should be reduced by the fee which the attorney would have received had he competently handled the litigation, we are faced with two opposing lines of decision. Those cases allowing the reduction hold, generally, that the client should recover only what he would have received had the original matter been properly handled. Since the client would have had to pay the attorney his fee, that fee is deducted from the malpractice award. [citations omitted]

The contrary line of decision, which appears to be the majority view, holds that no credit is due the attorney since he has breached the contract by performing negligently, and since deduction of his fee would not fully compensate the client who has incurred additional legal fees in pursuing the malpractice action. These additional fees are said to cancel out any fees which the plaintiff would have owed the attorney had he performed competently. [citations omitted]

On the facts of this case, we hold that Mr. Duggin should be denied any credit for the legal fees which he originally was to receive. It is the negligent attorney who is at fault for breaching the contract, and the burden of his incompetence should not be placed upon the innocent client. While in an appropriate case the attorney may be entitled to credit for expenses which were incurred on behalf of the client and which ultimately benefitted the client, the record here is silent as to any benefit incurring to the plaintiffs from the actions of Mr. Duggin. To the contrary, the plaintiffs have had to incur additional legal fees to pursue this malpractice action, and they should not be required to assume the burden of twice paying for legal representation. By taking into account the legal fees which plaintiffs have incurred in pursuing this malpractice action we are not, as Mr. Duggin argues, awarding the plaintiffs their attorney fees. The additional fees necessary to pursue this action are in the nature of incidental damages flowing from Mr. Duggin's breach of the contract. *See Winter v. Brown, 365 A.2d 381, 386 (D.C.App.1976).*"

15. **TEXAS** – Texas courts refuse to deduct a contingency fee, since any fee which plaintiff may have had to pay defendant had he successfully prosecuted the suit is canceled out by the attorney's fees plaintiff has incurred in retaining counsel and prosecuting a malpractice action.

Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development and Research Corp., 232 S.W.3d 883, 898 (Tex.App.-Dallas Aug 29, 2007)

“Some jurisdictions have held that damages should be reduced by the amount of a contingency fee because not to do so violates the basic tort rule that damages are compensatory only and must not put plaintiff in a better position than she would have been in absent the tort. [citations omitted]

Other jurisdictions have held that damages should not be reduced by the amount of a contingency fee on two grounds. First, the offset credits the negligent attorney with a fee he failed to earn and somewhat rewards his wrongdoing; and second, the deduction fails to fully compensate the plaintiff who has been required to incur new attorney's fees and expenses to recover the judgment it should have won in the trial court. [citations omitted]

Some of the jurisdictions expressing a general rule that damages should not be reduced by a contingency fee have adopted a “middle-road approach,” allowing some reduction on a *quantum meruit* basis. [citations omitted] These courts have reasoned that circumstances may exist where the efforts of the otherwise negligent attorney rendered some beneficial services to the plaintiff, making it unfair to deny some credit for the contingency fee. [citations omitted] Under this rationale, the jury would be required to determine whether the negligent lawyer provided services benefiting the plaintiff and, if so, to assign a value to those services and reduce the damages award accordingly. [citations omitted]

Ordinarily, an attorney would seek to recover his contingency fee through a breach of contract action. But if the attorney did not prevail in the underlying litigation, the contingency fee has not been earned, and there is no viable breach of contract action for recovery of the fee. A *quantum meruit* theory is an alternative avenue to recover all or part of a contingency fee based on services rendered. But on this record, Akin Gump could not prevail on a quantum meruit basis because the jury found that Akin Gump did not render *any* compensable services to NDR in the Panda lawsuit.

Akin Gump was entitled to its contingency fee only if NDR *prevailed* in the Panda lawsuit. Due to Akin Gump's negligence, NDR did not prevail and thus Akin Gump did not *earn* its contingency fee. To give the firm a credit for a contingency fee it failed to earn would be to reward its wrongdoing. To secure the damages it would have been awarded in the Panda lawsuit, NDR was required to pay two sets of lawyers and endure the aggravation of a second lawsuit and a second appeal. The attorney's fees and expenses incurred to prosecute a legal malpractice suit are not recoverable as damages, absent some statute or agreement not applicable here. [citations omitted] Simply put, NDR must pay attorneys twice to be in the same position it would have been in absent Akin Gump's malpractice. It should not be forced to “pay” a contingency fee that Akin Gump never earned. As we have noted, the jury in the malpractice suit found that Akin Gump performed no compensable services to NDR. Accordingly, we conclude that the judgment should not be offset by any contingency fee agreement in the underlying lawsuit. Therefore, the trial court did not err by effectively denying Akin Gump's request to reduce the damages by the amount of the contingency fee in the underlying suit.

