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The Expansion of Defense Counsel Liability to Include Malpractice Claims by Insurance Companies: How the West Was Won

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THE EXPANSION OF DEFENSE COUNSEL LIABILITY TO INCLUDE MALPRACTICE CLAIMS BY INSURANCE COMPANIES: HOW THE WEST WAS WON

Johnny Parker

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The law of attorney malpractice is evolving. In years past the sanctity of the attorney–client relationship kept the class of those who could sue an

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attorney for negligence narrow and predictable. More recently, however, the class of those to whom an attorney owes a duty has expanded and is less identifiable. Consequently, the answer to the question "who has standing to assert a malpractice claim against an attorney?" is no longer simple or convenient. In this environment of change, this article explores the question of whether an insurance company has standing to assert a malpractice claim against an attorney it has retained to represent an insured.

Part I discusses what was once the foundational requirement for an attorney malpractice claim, the existence of an attorney–client relationship. Privity of contract was once the sine qua non of the attorney–client relationship. However, the privity requirement has been relaxed in contemporary malpractice jurisprudence, thus opening the door for attorney liability to nonclients in general and the insurance company that hired the attorney in particular. This section examines the methods used to relax or avoid the privity of contract requirement, while they simultaneously attempt to preserve the sanctity of the attorney–client relationship.

Part II addresses the primary thesis. It examines, through two decades of decisional law, whether an insurance company has standing to assert a malpractice action against defense counsel hired to represent an insured. The case law reflects that two competing forces are shaping the common law landscape of attorney malpractice law in the context of insurance defense practice. The first is preserving the sanctity of the attorney–client relationship. The second is the social policy of imposing liability on a culpable attorney. In the insurance defense context, some states recognize both the insurer and insured as common clients of the attorney. This tripartite relationship often creates confusion for all parties. By examining cases from jurisdictions that have addressed this issue, this article explores the different methods courts have adopted to address these sometimes competing policies.

I. ATTORNEY–CLIENT RELATIONSHIP

At one time, the majority of jurisdictions viewed attorney malpractice claims as exclusively contract-based actions.[1] The general rule was well stated in a North Carolina case:

> Although the liability of an attorney on the grounds of negligence is ordinarily enforced by an action on the case for negligence in the discharge of his professional duties, the liability in reality rests on the attorney's employment

1. The decision to use the phrase "'attorney malpractice' rather than 'legal malpractice' or some other designation . . . is prompted by our concern that use of the term 'legal malpractice' might well lead to confusion by its connection in some minds with 'legal' or 'lawful' conduct." Chicago Title Ins. Co. v. Holt, 224 S.E.2d 177, 180 (N.C. Ct. App. 1978).

> by the client and is contractual in its nature. Hence, before the attorney can be made liable, it must appear the loss for which he is sought to be held arose from his failure or neglect to discharge some duty which was fairly within the purview of his employment. Moreover, an attorney is liable for negligence in the conduct of his professional duties to his client alone, that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties.[2]

Subsequent case law in many states has expanded the causes of action available to a potential plaintiff. Today, most jurisdictions recognize that an attorney malpractice claim can sound in tort, contract, or both.[3] In fact, the majority of jurisdictions now consider attorney malpractice claims to be essentially tort actions.[4]

Because there is an implicit promise in an attorney–client contract that the attorney will perform his or her services in a competent and professional manner,[5] a breach of this promise gives rise to a valid contract claim, even though negligent performance may also give rise to a tort action. Attorneys are subject to liability for failure to exercise reasonable care, irrespective of their contractual duties.[6] In this context, it is policy, not the contract, that gives rise to the legal obligation.

To prevail on an attorney malpractice tort claim in most jurisdictions, the plaintiff must prove (1) existence of an attorney–client relationship, (2) negligence on the part of the attorney, and (3) proximate cause of injury.[7] Most of the time, the existence of an attorney–client relationship between the plaintiff and the attorney is an essential element of the claim because the duty to exercise reasonable care commensurate with the profession emanates out of that relationship.[8] Thus, an attorney, "with limited exceptions,

2. *Id.* (quoting 7 C.J.S., *Attorney Client* § 140, at 978).
3. *See* cases cited *infra* note 7.
4. *See* Barcelo v. Elliot, 923 S.W.2d 575, 577 (Tex. 1996); Gravel v. Schmidt, 527 N.W.2d 199, 202 (Neb. 1995); Newton v. Meade, 143 S.W.3d 571, 574 (Tex. App. 2004); Keonjian v. Olcott, 169 P.3d 927, 931 (Ariz. Ct. App. 2007); Rice v. Lister, 980 P.2d 561, 565 (Idaho 1999); Johnson v. Carleton, 765 A.2d 571, 575 (Me. 2001); Montgomery v. Jack, 556 So. 2d 267, 270 (La. Ct. App. 1990).
5. Thompson v. Erving Hatcheries, Inc., 186 So. 2d 756, 757 (Miss. 1966).
6. *See, e.g.*, Pancake House, Inc. v. Redmond, 716 P.2d 575, 580 (Kan. 1986).
7. *See* Pierce v. Cook, 992 So. 2d 612, 617 (Miss. 2008); Stoklosa v. McGill, 1992 Ohio App. LEXIS 728, at *7 (Ct. App. Feb. 21, 1992); Storm v. Golden, 538 A.2d 61, 64 (Pa. Super. Ct. 1988); Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis, 356 S.E.2d 372, 375 (N.C. Ct. App. 1987); LaMetta v. Todisco, 2003 Conn. Super. LEXIS 2542, at *36 (Super. Ct. Sept. 8, 2003) (unreported); Wolski v. Wandel, 746 N.W.2d 143, 149 (Neb. 2008); Collins v. Miller & Miller Ltd., 943 P.2d 747, 752 (Ariz. 1996); Fox v. White, 215 S.W.3d 257, 260 (Mo. Ct. App. 2007); Marrs v. Kelly, 95 S.W.3d 856, 860 (Ky. 2003); Semenza v. Nev. Med. Liab. Ins. Co., 765 P.2d 184, 185–86 (Nev. 1988).
8. *Fox*, 215 S.W.3d at 260. *See also* Pickney v. Tigani, 2004 Del. Super. LEXIS 386, at *11 (Super. Ct. Nov. 30, 2004); Legacy Homes v. Cole, 421 S.E.2d 127, 129 (Ga. Ct. App. 1992).

owes no actionable duty to strangers or nonparties to the attorney–client relationship in the way responsibilities are performed."[9]

Typically, the attorney–client relationship is grounded in some form of contract, either expressed or implied.[10] However, because the focus is on the relationship itself, rather than how it is manifested, it may arise from implications such as where one attorney gives gratuitous advice[11] or makes a single special appearance at the request of the attorney of record.[12] Because formalities are not required, neither the receipt nor expectation of compensation is dispositive of whether an attorney–client relationship exists.[13] Sometimes the relationship can arise without any dealings between the client and attorney.[14] In most cases, however, the relationship must exist before one has standing to bring a lawsuit.[15]

The nature of the work performed and the circumstances under which confidences were divulged are relevant considerations in determining whether the requisite relationship exists.[16] Equally important is whether the client reasonably believes an attorney–client relationship exists. Thus, an attorney–client relationship may exist even if the attorney is not retained, if the client has a reasonable belief that he is seeking legal advice from a lawyer in the lawyer's professional capacity.[17] Whether the attorney through his conduct created or consented to the client's expectation is an

9. *Fox*, 215 S.W.3d at 260. *But see* Safeway Managing Gen. Agency, Inc. v. Gamble & Clark, 985 S.W.2d 166, 169 (Tex. App. 1998) (although there is no attorney-client relationship between an insurance company and defense counsel retained to represent an insured, the attorney is not protected from actual fraud or intentional misrepresentation).

10. *See* Daniels v. DeSimone, 13 Cal. App. 4th 600, 618 (1993); Franko v. Mitchell, 762 P.2d 1345, 1351 (Ariz. Ct. App. 1988) (citing R. Mallen & V. Levitt, Legal Malpractice § 101, at 173–74 (1981)); Robinson v. Benton, 842 So. 2d 631, 637 (Ala. 2002); Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 595 (Ariz. 2001); *Pickney*, 2004 Del. Super. LEXIS 386, at *38–39; Gulf Ins. Co. v. Berger, 79 Cal. App. 4th 114, 126 (2000).

11. *See Franko*, 762 P.2d at 1351; *Robinson*, 842 So. 2d at 636; Holland v. Lawless, 623 P.2d 1004, 1008 (N.M. Ct. App. 1981); Moen v. Thomas, 628 N.W.2d 325, 329 (N.D. 2001).

12. *See* Streit v. Covington & Crowe, 82 Cal. App. 4th 441, 445–46 (2000).

13. *Id.* at 444; *see also* Fox v. White, 215 S.W.3d 257, 261 (Mo. Ct. App. 2007); Mansur v. Podhurst, Orseck, P.A., 994 So. 2d 435, 438 (Fla. Dist. Ct. App. 2008); *In re* McGlothlen, 663 P.2d 1330, 1334 (Wis. 1983); Warner v. Stewart, 930 P.2d 1030, 1036 (Idaho 1997); Bd. of Overseers v. Mangan, 763 A.2d 1189, 1192 (Me. 2001); Att'y Grievance Comm. v. Parker, 506 A.2d 1183, 1185 (Md. 1986); *Holland*, 623 P.2d at 1008; Broyhill v. Aycock & Spence, 402 S.E.2d 167, 172 (N.C. Ct. App. 1991); *Berger*, 79 Cal. App. 4th at 126.

