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]

RESPONSE TO [redacted] MOTION FOR ASSISTANCE OF THE COURT WITH SETTLEMENT AND MOTION FOR COURT TO ENFORCE SETTLEMENT

I. Introduction and Background

[redacted] has filed a pleading asking for assistance by the Court in finalizing the settlement between the Plaintiffs and [redacted]. The Plaintiffs welcome the assistance of the Court in finalizing and *enforcing* the settlement agreement in this case.

After settling their claims with [redacted] (the other defendant in the case) on or around March 15, 2011, [1] Plaintiffs engaged and paid for The Plaintiffs' Resources,

[1] The settlement between the Plaintiffs and Defendant [redacted] has been finalized with settlement funds having been transferred to Plaintiffs' counsels' trust account. The Release of All Claims Agreement is attached to this pleading as Exhibit 2. Defendant attached various release agreements to its Motion for Assistance of the Court and Plaintiffs are attaching the other settlement and release agreement reached in this very

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Inc. to assist with [redacted] Medicare issues in the settlement, specifically with making sure the settlement complies with the Medicare Secondary Payor Act. [redacted] in turn worked with [redacted]. to determine an appropriate Medicare Set-Aside ("MSA") to protect Medicare's interests in the settlement. [redacted] submitted the MSA to Medicare for its review and approval while cautioning Plaintiffs' counsel that in the liability setting (as opposed to the worker's compensation setting) Medicare generally did not review MSAs.

As stated in [redacted] Motion, on March 16, 2011, Plaintiffs made a policy limits demand to [redacted]. [redacted] accepted Plaintiffs' policy limits demand on April 8, 2011 (verbally). Defendant [redacted] followed up with an email and letter accepting the policy limits demand on April 11, 2011. *See* Exhibit 1 (redacted). [redacted] counsel never stated in its acceptance to the policy limits demand that a material term of settlement was that 1) a Medicare Set Aside ("MSA") was required; 2) an MSA be approved by Medicare and/or 2) Plaintiffs' counsel would be required to indemnify [redacted], its insurers and its counsel for any liens, including any Medicare lien.

[redacted] counsel sent the first draft of the settlement and release agreement on April 22, 2011 and counsel for Plaintiffs responded with edits on April 27th, 2011. Apparently there was confusion over who was waiting for whom to do what. Plaintiffs'

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case. For the language dealing with medicare and other liens and claims for reimbursement, *see* Exhibit 2, page 2.

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counsel was waiting for defense counsel to review and respond in writing to her edits and questions, and defense counsel was apparently thinking that Plaintiffs' counsel was going to respond again to its initial draft document. In any event, Plaintiffs received the letter from Medicare stating it would not review the MSA for [redacted] because of lack of resources. *See* Exhibit A to Defense Motion for Assistance of Court. This letter was immediately forwarded to [redacted] defense counsel. Defense counsel undertook to revise the settlement and release agreement and provided a new draft settlement and release agreement on Friday, June 3, 2011. In defendant's revised draft of the settlement and release agreement provided to Plaintiffs *two months after the case settled*, defendant included all Plaintiffs' attorneys as "Releasors" in the agreement, in an attempt to have Plaintiffs' counsel be responsible for indemnifying and holding harmless [redacted], its insurers and its representatives from any claims involving Medicare and any other liens or claims for reimbursement relating to Plaintiffs' medical expenses.

There are other disagreements between the parties that they are working on and hope to resolve. However, an issue that clearly cannot be resolved without the Court's intervention is the issue of defendant attempting to require Plaintiffs' counsel to indemnify and hold harmless defendant, its insurers and its representatives against any liens or claims of reimbursement relating to the Plaintiffs' medical expenses, including any Medicare lien(s).

Other facts of note [redacted] had private insurance through [redacted] at the time of the accident and up until [redacted] was eligible for Medicare

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in March 2009. According to [redacted], it paid $212,411.94 in past medical expenses. [redacted] has a "Medicare Advantage" program through [redacted] which has paid for some of his medications and for some of his medical care. According to data from the [redacted] website, the Medicare Advantage program has paid $848.74 for [redacted] medications from March 2009 through June 2, 2011 and $1,422.36 for [redacted] medical treatment between August 2009 and June 2, 2011.[2] *See* Exhibit 3. Therefore, according to the information Plaintiffs have, the Medicare Advantage program ([redacted]) has paid approximately **$2,300** in conditional payments for [redacted] past medical expenses.[3] Medicare Advantage Programs, such as [redacted], do not have the same rights to reimbursement as Medicare itself.

