Does a Lawyer Have a Duty to Ascertain the Extent of the Client's Insurance Coverage?

. Interesting issues regarding legal malpractice often arise in a simple suit for unpaid legal fees. The defendant client who has not paid the bill must assert any alleged malpractice of the attorney by way of a defense or counterclaim in the suit for unpaid legal fees. A client who fails to do so risks forfeiting the claim by way of collateral estoppel.[1] In *Darby & Darby P.C. v. VSI International, Inc.*,[2] plaintiff law firm sued a former client for approximately $200,000 in unpaid legal fees incurred in defending the client in two Florida lawsuits alleging patent, trademark and trade dress infringement. The former client's answer asserted counterclaims for legal malpractice based on the firm's failure to advise them that the subject legal fees may have been covered by its general liability insurance policy. In fact, successor counsel had secured insurance coverage for litigation expenses subsequently incurred in the same suits.[3]

The firm moved for summary judgment dismissing the former client's counterclaim, essentially arguing that it was under no duty to advise of the possibility that the legal fees might be covered by an existing insurance policy. The firm argued that its obligation to the former client only extended to the actual intellectual property litigation in Florida and that it had no duty to provide advice regarding the financing of the litigation.[4] The Appellate Division eventually awarded the law firm summary judgment dismissing the former client's counterclaim for failure to state a cause of action for professional malpractice or breach of fiduciary duty.[5] In a somewhat broad holding, the Appellate Division concluded that in the absence of a factual assertion that the firm was retained specifically to inquire into the nature and extent of the former client's insurance coverage and whether it was applicable, the malpractice claim could not survive. "[T]he retention of counsel for the defense of such an action simply does not include any responsibility for assisting the client in determining whether sources exist from which to pay for that defense and any ultimate liability finding."[6]

The Court of Appeals affirmed the dismissal of the counterclaim, but on much narrower grounds. In an opinion by Judge Ciparick, the Court outlined the standard for a party asserting a legal malpractice cause of action, requiring a showing that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the bar "at the time of representation."[7] At the time of the representation, neither New York nor Florida recognized the duty of an insurer to defend patent infringement claims under a general liability policy and both states had rejected coverage for similar claims. In addition, only a few jurisdictions recognized an insurer's duty to defend patent infringement claims under similar general liability policies. Rather than refusing to impose a general duty to inquire as to possible insurance coverage, as the Appellate Division had done, the Court held that the duty did not arise under the particular facts in *Darby*. The Court stated that because Florida and New York, "the two most relevant States," had rejected coverage and the theory of coverage was largely unrecognized elsewhere, "plaintiff had no duty to advise defendants of possible coverage for patent infringement claims."[8] Although many other states eventually recognized an insurer's duty to defend similar claims under similar policies, they did so after the representation in the underlying matter concluded.

Even though the Court affirmed the dismissal of the legal malpractice counterclaim, the opinion seems to implicitly recognize a general duty to inquire and advise the client of possible insurance coverage in many situations. In response to the Court's opinion in *Darby*, many law firms have amended their form retainer agreements to include a provision addressing insurance coverage. In doing so, firms have attempted to limit the scope of their representation and avoid the duty to inquire into the existence and applicability of insurance coverage. Lawyers generally may limit the scope of the representation of the client in a retainer agreement provided the client knowingly agrees to the limitation and it is consistent with the Code of Professional Responsibility.[9]

Notes

. *Chisholm-Ryder Co. v. Sommer & Sommer*, 78 AD2d 143 (4th Dep't 1980).

. 95 NY2d 308 (2000).

. *Id.*, at 311. The former client's carrier denied coverage for any costs incurred during plaintiff's representation of defendants.

. *Darby & Darby, P.C. v. VSI Intern., Inc.*, 178 Misc2d 113, 116 (Sup. Ct., N.Y. Co. 1998)

. *Darby & Darby, P.C. v. VSI Intern., Inc.*, 268 AD2d 270, 271-272 (1st Dep't 2000).

. *Id.*, at 271. The Appellate Division did note that "[t]here may be particular circumstances, such as personal injury actions arising out of automobile collisions, in which an attorney who is retained to defend an action has an obligation to bring to the client's attention the possible existence of an insurance policy applicable to the claim." *Id.*, at 271-272.

. *Darby & Darby, P.C.*, 95 NY2d at 313.

. *Id.*, at 314. It is doubtful that New York is a "relevant" state for insurance coverage purposes. The lawsuits were commenced in Florida and the former client was a Florida corporation. The only apparent connection with New York seems to be the offices of the defendant law firm. Even if New York State did recognize coverage for similar claims, it would not be especially relevant to a Florida court examining whether it should recognize coverage under an insurance policy procured by a Florida corporation.

. See N.Y. State Bar Assoc. Committee on Professional Ethics, Op. No. 604 (1989).