FLORIDA BAR STAFF OPINION 30310
April 4, 2011

Florida Bar ethics counsel are authorized by the Board of Governors of The Florida Bar to issue informal advisory ethics opinions to Florida Bar members who inquire regarding their own contemplated conduct. Advisory opinions necessarily are based on the facts as provided by the inquiring attorney. Opinions are not rendered regarding past conduct, questions of law, hypothetical questions or the conduct of an attorney other than the inquirer. Advisory opinions are intended to provide guidance to the inquiring attorney; the advisory opinion process is not designed to be a substitute for a judge's decision or the decision of a grievance committee. The Florida Bar Procedures for Ruling on Questions of Ethics can be found on the bar's website at www.floridabar.org.

Two members of The Florida Bar have requested an advisory ethics opinion. The inquiring attorneys are opposing counsel in a personal injury matter. The operative facts as presented in the inquiring attorneys' letter are as follows.

> This inquiry results from a dispute between the parties as to whether an attorney representing a plaintiff in a personal injury matter under a contingency fee agreement may personally sign a settlement release containing a hold harmless and indemnification agreement in favor of the opposing party which would obligate the plaintiff's attorney to indemnify and hold harmless the defendant for any future liability under the Medicare Secondary Payor Act (hereinafter "MSPA").
>
> The MSPA defines the Federal Government's rights to recover benefits it has paid in the past or may reasonably be expected to pay in the future as a result of injury to plaintiffs in some third party claims or litigation. It also imposes on the defendant and the defendant insurance carrier, reporting requirements obligating them to notify Medicare of the settlement of the third party claim. The MSPA provides the Federal Government with a cause of action for double damages against, among others, the attorney representing the plaintiff and the settling defendant for violations of its requirements.
>
> In those cases to which the MSPA applies, a plaintiff and his/her attorney are already required to use the proceeds from the third party recovery to satisfy the Federal Government's subrogation rights for benefits paid in the past. Likewise, in those cases to which the MSPA applies, a plaintiff and his/her attorney are already required to create from the proceeds of the third party recovery a Medicare Set Aside (hereinafter "MSA") to protect Medicare from payment of future benefits that are caused by the injuries alleged to have been sustained in the accident at issue in the third party claim or litigation. For example, in a worker's compensation claim, it is clear under the MSPA that a MSA must be created.

> However, in the context of a third party liability claim, such as an automobile accident or medical malpractice claim, nothing in the MSPA, its regulations or case law interpreting the MSA expressly requires an MSA be established.
>
> Unfortunately, Medicare has failed to provide any formal written guidelines as to the need for an MSA in the context a liability claim. Therefore, a defendant, its attorneys and insurance carrier, incur the risk of uncertainty as to whether the payment they are making to a plaintiff is subject to MSPA requirement of establishing an MSA. These defendant parties are also unsure whether they are subject to any liability under the MSPA in the event the plaintiff is required, but fails to either satisfy the Federal Government's subrogation rights for benefits paid in the past or to establish an MSA to protect Medicare from payment of future benefits. For this reason, a settling defendant desires to obtain a hold harmless and indemnification agreement at the time of settlement or payment from the plaintiff and the plaintiff's attorney to protect the defendant from potential liability under the MSPA.
>
> May plaintiff's counsel, at the request of defendant's counsel, agree to hold harmless and indemnify a defendant from third party claims arising out of defendant's settlement payments to plaintiff, including a potential claim by Medicare resulting from liability under the Medicare Secondary Payor Act?

The Board of Commissioners on Grievances and Discipline of Ohio addressing this issue stated:

> A personal agreement by a lawyer to indemnify the opposing party from any and all claims is distinct from an agreement by a client, or the lawyer on behalf of the client, guaranteeing payment of lawful claims from the funds in the lawyer's possession. Such a personal indemnification agreement by a lawyer is, in essence, an agreement by the lawyer to provide financial assistance to the client. The lawyer is undertaking an obligation to pay the client's bills.

Ohio Ethics Opinion 2011-1(paragraph break omitted) (copy enclosed).

Rule 4-1.8(e) of the Rules Regulating The Florida Bar prohibits a lawyer from providing financial assistance to a client except under certain circumstances delineated in the rule. The rule states:

> **(e) Financial Assistance to Client.** A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

A plaintiff's counsel's agreement to hold harmless and indemnify a defendant from third party claims arising out of the defendant's settlement payments to the plaintiff is not a court cost or expense of litigation. Therefore, it is prohibited by the rule.

Additionally, entering in to such an indemnification agreement would result in a conflict of interest between the plaintiff's counsel and the counsel's client under Rule 4-1.7(a)(2) because it creates a substantial risk that the representation of the client would be materially limited by the lawyer's personal interest in not having to pay the client's debts.

Further, a lawyer should generally avoid becoming a party to a client's settlement agreement unless the agreement addresses the lawyer's release of a claim for attorneys' fees. The Tennessee Board of Professional Responsibility determined that an attorney's signature on a release:

> should vouch only for the fact that the client releases the defendant. A requirement that a plaintiff's attorney become a party to a release might create a conflict of interest between plaintiff's attorney and the plaintiff in violation of DR 5-101(A). Therefore these clauses are prohibited except in cases where the plaintiff's attorney releases a claim for attorney fees.

Tennessee Ethics Opinion 97-F-141 (copy enclosed).

Indiana is the only state to have addressed whether a lawyer can indemnify an opposing party as part of a settlement agreement involving Medicare. The Legal Ethics Committee of the Indiana State Bar Association notes:

> Courts are divided as to whether Medicare and Medicaid benefits may be recovered from the claimant's attorney if not reimbursed from the settlement proceeds. Interpreting 42 C.F.R. §411.24(g), compare *U. S. v. Sosnowski*, 822 F.Supp. 570 (W.D. Wisc. 1993) (recognizing the validity of Medicare's claim against the plaintiff's attorney for satisfaction of its claim) with *Zinman v. Shalala,* 835 F.Supp. 1163 (N.D. Cal. 1993) (holding that Medicare does not truly possess a lien, just the right to bring an action against any entity responsible to pay primarily for the medical expenses).

Indiana Ethics Opinion 1 (2005)(copy enclosed).

The Indiana committee, in apparent ambivalence regarding the issue, concluded that in cases not involving Medicare and Medicaid, settlement agreements that require a lawyer to indemnify the opposing party violate ethics rules and did not answer whether that would be the case with Medicare and Medicaid settlement agreements. It should be pointed out, however, that even if a lawyer may be statutorily obligated to reimburse Medicare for a debt incurred by a client, that does not mean that lawyers should voluntarily incur such obligations.

Finally, a defendant's lawyer should not request that the plaintiff's lawyer enter into such an indemnification agreement. Such a proposal could violate Rule 4-8.4(a) which states that a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, *knowingly assist or induce another to do so*, or do so through the acts of another."

Several other states have issued similar opinions regarding this matter. See Ohio Ethics Opinion 2011-1; North Carolina State Bar Ethics Opinion RPC 228; Arizona Ethics Opinion 03-05; Illinois Ethics Opinion 06-01; Indiana Ethics Opinion 1(2005); Missouri Ethics Opinion 125; South Carolina Ethics Opinion 08-07; Tennessee Ethics Opinion 2010-F-154, and Wisconsin Ethics Opinion O. E-87-11, New York City Formal Opinion 2010-3 (copies enclosed).

In conclusion, a lawyer should not agree to personally indemnify an opposing party. Such an agreement violates Rules 4-1.8(e) and 4-1.7(a)(2). Furthermore, a lawyer should not ask or require that another attorney enter into an agreement to personally indemnify an opposing party. Such conduct would violate Rule 4-8.4(a).

Index: 4-1.8(e), 4-1.7(a)(2), 4-8.4(a)

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2011-1
Issued February 11, 2011

SYLLABUS: It is improper for a plaintiff's lawyer to personally agree, as a condition of settlement, to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such agreements are not authorized by Prof. Cond. Rule 1.15(d) and violate Prof. Cond. Rules 1.8(e) and 1.7(a)(2). Further, it is improper for a lawyer to propose or require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such conduct violates Prof. Cond. Rule 8.4(a). The Board recommends that this advisory opinion be prospective in application.

OPINION: This opinion addresses whether, during settlement of a matter, it is ethical for a lawyer to propose, demand, and or agree to personally satisfy any and all claims by third persons as to settlement funds.

> Is it proper for a plaintiff's or claimant's lawyer to personally agree, as a condition of settlement, to indemnify the opposing party from any and all claims by third persons to the settlement funds?

Lawyers who represent plaintiffs in civil actions, such as personal injury or medical malpractice are required to work diligently to obtain a fair settlement for clients who often have incurred substantial medical bills as a result of their injuries. Sometimes it takes months and even years to reach settlement or judgment.

The proper disbursement of settlement proceeds is a huge responsibility for a lawyer who receives the settlement proceeds. Clients are sometimes in dire need of funds from the settlement proceeds. Lawyers need payment for their services too. And, third persons such as medical providers, insurance carriers, or Medicare and Medicaid seek reimbursement of their expenses from the settlement proceeds.

Increasingly, lawyers who represent plaintiffs are being asked to personally indemnify the opposing party and counsel from any and all claims by third persons to the settlement proceeds. Lawyers are concerned not only about whether it is ethical to enter such

agreements, but also whether it is ethical to propose or require that other lawyers enter such agreements.

This opinion advises as to the ethical concerns of a lawyer's personal agreement to indemnify. The opinion does not address legal issues that are outside this Board's advisory authority under Gov.Bar R. V(2)(C).

Applicable Ohio Rules of Professional Conduct

The Ohio Rules of Professional Conduct establish that a lawyer has an ethical duty to safekeep funds of clients *and* third persons. The duties are very specifically set forth in Prof. Cond. Rule 1.15 and apply to settlement funds that come into a lawyer's possession.

One duty is that a lawyer who is in possession of a client's or third person's funds must keep the funds in an interest bearing trust account separate from the lawyer's funds. This is required by Prof. Cond. Rule 1.15(a) which in pertinent part states: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a 'client trust account,' 'IOLTA account,' or with a clearly identifiable fiduciary title."

A second duty is that a lawyer who receives funds in which a third person has a lawful interest must promptly notify the third person and upon request promptly render a full accounting as to the funds; and, unless there is an exception within the rule or otherwise permitted by law or by agreement, the lawyer must promptly deliver the funds the third person is to receive. This is required by Prof. Cond. Rule 1.15(d) which states: "Upon receiving funds or other property in which a client or third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property."

A third duty is that a lawyer who is in possession of funds in which two or more persons claim interest, must hold the funds until the dispute is resolved, but must distribute the undisputed portions of the funds. This is required by Prof. Cond. Rule 1.15(e) which states: "When in the course of representation a lawyer is in possession of funds or other property in which two or more persons, one of whom may be the lawyer, claim interests, the lawyer shall hold the funds or other property pursuant to division (a) of this rule until

the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute."

