IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

[redacted] and [redacted]

Plaintiffs,

vs.

[redacted] and [redacted]

Defendants.

) Case No. [redacted]

REPLY TO [redacted] OPPOSITION TO PLAINTIFFS' MOTION FOR COURT TO ENFORCE SETTLEMENT AND NOTICE OF ADDITIONAL ISSUE WHICH MAY REQUIRE THE COURT'S INTERVENTION

I. Introduction

Defendant is clearly attempting to add a new and material term to the settlement agreement.

The defendant has simply failed to address Plaintiffs' concerns regarding the ethics of requiring Plaintiffs' counsel to indemnify defendant in this case in any meaningful way. In addition, there are other ethics opinions provided in this pleading which specifically address the fact that it is unethical for Plaintiffs' counsel to agree to indemnify and hold harmless defendants for Medicare liens, including Medicare Set Asides.

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Defendant's pleadings suggest that Plaintiffs are not considering Medicare's interests in this settlement. Plaintiffs are going beyond what is required by the Medicare Secondary Payer Act and have done EVERYTHING reasonably required to not only consider Medicare's interests, but also to protect the interests of Medicare and, therefore, the interests of the defendants. The terms agreed to in the settlement by both parties protect Defendant's interests.

Therefore, Plaintiffs request this Court to enforce the settlement of this case and order that the settlement will go forward without Plaintiffs' counsel indemnifying the defendant, his counsel or insurers.

II. Defendant is Attempting to Add Material Terms to the Settlement

Defendant claims that it is not adding materials terms to the initial settlement. In response to Plaintiffs' policy limits offer, [redacted] responded:

> As discussed with Rick Friedman on the phone on April 8, 2011, we have been directed to accept the settlement demand stated in your later [sic] dated March 16, 2011 .... as full, complete and final settlement of this case, for both Plaintiffs, dismissing all claims with prejudice, with a complete release of all claims with the standard provision of no admission of liability, and satisfaction of any and all liens from the settlement proceeds, including any medicare lien for future set aside.

Plaintiffs' Exhibit 1. Plaintiffs have agreed to the "standard provision of no admission of liability, and satisfaction of any and all liens from the settlement proceeds, including any medicare liens for future set aside." Defendant cannot credibly contend that its

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acceptance of the policy limits offer was conditioned upon Medicare *approving* of a Medicare Set Aside ("MSA")[1] and/or that, Plaintiffs' counsel would be required to indemnify defendant, his insurers and attorneys for any issues relating to Medicare or medical expenses. Indemnification by Plaintiffs' counsel is *not* a "standard provision" to a settlement and release agreement and, as explained further below, would be unethical.

III. It is Not Ethical for Plaintiffs to Agree to Indemnify Defendant, His Counsel and Insurers for Medicare Lien or Medicare Set Aside

The defendant has failed to meaningfully address Plaintiffs' concerns regarding the ethics of Plaintiffs' counsel indemnifying defendant in this case. Defendant apparently is arguing, based on the Indiana Committee opinion (Plaintiffs' Exhibit 5 at pages 4-5) that none of the ethics opinions cited by Plaintiffs at Exhibit 5 apply to Medicare liens or Medicare Set Asides. Additional ethics opinions have come to the attention of Plaintiffs' counsel since the filing of the Response to [redacted] Motion and Plaintiffs' Motion to Enforce the Settlement which are attached as Exhibit 6. The most recent Ethics Opinion, an advisory opinion of the Florida Bar Staff (Op. 30310, April 4, 2011) specifically addresses the question of whether or not it is ethical for a plaintiff's counsel to "sign a settlement release containing a hold harmless and indemnification

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[1] Which, as demonstrated by the letter from CMS dated May 11, 2011, [redacted] Exhibit A, and in Defendant's opposition as well as Plaintiffs' briefing, is likely not attainable in the liability setting.

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*." Exhibit 6 at 1 (emphasis added). After analyzing the issue and considering ethics opinions from Arizona, Ohio, North Carolina, South Carolina, Illinois, Indiana, Missouri, New York, South Carolina, Tennessee, Wisconsin[2] the Florida Bar Staff concluded that

> "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).*

Exhibit 6 at 4. (Emphasis added).