14. *See Streit*, 82 Cal. App. 4th at 445; *Att'y Grievance Comm.*, 506 A.2d at 1185.

15. *See* Chan v. Lee, 2004 Haw. LEXIS 291, at *2–3 (Apr. 23, 2004); McCarty v. Browning, 797 So. 2d 30, 31 (Fla. Dist. Ct. App. 2001); Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977).

16. *See* Franko v. Mitchell, 762 P.2d 1345, 1351 (Ariz. Ct. App. 1988); Cook v. Cook, 912 P.2d 264, 266 (Nev. 1996); Landis v. Hunt, 610 N.E.2d 554, 558 (Ohio Ct. App. 1992).

17. *See, e.g.*, Marx v. Benzel, 66 P.3d 735, 736 (Alaska 2003); *Franko*, 762 P.2d at 1351; *Fox*, 215 S.W.3d at 261; *Mansur*, 994 So. 2d at 438; Mays v. Adkins, 585 S.E.2d 735, 736 (Ga. Ct. App. 2003) (professional advice or assistance must be both sought and received in a legal matter); *In re* Anonymous, 655 N.E.2d 67 (Ind. 1995); *Bd. of Overseers*, 763 A.2d at 1192–93.

important consideration.[18] Thus, where the client's subjective belief is reasonable the attorney–client relationship should be recognized.[19]

The existence of an attorney–client relationship can be analyzed from either a contractual or tort perspective.[20] Under a contractual analysis, an implied contract arises between the attorney and client when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to a matter within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.[21] In appropriate cases, the third requirement can be established with proof of detrimental reliance, such as where the client reasonably relies on the attorney to provide competent advice or assistance, and the attorney, aware of such reliance, does nothing to negate it.[22] An objective standard that focuses on the conduct of the parties rather than their subjective beliefs determines whether a contractual relationship should be implied.[23]

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18. *See, e.g.*, Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 595–96 (Ariz. 2001); Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997); Troop v. Lumer, 806 N.Y.S.2d 599, 600 (N.Y. App. Div. 2005) (client's subjective belief alone is not sufficient to establish the attorney–client relationship.).

19. *See, e.g.*, Mansur v. Podhurst, Orseck, P.A., 994 So. 2d 435, 438 (Fla. Dist. Ct. App. 1008); *see also Marx*, 66 P.3d at 736; *Franko*, 762 P.2d at 1351; Fox v. White, 215 S.W.3d 257, 261 (Mo. Ct. App. 2007); *Mays*, 585 S.E.2d at 737; Oklahoma Bar Ass'n v. Rouse, 961 P.2d 204, 207 (Okla. 1998); *In re* Conduct of Wyllie, 19 P.3d 338, 344 (Or. 2001); Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 728–29 (Utah Ct. App. 1990); *In re* McGlothlen, 663 P.2d 1330, 1334 (Wis. 1983); Douglas v. Monroe, 743 N.E.2d 1181, 1184–85 (Ind. Ct. App. 2001); Spicer v. Gamble, 789 So. 2d 741, 744–45 (La. Ct. App. 2001); Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 595–96 (Ariz. 2001).

Section 14 of the Restatement (Third) of the Law Governing Lawyers provides: "A relationship of lawyer and client arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and . . . (a) the lawyer manifests to the person consent to do so." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000). The comments further provide that either intent or acquiescence may establish the relationship. *Id.* cmt. c. Pertinent to this article, the Restatement comments that an insurer should be recognized as having standing to assert a professional negligence claim against an attorney. *Id.* cmt. f.

20. *See* TJD Dissolution Corp. v. Savoie Supply Co., Inc., 460 N.W.2d 59, 62 (Minn. Ct. App. 1990); Saylor v. Nichols, 1988 Ohio App. LEXIS 1090, at *4–5 (Ct. App. Mar. 28, 1988); Robertson v. Gaston, Snow, Ely & Bartlett, 536 N.E.2d 344, 348–49 (Mass. 1989); U.S. Bank, N.A. v. Nat'l Lenders, Inc., 2008 Mass. Super. LEXIS 124, at *4 (Super. Ct. Apr. 9, 2008).

21. *See* Kury v. Calecham, 2007 Mass. Super. LEXIS 420, at *5 (Super. Ct. Feb. 14, 2007); State v. Gordon, 692 A.2d 505, 506 (N.H. 1997); Fanaras Enters. v. Doane, 666 N.E.2d 1003, 1006 (Mass. 1996); Stivrins v. Flowers, 729 N.W.2d 311, 317 (Neb. 2007); Atkinson v. Haug, 622 A.2d 983, 986 (Pa. Super. Ct. 1993); DeVaux v. Am. Home Assur. Co., 444 N.E.2d 355, 357 (Mass. 1983); Comm. on Prof'l Ethics v. Mollman, 488 N.W.2d 168, 171 (Iowa 1992); Bd. of Overseers v. Mangan, 763 A.2d 1189, 1192–93 (Me. 2001); Keegan v. First Bank, 519 N.W.2d 607, 611–12 (S.D. 1994).

22. *See* Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977); *Kury*, 2007 Mass. Super LEXIS 420, at *5–6; *DeVaux*, 444 N.E.2d at 357; McVaney v. Baird, Holm, McEachen, Pederson, Hamann & Strasheim, 466 N.W.2d 499, 506 (Neb. 1991); *In re* Kinney, 670 N.E.2d 1294, 1298 n.4 (Ind. 1996).

23. *See* Avery Pharms., Inc. v. Haynes & Boone, L.L.P., 2009 Tex. App. LEXIS 769, at *16–17 (App. Feb. 5, 2009).

Pursuant to a tort analysis, an attorney–client relationship can be proven to exist without any expressed agreement. Rather, the relationship is created whenever a person seeks and receives legal advice from an attorney under circumstances that would lead a reasonable person to rely on the attorney's advice.[24] The tort theory offers protection to the person injured when the lawyer should reasonably foresee that the person might be injured if the advice is given negligently.[25] The difference in the two theories is perspective. Contract focuses on the reasonable expectations of clients while tort focuses on what the attorneys should reasonably foresee as the consequence of their actions.

A. *Tripartite Relationship Among Insurance Companies, Insureds, and Defense Counsel*

Aspects of both the contract and tort analyses are present in the insurance context. When an insured is sued by a third party, the insurance contract creates a tripartite relationship among the insurance company, insured, and defense counsel by virtue of the language of the insurance contract. The standard insurance policy requires the insurance company to defend the insured. In fulfillment of this obligation, the insurer retains an attorney to represent the insured. By virtue of the obligation to defend, control of the litigation belongs to the insurance company. Because of the insurance contract, an attorney should foresee that negligent performance can harm directly the insured and the insurance company. The policy language and ensuing obligations distinguish the relationship among insured, insurer, and lawyer from the situation when a friend or family member guarantees or gratuitously pays the attorney fees. In the latter situation, the payment of fees alone is typically not enough to create an attorney–client relationship between the friend or family member and the attorney.[26]

The relationship among an insurance company, insured, and retained defense counsel is unique. In no other area of the law are parties routinely represented by an attorney chosen and paid by a third party whose interests may differ from those of the individual the attorney was hired to represent. Nevertheless, because of the insurance policy language, a majority of jurisdictions recognize the doctrine of dual representation by a common attorney for the benefit of two or more persons.[27] This position is consistent

24. *See TJD Dissolution Corp.*, 460 N.W.2d at 62; *Saylor*, 1988 Ohio App. LEXIS 1090, at *5–6.

25. *See* cases cited *supra* note 24.

26. *See, e.g.*, DeAngelis v. Rose, 727 A.2d 61, 69 (N.J. Super. Ct. App. Div. 1999).

27. *See* Lifestar Response of Ala., Inc. v. Admiral Ins. Co., 17 So. 3d 200, 217 (Ala. 2009); Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1330 (9th Cir. 1995) (interpreting Alaska law); Nat'l Union Ins. Co. v. Dowd & Dowd, 2 F. Supp. 2d 1013, 1017–18 (N.D. Ill. 1998) (interpreting Illinois law); Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603, 607 (Utah 2003); Gulf Ins. Co. v. Berger, 79 Cal. App. 4th 114, 133–34 (2000);

with a lawyer's rules of professional responsibility, which recognize that under appropriate circumstances a lawyer may represent two clients.[28]

In the insurance context, the dual representation doctrine provides that where the interests of the insurer and insured coincide, both may be considered clients of the defense counsel retained to represent the insured. The doctrine provides for a conditional or qualified extension of the attorney-client relationship to include both parties except where a conflict between the interest of the insurer and that of the insured exists.[29] If a conflict of interest exists, the insured is the sole client of defense counsel.[30]

Pine Island Farmers Coop v. Erstad & Reimer, P.A., 649 N.W.2d 444, 451 (Minn. 2002); Nationwide Mut. Fire Ins. Co. v. Bourlon, 617 S.E.2d 40, 45 (N.C. Ct. App. 2005), *aff'd*, 625 S.E.2d 779 (N.C. 2006); Finley v. Home Ins. Co., 975 P.2d 1145, 1150 (Haw. 1998); Nev. Yellow Cab Corp. v. 8th Judicial Dist. Ct., 152 P.3d 737, 739 (Nev. 2007); Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255, 272 (Miss. 1988); Gray v. Commercial Union Ins. Co., 468 A.2d 721, 727 (N.J. Super. Ct. App. Div. 1983); O'Brien v. Tuttle, 21 Pa. D. & C. 3d 319, 322 (1981); Preferred Am. Ins. Co. v. Dulceak, 706 N.E.2d 529, 533 (Ill. Ct. App. 1999); Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 161 (Ind. 1999); McCourt Co. v. FPC Props., Inc., 434 N.E.2d 1234, 1235–36 (Mass. 1982); *In re* Illuzzi, 1992 Vt. LEXIS 121, at *7 (Sept. 4, 1992); Barry v. USAA, 989 P.2d 1172, 1176 (Wash. Ct. App. 1999).