When Prof. Cond. Rule 1.15 became effective on February 1, 2007, lawyers expressed concern that their responsibility toward third person claims was limitless. That is not so, nor was it ever so, but to alleviate concerns and clarify the duty to third persons Prof. Cond. Rule 1.15(d) and Comment [4] were amended, effective January 1, 2010. [The proposed amendments were based, in part, on OhioSupCt, Bd Comm'rs on Grievances & Discipline, Op. 2007-7 (2007) and on a 2008 report and recommendation of an Ohio State Bar Association committee that reviewed Prof. Cond. Rule 1.15.]

The following clarifying language was added to Prof. Cond. Rule 1.15(d): "For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property." Explanatory language was also added to Comment [4] including this statement: "When the lawyer knows a third person's claimed interest is not a lawful one, a lawyer's ethical duty is to notify the client of the interest claimed and promptly deliver the funds or property to the client." Changes were also made to the first sentence of Comment [4]: "Divisions (d) and (e) address situations in which third persons may claim a lawful interest in specific funds or other property in a lawyer's custody."

In short, a lawyer's ethical duty is to protect a third person's lawful interest of which the lawyer has actual knowledge. The lawful interest must be in the specific funds in the lawyer's custody.

The language in Prof. Cond. Rule 1.15(d) that defines a lawful interest as including "a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property" is not to be construed as a green light for a lawyer to agree to personally indemnify opposing party for any and all third person claims to settlement proceeds. A personal agreement by a lawyer to indemnify the opposing party from any and all claims is distinct from an agreement by a client, or the lawyer on behalf of the client, guaranteeing payment of lawful claims from the funds in the lawyer's possession.

Such a personal indemnification agreement by a lawyer is, in essence, an agreement by the lawyer to provide financial assistance to the client. The lawyer is undertaking an obligation to pay the client's bills. This is unethical for several reasons.

Ohio lawyers are not permitted to provide financial assistance to client, except for very narrow circumstances permitted by rule. Prof. Cond. Rule 1.8(e) states: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may do either of the following: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the

outcome of the matter; (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client." None of the exceptions apply herein.

Further, such agreement creates a conflict of interest for a lawyer because there would be substantial risk that the lawyer's representation of the client would be materially limited by the lawyer's concerns about having personal financial responsibility for known and unknown claims against the client. Prof. Cond. Rule 1.7(a) states: "A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if . . . (2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests." Even if this conflict of interest could be ameliorated under Prof. Cond. Rule 1.7(b), the agreement still would be improper under Prof. Cond. Rule 1.15 and 1.8(e).

It is also this Board's view that it is improper for a lawyer to propose or require that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such conduct violates Prof. Cond. Rule 8.4(a). Prof. Cond. Rule 8.4(a) states that it is professional misconduct for a lawyer to "violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another."

This Board is not alone in finding such agreements unethical.

Advisory opinions from other states

An Arizona ethics committee advised that "[a] claimant's attorney may not ethically enter into any settlement agreement that would require the attorney to indemnify or hold the Releasee harmless from any lien claims against the settlement proceeds." State Bar of Arizona, Op. 03-05 (2003). The committee concluded that such agreements would violate several of the Arizona Rules of Professional Conduct, ER 1.7, 2.1, 1.8, 1.16(a). Id.

An Illinois ethics committee was asked: "Whether the Illinois Rules of Professional Conduct prohibit a lawyer representing a party receiving money in a settlement from entering into an agreement in which that lawyer provides his/her personal guarantee that the settlement funds will be paid to all person who have a claim on the funds and indemnifies the defendant against such claims?" Illinois State Bar Assn., Op. 06-01 (2006). The Illinois committee stated that "a plaintiff's lawyer's personal guarantee to pay the lien and subrogation claims against his client (even if such payments are to be made by the settlement funds) constitutes the provision of financial assistance to his client and violates Rule 1.8(d) of the [Illinois] Rules of Professional Conduct." The committee did not take a position of whether Rule 1.7(b) would be violated by such personal guarantees. Id.

An Indiana ethics committee was asked "whether the Indiana Rules of Professional Conduct ("Rules") permit plaintiff's counsel to execute a settlement agreement requiring counsel to hold harmless and indemnify the defendant, defendant's insurer and defense counsel from any subrogation liens and/or third-party claims." Indiana State Bar Assn., Op. 1 (2005). The committee noted that the practice violates the Rules on several grounds that include Rule 1.2(a), 1.7(a)(2), 1.8(e), 2.1(a), 1.16, 1.15(d). The committee noted that "[c]ourts are divided on whether Medicare and Medicaid benefits may be recovered from the claimant's attorney if not reimbursed from the settlement proceeds." Id. "In conclusion, the Committee is of the opinion that non-Medicare and Medicaid settlement agreements that require a counsel to hold harmless and indemnify the opposing party from subrogation liens and/or third-party claims violate our Rules." Id.

A Kansas ethics committee advised that "[a] lawyer for a personal injury plaintiff or claimant signing a blanket indemnification provision whereby the lawyer agrees to hold the insurance company and the insured harmless from 'any and all subrogation liens of every kind and nature whatsoever, both known and unknown' places the lawyer in a position where he or she creates a conflict of interest between the client and the insurance company and insured, and/or the lawyer's own interests." Kansas Bar Assn, Op. 01-5 (2001).

A Missouri ethics committee was asked "whether it is a violation of the Rules of Professional Conduct for an attorney to agree to indemnify the opposing party for debts owed by the attorney's client" and "whether it is a violation for an attorney to request or demand that another attorney agree to such indemnification." Missouri SupCt, Advisory Committee, Op. 125 (2008). That committee advised "[i]f a client owes a debt to a third party who expects payment from the client's recovery by settlement or judgment, an attorney may not agree to pay the third party from the attorney's own funds, if the client does not pay the third party." Further, the committee advised that "[b]ecause an attorney who agrees to indemnify an opposing party will violate Rule 4-1.8(e), it is a violation for another attorney to request or demand that an attorney enter into such an agreement. The second attorney would violate Rule 4-8.4." Id.

A North Carolina ethics committee advised that under Rule 5.1(b) of the North Carolina Rules of Professional Conduct a lawyer for a personal injury client may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers as part of the settlement of the client's claims. North Carolina State Bar Assn. Op. 228 (1996).

A South Carolina ethics committee advised that "[a]n attorney may not agree to serve as an indemnitor on behalf of her client to protect released parties in a settlement against lien claims asserted by third parties regarding settlement proceeds." South Carolina Bar, Op. 08-07 (2008).

In Tennessee, an ethics committee noted that "[r]equiring a plaintiff's lawyer to enter agreements posed in the inquiry, particularly requiring that the attorney indemnify and/or hold harmless any party being released or subrogation interest holder from medical

expenses or liens, creates a conflict between the interests of the plaintiff's attorney and those of their client." Tennessee SupCt, Board of Professional Responsibility, Op. 2010-F-154 (2010). The committee advised that "an attorney cannot ethically agree to such agreements and/or clauses." The committee cited Rules 1.7(b), 2.1, 1.2 and 1.8(e). Id.

A Wisconsin ethics committee was asked: "Do any standards of professional conduct preclude attorneys from proposing, demanding and/or entering into settlement agreements that include indemnification and hold harmless provisions binding an attorney to personally satisfy any unknown lien claims against the settlement funds or property?" State Bar of Wisconsin, O. E-87-11. The committee advised that "inclusion of such indemnification and hold harmless provisions in settlement agreements is improper" under both the Code of Professional Responsibility and the Rules of Professional Conduct for Attorneys. Id. "Accordingly, lawyers may not propose, demand or enter into such agreements." Id.

Conclusion

In conclusion, the Board advises as follows. It is improper for a plaintiff's lawyer to personally agree, as a condition of settlement, to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such agreements are not authorized by Prof. Cond. Rule 1.15(d) and violate Prof. Cond. Rules 1.8(e) and 1.7(a)(2). Further, it is improper for a lawyer to propose or require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such conduct violates Prof. Cond. Rule 8.4(a). The Board recommends that this advisory opinion be prospective in application.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 98-F-141

Inquiry is made about the ethical propriety of certain types of clauses included in releases signed to document settlement of personal injury cases.

The inquiring attorney has encountered certain clauses included in releases prepared for settlement of medical malpractice and other personal injury actions.

The four types of clauses mentioned by the inquiring attorney include confidentiality clauses, clauses requiring plaintiff's counsel to become a party to a release, clauses releasing the defense attorney in addition to the defendant, and clauses restricting the plaintiff or plaintiff's counsel from using case information to assist other litigants or claimants.

Confidentiality Clauses

Confidentiality clauses are provisions in a release which provide that the terms and conditions of the settlement are confidential and that the plaintiff and plaintiff's counsel will not reveal the terms and conditions of the settlement. The inquiring attorney states that confidentiality clauses are usually not negotiated and that they are forced upon the plaintiff after a settlement has been reached. Releases are contracts. Our understanding of contract law is that an acceptance which does not mirror the offer is a counter offer. A prohibition against negotiation of a release containing a confidentiality clause is inappropriate. No disciplinary rule prohibits such clauses.

The inquiring attorney makes a public policy argument supporting a total ban on confidentiality agreements. Those arguments are more properly addressed to the Supreme Court. The function of an ethics opinion is not to make public policy.

Clauses requiring plaintiff's counsel to become a party to a release

The attorney's signature on a release should vouch only for the fact that the client releases the defendant. A requirement that a plaintiff's attorney become a party to a release might create

conflict of interest between plaintiff's attorney and the plaintiff in violation of DR 5-101(A). Therefore, these clauses are prohibited except in cases where the plaintiff's attorney releases a claim for attorney fees.

Clauses releasing the defense lawyer in addition to the defendant

Just as in the case of a plaintiff's attorney, defense counsel is not a proper party to a release except as the representative of the client. It is our opinion that plaintiff's counsel would be justified in refusing to negotiate such a term in most circumstances.

Clauses restricting plaintiff or plaintiff's counsel from using case information to assist other litigants or claimants

DR 1-208(B) provides that:

> "In connection with a settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right to practice law."

As to existing clients, inclusion of such a clause in a release could be construed as the settlement of one client's case to the detriment of another client's case. Such a clause would constitute representation of differing interests in violation of DR 5-105.

As to future clients, ABA Formal Ethics Opinion 93-371 provides that it is ethically inappropriate to propose as part of a settlement agreement a restriction of a plaintiff's attorney from representing future claimants against the same defendant. Such clauses are ethically inappropriate.