The South Carolina Advisory Ethics Opinion (08-07, August 22, 2008) considered the situation where defense counsel included in a letter confirming the settlement (which was not part of the settlement negotiations between the parties) that

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[2] The following ethics opinions: Arizona (Op. 03-05 (2003)), Indiana (Op. 1 (2005)), Missouri Op. 125 (2008), North Carolina Op. 228 (1996), Tennessee and (Op. 2010-F-154 (2010)), Wisconsin (E-87-11 (2008)) are contained in Plaintiffs' Exhibit 5. The ethics opinions: Florida (Op. 30310, April 4, 2011), Kansas (01-5, 2001) (recently acquired, but cited in Plaintiffs' Response and Motion), Ohio (Op. 2011-1, February 11, 2011), New York (Op. 2010-3, 2010) and South Carolina (08-07 (2008)) are contained in Plaintiffs' Exhibit 6.

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plaintiff and counsel would be "solely responsible for satisfying any subrogation lien in favor of Medicare and/or Medicaid …." The South Carolina Bar concluded that "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," determining that such an agreement would violate Rules of Professional Conduct 2.1, 1.7 and 1.8. Exhibit 6 at 16.[3] The South Carolina Bar noted that "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." *Id.* at 16. *See also id.* at 5-6 (Kansas (01-5, 2001): "Additionally, this Committee sees the possibility of an ethical problem for a defense lawyer representing an insurance company or insured who proposes that plaintiff or claimant's counsel sign such an indemnification provision …).

Finally, defendant fails to explain how the reasoning of the ethics opinions that do not specifically mention Medicare, opinions which deal with the same Rules of Professional Responsibility that apply to Plaintiffs' counsel in Alaska, do not apply to this case or are somehow flawed.

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[3] *See also* Ohio Ethics Opinion 2011-1 (February 11, 2011) and New York Ethics Opinion 2010-3 (2010) which both conclude that it is unethical for a plaintiff's counsel to indemnify defendant, including in the context of Medicare liens and claims for reimbursement. Exhibit 6 at pages 7-12 and 13-17 respectively.

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The Defendant has failed to provide any authority that counters the ethics opinions provided by Plaintiffs.

IV. Plaintiffs Have Done Everything Reasonable to Consider (and even Protect) Medicare's Interests

First of all, with respect to conditional past payments, [redacted] received a letter from CMS stating that "*to date, Medicare has not paid any claims that currently appear related to the beneficiary's pending settlement, judgment or award of the above-referenced matter.*" (Emphasis added). Plaintiff [redacted] is awaiting a final letter from Medicare, but it would appear that there is no lien for past conditional payments (and to the extent Humana, a private company, has a claim for reimbursement, the information to date is that such claim would be for less than $3,000 and Plaintiffs have agreed to resolve any claim of reimbursement by Humana).

Defendant states that "it is [Plaintiffs' counsel's] obligation under federal law to insure that Medicare is protected in this settlement with a proper future set aside." Plaintiff, [redacted], agrees that it is his obligation to consider Medicare's interests in this settlement and he, in fact, is *protecting* the interests of Medicare and defendant's in this case. As explained previously, upon settlement with Defendant [redacted], Plaintiff undertook to engage an independent entity that specializes in Medicare issues and set asides to determine an appropriate MSA amount (for future medical payments). An MSA amount has been established and Plaintiffs have agreed to keep MSA funds in a

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separate account and to only expend MSA funds on Medicare qualified expenditures (this is more than the law requires). Defendant has never proposed, nor has it come forth with information supporting a different MSA amount, either since it received the MSA report on April 11, 2011 or since it received, on May 24, 2011, the letter from Medicare saying it did not have the resources to review the MSA ([redacted] Exh. A). What exactly defendant is concerned about or what it thinks puts this case into a special category requiring Plaintiffs to indemnify, is not clear.

Defendant has not cited *any* authority stating that in considering Medicare's interests in a settlement, Plaintiffs' counsel must indemnify defendant, his counsel and insurers.[4] Nor has counsel pointed to any case whatsoever where defendant, defense counsel or defendant's insurers were sued by the United States for past conditional payments or relating to an MSA. As demonstrated by the cases cited by Defendant in his brief, it is Medicare beneficiary the beneficiary's counsel who are at risk of being sued by the United States because they are receiving settlement funds, which include amounts that may be owing to Medicare.