28. Disciplinary Rule DR 5-105(C) of the American Bar Association's Model Code of Professional Responsibility provides in pertinent part:

> [A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(C) (1983).

Similarly, the Model Rules of Professional Conduct at Rule 1.7(a) prohibits, subject to exception, a lawyer from representing multiple clients where the representation of one client creates a concurrent conflict of interest. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2002). The Rule continues:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

Id. ar R. 1.7(b). Under Rule 1.7 there can be situations where despite full disclosure and consent, dual or multiple representation is ethically proscribed. As indicated in paragraph (b), some conflicts cannot be consented to, meaning the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. *Id. See also* Carnegie Co. v. Summit Prop., 918 N.E.2d 1052, 1065 (Ohio Ct. App. 2009).

29. *See* cases cited *supra* note 27. At least one jurisdiction requires, in addition to an absence of a conflict of interest, that defense counsel or other attorney consult with the insured and explain the implications of dual representation, and the insured must give expressed consent to the dual representation in order for the doctrine of dual representation to arise. *See* Pine Island Farmers Coop. v. Erstad & Reimer, P.A., 649 N.W.2d 444, 452 (Minn. 2002).

30. *See* cases cited *supra* note 27. While the dual representation doctrine appears to be the majority view, a substantial number of jurisdictions reject the doctrine and adhere to the

Because of the caveat to the dual representation doctrine, an insurance company's selection and compensation of defense counsel to represent an insured does not per se create an attorney–client relationship between the attorney and the insurer. The dual representation doctrine merely presupposes, in the absence of a conflict of interest, the existence of an attorney–client relationship among the parties to the tripartite relationship. Should the caveat, i.e., a conflict of interest, exist, an insurance company generally cannot maintain a malpractice action against an attorney. The attorney's first obligation is always to the insured client.[31]

The insurance contract language that supports recognition and application of the dual representation doctrine also evidences a direct commercial transaction among the insured, insurer, and defense counsel. This relationship is typically expressed by saying that these parties are in privity of contract. For centuries, privity represented an unassailable fortress that protected attorneys from malpractice claims. Because of their shared heritage, both doctrines—privity and dual representation—are inextricably linked to the evolution and development of the law of attorney malpractice. The latter represents a twentieth century adaptation of the former to fit the sui generis relationship that exists in the insurance context.

B. *Privity of Contract*

Privity is a contract-based principle and is often indicative of whether an attorney–client relationship exists. The denial of standing to assert a malpractice claim to individuals not in privity of contract is based on three rationales. First, an attorney's liability to third parties could deprive the contracting party of the right to control the attorney's performance of their agreement.[32] Second, extending the duty to cover nonparties would expose attorneys to infinite liability to an indeterminate class.[33] Last, but not least, expanding a duty to third parties could interfere with a lawyer's duty of undivided loyalty to the client.[34]

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view that the insured is the defense counsel's sole client. *See* Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 297 (Mich. 1991); State Farm Fire & Cas. Co. v. Weiss, 194 P.3d 1063, 1066 (Colo. Ct. App. 2008); Federal Ins. Co. v. N. Am. Specialty Ins. Co., 847 N.Y.S.2d 7, 12 (N.Y. App. Div. 2007); First Am. Carriers, Inc. v. Krogers, 787 S.W.2d 669, 671 (Ark. 1990); *In re* Youngblood, 895 S.W.2d 322, 328 (Tenn. 1995); *In re* Rules of Prof'l Conduct & Insurer Imposing Billing Rules & Procedures, 2 P.3d 806, 814 (Mont. 2000); Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103, 108 (2d Cir. 1991); Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP, 357 F. Supp. 2d 951, 957 (E.D. Va. 2005).

31. *See, e.g.*, cases cited *supra* note 30.

32. *See* Needham v. Hamilton, 459 A.2d 1060, 1062 (D.C. Ct. App. 1983); Estate of Leonard v. Swift, 656 N.W.2d 132, 144–45 (Iowa 2003); Barefield v. DPIC Cos., 600 S.E.2d 256, 270 (W. Va. 2004).

33. *See Needham*, 459 A.2d at 1062; *Estate of Leonard*, 656 N.W.2d at 144–45.

34. *See, e.g.*, Sisson v. Jankowski, 809 A.2d 1265, 1268 (N.H. 2002); DeAngelis v. Rose, 727 A.2d 61, 65 (N.J. Super. Ct. App. Div. 1999); Shoemaker v. Gindlesberger, 887 N.E.2d 1167,

The common law rule provided that, absent fraud or collusion, an attorney is not liable to third parties not in privity for damages arising out of professional malpractice.[35] In the absence of privity, suits by nonclients would interfere with the attorney's duty to represent the client diligently and without reservation.[36] The essential purpose of the privity rule is to insure the inviolability of the attorney's duties of care, loyalty, and contract to the client.[37] For example, in Texas, a state that adheres to the strict privity requirement, there is no attorney–client relationship between an insurance company and defense counsel retained to defend an insured.[38]

Although still followed in some states, most jurisdictions have relaxed the rule of strict contractual privity.[39] Under limited circumstances, attorneys have been exposed to liability to third parties with whom they are not in privity of contract. Courts have developed a variety of approaches to justify extending an attorney's liability exposure to nonclients. These approaches include (1) situations closely approximating privity, (2) foreseeability of the risk theory, (3) third-party beneficiary theory, (4) the balancing of factors approach, and (5) the principles of the Restatement (Third) of the Law Governing Lawyers § 51.

1171 (Ohio 2008); Barcello v. Elliot, 923 S.W.2d 575, 578–79 (Tex. 1996); Homeowner's Assistance Corp. v. Merrimack Mort. Co., 2000 Me. Super. LEXIS 13, at *7–8 (Super. Ct. Jan. 24, 2000); Neal v. Baker, 551 N.E.2d 704, 706 (Ill. Ct. App. 1990); Ferguson v. Cramer, 709 A.2d 1279, 1286 (Md. 1998); Spinner v. Nutt, 631 N.E.2d 542, 544 (Mass. 1994); *Estate of Leonard*, 656 N.W.2d at 144–45.

35. Nat'l Savings Bank v. Ward, 100 U.S. 195, 203 (1880).

36. *See* cases cited *supra* note 34.

37. *See* cases cited *supra* note 34.

38. Safeway Managing Gen. Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166, 169 (Tex. App. 1998).

39. The strict privity requirement is still followed in Alabama, Nebraska, Texas, and Maine. *See* Robinson v. Benton, 842 So. 2d 631, 634 (Ala. 2002); Swanson v. Ptak, 682 N.W.2d 225, 231 (Neb. 2004); *Barcello*, 923 S.W.2d at 578–79. *Cf.* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 788 (Tex. 2006) (nonclient executor can sue attorney for malpractice for negligently injuring estate itself); Neven v. Union Trust Co., 726 A.2d 694, 701 (Me. 1999) ("When there is a personal representative to assert the financial claims on behalf of the estate, however, the better rule appears to be not to allow individual beneficiaries to assert claims for negligence.").

Arkansas cannot be considered a strict privity jurisdiction because its lawyer immunity statute, ARK. CODE ANN. § 16-22-310 (2009), contains two exceptions to the general privity requirement. *See* McDonald v. Pettus, 988 S.W.2d 9 (Ark. 1999). Likewise, New York, which continues to express the strict privity requirement in its decisional law, is not a strict privity jurisdiction because it treats the closely approximating privity exception as a rule of legal malpractice, rather than as a rule of law that creates a distinct duty sounding in misrepresentation. *See* Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318, 320 (N.Y. 1992). One could make a strong argument that Texas should be removed from the list because it recognizes the right of excess insurers to sue attorneys on an equitable subrogation theory. *See* Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 484–85 (Tex. 1992).