ETHICS COMMITTEE:
Herman Morris, Jr, Chair
Frankie E. Wade
James M. Glasgow, Jr.

APPROVED AND ADOPTED BY THE BOARD

This 4th day of February, 1998.

Opinion No. 1 of 2005

Editor's Note: The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The Committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.

In recent years some defense attorneys and insurance companies have begun seeking a promise of indemnity from the plaintiff's attorney as well as the client. Those paying to resolve the claim are understandably interested in eliminating or reducing any continuing responsibility from the incident. That would include potential exposure to third parties pursuing subrogation for benefits extended to plaintiff. If the settling party is later forced to satisfy the subrogation lien, it may be difficult to obtain reimbursement from the plaintiff. Hence, a commitment of personal responsibility from the attorney may effectively minimize the risk. That attorney may or may not be willing to assume such risk, depending on his relationship with the client, the extent to which he feels comfortable that all such liens are known and will be satisfied, and his views as to the ethics of such a requirement. Attorneys may, in fact, reject the request, but the question is whether it is ethical for the attorney to sign such agreements.

It is possible all terms of the offered settlement may be acceptable to the client and yet the settlement is lost solely because his attorney refuses to assume that risk. The attorney may believe the offer is otherwise fair and in the client's best interests but recommend it be rejected only to avoid his own exposure for unpaid liens. In some cases the lien or unpaid claim may be substantial in amount but be unknown to the attorney.

The Indiana State Bar Association Legal Ethics Committee ("Committee") has been asked for its opinion as to whether the Indiana Rules of Professional Conduct ("Rules") permit plaintiff's counsel to execute a settlement agreement requiring counsel to hold harmless and indemnify the defendant, defendant's insurer and defense counsel from any subrogation liens and/or third-party claims.

Although the Committee has been unable to find any reported judicial opinions squarely on point, the Committee is nevertheless of the opinion that the practice violates the Rules on several grounds. They include:

- Rule 1.2(a) obligates the attorney to abide by the client's decision whether to settle a matter. That obligation can be compromised by an offer that injects the attorney's own financial exposure into the process;
- Rule 1.7(a)(2) prohibits an attorney from representing a client if there is a significant risk the representation will be materially limited by the attorney's own interest. Acceptance of an otherwise favorable settlement that hinges on the attorney assuming uncertain personal exposure may render the attorney's interests in conflict with those of the client;
- Rule 1.8(e) prohibits an attorney from providing financial assistance to a client beyond the advancement of costs and expenses of litigation. A promise of indemnity may effectively make the attorney a guarantor of the client's legal obligations, which is not the type of assistance permitted by the rule;
- Rule 2.1(a) requires the attorney to exercise independent professional judgment in representing a client. Forcing the attorney to weigh the settlement's benefits to the client with his own personal risk places an inappropriate burden on the essential element of independence; and
- Rule 1.16 prohibits an attorney from representing a client if the representation violates the Rules. If any concern listed above violates the Rules, termination of representation is required. Withdrawal at the end of an otherwise successful settlement negotiation is contrary to the interests of the client, the attorney and justice.

Rule 1.15(d) obligates the attorney to promptly deliver to a third person any funds or other property that the third person is entitled to receive upon settlement of an injury claim. *See, e.g., In re Cassady*, 814 N.E.2d 247 (Ind. 2004) (attorney disciplined for not following a letter of protection he issued to client's doctor promising to honor unpaid medical bills). But *Cassady* and its progeny deal with attorneys who violated a promise to respect the third-party's interest in the settlement proceeds. Counsel are often notified by those asserting liens against settlement proceeds or claiming to be owed for services rendered, but that is not always the case. Despite the exercise of due diligence, they may not know the identity of all lienholders and third-party providers and the extent of their interests. The extent of an attorney's duty to locate all lienholders and other providers is at best unclear.

Courts are divided as to whether Medicare and Medicaid benefits may be recovered from the claimant's attorney if not reimbursed from the settlement proceeds. Interpreting 42 C.F.R. §411.24(g), compare *U. S. v. Sosnowski*, 822 F.Supp. 570 (W.D. Wisc. 1993) (recognizing the validity of Medicare's claim against the plaintiff's attorney for satisfaction

of its claim) with *Zinman v. Shalala*, 835 F.Supp. 1163 (N.D. Cal. 1993) (holding that Medicare does not truly possess a lien, just the right to bring an action against any entity responsible to pay primarily for the medical expenses). The Medicare and Medicaid contexts, however, are distinguishable because in those contexts counsel has a reliable means of verifying the claimed lien amount.

Ethics committees from at least three other state bar associations have reached the same conclusion as this advisory opinion. *See*, State Bar of Arizona (Opinion No. 03-05, August 2003) (concluding "[a] claimant's attorney may not ethically enter into any settlement that would require the attorney to indemnify or hold the Releasee harmless from any lien claims."); Kansas State Bar (Ethics Advisory Committee Op. 01-05, May 23, 2002) (holding that such agreement "places the lawyer in a position where he or she creates a conflict of interest between the client and the insurance company and insured, and/or the lawyer's own interests."); and North Carolina State Bar (Ethics Opinion RPC 228, July 26, 1996) (expressing that "a lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers.").

In conclusion, the Committee is of the opinion that non-Medicare and Medicaid settlement agreements that require a counsel to hold harmless and indemnify the opposing party from subrogation liens and/or third-party claims violate our Rules.

Ethics Opinions

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RPC 228

July 26, 1996

Editor's Note: This opinion was originally published as RPC 228 (Revised).

Indemnifying the Tortfeasor's Liability Insurance Carrier for Unpaid Liens of Medical Providers as a Condition of Settlement

Opinion rules that a lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers.

Inquiry:

Attorney A represents Client A who was injured in an automobile collision caused by the negligence of Mr. X. Mr. X has liability insurance with Insurance Carrier. Attorney A negotiated a settlement of Client A's claim with Insurance Carrier for a sum certain. However, Insurance Carrier's settlement offer is conditioned upon the execution by Attorney A and Client A of an indemnity agreement in addition to the traditional general release. In the indemnity agreement, Attorney A would agree to indemnify Insurance Carrier against all claims Insurance Carrier might sustain as a result of any outstanding medical lien incurred by Client A as a result of the accident. The agreement requires Insurance Carrier to notify Attorney A of all medical provider claims or liens of which Insurance Carrier has actual or constructive knowledge. Is it ethical for Attorney A to sign the indemnity agreement as a part of the settlement of Client A's claim?

Opinion:

No. Rule 5.1(b) of the Rules of Professional Conduct.

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Ethics Opinions

03-05: Conflicts of Interest; Settlements; Creditors of Client; Indemnify Releasee; Liens

Print Opinion

08/2003

A claimant's attorney may not ethically enter into any settlement agreement that would require the attorney to indemnify or hold the Releasee harmless from any lien claims against the settlement proceeds.

FACTS[1]

According to the inquiring attorneys, defendants in civil cases, through the defense attorney, have demanded, as a condition of settlement, that the claimant's attorney, in addition to the claimant, agree to indemnify the defendant, the defendant's insurer and/or the defendant's attorney, from any claims arising from liens asserted against the claimant's settlement funds.

QUESTION PRESENTED

May an attorney ethically sign a Release or Settlement Agreement that requires the attorney, in addition to the client, to indemnify the Releasees, or to hold the Releasees harmless, from any liens asserted or claimed against the client's settlement funds?

RELEVANT ETHICAL RULES

ER 1.2. Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

* * * *

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

ER 1.7. Conflict of Interest: General Rule

* * * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

ER 1.8. Conflict of Interest: Prohibited Transactions

* * * *

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

* * * *

ER 1.15. Safekeeping Property

* * * *

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

* * * *

ER 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

* * * *

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interest of the client, or if:

* * * *

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;

* * * *

ER 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

* * * *

RELEVANT ARIZONA ETHICS OPINIONS

There are no prior Arizona Formal Opinions that address this issue. However, Ariz. Ops. 98-06, 88-02 and 88-06 and the case of *In re Augenstein*, 177 Ariz. 581, 582, 870 P.2d 399, 400 (1994), set forth an attorney's ethical obligations regarding the retention and disbursement of funds that may be subject to valid or disputed medical liens.

OPINION

An injured client's medical expenses in a civil action may be substantial and represent a significant portion of the claimant's recovery by settlement or judgment. All or part of those expenses may have to be repaid to a health insurer, government agency or healthcare provider pursuant to a statutory or common law lien.

The settlement of an injury claim is made between the parties, that is, the injured claimant and the alleged tortfeasor (as well as the tortfeasor's insurance carrier, if there is one). Out of the settlement funds, the claimant must pay his or her own attorneys the agreed-upon fee, and reimburse the costs advanced by the attorneys. The claimant must also satisfy, by payment in full or compromise, all valid liens out of the claimant's share of the settlement proceeds.

If a claimant refuses to repay a lien, or is unable to do so (for example, because the client has spent the client's share of the properly distributed settlement proceeds), it is possible that a lien holder might make a claim, or file suit, against the Releasees for payment of those

liens, as is permitted by A.R.S. § 33-934. The recourse of the Releasees would ordinarily be against the claimant who signed the settlement agreement and agreed to indemnify or hold the Releasees harmless against any and all lien claims (or it might be against the alleged lien holder if the lien claim was invalid or unenforceable against the Releasees or against the plaintiff's attorney if disputed funds were improperly released to the claimant).

However, the desire of the Releasees not to be involved in subsequent litigation over liens, after settlement of the underlying claim, has led them not only to insist that the claimant hold them harmless, or indemnify them, against such claims as a condition of settlement, but to request or demand that the claimant's attorneys do so as well.

The mere request that an attorney agree to indemnify Releasees against lien claims creates a potential conflict of interest between the claimant and the claimant's attorney. The attorney's refusal, for ethical reasons, to accede to such a demand as a condition of settlement could prevent the client from effectuating a settlement that the client otherwise desires.

The insistence upon an attorney's agreement to indemnify as a condition of settlement could, for example, cause the lawyer to recommend that the client reject an offer that would be in the client's best interest because it would potentially expose the lawyer to the payment of hundreds of thousands of dollars in lien expenses, or litigation over such lien expenses.

The attorney's acceptance of such a condition would also create a conflict of interest with an existing client under ER 1.7 because the client's failure or refusal to repay a lien could make the client's lawyer its guarantor.

That might materially limit the representation by virtue of the lawyer's own interest in having the client (rather than the lawyer) pay the liens in full. Even if the lawyer were willing to accept that potential financial burden, and even if the lawyer were ethically permitted to provide such financial assistance, such an agreement might compromise the lawyer's exercise of independent professional judgment and rendering of candid advice in violation of ER 2.1.