16. **VERMONT** – although unclear, it appears that Vermont will allow a claimant to collect the costs incurred in the later litigation, including attorney’s fees and costs, which flowed from the breach of the duty owed by the defendant attorney.

Bourne v. Lajoie, 540 A.2d 359, 364, 149 Vt. 45, 53 (Vt. Oct 30, 1987)

“Under either of the possible outcomes identified in Part I of this opinion, Bourne will have suffered damages because of the omission of the two ten-acre lots from the deed. Whether through reformation or rescission, Bourne will recover title to the twenty acres of which she was divested by the negligent drafting of the deed. In either event, Bourne has suffered damages as a result of her inability to recover profits from haying the land because of her lack of title and the fees and expenses she incurred in bringing the reformation action to recover title to the land. See Winter v. Brown, 365 A.2d 381, 384 (D.C.Ct.App.1976).^{FN3} We cannot agree, however, with Bourne's contention that she suffered damages in the form of a lost opportunity to sell the two parcels omitted from the deed. This contention is based only on her speculation that she would have been able to sell the property, rather than on evidence of an actual offer from a prospective purchaser which she was unable to pursue.

FN3. While attorney’s fees and costs normally are not recoverable, Gramatan Home Investors Corp. v. Starling, 143 Vt. 527, 535, 470 A.2d 1157, 1162 (1983), here “[t]he risk of the expenditure of sums of money for costs of litigation, including attorney's fees, directly flowed from the breach of the duty owed by the [defendant attorney....]” to Bourne. Ramp v. St. Paul Fire & Marine Insurance Co., 263 La. 774, 787, 269 So.2d 239, 244 (1972) (emphasis added).”

Bloomer v. Gibson, 180 Vt. 397, 912 A.2d 424 (Vt., 2006)

“The measure of damages for malpractice is “all damages proximately caused by the wrongful act or omission.” 3 R. Mallen & J. Smith, Legal Malpractice § 20.4, at 13 (2006 ed.); see State v. Therrien, 2003 VT 44, ¶ 14, 175 Vt. 342, 830 A.2d 28 (“[M]alpractice liability cannot arise unless the lawyer’s negligence is a proximate cause of the claimed harm.”). The fees charged by defendant were not caused by defendant’s malpractice; they were charged irrespective of the quality of defendant’s representation. On this point, we distinguish between two types of attorney's fees. If plaintiff had incurred legal fees to correct the adverse consequences of defendant’s malpractice, those fees might be recoverable because they were “caused by the wrongful act or omission.” Bourne v. Lajoie, 149 Vt. 45, 53 n. 3, 540 A.2d 359, 364 n 3 (1987); see Therrien, 2003 VT 44, ¶¶ 19-21, 175 Vt. 342, 830 A.2d 28 (finding attorney may have been liable for subsequent damages proximately caused by attorney's negligence). On the other hand, at least where defendant took some action “for which plaintiff[] received some value,” plaintiff cannot recover attorney’s fees paid to defendant. Ramp v. St. Paul Fire & Marine Ins. Co., 263 La 774, 269 So.2d 239 246 (1972) (cited and quoted in Bourne).”

17. **VIRGINIA** – Virginia courts do not deduct the attorney’s fee from the verdict because it would not make the plaintiff whole and would reward an attorney who committed wrongdoing.

Whittaker v. Abrams, 1992 WL 884820 (Va.Cir.Ct. Jul 23, 1992)

“The deduction of the fee would not only reward the attorney’s wrongdoing, but would fail to compensate the plaintiff fully for his loss. Any hypothetical fee which plaintiff might have owed to his attorney had the attorney not been negligent is canceled out by the fee which he must now pay to establish negligence. Kane, 165 Cal. Rptr. at 538. While recognizing that case law on this issue is divided, I find that the better reasoned cases, reaching a fairer result, follow the above rule. The damage award will not be reduced by the amount the attorney would have earned had he not been negligent.”

18. **WASHINGTON** – Washington courts refuse to deduct a contingency fee, since any fee which plaintiff may have had to pay defendant had he successfully prosecuted the suit is canceled out by the attorney’s fees and costs plaintiff has incurred in retaining counsel and prosecuting a malpractice action.