1. Situations Closely Approximating Privity

Some states have extended attorney liability to nonclients in situations closely approximating privity between the parties.[40] The requirement of a relationship so close as to approach that of privity prevents attorneys from being exposed to unlimited liability.[41] Accordingly, the closely approximating privity exception applies only when (1) defendant is aware that his statements will be used for a particular purpose, (2) plaintiff is a known party who relies on the statement in furtherance of that purpose, and (3) defendant engaged in conduct linking him to the plaintiff.[42] Although some jurisdictions view the closely approximating privity rule as an exception to the privity of contract requirement for attorney malpractice, others view it as the basis for recognizing the existence of a distinct duty sounding in negligent misrepresentation.[43] According to the latter view, negligent misrepresentation is not the equivalent of attorney malpractice because liability is not based on a breach of the duty a professional owes a client, but rather on an independent duty arising out of the attorney's awareness that someone other than the client will rely and act on the advice.[44]

2. Foreseeability of Risk Theory

A duty to a third-party can also arise as a result of a judicial determination that the social importance of protecting an aggrieved party's interest outweighs the attorney's interest in immunity from extended liability.[45] This theory is generally used when the injury is not purely economic such as when personal injury is caused by the attorney's negligence. The contract rationale (i.e., privity) underlying attorney malpractice claims is entirely displaced by the tort rationale (i.e., negligence). Relying on traditional tort principles, courts put aside the notion that the legal obligation emanates out of a contract. Rather, the legal obligation is firmly rooted in the law.[46]

40. *See Prudential Ins. Co.*, 605 N.E.2d at 320 (attorney could be liable if relationship between attorney and third party was "so close as to approach that of privity").
41. *Id.*
42. *Id. See also* Atl. Paradise v. Perskie, Nehmad & Zeltner, 666 A.2d 211, 214 (N.J. Super. Ct. App. Div. 1995); F.E. Applings Interests v. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405, 409 (Tex. App. 1997).
43. *See F.E. Applings Interests*, 953 S.W.2d at 408.
44. *Id.*; Homeowner's Assistance Corp. v. Merrimack Mort. Co., 2000 Me. Super. LEXIS 13, at *7–8 (Super. Ct. Jan. 24, 2000); Mehaffy, Rider, Windholz & Wilson v. Cent. Bank, N.A., 892 P.2d 230, 236 (Colo. 1995); Kirkland Constr. Co. v. James, 658 N.E.2d 699, 701 (Mass. Ct. App. 1995).
45. *See, e.g.*, Sisson v. Jankowski, 809 A.2d 1265, 1267 (N.H. 2002); *see also* Republic Nat'l Title Ins. Co. v. Garrell, 2004 Conn. Super. LEXIS 3670, at *13 (Super. Ct. Dec. 8, 2004) (unpublished).
46. *See, e.g.*, Dudrow v. Ernst & Young, 1999 Conn. Super. LEXIS 2564, at *22 (Super. Ct. Sept. 15, 1999); *Sisson*, 809 A.2d at 1267. *See also* Albright v. Burns, 503 A.2d 386, 389–90 (N.J. Super. Ct. App. Div. 1986) (after adopting the balancing of factors exception, the court

The social interests involved, the severity of the risks, the likelihood of the occurrence, the relationship between the parties, and the burden on the defendants are relevant considerations.[47] Courts that employ this model do so sparingly.[48] As explained by the Maryland Court of Appeals,

> [i]n determining whether a tort duty should be recognized in a particular context, two major considerations are: the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties. Where a failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability. This intimate nexus is satisfied by contractual privity or its equivalent. By contrast, where the risk created is one of personal injury, no such direct relationship need be shown, and the principle determinant of duty becomes foreseeability.[49]
>
> * * * *
>
> As the magnitude of risk increases, the requirement of privity is relaxed—thus justifying the imposition of a duty in favor of a large class of persons where the risk is of death or personal injury. Conversely, as the magnitude of the risk decreases, a closer relationship between the parties must be shown to support a tort duty.[50]

The foreseeable risk theory encompasses the tort theory of limited duties that arise out of special relationships. Thus, the tort duty to exercise care can arise out of the fiduciary duty an attorney owes to both the insured and the insurer as a consequence of insurance policy obligations.[51]

3. Third-Party Beneficiary Exception

The third-party beneficiary exception is the most widely recognized exception to the privity of contract requirement. Unlike the foreseeability of the risk theory, it generally applies to economic loss. An intended beneficiary harmed by a lawyer's negligence in drafting a testamentary document may bring a malpractice claim even though the beneficiary is not the lawyer's client.[52] To proceed on a third-party beneficiary theory, the plaintiff must

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also noted that an attorney may be held liable to a nonclient where he had reason to foresee the specific harm that occurred).

47. *See, e.g.*, *Sisson*, 809 A.2d at 1267.

48. *See, e.g.*, Simpson v. Calivas, 650 A.2d 318, 321–22 (N.H. 1994).

49. Jacques v. First Nat'l Bank, 515 A.2d 756, 759–60 (Md. 1986).

50. *Id.* at 761.

51. *See, e.g.*, Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 297 (Mich. 1991) (recognizing that defense counsel occupies a fiduciary relationship to the insured, as well as to the insurance company).

52. *See, e.g.*, Schreiner v. Scoville, 410 N.W.2d 679, 682 (Iowa 1987); Copenhaver v. Rogers, 384 S.E.2d 593, 596 (Va. 1989); Noble v. Bruce, 709 A.2d 1264, 1272–73 (Md. 1998); Pinckney v. Bruce, 2004 Del. Super. LEXIS 386, at *18–19 (Super. Ct. Nov. 30, 2004);

demonstrate that the parties to the contract intended to confer a direct benefit on him.[53] The intent to benefit must actually exist and be reflected in the language of the document.[54] This requirement reflects the view that the third-party beneficiary theory is restricted to attorney malpractice claims based on breach of contract.

A few jurisdictions also recognize the third-party beneficiary theory as an exception to the strict privity rule in tort actions.[55] In the tort context, because the attorney can foresee injury to the third party as a consequence of his dealings with the client, the intent to benefit the third party can be proven with extrinsic evidence. Consequently, an intended beneficiary may assert a malpractice action in either contract or tort.[56] Despite its applicability to either tort or contract actions, the intended beneficiary theory is a very limited and narrow exception to the privity requirement. Its application is universally restricted to situations where the nonclient was the actual intended beneficiary of the attorney–client relationship. Consequently, social policy has led to the recognition of additional exceptions,

MacMillan v. Scheffy, 787 A.2d 867, 869 (N.H. 2001); Franko v. Mitchell, 762 P.2d 1345, 1352 (Ariz. Ct. App. 1988).

53. *See, e.g.*, cases cited *supra* note 52; Blair v. Ing, 21 P.3d 452, 461 (Haw. 2001).

54. *See, e.g.*, cases cited *supra* note 52; *Blair*, 21 P.3d at 461.

55. *See* Simpson v. Calivas, 650 A.2d 318, 323 (N.H. 1994); Stowe v. Smith, 441 A.2d 81, 84 (Conn. 1981); Lorraine v. Grover, Ciment, Weinstein, 467 So. 2d 315, 317–18 (Fla. Dist. Ct. App. 1985); Flaherty v. Weinberg, 492 A.2d 618, 625 (Md. 1985); Hale v. Groce, 744 P.2d 1289, 1291 (Or. 1987); Mieras v. DeBona, 550 N.W.2d 202, 207 (Mich. 1996); Guy v. Liederbach, 459 A.2d 744, 746–47 (Pa. 1983); *Blair*, 21 P.3d at 460; *cf.* Pizell v. Zuspann, 795 P.2d 42, 48, *modified by* 803 P.2d 205 (Kan. 1990) ("An attorney cannot be held liable for the consequences of the attorney's professional negligence to an adversary of his or her client.").

The Restatement (Second) of Contracts endorses the third party beneficiary rule. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). Section 302 provides:

(1) Unless otherwise agreed between the promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
  (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
  (b) the circumstances indicate that the promisee intended to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

The Restatement provides a two-part test for determining whether a person is an intended third-party beneficiary. First, the trial court can bestow standing by determining whether "the recognition of the beneficiary's right [is] 'appropriate to effectuate the intention of the parties.'" Next, the performance must "'satisfy an obligation of the promisee to pay money to the beneficiary' or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'" Guy v. Liederbach, 459 A.2d 744, 751 (Pa. 1983); *see also* Raritan River Steel Co. v. Bekart & Holland, 407 S.E.2d 178, 181–182 (N.C. 1991).

56. *See Simpson*, 650 A.2d at 321; *Stowe*, 441 A.2d at 84; *Lorraine*, 467 So. 2d at 317–18; *Flaherty*, 492 A.2d at 625.

such as the balancing of factors theory, that can be applied to a greater variety of factual circumstances.

4. Balancing of Factors Approach

The balancing of factors approach is a policy-based exception to the privity of contract requirement. It requires courts to consider public policy before determining whether an attorney owes a duty to a nonclient. Courts that use this approach generally apply the following factors: "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm."[57] In addition, one should consider whether recognizing liability would impose an undue burden on the legal profession.[58]

The policy considerations against finding a duty to a nonclient are at their greatest when doing so would affect the attorney's ethical obligation to the client. The balancing of factors test has been criticized as being overly broad "and so unworkable that it has led to 'ad hoc determinations and inconsistent results.'"[59] Nevertheless, "[t]he balancing test has been cited with approval by most jurisdictions which have considered the issue."[60]

Several jurisdictions have adopted the balancing test with slight modification.[61] Pursuant to this model, the first factor, i.e., the extent to which the transaction was intended to affect the plaintiff, is modified to reflect that the factor weighs in favor of imposing a duty on the attorney to nonclients where the client specifically intended to benefit the nonclient.[62] An attorney owes no duty to a nonclient in the absence of an intent to directly benefit the nonclient.[63] The modification of the first factor is designed to address the primary policy concerns voiced against expanding an attorney's liability exposure to include third parties.

57. Lucas v. Hamm, 364 P.2d 685, 687 (Cal. 1961).

58. *Id.* at 688.

59. Noble v. Bruce, 709 A.2d 1264, 1271 (Md. 1998).

60. Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624, 627 (Mo. 1995) (citing RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 7.11, at 383 (3d ed. 1993)). *See also* Fickett v. Superior Court of Pima County, 558 P.2d 988, 990 (Ariz. Ct. App. 1976).