While ER 1.2 requires an attorney to abide by a client's decision whether to accept an offer of settlement, a settlement agreement that requires the attorney to indemnify, or hold the Releasees harmless, violates ER 1.8.

Since, under ER 1.8, an attorney cannot ethically provide financial assistance to a client by paying, or advancing, the client's medical expenses before or during litigation, an attorney cannot ethically agree, voluntarily or at the client's or Releasees' insistence, to guarantee, or accept ultimate liability for, the payment of those expenses.

Such financial assistance in the guise of an agreement of indemnification could encourage prospective clients to seek legal counsel for improper reasons, conduct that has resulted in disciplinary measures. *See Matter of Carroll*, 124 Ariz. 80, 602 P.2d 461 (1979). (Suspending attorney from practice for one year for, among other things, contingency fee agreement that relieved client of obligation to repay costs advanced if there was no recovery.)

A client's insistence upon the acceptance of a settlement offer containing such a condition would require the lawyer to withdraw from representation since it would result in a violation of the Rules of Professional Conduct. ER 1.16(a).

In short, such agreements to indemnify would violate several provisions of the Rules of Professional Conduct. Both the Kansas State Bar (in Ethics Advisory Committee Op. 01-05 (May 23, 2002)), and the North Carolina State Bar (in Ethics Opinion RPC 228 (July 26, 1996)) have reached the same conclusion.

CONCLUSION

A claimant's attorney may not ethically enter into any settlement that would require the attorney to indemnify or hold the Releasee harmless from any lien claims.

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[1] Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2003

IL Adv. Op. 06-01, 2006 WL 4584284 (Ill.St.Bar.Assn.)

Illinois State Bar Association

*1 TOPICS: ADVANCING CLIENT'S EXPENSES AND COSTS; SAFEKEEPING OF PROPERTY

ISBA Advisory Opinion on Professional Conduct

Opinion No.
06
-
01

July 2006

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

DIGEST: A lawyer may not provide a personal guarantee that s/he will pay the liens and subrogation claims chargeable against a client's settlement proceeds.

REF.: Illinois Rules of Professional Conduct, Rules 1.2(a), 1.7(b), 1.8(d), 1.15(a), 1.15(b)ISBA Opinion Nos. 92-9, 95-6Arizona Ethics Opinion No. 03-05Kansas Bar Association Legal Ethics Opinion No. 01-05North Carolina State Bar Opinion RPC 228Western States Insurance Co. v. Olivero, 283 Ill. App. 3d 307, 670 N.E.2d 333, 218 Ill. Dec. 836 (3d Dist. 1996)

FACTS

During the pendency of plaintiff's personal injury lawsuit, various medical care providers perfected their liens against possible proceeds of the suit for the unpaid medical bills. Additionally, plaintiff's automobile insurance carrier asserted a subrogation claim for the amounts paid by it to other care providers under the medical payments provision of the policy.

Upon settlement of the case, defendant's lawyer submitted to plaintiff's lawyer a general release to be signed by plaintiff and a personal guarantee to be signed by plaintiff's lawyer indicating that plaintiff's lawyer would satisfy all pending liens and subrogation claims out of the settlement proceeds. The release and personal guarantee also provided that both the plaintiff and the plaintiff's lawyer would indemnify defendants against any claims asserted by the lienholders and subrogation claimant.

Defendant's lawyer advised that s/he required plaintiff's lawyer's personal guarantee that all lien and subrogation claims would be paid based on defendant's concern that plaintiff would not pay the medical care providers or the automobile insurance company and, as a result, the lien/subrogation claimants would seek to collect the amounts owed to them from defendant.

QUESTION

Whether the Illinois Rules of Professional Conduct prohibit a lawyer representing a party receiving money in a settlement from entering into an agreement in which that lawyer provides his/her personal guarantee that the settlement funds will be paid to all persons who have a claim on the funds and indemnifies the defendant against such claims?

OPINION

Recently there has been a proliferation of liens and subrogation claims in personal injury lawsuits. It is not unusual to find several such claims in a single matter. These claims can be statutory, contractual, or equitable in nature and provide their holders with legal rights to be reimbursed for the amounts which they have advanced on behalf of the plaintiff. The disposition of these various third party claims has sometimes proven to be a hindrance to the resolution of such lawsuits.

*2 To address the issue, some lawyers request a personal guarantee and indemnification that the liens/subrogation claims will be paid. These personal guarantees have, at times, been proposed by the lawyer representing the plaintiff (to ensure a quicker settlement), and at other times have been requested by the lawyer representing the defendant (to limit potential future exposure to unreimbursed lien claims).

In response to the inquiry at hand, a lawyer has an obligation under Rule 1.15 of the Illinois Rules of Professional Conduct to safekeep property of others, including settlement funds. Rule 1.15 (a) provides, in part, "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property."

Rule 1.15(b) reads:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by an agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or the third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Accordingly, under Rule 1.15(b), a lawyer representing a plaintiff has an obligation to segregate the settlement funds over which a third party has a claim, to notify persons who have an in interest in those funds (including lien/subrogation claimants) and then distribute the funds owed to said persons.

This obligation was addressed in *Western States Insurance Co. v. Olivero*, 283 Ill. App. 3d 307, 670 N.E.2d 333, 218 Ill. Dec. 836 (3d Dist. 1996). In that case, plaintiff's lawyer settled a personal injury case, received defendant's settlement check - which identified the payees as the plaintiff, plaintiff's lawyer, and the medical insurance company subrogation claimant obtained the endorsements of the payees on that check (including the subrogation claimant), and deposited the funds into a trust account.

Thereafter, however, plaintiff's lawyer did not disburse those monies to the subrogation holder. A few months after the funds had been received by the plaintiff's lawyer, the client filed for bankruptcy and the lawyer argued that the Bankruptcy Code prevented release of the funds to the subrogation claimant (although the lawyer released a share of the funds to the client and the remainder to himself to pay for fees and costs).

The court concluded that plaintiff's lawyer was directly liable to the third party subrogation claimant because the lawyer wrongfully released funds and failed to pay the subrogation claim. The court further noted that "under

the Rules of Professional Conduct [citing Rule 1.15(b)], the [plaintiff's lawyer] had an affirmative duty to disburse [the subrogation claimant's] share of the settlement proceeds." 283 Ill. App. 3d at 310.

*3 Based on language of Rule 1.15 and the court's opinion in *Western States Insurance Co. v. Olivero*, it is clear that a lawyer representing a plaintiff is ethically obligated to identify the portion of funds which are due and owing to a lien/subrogation claimant and to ensure that those funds are properly paid to those entities.

Additionally, pursuant to Rule 1.8(d) of the Illinois Rules of Professional Conduct, a lawyer is prohibited from advancing or guaranteeing financial assistance to a client, unless such advance is for payment of litigation expenses. Rule 1.8(d) of the Rules of Professional Conduct, Conflict of Interest: Prohibited Transactions, reads:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including, but not limited to, court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence if:
> (1) the client remains ultimately liable for such expenses; or
> (2) the repayment is contingent on the outcome of the matter; or
> (3) the client is indigent.

The question of whether a lawyer is prohibited from guaranteeing the payment of the client's medical care providers'/insurers' claims for reimbursement from the proceeds of a lawsuit is dependent on whether that guarantee constitutes "financial assistance" given "to" the client.

This Committee has previously interpreted Rule 1.8(d) to prohibit a lawyer from paying his/her client's medical expenses. ISBA Opinion No. 95-6. Accordingly, if the client of the inquiring lawyer had requested the lawyer to pay the client's medical bills, directly, that would be a clear violation of Rule 1.8(d).

In this instance, however, the lawyer will not be assuming the primary responsibility to pay the bills, but, rather, will guarantee that the bills will later be paid out of the settlement proceeds and will indemnify the defendants if those claims were not paid.

In ISBA Opinion No. 92-9, this Committee found there was no violation of Rule 1.8(d) when a lawyer helped a client obtain financing from a third party to pay for the costs of legal representation. In that opinion the lawyer's "assistance" was permissible because the lawyer was not directly involved in the making or guarantee of the loan. Instead, the lawyer provided information and help to the client and the third party which permitted the financing.

Under the facts presented, the plaintiff's lawyer is not directing his guarantee to the client or to the medical care providers/insurers. Instead, the lawyer is making the guarantee to the defendant. Because the lawyer's guarantee of payment is not provided to the client, there is no direct financial assistance to the client. Nevertheless, the Committee notes that Rule 1.8(d) does not distinguish between "direct" and "indirect" financial assistance.

*4 If the plaintiff's lawyer does guarantee the payment of the lien/subrogation claims - which the plaintiff would ordinarily be required to pay - the guarantee is a plaintiff benefit. Such a benefit has real value to the plaintiff in that the lawyer's guarantee ensures that the settlement will take place more smoothly and promptly. Moreover, in the event that a problem arises after the settlement, the plaintiff will be benefited because the settling defendant would have little incentive to pursue the plaintiff to obtain its recovery. Instead, the defendant would much more readily look to the lawyer who provided the guarantee to reimburse the lien or subrogation claim.

Based on the foregoing, a plaintiff's lawyer's personal guarantee to pay the liens and subrogation claims against his client (even if such payments are to be made by the settlement funds) constitutes the provision of financial assistance to his client and violates Rule 1.8(d) of the Rules of Professional Conduct.

Providing a personal guarantee that lien/subrogation claims will be paid does not fall within the exception to Rule 1.8(d) that "a lawyer may advance or guarantee the expenses of litigation." The Rule's reference to such expenses relates to those costs which are important to ensure that the litigation can be pursued. Providing a guarantee that liens or subrogation claims will be paid would be done in resolution of the litigation and has nothing to do with ensuring that the litigation may be properly prosecuted. Therefore, such claims are not "expenses of litigation."

Our conclusion that Rule 1.8(d) prohibits these transactions also finds support in conclusions reached in Arizona Ethics Opinion No. 03-05. Arizona's professional conduct rule, Rule 1.8(e), relating to the provision of financial assistance to clients is similar to Illinois Rule 1.8(d). The Arizona Committee on the Rules of Professional Conduct determined that a lawyer representing a plaintiff would violate Arizona Rule 1.8 if that lawyer entered into an agreement to personally indemnify the defendants from a lien claim. The rationale expressed therein was that such an indemnification is the provision of financial assistance to the client.

Finally, the Committee also notes that three other states have analyzed this issue under the general conflict of interest provisions found in Rule 1.7(b). Illinois Rule 1.7 (b) reads:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after disclosure.

Those states have concluded that a lawyer's personal guarantee to pay liens/subrogation claims violates Rule 1.7(b). Based on this Committee's conclusion that the more specific conflict of interest provision of Rule 1.8(d) prohibits such transactions, no position is taken on whether Rule 1.7(b) would also bar such personal guarantees.