Shoemake v. Ferrer, 143 Wash.App. 819 (2008)

“The first issue presented is whether a negligent attorney is entitled to have the damages awarded to a successful malpractice plaintiff reduced by the amount stated in the negligent attorney’s contingent fee contract.

...the better-reasoned cases recognize that the policy underlying both negligence and breach of contract damage awards-to attempt to restore injured parties to the position they would have been in but for the wrongful conduct of the defendant-favors adopting the more modern rule of not reducing legal malpractice damage awards by an amount equal to the negligent attorney’s proposed fee. We thus conclude that the trial court erred by deducting an amount equal to Ferrer’s proposed fee from the Shoemakes’ damage award.

Because Washington cases are unambiguous that legal malpractice damages should fully compensate plaintiffs injured by attorney malpractice, we hold that the modern majority rule adopted by the Restatement is the best rule for Washington. Reducing a successful malpractice plaintiff’s damages by the amount that the attorney would have earned had the attorney not been negligent necessarily fails to put the injured plaintiff in the position he or she would have occupied in the absence of negligence. In virtually every case, the injured plaintiff will be required to hire a second attorney to prosecute the malpractice action against the negligent attorney and will be required to pay that second attorney. Crediting the negligent attorney with fees through a mechanistic application of the “American rule” fails to account for the fact that both the negligent attorney’s fees and the fees of replacement counsel are being incurred for the same service. The replacement attorney is required to prove precisely what the negligent lawyer failed to prove-that the plaintiff is entitled to recover on the underlying claim. That this must be done through the vehicle of a malpractice action does not change the fact that the plaintiff’s damages are limited to a single recovery on that underlying claim. By definition, reducing that recovery by two sets of attorney’s fees leaves the plaintiff in a worse position than the client would have been in, absent the malpractice.”

**III. AUTHORITY FOR NOT DEDUCTING FEES FROM A MALPRACTICE VERDICT
- THE MINORITY RULE**

19. **MAINE** – the First Circuit Court of Appeals reviewed a District Court of Massachusetts decision (sitting on diversity grounds) which attempted to predict what a Maine court would do with respect to this issue. The Circuit Court held that Maine would deduct attorney’s fees from the verdict to reflect the net amount a plaintiff would have recovered in the underlying case. However, the decision also suggests that in cases in which an attorney does no work to benefit a client (i.e. misses a filing deadline or accepts a fee but does not show up for a hearing), the case may be decided differently.

Moore v. Greenberg, 834 F.2d 1105 (1st Cir. (Mass.) 1987) applying Maine law.

“In contract, the end result is much the same. Maine law provides for damages adequate to “place plaintiff in the same position he would have been in had there been no breach.” [citations omitted] Had Greenberg not broken the faith, Moore’s-exclusive of other considerations-would have netted \$60,000 after paying Greenberg. To replicate plaintiff’s position, therefore, the jury should have awarded him only that much. And, although Moore’s could have recovered such added damages as were “reasonably within the contemplation of the contracting parties when the agreement was made,” [citations omitted] , it was his burden to introduce evidence of such items. [citations omitted] He offered none.

Finally, there is no reason to believe that a Maine court, under a “legal malpractice” rubric, would award damages beyond those available under conventional tort and contract theories. After all, the conceptual foundation on which legal malpractice rests is excerpted from precisely such common law underpinnings. Short of punitive damages-and none were granted in this case-“[a]n attorney who [commits malpractice] is liable to his client for any reasonably foreseeable loss caused by his negligence.” Fishman v. Brooks, 396 Mass. 643, 646, 487 N.E.2d 1377, 1379 (1986). On this record, it was “reasonably foreseeable” that, by failing to communicate the offer, Greenberg would effectively deprive his client of the net benefit of the tendered bargain-nothing more.

In terms of a plaintiff’s theoretical entitlements, all of the travelled roads lead in the direction of Rome. No matter which of plaintiff’s several theories is seen as controlling, logic suggests that Moore’s cannot recover the fee equivalent in the present action. Unless he can present some cognizable basis for receiving from the lawyer more than he would have netted from the tortfeasors, his assignment of error cannot be credited. It is against this backdrop that we consider plaintiff’s caselaw-dependent argument.