61. *See, e.g., Donahue*, 900 S.W.2d at 629; Trask v. Butler, 872 P.2d 1080, 1084 (Wash. 1994); Pizel v. Zuspann, 795 P.2d 42, 50, *modified by* 803 P.2d 205 (Kan. 1990). *See also* Watkins Trust v. Lacosta, 92 P.3d 620, 625–26 (Mont. 2004) (Montana Supreme Court has cited to the modified balancing factors approach twice but has not expressly adopted this theory); Leyba v. Whitney, 907 P.2d 172, 179 (N.M. 1995); Jensen v. Crandall, 1997 Me. Super. LEXIS 72, at *10–11 (Super. Ct. Mar. 4, 1997); Connely v. McColloch, 83 P.3d 457, 464–65 (Wyo. 2004); Francis v. Piper, 597 N.W.2d 922, 923 (Minn. Ct. App. 1999); Baer v. Broder, 436 N.Y.S.2d 693, 695 (N.Y. Sup. Ct. 1981); Blair v. Ing, 21 P.3d 452, 459–60 (Haw. 2001).

62. *See* cases cited *supra* note 61.

63. *See, e.g., Leyba*, 907 P.2d at 175; *Connely*, 83 P.3d at 565.

Those policy concerns—that liability will extend to an unlimited class of individuals and interfere with the attorney–client relationship—are resolved by the requirement that the transaction must be intended to benefit a nonclient directly. This requirement restricts the attorney's liability exposure to a small identifiable class. It does not interfere with the attorney–client relationship because the client's primary objective is to bestow a direct benefit on the nonclient.[64]

5. *Restatement (Third) of the Law Governing Lawyers* § 51

The multitude of common law declarations regarding the exceptions to the privity requirement have been incorporated into the Restatement (Third) of the Law Governing Lawyers, which recognizes that an attorney may owe a duty of care to certain nonclients under certain limited circumstances.[65] Thus, as described above, a lawyer owes a duty to a nonclient in situations closely approximating privity, when injury to the nonclient is foreseeable, and/or when the nonclient is an intended beneficiary of the lawyer's services.[66]

64. *See* cases cited *supra* note 61.
65. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000).
66. *Id.* Section 51 provides:

For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

. . . .

(2) to a nonclient when and to the extent that:
  (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and
  (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;
(3) to a nonclient when and to the extent that:
  (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;
  (b) such a duty would not significantly impair the lawyer's performance of the obligations to the client; and
  (c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and
(4) to a nonclient when and to the extent that:
  (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
  (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where
    (1) the breach is a crime or fraud or
    (2) the lawyer has assisted or is assisting the breach;
  (c) the nonclient is not reasonably able to protect its rights; and
  (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

Although the pronouncements of the Restatement are not binding, many courts have found its reasoning persuasive.[67]

II. EXPANDING ATTORNEY MALPRACTICE LIABILITY FOR ACTIONS BY INSURANCE COMPANIES

The recognition of exceptions to the strict privity requirement was a significant first step towards expanding attorney liability for malpractice. These exceptions, however, are not particularly suited to the insurance environment because insurance contracts are not ordinary commercial agreements.[68] Because of the economic and social policies inherent in the insurance business and the unique nature of the insurance contract and relationships created therein, courts have proceeded with great caution when considering the issue of whether insurance companies should be granted standing to assert a malpractice claim. Nevertheless, in a few states judicial appreciation of these aspects of the insurance business and contract has resulted in the expansion of attorney malpractice law to include actions by insurance companies. Reported decisions reaching this conclusion have been issued in Michigan, California, Arizona, Minnesota, and Ohio. Interestingly, each jurisdiction, relying on its own perception of the unique nature of an insurance policy, has adopted a different approach to the problem.

A. *Michigan*

In *Atlanta International Insurance Co. v. Bell*,[69] the Michigan Supreme Court became the first state supreme court to consider the question whether a liability insurer possessed standing to sue for malpractice defense counsel appointed to represent an insured. Here, Atlanta International Insurance Co. appointed John Bell and David Hertler to defend its insured, Securities Services, in a wrongful death action.[70] Bell answered the complaint but failed to raise comparative fault as a defense.[71] A judgment was subsequently entered against Securities Services, which Atlanta as primary

67. *See, e.g.*, Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 601 (Ariz. 2001); Graves v. Webber, 2007 Me. Super. LEXIS 16, at *4 (Super. Ct. Feb. 5, 2007); Pivnick v. Beck, 762 A.2d 653, 654 (N.J. 2000); Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756, 770–71 (S.D. 2002); Estate of Leonard v. Swift, 656 N.W.2d 132, 145–46 (Iowa 2003); Pederson v. Barnes, 139 P.2d 552, 561 (Alaska 2006). *See* State & County Mut. Fire Ins. Co., 490 F. Supp. 2d 741, 743–44 (N.D. W. Va. 2007).

68. *See* Johnny Parker, *The Development of First-Party Extracontractual Insurance Litigation in Oklahoma: An Analytical Examination*, 31 TULSA L. REV. 57, 61–62 (1995) (outlines the differences between insurance contracts and ordinary commercial agreements).

69. 475 N.W.2d 294 (Mich. 1991).

70. *Id.* at 296.

71. *Id.*

insurer was required to satisfy.[72] Atlanta then filed suit against Bell and Hertler alleging malpractice for having failed to raise comparative fault as a defense.[73]

In a motion for summary judgment, Bell acknowledged that his failure to plead comparative fault constituted a breach of the professional standard of care.[74] He argued, however, that because no attorney–client relationship existed between the parties, his sole duty was to his client, the insured.[75] The trial court agreed with Bell and dismissed the case.[76] After Atlanta appealed, the Michigan Court of Appeals affirmed, holding that "[no] attorney–client relationship exists between an insurance company and the attorney representing the insurance company's insured. . . . Rather, an attorney's sole loyalty and duty is owed to the client alone, the client being the insured, not the insurance company."[77]

The Michigan Supreme Court reversed, holding that although something less than an attorney–client relationship existed between the insurance company and the defendant, social policy justified expanding the defendant's liability to include actions by an insurance company where no conflict of interest existed.[78] The court began its analysis by recognizing that liability policies typically include language that "'both obligate the insurer to provide the insured with a defense and entitle the insurer to control the defense.'"[79] "The insurer typically hires, pays and consults with defense counsel."[80] "It has been appropriately recognized that '[defense counsel] occupies a fiduciary relationship to the insured, as well as to the insurance company. . . .'"[81] The court also recognized, however, that the tripartite relationship among insured, insurer, and defense counsel often creates the possibility of a conflict of interest. If a conflict arises, appointed counsel's primary duty of loyalty must be to the client and not to the insurer.[82]

Because defense counsel owed a fiduciary duty to the insured and the insurer, and the insurer was ultimately responsible for satisfying a judgment arising out of defense counsel's malpractice, special circumstances justified removing the case from the general prohibition against third-party

72. *Id.*
73. *Id.*
74. *Id.* at 296 n.2.
75. *Id.* at 296.
76. *Id.*
77. *Id.* (quoting Atl. Int'l Ins. Co. v. Bell, 448 N.W.2d 804, 805 (Mich. Ct. App. 1989)).
78. *Id.* at 297.
79. *Id.* (quoting Robert E. Keeton & Alan I. Widiss, Insurance Law 822 (1988)).
80. *Id.* at 298.
81. *Id.* at 297 (quoting Keeton & Widiss, *supra* note 79, at 835–36).
82. *Id.*

liability.[83] Consequently, because no conflict of interest existed between the insured and the insurer, "the attorney–client relationship, the interests of the client, the interest of the insurer, and ultimately the public, which otherwise would absorb the costs of the malpractice, all benefit from [the attorney's] exposure to suit [by the insurance company]."[84]

The special circumstances that justified the application of basic norms of the duty of care or negligence do not " 'substantially impair an attorney's ability to make decisions that require a choice between the best interests of the insurer and the best interests of the insured' "[85] where there is no conflict of interest. In the absence of a conflict "[t]he best interests of both insurer and insured converge in expectations of competent representation."[86] As expressed by the court, "[a]llowing the insurer to stand in the shoes of the insured under the doctrine of equitable subrogation best serves the public policy underlying the attorney–client relationship."[87] Equitable subrogation[88] represents "a less sweeping, less rigid solution than creation of an attorney–client relationship between the insurer and defense counsel, but a more flexible, more equitable solution than absolution from liability for professional malpractice."[89] Thus, the doctrine of equitable subrogation was used by the court to bridge the gap between extremes.[90]

B. *California*

In *Fireman's Fund Insurance Co. v. McDonald, Hecht & Solberg*,[91] a California appellate court rejected the *Bell* analysis. It concluded that the doctrine of equitable subrogation could not be used as a basis for allowing an insurer to assert a malpractice claim against defense counsel it retained to represent an insured.[92] According to the court in *Fireman's Fund*, a legal malpractice claim is personal to the client.[93] Therefore, despite the fact that subrogation and assignment are technically distinct, they are similar in that each operates to transfer a cause of action against a third party to someone else.[94] Consequently, the policy concerns that prohibit the assignment of

83. *Id.*
84. *Id.* at 299.
85. *Id.* at 298 (quoting Cavanaugh, J., dissenting, at 303–04).
86. *Id.*
87. *Id.* at 297.
88. *Id.* at 298 ("Subrogation, simply defined, involves 'the substitution of one person *in the place of* another with reference to a lawful claim or right' " (quoting 73 AM. JUR. 2D, *Subrogation* § 1, at 598 (2010))).
89. *Id.* at 299.
90. The court in *Bell* noted that application of the doctrine of equitable subrogation must be determined on a case-by-case analysis characteristic of equity jurisdiction. *Id.* at 295 n.1.
91. 30 Cal. App. 4th 1373 (1994).
92. *Id.* at 1384.
93. *Id.* at 1381–82.
94. *Id.* at 1382.

an attorney malpractice claim also apply to transfers of causes of action by subrogation.[95]