IL Adv. Op. 06-01, 2006 WL 4584284 (Ill.St.Bar.Assn.)

END OF DOCUMENT

2008 WL 6014026 (Missouri S.Ct. Adv. Com.)

Missouri Supreme Court Advisory Committee
State of Missouri

*1 AGREEING TO INDEMNIFY OPPOSING PARTY AS A TERM OF SETTLEMENT

Formal Opinion No.
125

November 13, 2008

We have been asked whether it is a violation of the Rules of Professional Conduct for an attorney to agree to indemnify the opposing party for debts owed by the attorney's client. We have further been asked whether it is a violation for an attorney to request or demand that another attorney agree to such indemnification.

Rule 4-1.8 (e) provides:

> (e) **A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation**, except that:
> (1) a lawyer may advance court costs and expenses of litigation, including medical evaluation of a client, the repayment of which may be contingent on the outcome of the matter; and
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(emphasis added).

Financial assistance can take many forms. It includes gifts, loans, and loan guarantees. Any type of guarantee to cover a client's debts constitutes financial assistance. If a client owes a debt to a third party who expects payment from the client's recovery by settlement or judgment, an attorney may not agree to pay the third party from the attorney's own funds, if the client does not pay the third party.

We note that this opinion is consistent with opinions from Illinois, Arizona, Florida, and North Carolina. [FN1]

Under Rule 4-1.15(f):

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as provided in this Rule 4-1.15 or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

If the third parties have a legal interest in the particular funds the attorney is holding and the attorney has notice of that legal interest, the attorney must either disburse the funds to the third party or hold the funds in trust for a reasonable time to allow the dispute between client and the third party to be resolved. If the dispute is not resolved within a reasonable time, the attorney usually [FN2] must interplead the funds.

An attorney may include a provision in a settlement agreement in which the attorney agrees to perform obligations that the attorney already has under the Rules of Professional Conduct. An attorney may not assume the further obligation to indemnify the opposing party if the attorney ethically disburses the funds to the client but the client does not use the funds to pay a debt to a third party.

A client may owe a debt to a third party under circumstances that will not require an attorney to hold the amount of the debt in the trust account, if the client does not want the attorney to disburse the funds to the third party. A debt, even one reduced to a judgment, does not establish a legal claim against the particular funds held by the attorney. However, a valid lien against, or garnishment of, those funds would place the attorney under an obligation to hold the funds in trust if the client directs the attorney not to disburse the funds to the third party.

*2 Because an attorney who agrees to indemnify an opposing party will violate Rule 4-1.8(e), it is a violation for another attorney to request or demand that an attorney enter into such an agreement. The second attorney would violate Rule 4-8.4, which provides, in part:

> It is professional misconduct for a lawyer to:
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another ....

Therefore, it is a violation of Rule 4-8.4(a) for an attorney to propose a settlement that includes a provision that would involve a violation of any of the Rules of Professional Conduct by another attorney.

FN1. IL Adv. Op. 06-01, 2006 WL 4584284 (Ill.St.Bar.Assn.); Arizona Ethics Opinion No. 03-05; FL Eth. Op. 70-8, 1970 WL 10144 (Fla.St.Bar Assn.); 2000 NC Eth. Op 4, 2001 WL 473974 (N.C.St.Bar.)

FN2. Exceptions would include instances when the amount in dispute is less than the cost of the interpleader action or when other litigation that will resolve the dispute has already been filed.

2008 WL 6014026 (Missouri S.Ct. Adv. Com.)

END OF DOCUMENT

SC Adv. Op. 08-07, 2008 WL 8089791 (S.C.Bar.Eth.Adv.Comm.)

South Carolina Bar Ethics Advisory Committee

Ethics Advisory Opinion
08
-
07

August 22, 2008

Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

Full Text
Applicable SC Rules of Professional Conduct: 1.7; 1.8(e); 2.1
Facts
Attorney A orally settled an automobile accident case for a sum exhausting most of the limits of an insurance policy applicable to the accident. Attorney B, the defense counsel in the case, sent a letter confirming the settlement containing the following language:

. . . you will be solely responsible for satisfying any subrogation lien in favor of Medicare and/or Medicaid at the time of disbursement of the settlement proceeds. To that end, I need written confirmation that you and your client will indemnify, defend and protect the insurance carrier, my law firm, and the Defendant in the event there is any claim or lawsuit by Medicaid and/or Medicare in connection with any subrogated interest that either entity may claim to the settlement proceeds. I would appreciate your confirming that understanding for my file by signing and dating this letter and faxing it back to me.

This language was not part of the settlement negotiation between the parties.

Question
Is it unethical for Attorney A to agree to language in a settlement agreement obligating her or her firm to indemnify Attorney B and his clients for any subrogation lien claims asserted against them with regard to payment of the settlement proceeds?

Summary
An attorney may not agree to serve as an indemnitor on behalf of her client to protect released parties in a settlement against lien claims asserted by third parties regarding settlement proceeds.

Opinion

Whether the parties have a binding settlement that includes the language set forth above is a legal question that

is beyond the scope of the Committee to address. Further, the legal obligations to others, if any, of a lawyer receiving and disbursing settlement funds subject to or potentially subject to a lien are beyond the scope of the Committee's authority to address. Rule 1.15 (a), (d), (e), and (f), and comment 4 to that rule set forth the ethical requirements for lawyers when handling the disbursement of disputed funds subject to claims of third parties such as medical providers. Case law addresses the legal liability of attorneys for failing to properly account for and disburse settlement funds.

The ethical question posed is narrower: may Attorney A ethically agree to serve as an indemnitor of Attorney B and his clients on behalf of her client. She may not.

The request that Attorney A indemnify Attorney B and his clients is improper for three reasons.

First, as pointed out in Arizona State Bar Ethics Adv. Op. 2003-05, the demand creates a potential conflict between Attorney A and her client under Rule 1.7. The injured party's medical expenses associated with a matter may be substantial and represent a significant portion of the money obtained by settlement or judgment. As noted by the Arizona Bar:

*2 The mere request that an attorney agree to indemnify Releases against lien claims creates a potential conflict of interest between the claimant and the claimant's attorney. The attorney's refusal, for ethical reasons, to accede to such a demand as a condition of settlement could prevent the client from effectuating a settlement that the client otherwise desires.

The insistence upon an attorney's agreement to indemnify as a condition of settlement could, for example, cause the lawyer to recommend that the client reject an offer that would be in the client's best interest because it would potentially expose the lawyer to the payment of hundreds of thousands of dollars in lien expenses, or litigation over such lien expenses.

Second, even if it a lawyer were permitted to and was willing to enter into such an agreement to accept such a financial burden, acceptance of such a duty might compromise the lawyer's exercise of independent professional judgment in violation of Rule 2.1.

Third, Rule 1.8 prohibits providing financial assistance to clients with certain specified exceptions. Payment of general medical treatment, apart from treatment necessary to pursue claims, is not generally permitted. See S.C. Ethics Adv. Ops. 90-40, 89-12. Agreeing to act as an indemnitor, and hence ultimate guarantor of payment of a client's medical expenses, as a condition of settlement indirectly provides financial assistance that could not otherwise be provided directly by the attorney to the client.

Other states considering the issue have found such indemnity agreements unethical. Ariz. Ethic Adv. Op. 2003-05, N.C. RPC 228 (July 26, 1996), Kan. Ethics Adv. Op. 01-05.

SC Adv. Op. 08-07, 2008 WL 8089791 (S.C.Bar.Eth.Adv.Comm.)

END OF DOCUMENT

TN Eth. Op. 10-F-154, 2010 WL 3767993 (Tenn.Bd.Prof.Resp.)

Board of Professional Responsibility of the Supreme Court of Tennessee

Formal Ethics Opinion Number
2010
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F
-
154

September 10, 2010

Inquiry is made regarding the propriety of requesting or requiring plaintiffs attorney to enter into agreements or releases which require the attorney to insure payment of medical bills or liens or to indemnify and hold harmless any party being released.

Inquiry is made as follows:

> May a plaintiffs attorney be required to execute a Release which requires that attorney to ensure that medical expenses and liens applicable to his or her client are paid from the settlement proceeds, when the representation is made during settlement negotiations that an agreement with the medical lien holder has been reached and payment will be made from the settlement proceeds?
>
> May an attorney representing a plaintiff in personal injury litigation be required to indemnify and hold harmless any party being released as a result of the settlement negotiations from any medical expenses and/or liens which that attorney has represented will be satisfied and/or settled from applicable settlement proceeds, or which the law requires to be satisfied from any settlement?

It must first be determined to what extent a plaintiffs attorney is obligated to withhold settlement proceeds from the client to pay outstanding medical bills or liens.

Rules of Professional Conduct (RPC) 1.15(c), as amended July 8, 2009, provides:

> (c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such funds or other property. If a dispute arises between the client and a third person with respect to their respective interests in the funds or property held by the lawyer, the portion in dispute shall be kept separate and safeguarded by the lawyer until the dispute is re- solved.

(underlining added)

Comment [10] to RPC 1.15 provides:

> Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's

> custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. If not inconsistent with the interests of the client, the lawyer may file an interpleader action concerning funds in dispute between the client and a third party.

(underlining added)

Tennessee Formal Ethics Opinion 87-F-109, adopted September 16, 1987, considered this issue prior to the adoption of the Rules of Professional Conduct and provided as follows:

> *2 This ethics opinion holds that a lawyer who has notice that a creditor of the client has a lien or assignment to the funds held on behalf of the client is ethically obligated to segregate and retain the disputed funds until the dispute is resolved. Payment of the disputed amount into court for a resolution of the matter is permissible after the parties have had a reasonable opportunity to resolve the dispute.

If there is no legitimate dispute about who is entitled to all or part of the funds in the attorney's possession, the attorney must disburse the undisputed portion of the funds to the client or the third person as is appropriate. D.C. Ethics Op. 293 (1999). If, however, the attorney is aware that a third person has a "just claim" for all or part of the funds in the attorney's possession to which "applicable law" imposes "a duty," the attorney may not ignore the third person's interest. [FN1] RPC 1.15, cmt. [10]. If the third party has a "just claim" to which "applicable law" imposes a duty, RPC 1.15(c) ethically obligates the attorney to disregard his client's demands for the funds in their possession and to hold the funds until the dispute is resolved. A "just claim" which Rule 1.15 obligates the attorney to honor is one which relates to the particular funds in the lawyer's possession. Wise. Ethics Op. E-09-01 (2009); Ohio Ethics Op. 2007-07 (2007); Ariz. Ethics Op. 98-06 (1998); D.C. Ethics Op. 293 (1999); Conn. Informal Op. 95-20 (1995). The phrases "just claims" and "duty under applicable law" have been construed to mean that the only type of third party "interest" which the attorney should preserve for a third person is a matured legal or equitable lien on the disputed funds or interest for which the attorney has agreed to serve as escrow agent. Ohio Ethics Op. 2007-7 (2007); R.I Ethics Op. 2007-02 (2007); Pa. Ethics Op. 2003-4 (2003); Utah Ethics Op. 00-04 (2000); D.C. Ethics Op. 293 (1999); Ariz. Ethics Op. 98-06 (1998). The term "interest" has been deemed to extend to a valid assignment by the client and to rights created by order of a court. Pa. Ethics Op. 2003-4 (2003).