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[2] The [redacted] website only allows claimants to search back a certain number of months for claims paid. While Plaintiff [redacted] has the total spent by [redacted] since March 2009 on his prescriptions, he only has the total for medical expenses (i.e., for seeing providers) since August 2006. Given that [redacted] has paid only $1,422.36 for medical expenses (excluding prescriptions) between August 2009 and June 2, 2011, it is reasonable to assume that whatever amount was paid between March 2009 and August 2009 would not change the amount paid by very much if at all.

[3] Upon settlement with [redacted] in March 2011, Plaintiffs, through [redacted], submitted a request to Medicare for an accounting of conditional payments made related to [redacted] September 4, 2006 injuries. Medicare has 65 days to respond to this request and Plaintiffs expect to hear from Medicare mid to late June, 2011 confirming the amount of past medicals paid by Medicare (or in this case the Medicare Advantage Program).

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[redacted] is the only Plaintiff who is a beneficiary of Medicare. [redacted] is not a beneficiary of Medicare and is not expected to be a beneficiary of Medicare. [redacted] did not have any past medicals paid for by Medicare and [redacted] is not expected to have any future medical expenses related to the accident in this case. Nor has defendant ever claimed that [redacted] was a Medicare beneficiary. *See* Exhibit 4, pages 2-3 (Excerpt from [redacted] deposition).

II. Discussion

A. Medicare

There are three aspects of Medicare that are at issue in any settlement where a plaintiff is or is going to become a Medicare beneficiary: past conditional payments, future injury-related medical expenses that would be covered by Medicare, and reporting requirements.

The Medicare Secondary Payer Act basically provides that Medicare is the secondary payer whenever other insurance covers the beneficiary's medical care. However, if the primary insurer is not likely to pay promptly, Medicare may make "conditional payments." 42 U.S.C. § 1395y(b)(2). These payments are "conditional" because they are made on the condition that Medicare will be reimbursed, if and when the primary insurer pays. 42 U.S.C. § 1395y(b)(2)(B). Conditional payments are for past medical expenses. Under 42 USC § 1395y(b)(2)(B)(iii) the United States "in order to recover payment made under this subchapter for an item or service … may bring an action against any or all entities that are or were required or responsible (directly, as an

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insurer or self insurer, as a third party administrator ...) to make payment with respect to the same item or service...." This provision allows for double damages. These provisions are not new.

With respect to future medical expenses that would be covered by Medicare, the parties to a settlement are required to consider Medicare's interests in the settlement. 42 U.S.C. § 1395y(b)(2)(A)(ii). While Medicare has specific regulations and guidance for how Medicare beneficiaries are to protect Medicare's interests in the worker's compensation arena, there are no regulations and little to no guidance regarding how beneficiaries are to protect Medicare's interests in the setting where a liability carrier is funding the settlement. Liability cases are different from worker's compensation cases. In worker's compensation cases, the damages generally involve indemnity, past medical expenses and future medical expenses. In liability cases, the damages issues are more complex, involving loss of earning capacity, loss of earnings, loss of household services and non-economic losses such as pain and suffering and loss of enjoyment of life.

Contrary to what [redacted] stated in its Motion, there is no legislation or regulation which compels beneficiaries to set aside settlement proceeds to pay for future medical expenses where a Medicare beneficiary receives payment from a liability carrier.[4] In any event, although Medicare Set-Asides are *not* compelled by law, they are generally

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[4] Defendant cites 42 CFR § 411.46 and 411.47 which are both are under Part C titled "Limitations on Medicare for Services Covered Under Worker's Compensation."

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recommended in some cases involving payment by a liability carrier as a way of considering Medicare's interests and avoiding running afoul of the federal government.