There are, as Moore’s advertises, several cases which suggest that one victimized by legal malpractice should be more generously treated. [citations omitted] The cases which encourage fee disregard are not, however, persuasive. To the extent that they undertake any analysis, only three justifications are advanced:

1. That a negligent attorney should not “collect” a fee for his shoddy workmanship. *E.g.*, Strauss v. Fost, 517 A.2d at 145; Andrews v. Cain, 406 N.Y.S.2d at 169.

2. That since a plaintiff must pay his attorneys in the subsequent malpractice action, disregarding the original lawyer's fee when calculating damages “cancels out” the extra cost. *E.g., Togstad*, 291 N.W.2d at 695-96.

3. That attorneys' fees incurred *in the malpractice action* are recoverable as consequential damages of the negligent lawyering. *E.g., Foster v. Duggin*, 695 S.W.2d 526, 527 (Tenn.1985).

In our view, the first two of these arguments cannot withstand scrutiny-and we need not reach the last.

Restricting the client's recovery in a follow-on malpractice action to the realizable net proceeds from his earlier case does not allow a culpable attorney to “collect” anything. More importantly, the argument to the contrary overlooks that the fundamental purpose of such damages is to compensate a plaintiff, not punish a defendant. [citations omitted] Moores's professed fear that professional irresponsibility will be encouraged by focusing upon net recoveries is wholly speculative. The loss of custom and reputation, the availability of compensatory damages, and the prospect of exemplary damages in appropriate cases, provide an array of disincentives which far outstrip this one.

The second proposition is equally unconvincing. It is true that a victimized client will ordinarily hire successor counsel and will incur added expense in pursuing an action against his quondam lawyer. But, the assertion that the fees originally to be paid should not be deducted from a malpractice award because the client will then pay twice for the “same” services assumes what it sets out to determine: that plaintiff is entitled to recover the attorneys' fees. To that extent, the argument is an essentially circular *ipse dixit*; it supplies no cognitive basis for the result urged by Moores. Moreover, the general rule in the United States, unlike in England, is that each suitor bears his own lawyering costs. [citations omitted] In the absence of a statute, an enforceable agreement, or a recognized juridical exception to the general rule, counsel fees do not accrue in favor of a successful litigant. [citations omitted] In a judicial system which refuses routinely to shift attorneys' fees as a form of incidental damages, it makes little sense to award them by indirection. By barring a jury from considering the antecedent contingent fee obligation when deciding damages in a follow-on malpractice action, we would accomplish exactly that.

The third suggested rationale for deemphasizing a “realizable net proceeds” approach need detain us only momentarily. If one accepts the notion that counsel fees in a malpractice action should be viewed as proximately caused by the original attorney's negligence and therefore recoverable as consequential damages-a matter as to which we express no opinion, *see supra* n. 7-Moores is not assisted. Whatever form a legal malpractice action takes, the plaintiff has the burden of introducing evidence to justify an award of consequential damages. [citations omitted] In this instance, Moores offered no proof as to the fees of his newly-retained lawyers.

Were this a matter of federal law, we would end the discussion at this point. But it is not. Diversity jurisdiction carries with it an added set of responsibilities. A federal court which finds itself obliged to make an informed prophecy as to state substantive law in an area in which state courts have not spoken, has a duty, we think, to keep its forecast within the narrowest bounds sufficient to permit disposition of the actual case in controversy. Although we believe that the

focus on a plaintiff's realizable net proceeds compels deduction of the hypothetical contingent fee in virtually any follow-on malpractice suit, and we suspect that the Maine courts would so hold, this case is a particularly strong one for application of the rule.

There is another important line of demarcation as well. Many of the cases hawked by Moores, typically ones in which a lawyer neglected to sue before a temporal deadline expired, stress the fact that the attorney-defendant had furnished no services to his client. *E.g.*, Andrews, 406 N.Y.S.2d at 169; Benard 77 Cal.Rptr. at 551 (defendant had “not established that [the lawyer] performed any part of the contract”). These “do-nothing” cases are also distinguishable. Where a lawyer accepts an engagement and thereafter fails to show up at the starting gate, *e.g.*, *id.* (failure to file suit within statute of limitations); Winter v. Brown, 365 A.2d 381 (D.C. 1976) (failure to serve mandatory notice of claim within prescribed period), it is arguably equitable to fix damages without regard to a fee entitlement which would only have come into existence had the lawyer performed the contract. Those rough equities are in a different balance, however, where the lawyer-notwithstanding that he was guilty of some breach of duty-actually did the work. And the difference in the equities is heightened in a case like this one, where the sum in dispute-the \$90,000 offer-arose during the trial, presumably in direct response to Greenberg's labors on his client's behalf. Cf. Strauss v. Fost, 517 A.2d at 145 (“We can envision cases where on a *quantum meruit* basis the efforts of a defendant attorney may have so benefited [sic] a plaintiff ... that it would be unfair to deny” the deduction); Foster v. Duggin, 695 S.W.2d at 527 (“in an appropriate case, the attorney may be entitled to credit for expenses ... which ultimately benefitted the client”).