The mere assertion, however, by a third person or entity that they are entitled to funds in the possession of the attorney does not trigger the Rule 1.15 obligation of the attorney to remit the funds, to the third person or to safeguard the funds until the dispute is resolved. [FN2] Debts of the client which merely come to the attention of the attorney are not "interests" protected by Rule 1.15. A lawyer is not required to pay the general unsecured creditors of the client, including judgment creditors, who have not attached or garnished the funds in the lawyer's possession. Ariz. Ethics Op. 98-06 (1998); D.C. Ethics Op. 293 (1999); Va. Legal Ethics Op. 1747 (1992). Absent such an interest, the attorney has no ethical duty to withhold the funds from the client. Pa. Ethics Op. 2003-04 (2003). Unless the lawyer knows that the third person has a just claim, the attorney should deliver the funds to the client. D.C. Ethic Op. 293 (1999).

*3 The determination of whether, and to what extent, the third person's claim rise to the level of a colorable interest which requires protection under Rule 1.15 is a matter of substantive law. Pa. Ethics Op. 2003-4 (2003); R.I. Ethics Op. 95-60 (1996). In performing that analysis, one should consider whether the client signed a third party reimbursement form, participation agreement or other document addressing the right of subrogation, whether the right to subrogation is statutory and/or subject to federal pre-emption, whether the right of subroga-

tion is secured or unsecured and whether the attorney or client has represented to the third party that it would be paid. >> Pa. Ethics Op. 2003-04 (2003). D.C. Ethics Op. 293 (1999) held that the following were "just claims":

(1) an attachment or garnishment arising out of a money judgment against the client;
(2) a statutory lien that applies to the proceeds of the suit being handled by the lawyer;
(3) a court order relating to the specific funds in the lawyer's possession;
(4) a contractual agreement, commonly known as an authorization and assignment, made by the client and joined in or ratified by the lawyer.

It is concluded that RPC 1.15(c) obligates an attorney to pay the settlement funds to the third person or to safeguard the funds until the dispute is resolved if one of the following exist: (1) an attachment or garnishment arising out of a valid judgment relating to disposition of the funds; (2) a valid and perfected statutory, [FN3], [FN4] contractual or judgment lien against the property; (3) a letter of protection or similar obligation specifically entered into to aid in obtaining the funds; (4) a written assignment or authorization signed by the client, counsel or other individual with authority conveying interest in the funds to the third person or entity; or (5) a court order relating to the funds in the attorney's possession.

Arizona Ethics Op. 98-06 (1998) analyzed this issue with respect to twelve different factual scenarios. The opinion held that in situations: (1) in which the attorney had notice of the medical provider's lien signed by the client, but not recorded, (2) in which the medical provider's lien was signed by the client and by the attorney, (3) in which the attorney orally agreed to reimburse the medical provider from settlement proceeds, (4) in which the attorney or. client had signed a letter of protection in favor of the medical provider, (5) in which the client had signed an assignment in favor of the medical provider, or (6) in which both the client and the attorney signed an assignment in favor of the medical provider, the attorney was required to comply with Rule 1.15 to protect the interest of the medical provider. In situation (7) in which a statutory lien was facially incomplete or untimely, but had been properly recorded, the attorney was required by Rule 1.15 to protect the provider's interest by holding the funds in dispute, but could contest the lien by interpleader or other proper means. In situations: (8) in which the attorney was aware of medical services provided by the medical provider because medical bills had been provided to the attorney by the client, but for which the provider had made no demand upon the attorney, (9) in which the medical provider had simply sent copies of the client's medical bills to the attorney, (10) in which the provider simply sent a letter to the attorney demanding payment for medical bills, (11) in which the attorney simply knew that the medical provider had treated the plaintiff, but the medical provider had no lien nor assignment and had taken no other demand action with regard to the bills, or (12) in which the medical provider's lien was not signed by the client nor attorney and was not recorded, the attorney was not required to notify nor disburse funds to the medical provider in compliance with Rule 1.15. The determinations made in the Arizona Opinion are consistent with and adopted in this opinion.

*4 An attorney should not disburse the funds in his possession to a third person if the client contests the issue. [FN5] If the attorney knows of a dispute and has a "good faith doubt" [FN6] as to who is entitled to receive the disputed funds, the attorney must investigate, notify the third party, [FN7] and hold only the disputed funds until the dispute is resolved. The Rules of Professional Conduct do not, however, impose an obligation on the attorney to seek out third parties. Wise. Ethics Op. E-09-01 (2009); Conn. Informal Ethics Op. 95-20 (1995). While the dispute may be resolved by negotiation, arbitration or process of court, if necessary, the attorney cannot make the determination to whom the funds belong. RPC 1.15, cmt. [10], provides that an attorney "should not unilaterally assume to arbitrate a dispute between the client and a third party." Comment [10] further provides that filing an interpleader action is one alternative to resolve the dispute. [FN8] The Rules do not otherwise prescribe the method or forum of resolving the dispute nor impose a duty to initiate action within a particular period

of time. Such issues are controlled by substantive law. Pa. Ethics Op. 2003-4 (2003).

If the attorney ignores a duty owed to a third person and pays the disputed amount directly to the client, the attorney may be held liable to the third person. Such liability is a matter of substantive law beyond the scope of this opinion. Aetna Cas. & Sur. Co. V. Gilreath, 625 S.W.2d 269, 274 (Term. 1981), citing Motors Ins. Corp. v. Blakemore. 584 S.W.2d 204, 207 (Tenn. App. 1978), held:

> ... a lawyer will be held civilly liable to a non-client where he knowingly participates in the extinguishment of a subrogation interest of a non-client third party and delivers to his client funds that he knows belong to the third party and knows or should know, that he has thereby placed the funds beyond the reach of the third party ...

See also, Hankins v. Seaton. 1998 Tenn. App. LEXIS 419 (Tenn. Ct. App. June 25, 1998) (attorney liable for failure to honor a signed subrogation agreement); Greenwood Mills, Inc., v. Burris. et. al., 130 F.Supp.2d 949 (D.C. Term. 2001) (attorney liable for failure to pay ERISA subrogation interest).

Tennessee Formal Ethics Opinion (TFEO) 97-F-141, issued February 4, 1998, addressed clauses proposed by defense attorneys for inclusion in releases to settle personal injury cases. The opinion held, in part:

> The attorney's signature on a release should vouch only for the fact that the client releases the defendant. A requirement that a plaintiffs attorney become a party to a release might create conflict of interest between plaintiffs attorney and the plaintiff in violation of DR 5-101(A). Therefore, these clauses are prohibited except in cases where the plaintiffs attorney releases a claim for attorney fees.

RPC 1.7(b), Conflict of Interest: General Rule, provides in part:

> *5 (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents in writing after consultation.

* * *

Comment [8] to RPC 1.7 provides in part:

> The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client ... If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Arizona Opinion 03-05 (2003) considered the same question posed in the second paragraph of the inquiry herein. The Arizona opinion held, in part:

> The mere request that an attorney agree to indemnify Releasees against lien claims creates a potential conflict of interest between the claimant and the claimant's attorney. The attorney's refusal, for ethical reasons, to accede to such a demand as a condition of settlement could prevent the client from effectuating a settlement that the client otherwise desires.
>
> The insistence upon an attorney's agreement to indemnify as a condition of settlement could, for example, cause the lawyer to recommend that the client reject an offer that would be in the client's best interest because it would potentially expose the lawyer to the payment of hundreds of thousands of dollars in lien expenses, or litigation over such lien expenses.

The attorney's acceptance of such a condition would also create a conflict of interest with an existing client under ER 1.7 because the client's failure or refusal to repay a lien could make the client's lawyer its guarant- or. That might materially limit the representation by virtue of the lawyer's own interest in having the client (rather than the lawyer) pay the liens in full. Even if the lawyer were willing to accept that potential financial burden, and even if the lawyer were ethically permitted to provide such financial assistance, such an agreement might compromise the lawyer's exercise of independent professional judgment and rendering of candid advice in violation of ER 2.1.

While ER 1.2 requires an attorney to abide by a client's decision whether to accept an offer of settlement, a settlement agreement that requires the attorney to indemnify, or hold the Releasees harmless, violates ER 1.8.

Since, under ER 1.8, an attorney cannot ethically provide financial assistance to a client by paying, or advancing, the client's medical expenses before or during litigation, an attorney cannot ethically agree, voluntarily or at the client's or Releasees' insistence, to guarantee, or accept ultimate liability for, the payment of those expenses.

*6 It is concluded that the ethics rules relied upon in Arizona Opinion 03-05 are consistent with Tennessee Rules of Professional Conduct 1.7(b), 2.1, 1.2, and 1.8(e) and that opinion's conclusions are adopted herein. [FN9] Requiring a plaintiffs attorney to enter into agreements posed in the inquiry, particularly requiring that the attorney indemnify and/or hold harmless any party being released or subrogation interest holder from medical expenses or liens, creates a conflict between the interests of the plaintiffs attorney and those of their client. Consistent with TFEO 97-F-141, an attorney cannot ethically agree to such agreements and/or clauses. As discussed herein, the actions which are the subject of the first paragraph of the inquiry are obligations imposed upon the plaintiffs attorney by RPC 1.15(c). The attorney is obligated to safeguard the funds in his possession until any dispute between the client and the third person regarding the funds is resolved. Whether the funds in the attorney's possession rightfully belong to the client or to the third person or entity may not be determined at the time that the release resolving the lawsuit is executed. The attorney cannot be required to breach the ethical obligations imposed upon the attorney by RPC 1.15(c) by signing an agreement regarding disposition of the funds prior to the resolution of the dispute. If the attorney makes misrepresentations in settlement negotiations regarding payment of medical bills or liens, as posed in the inquiries, the attorney's conduct will be subject to Rules of Professional Conduct, including 4.1(a) and 8.4(c), and/or liability pursuant substantive law beyond the scope of this opinion.

APPROVED AND ADOPTED BY THE BOARD

Ethics Committee:

Roger Alan Maness

Virginia Anne Sharber

Thomas Stratton Scott, Jr.

