

# Non-Clients Who Think They Are Clients

Sometimes non-clients will believe that a lawyer represents them when, in fact, he or she does not. For example, a corporate board member or officer may assume that because a lawyer represents the corporation, that automatically makes him or her the board member's or officer's lawyer. Another example is where a non-represented party is dealing with a represented party and assumes that the lawyer is representing both. Or, as a recent case demonstrates, such a misunderstanding can occur when representatives of a company are permitted to communicate directly with counsel for another entity.

In *Makhoul v. Watt, Tieder, Hoffar & Fitzgerald, LLP*, 2015 WL 5158477 (E.D.N.Y. 2015), the plaintiffs' company and its president were involved in a joint venture to complete federally funded projects at a high-energy propellant-formulation facility for the U.S. Army Corps of Engineers. The plaintiffs executed two indemnity agreements in favor of an insurance carrier that "contractually obligated [them] to indemnify [the carrier] for any losses incurred in fulfilling [the plaintiffs'] obligations under the three projects." The Corps declared a default of the plaintiffs' contractual obligations on all three contracts, issuing formal cure notices to the plaintiffs and to the carrier. Thereafter, the Corps "issued demands on [the carrier] to complete the projects pursuant to [the carrier's] obligations under the Performance and Payment bonds, stating that '[t]he Government expects [the carrier] to fulfill its obligations as surety in this case.'"

The carrier hired the defendant law firm as its outside counsel to offer advice and represent it in responding to the bond-demand letters. A meeting took place involving a representative of the carrier, defendant lawyers (members of the defendant law firm) and an individual plaintiff. According to the plaintiffs, this is when the joint representation began.

Notwithstanding that the parties were adverse to each other, the plaintiffs contended that they could share the same lawyer with the carrier with respect to their shared common interest as against the Corps. According to the plaintiffs' affidavit, which the court would later characterize as "self-serving," the defendant lawyers "advised [the plaintiffs] that [the defendant law firm] could simultaneously represent [the carrier] and [the] plaintiffs in connection with the takeover and completion of the

[project] and any related negotiations with the [Corps]." The plaintiffs also contended that one of the defendant lawyers "assured [the president of the plaintiff company] that it was 'in his and [plaintiff company's] best interest to work with [the carrier] toward an amicable completion of the work.'"

In contrast, the defendants denied that any of its lawyers ever stated, verbally or in writing, that they were representing both the plaintiffs and the carrier. All parties agreed that there was nothing in writing to confirm the existence of an attorney/client relationship between the plaintiffs and the defendants.

The plaintiffs brought suit against the defendant law firm and four of its lawyers, asserting legal malpractice, among other claims. Of course a requirement to assert a legal malpractice claim is the existence of an attorney/client relationship, the existence of which the defendants denied. Upon conclusion of discovery, the district court granted summary judgment in favor of the defendants based on a finding of the absence of an attorney/client relationship as a matter of law. To reach this conclusion the court applied several factors to determine whether an attorney/client relationship existed, "though no one factor is dispositive." In this instance, however, the court found that none of the factors suggested the existence of such a relationship.

There was no evidence of a fee arrangement and at no time did the plaintiffs pay the defendant law firm for any of the services that its lawyers purportedly provided to them. The court rejected the plaintiffs' argument that the fees incurred by the carrier, which the plaintiffs were obligated to pay per their contractual obligation to indemnify the carrier, somehow indicated that a fee had been paid.

The court noted the absence of any retainer contract. Plaintiffs contended that "a verbal retainer was reached during [a meeting]." The court rejected this premise, noting that "it is well settled that one party's unilateral, subjective belief that he was a client is not sufficient to establish an attorney/client relationship."

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The plaintiffs conceded that the defendant law firm had "never formally appeared on behalf of plaintiff[s] in any litigation," but nonetheless argue[d] that they *believed* that [the defendant law firm's] words and actions created an attorney/client relationship." The court found that this was not evidence of actual representation because the "[m]ere participation in meetings with the [defendant

## Avoiding Liability



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lawyers] and [the carrier], sharing project documents with [the defendant law firm] — as plaintiffs were required to do under the indemnity agreement — is ambiguous conduct at best [and], if anything, is more consistent with the contractual indemnitor-indemnitee relationship that existed between [the carrier] and plaintiffs than a purported, un-memorialized attorney-client relationship between plaintiffs and [the defendant law firm], who were clearly retained by [the carrier]."

The court also noted that the defendant law firm, on occasion in its dealings with the Corps, excluded the plaintiffs from the negotiations. In fact, the court noted that the plaintiffs had alleged that there were instances where the defendant law firm was loyal to the carrier and not to the plaintiffs, which is consistent with the proposition that the defendant lawyers were only representing the carrier.

The court noted that the plaintiffs had their own attorneys with whom they communicated on this matter, which contradicted the proposition that they were represented by the defendants. Moreover, the court noted that the carrier had "repeatedly advised [the plaintiffs] that [the carrier] was represented by [the defendant law firm] and requested that plaintiffs engage their own counsel several times during the alleged period of joint representation." There was even evidence that the plaintiffs had acknowledged that the defendant law firm represented the carrier and not them.

*Makhoul* presents a compelling case of non-representation, which is obviously why the court granted summary judgment in favor of the defendants. It also demonstrates that a lawyer cannot possibly over-"paper the file" to make the record clear as to the nature, scope and existence of an attorney/client relationship.