Despite the *Fireman's Fund* court's rejection of equitable subrogation as a basis for allowing a liability insurer to assert a malpractice claim, less than nine months later another appellate panel entertained the issue of whether defense counsel appointed to represent an insured by a liability carrier owed an independent duty to the insurer.[96] In *Unigard Insurance Co. v. O'Flaherty & Belgum*, the insurer filed a complaint alleging malpractice against the O'Flaherty law firm for its representation of an insured being sued by an injured employee.[97] The specific allegation was that the law firm was negligent in failing to assert the worker's compensation act and related defenses as the employee's exclusive remedy.[98] Defendant's failure to assert these affirmative defenses forced Unigard to hire new counsel to represent the insured and pay the policy limits.[99]

The O'Flaherty law firm moved for nonsuit.[100] The trial judge granted the motion and dismissed the case.[101] Unigard appealed, contending that it had an attorney–client relationship with the defendant and thus had standing to assert the malpractice action.[102]

Although the *Unigard* court rejected the Michigan Supreme Court's adoption of equitable subrogation in *Bell*, it extensively accepted the *Bell* court's reasoning.[103] Accordingly, the *Unigard* court concluded that

> where the insurer hires counsel to defend its insured and does not raise or reserve any coverage dispute, and where there is otherwise no actual or apparent conflict of interest between insurer and the insured that would preclude an attorney from representing both, the attorney has a dual attorney–client relationship with both insurer and insured (emphasis omitted).[104]

The foregoing reasoning mandates that the insurer, seeking to bring a malpractice claim against defense counsel, prove that an attorney–client relationship existed and that there was no conflict of interest between it and the insured.[105] The requisite relationship can be proven to exist by virtue of the general rules used to ascertain this issue in typical cases.

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95. *Id.*
96. Unigard Ins. Co. v. O'Flaherty & Belgum, 38 Cal. App. 4th 1229 (1995).
97. *Id.*
98. *Id.* at 1233–34.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1235–36.
104. *Id.* at 1236–37.
105. *See, e.g.*, Gulf Ins. Co. v. Berger, 79 Cal. App. 4th 114, 133–34 (2000).

> There is no talismanic rule that allows a facile determination of whether a disqualifying conflict of interest exists. Instead, "[t]he potential for conflict requires a careful analysis of the parties' respective interests to determine whether they can be reconciled . . . or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality defense for the insured."[106]

The California approach differs significantly from that employed in Michigan. First, it assumes, in the absence of a conflict of interest between insured and insurer, that a per se attorney–client relationship exists between the insurer and defense counsel. Michigan views the relationship between the insurer and defense counsel as something less than an attorney–client relationship. Second, in California, the absence of a conflict of interest justifies recognition of a direct duty owed by defense counsel to the insurance company. In Michigan, the duty emanates out of the special relationship that exists between defense counsel and insurance company. Finally, California law relies exclusively on traditional principles of negligence to afford a remedy, but Michigan law, which is also grounded in negligence principles, employs a different standard, i.e., equitable subrogation, to justify liability.

C. *Arizona*

Arizona first addressed the ability of an insurer to assert a malpractice action against defense counsel retained to represent an insured in *Paradigm Insurance Co. v. Langerman Law Offices, P.A.*[107] Paradigm had issued an insurance policy covering Dr. Benjamin Vanderwerf for medical malpractice.[108] When Vanderwerf, director of the Samaritan Transplant Service, was sued by a patient for medical malpractice, Paradigm assigned the case to Langerman.[109] Langerman advised Paradigm that it believed there was no viable theory of liability against Samaritan but failed to investigate whether Vanderwerf was covered by Samaritan's liability policy.[110] Thus, Langerman failed to advise Paradigm whether the defense could be tendered to Samaritan.[111]

For reasons not relevant to the case, Paradigm terminated Langerman's representation and retained new counsel to represent Vanderwerf in the medical malpractice case.[112] New counsel discovered that Samaritan had

106. *Id.* at 131 (quoting Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999, 1007–08 (1998)).
107. 24 P.3d 593 (Ariz. 2001).
108. *Id.* at 594.
109. *Id.*
110. *Id.* at 594–95.
111. *Id.*
112. *Id.* at 595.

liability insurance that constituted primary coverage that covered Vanderwerf in the medical malpractice case. New counsel tendered the medical malpractice claim to Samaritan's insurer, which rejected it on the basis that the tender was untimely.[113]

The case against Vanderwerf was subsequently settled for an amount within Paradigm's policy limits.[114] Langerman then presented Paradigm with a bill for its legal services.[115] Paradigm refused to pay, claiming Langerman had been negligent in failing to advise it that Samaritan's liability coverage was primary and by not timely tendering the defense.[116] When Langerman sued for fees, Paradigm counterclaimed for damages.[117]

On motions for summary judgment, the trial court dismissed Paradigm's claim against Langerman, concluding that no attorney–client relationship existed between Langerman and Paradigm in the absence of an expressed agreement that the defense attorney would represent both the insurer and the insured.[118] Paradigm appealed and the Arizona Court of Appeals reversed in part,[119] holding that there could be an implied attorney–client relationship between Langerman and Paradigm even without an expressed agreement.[120] The appellate court held that in the absence of a real or apparent conflict of interest between the insured and the insurer, defense counsel represents both.[121] Thus, according to the court, a dual attorney–client relationship existed between Langerman and Paradigm, and this relationship entitled the latter to bring a malpractice claim against retained defense counsel.[122]

On appeal to the Supreme Court of Arizona, Langerman argued that "before an attorney–client relationship can form between an insurer and the counsel it retains to represent an insured, express mutual consent must be reached among all the respective parties."[123] The court rejected this argument on the basis that an expressed agreement is not a prerequisite for the existence of an attorney–client relationship.[124] Rather, the requisite relationship can be implied from either the intent or acquiescence of the parties.[125]

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 595–96.

However, the court also recognized that concerns over conflicts of interest among attorney, insured, and insurer are well founded.[126] Consequently, an attorney–client relationship is not automatically created when the insurance company hires defense counsel.[127] As observed by the court,

> [i]t is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 14 [of the Restatement].[128]

Because there are times when the interests of both parties coincide, the always present potential conflicts of interest between insurer and insured do not justify recognition of an absolute prohibition against dual representation of insurer and insured.[129] Nevertheless, the court refused to endorse the view that defense counsel automatically represents both insurer and insured until the conflict actually arises. Sometimes, the potential for conflict is too great to justify the dual representation.[130]

The *Paradigm* court's conclusions regarding whether an attorney–client relationship exists between an assigned defense counsel and the insurer did not resolve fully whether the insurer could sue defense counsel for malpractice. The court clarified that a lawyer's liability for malpractice does not depend entirely on the existence of an actual attorney–client relationship. A blanket immunity is avoided by the general rule that recognizes that in certain circumstances a lawyer owes a duty to a nonclient.[131] Relying on § 51(3) of the Restatement[132] and the balancing of factors theory,[133] the court concluded that the assigned defense counsel owes a duty to the insurer that arises from the understanding that the lawyer's services are ordinarily intended to benefit both the insurer and the insured when their interests coincide. After making these pronouncements, the court declined to rule on whether Paradigm could sue Langerman for malpractice and instead remanded the case to the trial court.[134]

126. *Id.* at 596.
127. *Id.*
128. *Id.* at 596–97 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134, cmt. f).
129. *Id.* at 598.
130. *Id.* at 599.
131. *Id.* at 599–600.
132. *Id.* at 601 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3) cmt. g ("[A] lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer.")).
133. *Id.* at 600.
134. *Id.* at 601.

Arizona, like California, recognizes that defense counsel retained to represent an insured owes a duty to the insurer when the interests of the parties coincide.[135] Arizona law, unlike that in California, relies on the Restatement for the proposition that defense counsel may under appropriate circumstances owe a duty to an insurer regardless of whether the insurer is a client or nonclient.[136] Arizona's reliance on traditional negligence principles as a basis for relief supplants the need for a different standard, namely, equitable subrogation, to justify liability.

D. *Minnesota*

In *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*,[137] the Minnesota Supreme Court addressed whether (1) defense counsel appointed by an insurer to represent an insured had an attorney–client relationship with the insurer and (2) in the absence of an attorney–client relationship between defense counsel and the insurer, whether a malpractice action by the insurer could be asserted under the doctrine of equitable subrogation.[138]

Pine Island arose out of a breach of contract and negligence action brought by Windhorst against Pine Island Farmers Coop resulting from the coop's sale and installation of a milk metering system on Windhorst's dairy farm.[139] Windhorst alleged that as a result of Pine Island's improper installation of the milk metering system, a number of his cows became contaminated with bacteria.[140] Farmland Insurance Co., the insurer, retained Erstad & Riemer to represent Pine Island in the Windhorst lawsuit.[141] After a substantial jury verdict, Farmland settled with Windhorst while the case was on appeal.[142]

Following the unfavorable outcome, Farmland and Pine Island filed a malpractice claim against Erstad & Riemer alleging that defendant had an attorney–client relationship with both in the underlying action.[143] In its answer, Erstad & Riemer denied having an attorney–client relationship with Farmland.[144] The trial court granted summary judgment in favor of Erstad & Riemer with respect to all of Farmland's claims on the grounds that Erstad & Riemer and Farmland did not have an attorney–client relationship.[145] According to the trial court, under Minnesota law, the attorney–client

135. *Id.* at 602.
136. *Id.*
137. 649 N.W.2d 444 (Minn. 2002).
138. *Id.* at 448.
139. *Id.* at 446.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 447.

