

Ethics Advisory Opinion Committee

Opinion No. 18-04

Issued September 11, 2018

ISSUES

1. Is it permissible for an attorney to include an indemnification provision in a retainer agreement at the commencement of representation that requires the client to indemnify the attorney and related entities against third party claims that arise from the client's behavior or negligence?

2. Is it permissible, in response to a malpractice claim brought after the conclusion of the representation, for the attorney to use such an indemnification provision to hold a client responsible for the attorney's malpractice insurance deductible if the client does not prevail on the malpractice claim against the attorney?

OPINION

3. An attorney may include an indemnification provision in a retainer agreement at the commencement of representation that requires the client to indemnify the attorney and related entities against claims that arise from the client's behavior or negligence.

4. An attorney may not participate in an agreement that limits the attorney's liability for malpractice. Although the proposed application does not explicitly limit the attorney's liability for malpractice, it could decrease the likelihood that a client will bring a claim for malpractice, if he or she will be required to pay the attorney's deductible if the claim fails, and thus has the potential to interfere with the administration of justice by having a chilling effect on a potential malpractice suit.

BACKGROUND

5. The Ethics Advisory Opinion Committee (the “Committee”) has been asked to opine whether a retainer agreement signed at the commencement of representation containing the following indemnification provision is permissible under the Utah Rules of Professional Conduct:

Indemnification: Client shall indemnify and hold harmless [Attorney], its officers, employees, and agents from and against any and all liability, loss, expense (including reasonable attorney’s fees) or any and all claims, lawsuits, demands, causes of action, liability, loss, injury and/or damage of any kind whatsoever (including without limitation all claims for monetary loss, property damage, equitable relief, personal injury or wrongful death), whether brought by an individual or other entity, or imposed by a court of law or by administrative action of any federal, state or local governmental body or agency, arising out of, in any way whatsoever, any acts, omissions, negligence, or willful misconduct on the part of the client.

6. The Committee has also been asked to opine whether, if the above indemnification provision is allowable, it could be used at the close of an unsuccessful malpractice claim against the attorney to hold a client responsible for the attorney’s malpractice insurance deductible.

DISCUSSION

7. The proposed indemnification provision is not specifically prohibited by the rules. Although Rule 1.8 of the Utah Rules of Professional Conduct addresses an attorney’s prospective limitations to a client for malpractice, it does not address the specific question of whether an attorney may include an indemnification provision for claims brought by third parties. Rule 1.8(h) provides that a lawyer shall not:

1.8(h)(1) make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement; or
1.8(h)(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable

opportunity to seek the advice of independent legal counsel in connection therewith.

Under this rule, an attorney may obtain advance limitation on his or her liability for malpractice only if the client is advised in writing of the advisability of and provided the opportunity to seek separate counsel regarding the prospective limitation. There is no rule, however, that directly prohibits an attorney from obtaining a client's advance agreement to indemnify the attorney on matters that do not constitute legal malpractice. *See* Hazard, Hodes & Jarvis, *Law of Lawyering* 5.37 (2018) (citing example of attorney writing an opinion letter for a lessor-client that was to be provided to the lessee; attorney could require client to agree to indemnify the attorney for any claims brought by the lessee (citing N.Y. State Ethics Op. 969 (2013)); Or. Formal Ethics Op. 2005-165 (attorney asked to investigate corporate employee may seek indemnity from client-employer against subsequent claims by the employee against the lawyer). Therefore, the proposed indemnification provision is not prohibited on its face under the rules.

8. However, the Committee notes that the average client may not understand what indemnification is or in what specific circumstances it could be applied. Specifically, with respect to the second issue, the client may not understand that he or she may be responsible to pay an attorney's insurance deductible for the client's unsuccessful malpractice suit. For the sake of increased clarity, attorney should instead consider utilizing an attorney fees provision in the engagement letter that clearly sets forth that client will be responsible for paying attorney's attorney fees in specifically enumerated types of claim against the attorney. Such a provision would be preferable to the indemnification provision for the average client to ensure that the client understands that he or she may potentially be liable for attorney fees.

9. Likewise, Rule 1.8(h) does not explicitly bar an attorney from seeking payment of its malpractice insurance deductible. Requiring the payment for an *unsuccessful* malpractice claim, on its face, does not limit liability for malpractice.

10. However, the Committee notes that seeking to hold a client responsible for the attorney's malpractice insurance deductible may be misconduct under the rules. Rule 8.4(d) provides that it is misconduct to "engage in conduct that is prejudicial to the administration of justice." In this hypothetical situation, applying the provision to recover the attorney's deductible may have a chilling effect on a client's pursuit of a malpractice claim and would thus be prejudicial to the administration of justices. In light of Rule 8.4(d) and the potential for discouraging a client from bringing a malpractice claim against the attorney, if the attorney intends to apply the provision so that he or she will seek payment of his or her malpractice insurance deductible, the attorney should advise the potential client in writing of the advisability of seeking outside counsel regarding the provision and allow the client time to seek that counsel.