Since 2007, when the Medicare, Medicaid and SCHIP Extension Acts were passed, insurers have been required to report settlements involving Medicare recipients. Insurers may be penalized if they do not comply with the reporting requirements. 42 USC § 1395y(b)(8)(A)-(E).

It is unclear why defendant is having such a difficult time with finalizing the settlement in this case, as Plaintiffs have done everything they can reasonably be expected to do, and in fact have done more than what the law requires, to protect Medicare's interests in this settlement. Plaintiff, [redacted], has agreed to satisfy conditional payments made by Medicare (past medical payments) and employed an independent entity that specializes in Medicare issues and set asides to determine an appropriate MSA amount (future medical payments). Plaintiffs submitted the MSA for Medicare approval, however, Medicare has elected to not review the MSA. *See* Exhibit A to [redacted] Motion. To Plaintiffs' knowledge, [redacted] has not determined that a different MSA amount should be used. Plaintiffs have agreed to indemnify and hold defendant harmless with respect to Medicare and other liens. Furthermore, the information Plaintiffs have to date (and have communicated to defendants) is that [redacted] has "Medicare Advantage," a program administered by [redacted] which has paid less than $3,000 for [redacted] care and medications since he became eligible for Medicare in March 2009. Medicare Advantage programs, such as [redacted], do not even have the

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same rights to reimbursement as Medicare itself. *See Care Choices HMO v. Engstrom*, 330 F.3d 786 (6th Cir. 2003); *Nott v. Aetna U.S. Healthcare, Inc.*, 303 F.Supp.2d 565 (E.D. Pa. 2004); *Humana Medical Plan, Inc. v. Reale*, No. 10-21493, Slip Opinion (S.D. Fla. Jan. 31, 2011).

Nonetheless, now, *two months after the settlement*, defendant insists on Plaintiffs' counsel indemnifying [redacted], its carriers and its representatives. Requiring Plaintiffs' counsel to indemnify the defendants is an unacceptable new term to the settlement agreement and, as explained below, would require Plaintiffs' counsel to violate the Rules of Professional Conduct.

B. Defendant is Attempting to Add Material Terms to the Settlement Agreement

[redacted] has never stated that its acceptance of Plaintiffs' policy limits demand was conditioned on an MSA being created or Medicare approving of an MSA and/or Plaintiffs' counsel indemnifying [redacted], its insurers and its representatives. Nor are these typical provisions to a settlement agreement.

Defendant cannot add material terms to the settlement agreement after the fact, particularly terms that are unreasonable[5] and highly likely to require Plaintiffs' counsel to engage in unethical conduct.

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[5] As can be gleaned from the letter from Medicare, Exhibit A to [redacted] Motion, Plaintiffs have no control over whether or not Medicare will review its MSA.

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C. Plaintiffs Cannot Be Compelled to Indemnify the Defendant

As recognized in several ethics opinions in other jurisdictions, it would be unethical for Plaintiffs' counsel to promise to indemnify defendant, his insurers and his representatives. *See* Arizona Ethics Op. 03-05 (2003) (Exh. 5, pages 1-3); Indiana Ethics Op. 1 (2005) (Exh. 5, pages 4-5); Kansas Ethics Op. 01-05 (2002); Missouri Formal Ethics Op. 125 (2008) (Exh. 5, pages 6-7); North Carolina Ethics Op. 228 (1996) (Exh. 5, page 8); Tennessee Formal Ethics Op. 2010-F-154 (2010) (Exh. 5, pages 9-18); Wisconsin Formal Ethics Op. E-87-11 (1998) (Exh. 5, pages 19-20).[6]

The reasoning is that requiring a plaintiff's counsel to indemnify the defendant, his insurers and representatives creates a conflict of interest between the client and the attorney and interferes with an attorney's professional independent judgment in representing the client. The attorney is obligated to abide by the client's wishes in terms of whether or not to settle a case, however that obligation can be "compromised by an offer that injects the attorney's own financial exposure into the process."[7] In addition, the rules of professional responsibility do not allow an attorney to represent a client if there is a significant risk that the representation will be materially limited by a personal

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[6] These opinions are attached as Exhibit 5 for the Court's convenience, except for the Kansas Ethics Op. which Plaintiffs were unable to print. There is no specific Alaska ethics opinion on this issue.