relationship can be created by contract, either expressed or implied, or through tort theory.[146] Based on its analysis of the facts, the trial court concluded that Pine Island was Erstad & Riemer's sole client.[147] The trial court also concluded that despite the absence of an attorney–client relationship between defense counsel and insurer, the latter could maintain an action for malpractice against Erstad & Riemer under the doctrine of equitable subrogation.[148]

Farmland and Pine Island appealed the trial court's holding.[149] The Minnesota Court of Appeals affirmed the trial court's conclusion that defense counsel and Farmland did not have an attorney–client relationship and reversed the trial court on the equitable subrogation issue.[150]

The Minnesota Supreme Court began its analysis by recognizing the long-standing rule that in the insurance context, defense counsel has an attorney–client relationship with the insured.[151] This rule, however, failed to answer the question whether defense counsel was prohibited from also forming an attorney–client relationship with the insurer. The court emphasized that

> [t]he problems caused by conflicts of interest are particularly acute in the insurance defense context, where the potential for conflict exists in every case and actual conflicts are frequent.
>
> . . . .
>
> The danger is that, if a conflict of interest does arise, the nature of the tripartite relationship makes it likely that defense counsel will tend to favor the interests of the insurer at the expense of those of the insured.[152]

Due to the unique characteristics of the tripartite relationship among insurer, insured, and defense counsel, the court declined Farmland's invitation to apply the general rules for determining the existence of an attorney–client relationship.[153] Instead, the court thought it more appropriate to supplement the general rules to allow for dual representation where (1) there is an absence of a conflict of interest between the insured and the insurer; (2) defense counsel or another attorney consulted with the insured,

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146. *Id.*
147. *Id.*
148. *Id.* The trial court acknowledged that there was no Minnesota law on the issue. However, it relied exclusively on *Atlanta International Insurance Co. v. Bell*, 475 N.W.2d 294, 298 (Mich. 1991), for its holding that the doctrine of equitable subrogation was applicable. Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 447 (Minn. 2002).
149. *Pine Island Farmers Coop*, 649 N.W.2d at 447.
150. *Id.* The appellate court held that "the insured is the sole client of the defense attorneys hired by the insurer." *Id.* (quoting Pine Island Farmers Coop v. Erstad & Riemer, P.A., 636 N.W. 2d 604, 609 (Minn. Ct. App. 2001)).
151. *Id.* at 449.
152. *Id.* at 450.
153. *Id.* at 451.

explaining the implications of dual representation; and (3) the insured gave expressed consent to the dual representation.[154] The requirements of consultation and consent make it impossible for the insurer to become defense counsel's co-client without the knowledge and permission of the insured.[155] In the absence of meeting these requirements, the insured remains defense counsel's sole client.[156] The advantage of this approach is that it permits

> dual representation in cases where the interests of the insured are least likely to be ignored—that is, when there is no conflict of interest between the insured and insurer and, after being informed of the risks and advantages of dual representation, the insured makes an informed decision that dual representation is appropriate.[157]

Based on the facts of the case, this standard precluded Farmland from pursuing a malpractice action on its own behalf against defense counsel.[158]

Turning to the issue of whether Farmland was entitled to assert Pine Island's rights against Erstad & Riemer by maintaining an attorney malpractice action pursuant to the doctrine of equitable subrogation, the court noted that the facts that supported application of the doctrine in *Bell* were absent in the instant case. In *Bell*, the insured did not bring an action for malpractice against defense counsel.[159] This fact significantly influenced the Michigan Supreme Court to seek recourse to avoid granting blanket immunity from malpractice liability to defense counsel.[160] As explained by the court in *Bell*, "defense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer. The only winner produced by an analysis precluding liability would be the malpracticing attorney. Equity cries out for application under such circumstances."[161]

Because Pine Island, the insured, also sued defense counsel for malpractice, the concerns that gave rise to the court's adoption of equitable subro-

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154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 452. The dual representation doctrine directly benefits an insurance company in that it transforms the company into a co-client of the attorney for purposes of a malpractice claim. It is not clear, however, what if any benefits the doctrine bestows on the insured/client.

158. Because the record contained no evidence that legal counsel consulted with Pine Island regarding the possibility of dual representation or that, after being informed of the risks and advantages of dual representation, Pine Island consented to dual representation, the court concluded that an attorney-client relationship did not exist between the insurer and defense counsel. *Id.* Since the court answered the question of whether the dual representation doctrine was applicable under the facts of the case in the negative, it was unnecessary to determine whether (1) an attorney-client relationship existed under general rules of law or (2) there was a conflict of interest between insured and insurer. *Id.* n.6.

159. *Id.* at 452.

160. *Id.*

161. *Id.* (citing Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 298 (Mich. 1991)).

gation in *Bell* were not present. Furthermore, equitable subrogation allows the insurer to step into the shoes of the insured; because Pine Island was asserting its own claim for malpractice against defense counsel, there were no empty shoes for Farmland to step into.

Minnesota, like California, recognizes that defense counsel can represent both the insured and the insurer in the absence of a conflict of interest. Minnesota law, however, goes a step further and requires that the client/insured be informed by legal counsel of the advantages and disadvantages of dual representation and consents to the arrangement. If these requirements are not satisfied, defense counsel's sole client is the insured. It is unclear in Minnesota whether the insurance company can rely on the doctrine of equitable subrogation to hold retained defense counsel liable for malpractice in representing an insured. The court in *Pine Island* neither adopted nor rejected the doctrine. It merely declared that the equitable subrogation was not appropriate in light of the facts of the case.

E. *Ohio*

In 2005, Ohio became the fifth jurisdiction to report a decision on the issue of whether a liability insurer possessed standing to assert a malpractice action against defense counsel assigned to represent an insured. In *Swiss Reinsurance America Corp. v. Roetzel & Andress*,[162] Frontier Insurance Co. retained Tom Treadon to defend its insured, Dr. Thomas Robinson, in a medical malpractice action.[163] Early in the case, Treadon informed Frontier that the case was defensible but that settlement in the range of $500,000 to $1 million should be considered.[164] Treadon repeatedly advised Frontier that the case should be settled and that Robinson had a greater liability exposure due to the quality of plaintiff's new expert witnesses.[165] In a letter dated April 8, 1997, Robinson also demanded that the case be settled within the policy limits.[166] The letter also threatened a bad faith suit if the matter was not successfully resolved.[167]

Despite Treadon's advice and Robinson's request, Frontier demanded that the matter proceed to trial.[168] Frontier replaced Treadon as lead counsel shortly before the trial.[169] Replacement counsel, Gary Goldwasser, also recommended to Frontier that the case be settled for up to $2 million

162. 837 N.E.2d 1215 (Ohio Ct. App. 2005).
163. *Id.* at 1218.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

before trial.[170] Like his predecessor, he also felt that he could put forth a quality defense if necessary, and the case went to trial pursuant to Frontier's instructions.[171] After two days, Frontier agreed to settle the matter for $2.2 million.[172]

After the settlement, Frontier sought recovery from Swiss Reinsurance Inc. in the amount of $1 million.[173] Swiss Reinsurance contended that Frontier had a duty to mitigate the damages by suing Treadon for malpractice.[174] Swiss Reinsurance refused to contribute to the settlement unless Frontier filed a malpractice action against Treadon.[175] Frontier filed the suit and was paid by Swiss Reinsurance.[176]

The trial judge granted summary judgment for Treadon because Frontier lacked standing to pursue a malpractice claim against defense counsel.[177] Frontier appealed, asserting that it had standing to sue Treadon because it was Treadon's client in the underlying medical malpractice case.[178] On appeal, Frontier requested that the court determine whether it was Treadon's client by applying the general rules regarding the creation of an attorney–client relationship.[179] Pursuant to this analysis, Frontier urged that its contract with Treadon as well as his provision of legal advice were sufficient to create such a relationship.[180]

According to the court, application of the general rules for determining the existence of an attorney–client relationship in the insurance defense context was not appropriate.[181] Relying on the rationale of the Minnesota Supreme Court in *Pine Island*, the court explained:

> [d]espite the unique characteristics of the tripartite relationship between defense counsel, insurers, and insureds, Farmland and Pine Island argue that we should simply apply the general rules regarding the creation of attorney–client relationships to the facts of this case to determine whether Erstad & Riemer represented Farmland. Although we agree that an insurer seeking to establish the existence of an attorney–client relationship with defense counsel can do so using contract or tort theory, merely applying the general rules would not adequately address our concerns regarding dual representation in insurance defense cases. In light of the insurer's rights to control the defense

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 1218–19.
176. *Id.* at 1219.
177. *Id.*
178. *Id.* at 1220.
179. *Id.*
180. *Id.*
181. *Id.*

> of the claims, exchanges of information between defense counsel and the insurer—including exchanges in which the insurer seeks, receives, and relies on legal advice from defense counsel—are bound to occur. Thus, a holding that these exchanges, standing alone, are sufficient to create an attorney–client relationship between defense counsel and insurer would result in a rule that defense counsel represents the insurer in virtually every insurance defense case. Furthermore, such a holding would allow defense counsel to represent the insurer without the insured's consent or knowledge of the significant risks posed by dual representation.[182]

The inherent danger in finding an attorney–client relationship between insurer and defense counsel is that defense counsel, where there is a conflict of interest between insurer and insured, " 'may be tempted to help the client [the insurer] who pays the bills, who will send further business, and with whom long-standing personal relationships have developed.' "[183] Due to the overwhelming evidence of conflict of interest between the insured and insurer, the court concluded that Frontier was not Treadon's client.[184]

