COUNSELOR OR INDEMNITOR?

Are Attorneys Responsible for Indemnifying Clients for Any Fallout they Face?

Peter T. DeMasters, Michelle K. Schaller, and **Morgan E. Villers**
Flaherty Sensabaugh Bonasso PLLC

It is well known that when clients are dissatisfied with legal representation, they can file a malpractice suit against their attorney. But can an attorney be liable for more than malpractice? Depending on the court where they are sued, maybe. When a client is sued by someone over actions taken with or at the advice of counsel, the client may seek to hold their attorney liable for any harm they suffer as a result of that suit. When a client is liable to a third-party as a result of the advice that their attorney provided, does the client have an implied right to indemnification from the attorney? Courts in various jurisdictions have grappled with this issue, which has the potential to burden the attorney-client relationship and increase an attorney's liability exposure.

Implied indemnity is a legal concept originating out of equitable considerations. Where there is a relationship between two parties, a court may, in certain circumstances, find that there is an implied right to indemnification where the parties don't have a written indemnification agreement. An implied right of indemnity is often found in *respondeat superior* relationships, bailor/bailee relationships, and lessor/lessee relationships. The idea is that where a party in one of these relationships has been found liable and responsible for a monetary sum, fairness requires that the other party assume the burden of that liability by virtue of the relationship. For this reason, these types of relationships are sometimes referred to by courts as "special relationships."

Does an attorney-client relationship result in one of these special legal relationships that would give rise to an implied right to indemnity?

The answer is the stereotypical lawyer's response—it depends. Many states have not ruled on this exact issue. This is unsurprising, as legal malpractice claims are the standard remedy for problems resulting from legal representation. However, if a third party sues a client, the client may seek to hold the attorney liable for indemnification if the client is held liable to the third party.

Some courts have indicated that they consider an attorney-client relationship to be one of those relationships that could give rise to implied indemnity, at least on certain types of claims. See *Nestle Purina Petcare Co.* v. *Blue Buffalo Co. Ltd.*, 181 F. Supp. 3d 618 (E.D. Mo. 2016); *Amusement Indus., Inc.* v. *Stern*, 693 F.Supp.2d 301 (S.D.N.Y. 2010); *Schulson* v. *D'Ancona and Plfaum LLC,* 821 N.E.2d 643 (Ill. App. Ct. 2004).

Other courts have determined that a typical attorney-client relationship, by itself, does not give rise to an indemnitee-indemnitor relationship, but without foreclosing on the idea that such a special relationship could exist. In *Rhode Island Depositors Economic Protection Corp.* v. *Hayes*, 64 F.3d 22 (1st Cir. 1995), the court reviewed the issue of implied indemnity between a client and attorney and determined there was no evidence to substantiate a claim for implied indemnity because there was no evidence that the attorney agreed to indemnify its client. Nor was there any evidence that the relationship was anything more than an ordinary attorney-client relationship. Most importantly, however, the court did not foreclose the possibility that an implied right to indemnity could be found in such a relationship. The court simply found no evidence to establish it in that case. This indicates that in some situations, an attorney could be implicitly liable to their client for indemnity. Likewise, in *Schulson* v. *D'Ancona and Plfaum LLC,* 821 N.E.2d 643 (Ill. App. Ct. 2004), the court did not foreclose the possibility of implied indemnity on claims not relating to breach of contract. Still, with regard to breach of contract claims, the court held that an attorney who drafts a contract that is entered into between a client and a third party is a stranger to a contract and could not be held liable for his client's breach of contract. In *Fidelity National Title Insurance Company* v. *Radford*, No. 7:15–cv–00018, 2015 WL 6958291 (W.D. Va. Nov. 10, 2015), the court examined a "typical" attorney-client relationship in a matter of purported wrongdoing by the attorney arising out of their work on a grant of easement. The court determined that the facts of that particular case did not lead it to find that the relationship was "unique or special enough" to give rise to an implied right of indemnification. In so finding, the court relied on holdings from other jurisdictions that general professional relationships with a simple contract do not constitute special relationships.

Some courts that have examined the issue in depth have noted the risks to the attorney-client relationship if an implied right to indemnity were to exist. For example, in *Fladerer* v. *Needleman*, 30 A.D. 371 (N.Y. App. Div. 1968), a third-party complaint was filed by a client against her lawyer for failing to discover a title defect. The appellate court rejected the implied indemnity claim between the client and the attorney. It explained that to hold otherwise would be akin to holding "that a lawyer in every case such as this becomes an insurer of the title, with no temporal limitation upon his liability; or, indeed, that every rendering of legal advice implies the advisor's liability as an indemnitor."

With this in mind, attorneys and clients should establish their intentions at the outset of a matter and be clear about memorializing the scope of the representation in their representation agreement. Unless they want to become an indemnitor of their clients, attorneys should also be cognizant of their actions and not do anything to create a "special relationship" that goes above and beyond the typical attorney-client relationship. Unfortunately, even in the cases decided to date, no courts have been clear as to what those actions might be. Because each case seems to be factually driven and decided on a case-by-case basis, we have no clear guidance and are left to guess.

Peter T. DeMasters is Managing Member in the Morgantown, West Virginia, office of Flaherty Sensabaugh Bonasso PLLC. Pete has been practicing for more than 25 years and is head of Flaherty's Transportation Practice Group. He concentrates his practice on the defense of transportation companies and construction litigation but has a varied practice in both state and federal courts. Pete may be reached at pdemasters@flahertylegal.com.

Michelle K. Schaller is an associate in Flaherty's Morgantown office, where she is a member of the Commercial Litigation and Transportation Group. She has experience in federal and state courts in West Virginia in a variety of subjects ranging from criminal law and mediation to toxic torts and insurance. Michelle may be reached at mschaller@flahertylegal.com.

Morgan E. Villers focuses her practice on professional malpractice defense, as well as commercial and general litigation. As a member of our healthcare law practice group, Morgan has defended an array of healthcare professionals and hospitals against medical professional liability claims. She has also defended attorneys and other professionals accused of malpractice or breach of contract in their fields. Morgan may be reached at mvillers@flahertylegal.com.