[7] *See e.g.*, Arizona Ethics Op. 03-05; Indiana Ethics Op. 1. Exh. 5, pages 1,5. Alaska RPC 1.2(a).

interest of the lawyer.[8] An attorney may not provide financial assistance to a client in connection with pending litigation, except for the advancement of court costs and expenses of litigation.[9] An attorney must exercise independent professional judgment.[10] By requesting or requiring plaintiffs' counsel to indemnify defendant, his carrier and representatives, the defendant pits the attorney's financial interests against the client's in direct violation of the Rules of Professional Conduct.

III. Conclusion

Plaintiffs welcome the Court's assistance in enforcing the settlement in this case between the Plaintiffs and [redacted] While there are a number of disagreements the parties are continuing to try to resolve in finalizing the settlement. The issue of requesting and requiring Plaintiffs' counsel to indemnify defendant, his insurers and representatives is an issue that cannot be resolved and does require Court intervention. As explained above, Plaintiffs have done everything possible within reason and the law to protect Medicare's interests (and, therefore, defendant's interests with respect to Medicare). [redacted] is attempting to add new and material terms to the

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[8] *See* e.g., Arizona Ethics Op. 03-05; Indiana Ethics Op. 1. Exh. 5, pages 1,5. Alaska RPC 1.7(a)(2).

[9] *See* e.g., Arizona Ethics Op. 03-05; Indiana Ethics Op. 1. Exh. 5, pages 1,5. Alaska RPC 1.8(e).

[10] *See* e.g., Arizona Ethics Op. 03-05; Indiana Ethics Op. 1. Exh. 5, pages 2,5. Alaska RPC 2.1.

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settlement and is attempting to require Plaintiffs' counsel to enter into an agreement that would violate the Rules of Professional Conduct.

FRIEDMAN | RUBIN
Attorneys for Plaintiffs

DATED: 6/9/11 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 9 day of June 2011 to:

[redacted]

[redacted]

[redacted]

[redacted]1

FRIEDMAN | RUBIN

By: _____
Kristi Berga
J:[redacted]\PLED\Mot for Court Assist (Pltf Response) 11 0609.doc

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

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.

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.

Advisory Committee of the Supreme Court of Missouri

Formal Opinion 125

AGREEING TO INDEMNIFY OPPOSING PARTY AS A TERM OF SETTLEMENT

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.[1]

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,

[1] 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.)

> 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[2] 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.

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.

November 13, 2008

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[2] 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.

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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BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION NO. 2010-F-154

Inquiry is made regarding the propriety of requesting or requiring plaintiff's 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 plaintiff's 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 plaintiff's 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 resolved.

(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:

> 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.[1] RPC 1.15, cmt. [10]. If the third party has a "just claim" to which "applicable

[1] 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 lien 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

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. Wisc. 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.[2] Debts of the

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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).

[2] 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

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).

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 subrogation is secured or unsecured and whether the attorney or client has represented to the third party that it would be paid.[2] 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.

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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).

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,[3,4] 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.

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[3]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))

[4] Nothing in this opinion is intended to relieve any individual or entity, including plaintiff's 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, provider, supplier, physician, private insurer, State agency, attorney, or any other entity entitled to payment by a primary payer.

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.

An attorney should not disburse the funds in his possession to a third person if the client contests the issue.[5] If the attorney knows of a dispute and has a "good faith doubt"[6] as to who is entitled to receive the disputed funds, the attorney must investigate, notify the third party,[7] and

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[5] 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).

[6] 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).

[7] 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.

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. Wisc. 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.[8] 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 (Tenn. 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.

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).

[8] 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).

Burris, et. al., 130 F.Supp.2d 949 (D.C. Tenn. 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 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.

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

> (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 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.

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.[9] Requiring a plaintiff's 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 plaintiff's 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

[9] 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); Ill. 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);

herein, the actions which are the subject of the first paragraph of the inquiry are obligations imposed upon the plaintiff's 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.

This the 10th day of September, 2010.

ETHICS COMMITTEE:

Roger Alan Maness

Virginia Anne Sharber

Thomas Stratton Scott, Jr.

APPROVED AND ADOPTED BY THE BOARD

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).