FN1. Ohio Ethics Op. 2007-7 (2007) (when a lawyer knows there is a dispute between a client and a third person who has a lawful claim under applicable law to funds in the lawyer's possession, the lawyer's ethical duty under Rule 1.15 is to notify both the client and the third person and hold the disputed funds in trust until the dispute is

resolved); S.C. Ethics Adv. Op. 05-08 (2005) (lawyer who knows that insurer has actual subrogation claim against settlement proceeds may not pay all proceeds to client but must retain sufficient funds to pay subrogation claim); La. Public Op. 05-RPCC-004 (2005) (lawyer's obligation to third parties is separate and distinct from the obligation to the client and may not be disregarded at the request or direction of the client); N.C Formal Ethics Op. 4 (2001) (attorney may ignore client's instruction to pay proceeds to client only if there is a valid hen or other valid legal assignment of the rights in the proceeds); Ala. Ethics Op. 2003-02 (2003) (rules ethically preclude an attorney from failing or refusing to honor his commitment to pay a client's creditors); Va. Legal Ethics Op. 1747 (1992) (a lawyer who knows that his client has made a valid assignment of rights to the proceeds of a settlement or has allowed for the creation of a consensual lien on settlement cannot disregard the third party assignee or lienholder's rights, notwithstanding a client's directive to do so); Md. Ethics Op. 94-19 (1993) (lawyer must disregard client instruction not to pay creditor where client had a valid agreement with creditor); Md. Ethics Op. 96-16 (1996) (lawyer whose client instructs him not to pay creditor despite client's subrogation agreement with creditor must hold funds until dispute is resolved); Mich. Informal Ethics Op. RI-61 (1990) (lawyer may not disburse to client if aware of outstanding lien; unless resolved, attorney must initiate court proceeding to resolve which portion belong to lien holder and client); R.I. Ethics Op. 95-60 (1996) (lawyer cannot obey client's instruction to refuse reimbursement to health insurer but must notify the insurer and pay the funds in which insurer has legally enforceable interest); R.I. Ethics Op. 95-31 (1995) (lawyer whose client agreed in writing to pay wife one-half of personal injury proceeds must notify the wife and keep disputed portion of proceeds separate until resolution); S.C. Ethics Adv. Op. 94-20 (1994) (if lawyer knows client has executed valid doctor's lien he may not comply with client's instruction to disregard it); S.C. Ethics Adv. Op. 93-14 (1993) (attorney who agreed to honor statements signed by client regarding lien for medical care provider may not ignore client's instruction to do otherwise but must notify the provider and hold the funds until the dispute is resolved).

FN2. Wis. Formal Op. E-09-01 (2009) (when a lawyer holds funds in which the client and a third party assert an interest identified by lien, court order, judgment or contract, and a dispute arises over ownership or division of those funds, the lawyer must hold those funds in trust until the dispute is resolved; asserted interests which do not fall within one of the four listed categories do not trigger obligations under the Rule); Ohio Ethics Op. 2007-7 (2007) (not every claim of a third person triggers a lawyer's safekeeping duty, only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15; lawful claims involve a valid statutory subrogation right as to the specific funds in the lawyer's possession, a written agreement signed by the client promising payment or authorizing the lawyer to make a payment, a letter from a lawyer to a medical provider promising to uphold the client's agreement to pay the provider, a written agreement between an insured individual and a health benefits provider and a secured claim by a creditor that is specific to the funds in the attorney's possession); La. Public Ethics Op. 05-RPCC-004 (2005) (if the lawyer has actual knowledge of a lien, a privilege, a judgment or a guarantee of payment, then the funds do not belong solely to the client; instead, a third party also has an interest in the funds up to the amount of the lien, privilege, judgment or guarantee); Utah Ethics Op. 00-04 (2004) (not every claim made by a third person triggers the duties expressed in Rule 1.15; these duties are triggered when the lawyer receives funds or property in which the lawyer knows that a third person "has an interest."); Pa. Ethics Op. 2003-04 (2003); Conn. Informal Ethics Op. 95-20 (1995) (lawyer has no duty to act on mere assertions of third-party interests or to investigate whether third persons have interests in the client property); Conn. Informal Ethics Op. 01-08 (2001) (lawyer has duty to deliver client's property to the client upon the client's demand despite a third party's claim to the property, unless the lawyer knows of: (1) a valid judgment relating to disposition of the property; (2) a valid and perfected statutory, contractual or judgment lien against the property; (3) a letter of protection or similar obligation specifically entered into to aid the lawyer in obtaining the property; or (4) a written assignment, signed by the client, counsel or other individual with such authority

conveying interest in the property to another person or entity); Md. Ethics Op. 97-20 (1997) (lawyer may disburse entire settlement to client where hospital failed to timely submit bills to insurer and thus had no legally valid claim); Ariz. Ethics Op. 88-6 (1988) (third-party claim that is not perfected lien or assignment does not affect client's right); Colo. Ethics Op. 94 (1993) (lawyer must distribute promptly to client if third person's claim does not arise out of statutory lien, contract, or court order); Ariz. Ethics Op. 98-06 (1998) ("actual knowledge" of assignment, medical lien, statutory lien, and letter of protection can trigger lawyer's duty to protect nonclient's interests); Va. Legal Ethics Op. 1747 (1992) (a lawyer's obligation under Rule 1.15 does not extend to all general creditors of the client, but only those persons who have an interest in the settlement proceeds either by law or assignment; if a third party has a valid statutory lien, contract or court order that grants an interest in the settlement proceeds, the lawyer may not ignore the third party's interests); R.I. Ethics Op. 95-60 (1996); Phila. Ethics Op. 86-134 (1986) (lawyer must disburse to client without retaining anything for physicians who are owed payment provided there is no agreement between doctors and client which the lawyer must recognize and protect).

FN3. Including, Hospital Liens, TCA 29-22-101 et. seq. and Medical Assistance Act, TCA 71-5-101 et. seq. ("... To the extent of payments of medical assistance, the state shall be subrogated to all rights of recovery, for the cost of care or treatment for the injury or illness for which medical assistance is provided, contractual or otherwise, of the recipients against any person ..." TCA 71-5-117(a); "... If the plaintiff or plaintiff s attorney collects the judgment, each has the obligation to promptly remit the net subrogation interest, and attorneys' fees and costs to any counsel employed by the state or its assignee, as required by the final judgment ..." TCA 71-5-117 (i))

FN4. Nothing in this opinion is intended to relieve any individual or entity, including plaintiffs counsel, of any obligations, including reporting and/or payment obligations, imposed by the Medicare Secondary Payer Act, 42 U.S.C. § 1395y, et seq. Counsel may be subject to a direct action suit by the Center for Medicare and Medicare Services (CMS), recovering attorney fees collected through a settlement or release that is not properly reported and negotiated consistent with the obligations of the statute. 42 U.S.C. § 1395y(b)(2)(B). 42 U.S.C. § 1395y(b)(2)(B)(iii) provides, in part:

> Action by United States. In order to recover payment made under this subchapter for an item or service, the United States may bring an action against any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment with respect to the same item or service (or any portion thereof) under a primary plan. The United States may, in accordance with paragraph (3)(A) collect double damages against any such entity. In addition, the United States may recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity ...

As provided in 42 CFR 411.24(g):

> Recovery from parties that receive primary payments. CMS has a right of action to recover its payments from any entity, including a beneficiary, provider, supplier, physician, attorney, State agency or private insurer that has received a primary payment.

42 U.S.C. § 1395y(b)(2)(B)(iv) provides:

> Subrogation rights. The United States shall be subrogated (to the extent of payment made under this subchapter for such an item or service) to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan.

42 CFR 411.26(a) provides:

> Subrogation. With respect to services for which Medicare paid, CMS is subrogated to any individual, pro-

vider, supplier, physician, private insurer, State agency, attorney, or any other entity entitled to payment by a primary payer.

FN5. R.I. Ethics Op. 2007-02 (2007) (where the client insists that the settlement proceeds be disbursed to the client, and where the inquiring attorney has received no notice of a claim from the health insurer, the inquiring attorney must disburse the settlement funds to the client); R.I. Ethics Op. 2008-03 (2008); Utah Ethics Op. 00-04 (2000) (if client in good faith disputes creditor's interest and instructs lawyer not to disburse property, counsel must protect property until dispute is resolved); Conn. Informal Ethics Op. 95-20 (1995) (lawyer cannot pay money to third person over client's objection).

FN6. Utah Ethics Op. 00-04 (2000) (if client in good faith disputes creditor's interest and instructs lawyer not to disburse property, counsel must protect property until dispute is resolved); Ariz.Ethics Op. 88-6 (1988) (lawyer may disburse money if he has concluded that one party is entitled to it under applicable law; but if good faith doubt, he should deposit into trust account pending resolution and initiate an interpleader or other proceeding to resolve the dispute); Ariz. Ethics Op. 98-06 (1998) ("actual knowledge" of assignment, medical lien, statutory lien, and letter of protection can trigger lawyer's duty to protect nonclient's interests; but good faith doubt requires lawyer to place disputed portion of funds in trust pending resolution of conflicting claims); Wash. Ethics Op. 185 (1990) (if lawyer guaranteed payment to creditor, he must pay creditor unless there is good faith dispute as to amount of debt).

FN7. Ohio Ethics Op. 2007-7 (2007) (when a lawyer knows there is a dispute between a client and a third person who has a lawful claim under applicable law to the funds in the lawyer's possession, the lawyer's ethical duty under Rule 1.15 is to notify both the client and the third person and to hold the disputed funds in a trust account until the dispute is resolved.); La. Public Ethics Op. 05-RPCC-004 (2005) (upon receipt of funds or property in which a client and/or a third party has an interest, the lawyer shall promptly notify both the client and the third party); S.C. Ethics Adv. Op. 88-06 (1988); R.I. Ethics Op. 95-60 (1996) (lawyer cannot obey client's instruction to refuse reimbursement to health insurer but must notify the insurer and pay the funds in which insurer has legally enforceable interest); R.I. Ethics Op. 95-31 (1995) (lawyer whose client agreed in writing to pay wife one-half of personal injury proceeds must notify the wife and keep disputed portion of proceeds separate until resolution); S.C. Ethics Adv. Op. 93-14 (1993) (attorney who agreed to honor statements signed by client regarding lien for medical care provider may not ignore client's instruction to do otherwise but must notify the provider and hold the funds until the dispute is resolved).