Frontier also argued that it possessed standing to sue Treadon through privity of contract with the client/insured, Robinson.[185] Ohio case law recognizes that a nonclient has standing to assert a malpractice claim if in privity with the client for whom the legal services were performed.[186] Contractual privity with the client is not, however, the equivalent of privity in the malpractice context.[187] Contractual privity with the client is concerned with whether the parties' interests are the same in the sense that representing the client is equivalent to representing the party alleging privity with the client.[188] The primary consideration in determining whether there is privity between a client and a nonclient is whether the client and third person share a mutual or successive right of property or other interest.[189] Due to the conflict of interest between Robinson as the client/insured and Frontier, the court concluded that the privity with the client rule was inapplicable.[190]

Frontier's final assertion that, even in the absence of an attorney–client relationship, the doctrine of equitable subrogation entitled it to file a mal-

182. *Id.* at 1221 (quoting Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 451 (Minn. 2002)).
183. *Id.* (citing Ronald E. Mallen & Jeffrey M. Smith, 4 Legal Malpractice § 29.16, at 325 (5th ed. 2000)).
184. *Id.* at 1222–23.
185. *Id.* at 1223.
186. *Id.* at 1220 (citing Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987)).
187. *Id.* at 1223.
188. *Id.*
189. *Id.* (citing Sayyah v. Cutrell, 757 N.E.2d 779, 786 (Ohio Ct. App. 2001)).
190. *Id.*

practice claim against Treadon, was met with similar resolution.[191] According to the court, the doctrine is not applicable where there is a conflict of interest between the insured and insurer and the attorney complied with the insured's interests.[192] To permit subrogation under such circumstances "'would drive a wedge between counsel and the insured to the inexorable detriment of the attorney–client relationship.' Indeed, the attorney would be placed in an even more precarious position than is inherent in a tripartite relationship."[193] As noted by the court, "Ohio's zealous guarding of the attorney–client relationship compels a holding that equitable subrogation is not available to appellants."[194]

Ohio case law recognizes that an insurer and an insured are the common client of defense counsel in the absence of a conflict of interest.[195] Thus, like California and Minnesota, Ohio recognizes the dual representation doctrine. It also follows California and Arizona in their rejection of equitable subrogation as a means for expanding defense counsel liability to include insurers.

F. *Equitable Subrogation*

In the context of malpractice liability, equitable subrogation is not a basis for recognizing the existence of an attorney–client relationship.[196] Rather, the doctrine is merely another limited exception to the privity of contract requirement. The doctrine has received mixed reviews from the courts that have addressed the issue of whether to adopt or apply it in the context of insurance defense counsel malpractice. The majority of jurisdictions that have addressed this issue prohibit the equitable subrogation of an attorney malpractice action.[197] Courts that have rejected the doctrine rely on the

191. *Id.* at 1224.

192. *Id.*

193. *Id.* (quoting Cont'l Cas. Co. v. Pullman, Comley, Bradley, & Reeves, 929 F.2d 103, 107 (2d Cir. 1991)).

194. *Id.*

195. *Id.* at 1221.

196. For a detailed discussion of the equitable subrogation doctrine, see Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723 (2005).

197. Swiss Reinsurance Am. Corp. v. Roetzel & Andress, 837 N.E.2d 1215, 1224 (Ohio Ct. App. 2005); State Farm Fire & Cas. Co. v. Weiss, 194 P.3d 1063, 1069 (Colo. Ct. App. 2008); Capital Indem. Corp. v. Fleming, 58 P.3d 965, 969 (Ariz. Ct. App. 2002); Great Am. Ins. Co. v. Dover, Dixon Horner P.L.L.C., 456 F.3d 909, 912 (8th Cir. 2006) (applying Arkansas law); Fireman's Fund Ins. Co. v. McDonald, Hecht & Solbert, 30 Cal. App. 4th 1373 (1994); Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves, 929 F.3d 103, 106 (2d Cir. 1991) (applying Connecticut law); Nat'l Union Fire Ins. Co. v. Salter, 717 So. 2d 141, 142 (Fla. Dist. Ct. App. 1998); Querrey & Harrow, Ltd. v. Transcon. Ins. Co., 861 N.E.2d 719, 723–24 (Ind. Ct. App. 2007); Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson, 827 P.2d 758, 756–66 (Kan. 1992); Am. Cont'l Ins. Co. v. Weber & Rose, P.S.C., 997 S.W.2d 12,

same policy basis that supports the prohibition against the assignment of an attorney malpractice claim.[198]

Although subrogation is technically different from assignment, both doctrines result in the transference of a cause of action to a third party. Consequently, both doctrines potentially "undermine the vital relationship between an attorney and client, unduly burden the justice system, and restrict the availability of competent legal services."[199] Courts that reject the doctrine of equitable subrogation place greater emphasis on preservation of the attorney–client relationship.[200] Courts that allow the doctrine tend to value the shifting of the economic burden to the responsible party over the protection of the attorney–client relationship.[201]

Because equitable subrogation is a legal fiction, its application is restricted to circumstances where justice demands.[202] Consequently, courts that have endorsed the doctrine refuse to apply it when an actual or apparent conflict of interest exists between insured and insurer or where the insured has asserted a malpractice claim against defense counsel.[203] The doctrine is also inapplicable where the insured/client has standing but no right to sue defense counsel.[204]

III. CONCLUSION

Two forces have reshaped the common law landscape of attorney malpractice law in the context of insurance defense practice—preserving the sanc-

13 (Ky. Ct. App. 1998); St. Paul Ins. Co. v. AFIA Worldwide Ins. Co., 937 F.2d 274, 279 (5th Cir. 1991) (applying Louisiana law); St. Paul Surplus Lines Ins. Co. v. Remley, 2009 U.S. Dist. LEXIS 59434, at *14 (E.D. Mo. July 13, 2009) (predicting Missouri law).

198. The policy bases underlying the prohibition against assignment of an attorney malpractice claim are "(1) protection of the attorney's duties of loyalty and effective advocacy to the client; (2) the potential of conflict of interest with a third-party plaintiff; and (3) the potential for an attorney's unlimited liability to unknown third parties." Glover v. Southard, 894 P.2d 21, 26 (Colo. Ct. App. 1994). *See also* cases cited *supra* note 197.

199. *State Farm Fire & Cas. Co.*, 194 P.3d at 1066.

200. *Id.*

201. *See* Nat'l Union Ins. Co. v. Dowd & Dowd, P.C., 2 F. Supp. 2d 1013, 1022–23 (N.D. Ill. 1998); St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP, 379 F. Supp. 2d 183, 193 (D. Mass. 2005); Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 787 N.Y.S.2d 15 18 (App. Div. 2004); Ohio Cas. Ins. Co. v. Southland Corp., 1999 U.S. Dist. LEXIS 5564, at *9–10 (E.D. Pa., Apr. 21, 1999) (predicting Pennsylvania law); Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 297, 299 (Mich. 1991); Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 484–85 (Tex. 1992).

202. *Atlanta Int'l*, 475 N.W.2d at 299 n.17 ("No fiction shall extend to work an injury; its proper operation being to prevent mischief, or remedy an inconvenience, that might result from the general rule of law.").

203. *See id.* at 299; Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 452 (Minn. 2002).

204. Preferred Risk Mut. Ins. Co. v. Hoiby & Kanter, 1994 U.S. Dist. LEXIS 12057, at *8 (E.D. Mich. July 11, 1994).

tity of the attorney–client relationship and shifting the economic burden of loss to the responsible party. The first force has led to the universally recognized rule that, whenever there is a conflict of interest between the insured and the insurer, an attorney–client relationship exists solely between the attorney and client. The rule is designed to ensure that the attorney's primary loyalty is to the insured she was retained to defend. The rule achieves that goal by adopting one of the following views: (1) the attorney–client relationship exists solely between the insured and defense counsel;[205] (2) where an actual or apparent conflict of interest exists between the insured and the insurer, an attorney–client relationship exists only between defense counsel and the insured;[206] (3) generally recognized traditional exceptions to the privity of contract doctrine sufficiently protect the integrity of the duty of loyalty;[207] or (4) the general rules for determining the existence of an attorney–client relationship should be supplemented to include consultation with and consent of the insured.[208]

The second force, which is designed to impose liability where it rightfully belongs—on the negligent defense counsel—achieves its aim by either (1) utilizing the doctrine of equitable subrogation[209] or (2) recognizing, in the absence of a conflict of interest, that defense counsel owes an independent duty to the insurer.[210]

These two forces are primarily responsible for the uneven and inconsistent state of the law in this area. Thus, while all the jurisdictions that have addressed the issue agree that compelling and persuasive policy reasons exist to impose liability, each has developed its own unique solution to the problem.

205. *See Atlanta Int'l*, 475 N.W.2d at 297.

206. *See* Unigard Ins. Group v. O'Flaherty & Belgum, 38 Cal. App. 4th 1229, 1236–37 (1995); Swiss Reinsurance Am. Corp. v. Roetzel & Andress, 837 N.E.2d 1215, 1222 (Ohio Ct. App. 2005); Gulf Ins. Co. v. Berger, Kahn, Moss, Figler, Simon & Gladstone, 79 Cal. App. 4th 114, 131 (2000); Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 596 (Ariz. 2001); *Pine Island*, 649 N.W.2d at 451.

207. *See Swiss Reinsurance*, 837 N.E.2d at 1223; *Paradigm*, 24 P.3d at 599.

208. *See Pine Island*, 649 N.W.2d at 451.

209. *See* Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 297 (Mich. 1991).

210. *See Unigard*, 38 Cal. App. 4th at 1236–37.