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[4]With respect to [redacted] Exhibit B, defendant attached two orders from Illinois and Michigan trial courts regarding asbestos litigation. Neither of these orders require Plaintiffs' counsel to indemnify defendants and [redacted] has not shown that the issues raised by Plaintiffs in the [redacted] case were raised in either of these asbestos

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V. Notice of An Additional Issue That May Require Court Intervention

Defendant's proposed Settlement and Release Agreement language requires [redacted] to indemnify [redacted] for any issues involving [redacted] being a Medicare beneficiary and any claims against [redacted] for reimbursement from health care providers and *vice versa*. This is unacceptable. Because of the way defendant has drafted the Agreement, it is difficult to adjust the language to protect both Plaintiffs from indemnifying [redacted] for the other's liabilities relating to medical expenses. To simplify matters and to move forward with the settlement, Plaintiffs suggested breaking the Agreement into two separate agreements with identifiable amounts to each Plaintiff in each agreement. As of the time of the filing of this pleading, defendant will not agree to this or any other solution to the problem.

VI. Conclusion

Plaintiffs welcome the Court's assistance in enforcing the settlement in this case between the Plaintiffs and [redacted] without requiring Plaintiffs' counsel to indemnify the defendants. It is neither fair, nor proper and in fact it is unethical for the Defendant to ask Plaintiffs' counsel to enter into an agreement to indemnify [redacted], its counsel and insurers and for Plaintiffs' counsel to enter into such an agreement.

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litigation cases. Defendant has not presented any citation or authority which answers the issues raised in Plaintiffs' Response and Motion to Enforce the Settlement.

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FRIEDMAN | RUBIN
Attorneys for Plaintiffs

DATED: 6/22/11

By: _____
Donna J. McCready
Alaska Bar No. 9101003

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was ( ) hand delivered ( ) faxed (X e-mailed (X) mailed on the 22 day of June 2011 to:

[redacted] (hand-delivered)

[redacted]

[redacted]

FRIEDMAN | RUBIN

By: _____
Kristi Berga

J:[redacted]PLED\Mot for Court Assist (Pltf Reply) 11.0622.doc

REPLY TO [redacted] OPPOSITION TO PLAINTIFFS' MOTION FOR COURT TO ENFORCE SETTLEMENT AND NOTICE OF ADDITIONAL ISSUE WHICH MAY REQUIRE THE COURT'S INTERVENTION

[redacted]

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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)

Kansas Ethics Opinion

2001.

01-5.

2001

KBA Legal Ethics Opinion No. 01-5

TOPIC: Insurance settlement agreements; hold harmless clauses from subrogation liens; conflicts of interest; providing financial assistance to a client

DIGEST: 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.

Reference: KRPC 1.7(b), 1.8(e)

FACTS

The requesting lawyer reports that some insurance defense lawyers recently have started inserting in settlement agreements a blanket indemnification provision whereby a plaintiff or claimant's lawyer agrees to hold the insurance company and the insured harmless from "any and all subrogation liens of every kind and nature whatsoever, both know and unknown." The lawyer questions whether this indemnification provision violates Rule 1.8(e) because it is, in substance, "financial assistance" provided "to a client in connection with pending or contemplated litigation."

ANALYSIS

The inquiry posed by the requesting lawyer is one which frequently arises in personal injury/insurance settlement situations. The requesting lawyer has suggested that a lawyer who signs a blanket indemnification provision would be violating Rule 1.8(e) because the lawyer would in essence be providing "financial assistance" to the client by indemnifying the insurance company and the insured of a subrogation lien. KRPC 1.8(e) states that:

A lawyer shall not provide financial 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;

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

The inquiry also raises conflict of interest questions, which the Committee finds to be more troubling than the Rule 1.8(e) questions. Specifically, the Committee believes that Rule 1.7(b) is implicated by the inquiry. KRPC 1.7(b) states that:

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.