In our opinion, the Supreme Judicial Court of Maine, if confronted with the precise question now before us, would rule that where counsel's efforts produced an offer which he then wrongfully failed to relay to the client, the settlement sum should be reduced by the amount of the lawyer's pre-agreed contingent fee (if readily ascertainable) in calculating damages for legal malpractice. This, we think, represents the better-reasoned view of the applicable law and the view most consistent with Maine's expressed jurisprudence. Accordingly, we hold that the district court, on the facts of this case, properly charged the jury to deduct the fee from the offer in arriving at its verdict.”

20. **SOUTH DAKOTA** – at least in dicta, a District Court in South Dakota indicated that “an additional factor to then consider is the amount by which this sum would be reduced by attorney's fees under the contingent fee basis, since any recovery gained would have been subject to the contingent fee agreement.”

McGlone v. Lacey, 288 F.Supp. 662 (D.S.D. 1968).

“The personal injury claim for which Mr. Lacey's services were sought was offered to him on a contingent fee basis. It is well established that the percentage of the contingent fee varies greatly depending upon the expense of pursuing the intended litigation and the prospect for success in the litigation. With that in mind, it could well be concluded that Mrs. McGlone invited a counter-offer from Mr. Lacey in which he would either state from the facts known to him, should he consider them sufficient, what percentage he would require for a contingent fee or else request an interview by which he could obtain the necessary information upon which to determine what

percentage fee he would request to handle the claim. The importance of the percentage of the contingent fee is pointed out in Sitton v. Clements, 385 F.2d 869 (6th Cir. 1967), which also is a suit brought against an attorney who had permitted the statute of limitations to run in an action. When a suit of this nature is brought, the trier of fact must determine what recovery would have been gained from the prosecution of the suit had not the statute barred such prosecution. An additional factor to then consider is the amount by which this sum would be reduced by attorney's fees under the contingent fee basis, since any recovery gained would have been subject to the contingent fee agreement. The Sitton case involved a written contingent fee agreement providing for fifty per cent fee upon the recovery of any sum through litigation. This amount was taken into consideration in computing the attorney's liability for permitting the running of the statute barring suit in the matter.”

21. **WYOMING** – the high court of Wyoming, over a dissenting opinion, decided on certified questions that the contingency fees will be deducted from a malpractice award and the attorney prosecuting the malpractice case has no right to seek the fees from the negligent one.

Horn v. Wooster, 165 P.3d 69 (Wyo. 2007)

“Applying these principles, an aggrieved client should be entitled to recover from the negligent attorney the amount he would have expected to recoup if his underlying action had been successful. It would, therefore, be appropriate to deduct the attorney’s contingency fee from the amount the jury determines the underlying judgment would have been because the client’s ultimate recovery in the underlying action would have been reduced by that expense. The approach holding that a client is not responsible for the expenses of successful completion of the attorney/client contract is inconsistent with the principles we typically apply in determining compensatory damages. [citations omitted]

To adopt a cause of action between co-counsel simply because the attorney proposed to give the client the benefit of any judgment in his favor would not square with our other precedent and could, in the future, result in a case where the client's best interests are compromised by the self interests of feuding attorneys. Consequently, we answer the second certified question in the negative.”

We decline to adopt a means of measuring damages in legal malpractice actions that is different from other areas of the law. We conclude that the malpractice client is only entitled to a judgment which reflects the net recovery he would have received had the underlying action been successful. In addition, we refuse to recognize a cause of action in favor of an attorney against his negligent co-counsel.”

IV. CONCLUSION

Hopefully, the majority rule followed in Cintra v. Law Office of Dane H. Shulman, 28 Mass.L.Rptr. 271 (Hon. John C. Cratsley, April 28, 2011) will be more generally applied in Massachusetts and the MCLE Jury Instruction will be appropriately amended.