FN8. Wis. Ethics Op. E-09-01 (2009) (if the dispute between a client and a third party over ownership of funds held in trust cannot be resolved, the lawyer should file a declaratory action to establish the respective rights of the client and third party); Ohio Ethics Op. 2007-7 (2007) (if efforts among the client, the third person, and the lawyer do not resolve the dispute and there are substantial grounds for the dispute, a lawyer may file an interpleader action asking the court to resolve the dispute); La. Public Ethics Op. 05-RPCC-004 (2005); Ala. Ethics Op. 2003-02 (2003) (if there is a legitimate question concerning the debt, or the amount of the debt, the attorney should interplead the disputed funds and let the court reach a determination regarding the creditor's claim); Mich. Informal Ethics Op. RI-61 (1990) (lawyer may not disburse to client if aware of outstanding lien; unless resolved, attorney must initiate court proceeding to resolve which portion belong to lien holder and client); Utah Ethics Op. 00-04 (2000) (where a third person has a sufficient interest to trigger the duties expressed in Rule 1.15 and a client in good faith instructs the lawyer not to pay the third person, the lawyer must hold the funds or property until the dispute is resolved, or, if resolution seems unlikely, interplead the funds or property); N.C. Formal Ethics Op. 4 (2001).

FN9. See also: S.C. Ethics Adv. Op. 08-07 (2008) (attorney may not agree to serve as an indemnitor on behalf of her client to protect released parties in a settlement against lien claims asserted by third parties regarding settlement proceeds); Mo. Formal Op. 125 (2008) (it is a violation for an attorney to propose a settlement that includes a provision that would involve a violation of any of the Rules of Professional Conduct by another attorney); 111. Adv. Op. 06-10 (2006) (a lawyer may not provide a personal guarantee that he will pay the lien and subrogation chargeable against a client's settlement proceeds); Kan. Op. 01-5 (2001) (such agreement places the lawyer in a position where he or she creates a conflict of interest between the client and the insurance company and insured, and/or the lawyer's own interests.); Ind. Ethics Op. 1 of 2005 (2005) (non-Medicare and Medicaid settlement agreements that require a counsel to hold harmless and indemnify the opposing party from subrogation liens and/or third-party claims violate our Rules); N.C. State Bar Ethics Op. RPC 228 (1996) (a lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers);

TN Eth. Op. 10-F-154, 2010 WL 3767993 (Tenn.Bd.Prof.Resp.)

END OF DOCUMENT

E-87-11 Settlements: Attorneys as parties to as guarantors against lien claims

Question

Do any standards of professional conduct preclude attorneys from proposing, demanding and/or entering into settlement agreements that include indemnification and hold harmless provisions binding an attorney to personally satisfy any unknown lien claims against the settlement funds or property?

Opinion

Under both the Code of Professional Responsibility [repealed effective Jan. 1, 1988, and cited herein as Code or "SCR 20."] and the Rules of Professional Conduct for Attorneys [created effective Jan. 1, 1988 and cited herein as Rules or "SCR 20:"], inclusion of such indemnification and hold harmless provisions in settlement agreements is improper. Accordingly, lawyers may not propose, demand or enter into such agreements.

The primary ethical problem with conditioning a settlement agreement on a lawyer's becoming a guarantor against lien claims is that the lawyer's interests are placed clearly at odds with his or her clients. Although the U.S. Supreme Court's holding in *Evans v. Jeff D.*, 106 S. Ct. 1531 (1986), suggests that settlement proposals may sometimes legally and ethically drive such a potential wedge between attorney and client, this committee concurs with other bar association ethics committees in holding that it is unprofessional conduct to enter into or to propose such agreements, at least in contexts other than the 1976 Civil Rights Attorneys Fees Act, which was at issue in *Evans, supra*. *See, e.g.*, District of Columbia Opinion 147 (1/24/85); New York City Opinion 82080 (reaffirming Opinion 80-94).

In addition, both the Code and Rules narrowly circumscribe the extent to which lawyers may acquire a financial interest in representation for which they are responsible. *See generally* SCR 20.26 and SCR 20:1.8. Neither the Code nor Rules expressly or, in the committee's opinion, implicitly sanctions the usage of such indemnification and hold harmless provisions. In summary, we conclude that a lawyer's participating in settlement agreements incorporating such provi-

sions would constitute a prohibited acquisition of a financial (although potentially negative) interest in the cause of action or subject matter of the litigation that the lawyer is conducting, as well as an improper advance of financial assistance to a client. *See* SCR 20.26 and SCR 20:1.8(e) and (j).

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

Formal Opinion 2010-3: Settlement Agreements Requiring the Financial Assistance of Counsel

TOPIC: Settlement agreements requiring plaintiff's counsel to hold defendant harmless for making settlement payments to plaintiff.

DIGEST: Plaintiff's counsel may not agree to hold defendant harmless from claims arising out of defendant's payment of settlement consideration and defendant's counsel may not ask plaintiff's counsel to provide such financial assistance.

RULES: 1.2(a), 1.7(a), 1.8(e), 1.15(c), 1.16(b), 8.4(a)

QUESTION: May plaintiff's counsel, at the request of defendant's counsel, agree to hold defendant harmless from third party claims arising out of defendant's settlement payments to plaintiff?

OPINION

I. Background

Before entry of final judgment in personal injury litigation, plaintiffs often seek financial assistance from workers compensation carriers, Medicaid, Medicare, or private insurance coverage. Such carriers or agencies may be entitled by statute or contract to be reimbursed by the plaintiff for any payments made to her in the event she obtains a damages award or settlement payment at the conclusion of the litigation, and therefore may seek to recoup any amount paid to plaintiff by defendant.

For this reason, defendants and their counsel who settle such cases generally are aware that payments made under the parties' settlement agreement may be subject to the liens or claims of plaintiff's insurance providers or other creditors. To protect themselves against any potential liability for those claims, defendants may demand that their settlement agreement stipulate that the settling plaintiff hold defendants harmless from any claims made by insurers or other creditors by reason of the settlement payments. Defendants may also demand that plaintiff's counsel personally guarantee her client's indemnification obligation and hold defendants harmless from any third party claims. In this opinion, we address the question of whether the New York Rules of Professional Conduct (the "Rules") permit defendants' counsel to request such a provision in a settlement agreement and whether plaintiffs' counsel may agree to be bound by it.

II. Counsel May Not Guarantee Client Settlement Obligations

Rule 1.8(e)(1) bears directly on the question of whether, and to what extent, an attorney may provide financial assistance to a client in connection with pending or contemplated litigation. The rule provides as follows:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that . . . a lawyer may advance court costs

and expenses of litigation, the repayment of which may be contingent on the outcome of the matter . . . .

N.Y. Prof'l Conduct R. 1.8(e)(1) (2010).

Under this Rule, a lawyer generally may not assist a client in meeting its financial obligations to third parties stemming from the settlement of litigation. In the event of a settlement, a client's obligation to use settlement proceeds to satisfy a lien or other indebtedness is a personal obligation of the client,[1] and, for purposes of the Rule, is indistinguishable from the client's obligation to pay other expenses such as medical expenses or residential rent. A lawyer's agreement to guarantee a client's obligations to third party insurers to induce a defendant to settle thus amounts to "guarantee[ing] financial assistance to the client" in violation of Rule 1.8(e).

The agreement of plaintiff's counsel to indemnify defendants in this context would not fall within the exception under Rule 1.8(e)(1) permitting lawyers to "advance court costs and expenses of the litigation, the repayment of which may be contingent on the outcome of the matter." Id. This exception is strictly limited to those expenses and costs incurred in litigating a lawsuit to completion, such as the cost of copying documents or purchasing deposition transcripts. It does not cover potential liabilities arising out of the performance of a settlement agreement after the litigation has been concluded.

In a settlement agreement, a covenant by plaintiff's counsel to indemnify defendants for third party claims arising out of settlement payments also implicates Rule 1.7(a)(2), which provides, in pertinent part, that:

a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

Id. 1.7(a)(2).

When a lawyer is retained in a damages action pursuant to a contingent fee agreement, the financial interests of the plaintiff and her lawyer are generally aligned. However, a conflict may arise if plaintiff's counsel is asked, as part of a settlement, to indemnify the defendant against liability to third parties for settlement payments made to plaintiff. The conflict would be between the plaintiff's interest in procuring a settlement and her lawyer's own "financial, business . . . and personal interest." Id. If a client wishes to settle the case for a fixed amount and has instructed her lawyer to proceed with the settlement, her lawyer must proceed as instructed under Rule 1.2(a), which provides that "[a] lawyer shall abide by a client's decision whether to settle a matter." Id. 1.2(a). Therefore, once the client has made the decision to settle, the lawyer generally has a professional obligation to take all steps necessary and appropriate to effectuate the client's goals. See id. cmt. 1.

A lawyer may not be willing, however, to assume responsibility for indemnifying and holding harmless defendants for a potentially significant sum of money for an indefinite period of time, an obligation encompassing not only known liens, but also presently unknown claims, including possible payment of defendants' legal fees. A lawyer's reluctance to incur such personal liability may conflict with the client's direction to resolve the case. Despite the client's instruction to settle, the lawyer's own "financial" "business" and "personal" interests not to incur such liability could conflict directly with the lawyer's duty to complete the settlement as the client has directed.

We therefore conclude that counsel to a settling plaintiff may not enter into a hold harmless/indemnity agreement for the benefit of settling defendants because such an agreement would both violate the prohibition against financial assistance under Rule 1.8(e) and create an impermissible conflict of interest in violation of Rule 1.7(a). Accord Illinois Advisory Op. 06-01 (2006), available at 2006 WL 4584284;

Indiana Op. 1 (2005); Kansas Op. 01-05 (2002); North Carolina Op., RPC 228 (1996); Advisory Committee of the Supreme Court of Missouri, Formal Op. 125 (2008) ("Missouri Formal Op."); Arizona Op., No. 03-05 (2003); Florida Op. 70-8 (rev. 1993).

III. Counsel for Defendants May Not Seek Indemnification from Plaintiff's Counsel

Rule 8.4(a) provides that a "lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." N.Y. Prof'l Conduct R. 8.4(a) (2010). In light of our conclusion that plaintiff's counsel may not agree to hold defendants harmless for performance of their payment obligations pursuant to a settlement agreement, it necessarily follows that defendants' counsel may not request such indemnification without violating Rule 8.4(a). See Missouri Formal Op. 125 (2008).

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[1] In addition, under Rule 1.15(c), a lawyer is obligated to "promptly notify a client or third person of the receipt of funds . . . in which the client or third party has an interest," to safeguard the funds and to "promptly pay or deliver to the client or third person as requested by the client or third person the funds . . . in the possession of the lawyer that the client or third person is entitled to receive." N.Y. Prof'l Conduct R. 1.15(c)(1), (2), (4) (2010). To the extent a lawyer is aware of a lien or other claim against settlement funds she receives on behalf of a client, she has an obligation under the Rule to notify the interested claimant of the receipt of the funds, to segregate and protect the funds claimed, and to pay them over if the claimant is entitled to receive them. See id.