Loyalty is an essential element in the lawyer's relationship to a client [1] . A

lawyer's duty of loyalty to a client may be compromised in the situation that the requesting lawyer has outlined. Rule 1.7(b) states that a conflict can occur if the lawyer's responsibilities to a client are limited by responsibilities to: 1) another client, 2) a third person, or 3) by the lawyer's own interests. A conflict between the claimant/client and another client of the lawyer is not likely to occur under the scenario put forth by the requesting lawyer because the lawyer does not have a lawyer-client relationship with either the insurance company, insured or subrogating lienholder, even if the subrogating lienholder is the client's insurance company that is exercising statutory PIP lien rights [2] .

However, we do perceive that a conflict of interest may occur between the client and "a third person" and/or "the lawyer's own interests." A lawyer may be confronted with a conflict between the interests of the client and the interests of the insurance company and insured if the lawyer signs the indemnification provision should the client later direct the lawyer to not disperse the settlement proceeds necessary to pay the subrogating liens. In Vermont Bar Association Advisory Ethics Opinion 96-05, the requesting lawyer described a situation where his client's medical providers had asked him to sign a "medical lien" form. In opining that the signing of the proposed "medical lien" form by the lawyer created "an impermissible ethical conflict whereby the interests of the client may be in conflict with the proposed lawyer's agreement that the interests of the health care provider

will be protected", the Vermont Bar Association committee stated that a "lawyer may be placed in an untenable position if the client subsequently directs (the) lawyer not to pay the health care provider in full." [3]

This Committee is very concerned about a possible conflict between the interests of the client and the lawyer's own interests if the lawyer were to consent to the blanket indemnification provision. The client's interest in a personal injury/insurance case is to secure the best possible settlement that compensates the client for whatever injuries have been sustained. Because these cases are frequently taken on a contingent fee basis by lawyers, the lawyer also has a interest in securing the best possible settlement for the client since the higher the settlement amount the lawyer can secure, the higher the fee the lawyer will receive.

In this situation, the insurance company is essentially making the indemnification agreement between the lawyer and insurance company/insured a condition of the settlement. The lawyer has a financial interest in settling the case, both for himself or herself and for the client. However, if the lawyer were to refuse to sign the indemnification provision, he or she could be putting the settlement at risk and in so doing jeopardizing the lawyer's fee. Because the lawyer wants to earn the fee by settling the case, a financial incentive exists to sign the indemnification provision. But how does signing the provision aid in the representation of the client? It doesn't. In a North Carolina State Bar Opinion, the Bar opined 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, citing the equivalent of KRPC Rule 1.7(b) as its rationale [4].

Additionally, this Committee sees the possibility of an ethical problem for a defense lawyer representing an insurance company or insured who proposes that plaintiff or claimant's counsel sign such an indemnification provision, however we are not expressing a specific opinion on this subject because it is outside of the scope of the requesting lawyer's inquiry.

OPINION

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.

For the KBA Ethics Advisory Committee, I am

William Mills, Chair

[1] Comment to Kansas Rule of Professional Conduct 1.7.

[2] See Kansas Bar Association Legal Ethics Opinion 97-9 (the KBA Ethics Advisory Committee opined that if a dispute arises between the insurer and the plaintiff-insured over coverage questions after the insurer has asked plaintiff's lawyer to protect the insurer's PIP lien in a personal injury action, the plaintiff's lawyer may continue to represent the plaintiff's best interest because no conflict of interest arises solely by virtue of the lawyer expressly or impliedly agreeing to protect the company's valid statutory PIP lien rights since no lawyer-client relationship is formed by the statutory PIP recovery system); Also see American Family Mutual Insurance Company v. Griffin, 9 Kan.App.2d 482, 681 P.2d 683 (Kan.App. 1984).

[3] Vermont Bar Association Advisory Ethics Opinion 96-05, p. 2. See also Alaska Bar Association Opinion 80-1 (1980).

[4] North Carolina State Bar RPC 228 (July 26, 1996).

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.

The Association of the Bar of the City of New York Committee on Pro... 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.

Ethics Advisory Opinions

Ethics Advisory Opinion 08-07
Applicable SC Rules of Professional Conduct: 1.7; 1.8(e); 2.1

Date: August 22, 2008

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:

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.

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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.

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