

ETHICS OPINION 131224

Facts:

A previously disabled plaintiff is seriously injured in an accident. The previous disability is based on bipolar disorder and the injured party has been on social security disability and Medicare for a decade prior to the accident. Medicare pays a number of medical bills related to the orthopedic injuries sustained in the car accident. The insurance company for the at-fault driver also pays some of the medical bills related to the car accident.

Approximately two years after the wreck and one year after the suit is filed, the injured plaintiff and the insurance company for the defendant driver agree to settle the case for \$200,000. For three months prior to reaching the settlement, the insurance company and the plaintiff's attorney have written letters to Medicare, requesting a final conditional payment amount. Medicare has not responded. However, Medicare did send a preliminary conditional payment letter six months prior to settlement, showing it had paid \$25,000 in medical bills since the accident. Medicare's ledger of bills, however, shows payments to the injured plaintiff's psychiatrist, payment for an unrelated podiatric surgery and a flu shot. In addition to these disputed bills, Medicare is required to share in the costs of recovery (proportionate attorney fees and costs) by virtue of 42. C.F.R. 411.37. The plaintiff's attorney believes the correct conditional payment amount is \$14,500.

The plaintiff's attorney and the defense attorney discuss these issues and to be safe, agree the plaintiff will keep the full \$25,000 in her attorney's trust account while working through the conditional payment issues with Medicare. The case settles and the parties go home. One week later, the release arrives, but contains the following provision that was not discussed at the mediation:

Attorney to Indemnify.

In addition to retaining \$25,000 in its trust account, as set forth in [section omitted] above, the plaintiff's law firm of Smith & Jones, P.C. agrees that it will hold harmless and indemnify Insurer for any future liability that may arise from any lien holder, including Medicare.

The plaintiff's attorney believes the \$200,000 settlement is to his client's advantage, but is concerned about the provision in the proposed release that would require his law firm to indemnify the insurer. The plaintiff's attorney knows that the conditional payments need to be paid back to Medicare and will do so. The lawyer has heard that attorney indemnification agreements have been found to

violate the Rules of Profession Conduct in other states and has concerns about his ethical obligations. Additionally, the plaintiff's attorney is worried that Medicare may, at some point in the future, clarify or issue new guidance regarding Medicare's rights regarding a liability set-aside. At present, his client's orthopedic injuries have healed, but there is some residual pain and reduced range of motion in a joint. The treating physician would not opine on future medical needs, saying it is impossible to predict the future. Thus, there was no medical basis at the settlement conference to seek damages for future medical needs. However, the plaintiff's attorney knows from other cases he has handled that the compromised joint may lead to other orthopedic problems down the road. Thus, Medicare may or may not have to pay for additional medical care potentially related to the accident at some point in the future.

The plaintiff's lawyer contacts the defense lawyer about the unexpected provision in the settlement agreement. The defense attorney is sympathetic, but states the insurance company is insistent that the attorney indemnification provision be included. The injured client is desperate for her money and instructs her lawyer to do whatever he can to expedite the settlement.

Question Presented:

May an attorney sign a Release or Settlement Agreement that requires the attorney to hold harmless and indemnify the insurer for any future liability that may arise from any lien holder, including Medicare?

Short Answer:

No. A lawyer should not agree to personally indemnify the Releasee from any lien claims.

It is ethical for plaintiff's counsel to hold money in a trust account to resolve the lawyer's obligation to secure funds that are subject to a lien by a third party, but that is not indemnification.

General Discussion:

The question presented has been addressed in 12 State's Ethics Committees and by New York City's Ethics Committee.¹ Each of the 13 agree that lawyers should not personally indemnify the Releasee from any lien claims, but they reach it under a mix of several rules of conduct.

This Committee agrees that Montana should join the majority in holding that the indemnification language as set forth is not appropriate under Montana's Rules of Professional Conduct. But the Committee also recognizes that the problem is not solely a plaintiff's bar issue. Medicare set-asides also strain the defense bar. The indemnification language is being requested because Medicare is legally entitled to seek repayment of its benefits from a multitude of parties, including defendants, defense counsel and defendant's liability insurer. The default solution for defense counsel has been to include everyone connected to the claim as a responsible party for reimbursement purposes. In some cases, defense counsel opt to include the lienholder on the settlement check. Defense counsel explains that if plaintiff's counsel does not want the lienholder on the settlement check, then plaintiff's counsel needs to indemnify the release so defense counsel's client isn't compromised. Most defense counsel do not use the indemnification language as a condition of settlement, but it has served as a bargaining chip. It is this Committee's opinion that some other solution will have to be developed, as the language proposed in the facts would violate Montana's Rule 1.2(a) allocating authority between a lawyer and client, Montana's Rule 2.1 delineating the lawyer's role as advisor, and Montana's conflict Rules 1.7 and 1.8(e).

The Rule 1.2 Violation:

The first difficulty confronting the indemnification language proposed is Montana's Rule 1.2—*Scope of Representation and Allocation of Authority Between Client and Lawyer* which provides, in pertinent part:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is

¹ See Wisconsin Formal Ethics [Op. E-87-11](#) (1987); North Carolina Ethics [Op. 2000-4](#) (2001); Arizona Ethics [Op. 2003-05](#) (2003); Indiana Ethics [Op. 1](#) of 2005; Illinois Ethics [Op. 06-01](#) (2006); Missouri Formal Ethics [Op. 125](#) (2008); South Carolina Ethics [Op. 08-07](#) (2008); New York City Ethics [Op. 2010-3](#) (2010); Tennessee Formal Ethics [Op. 2010-F-154](#) (2010); Ohio Supreme Court Ethics [Op. 2011-1](#) (2011); Kansas Ethics [Op. 11-02](#) (2011); New York State Ethics [Op. 852](#) (2011); Maryland Ethics Op. 2012-03 (2012).

impliedly authorized to carry out the representation. *A lawyer shall abide by a client's decision whether to settle a matter...* [emphasis supplied].

If a lawyer is required to abide by the client's decision on settlement, and the client chooses to settle and chooses to agree to the proposed indemnification language, the indemnification demand could cause the lawyer to refuse the settlement offer or try to dissuade the client from settling in order to protect the lawyer's own personal, financial or business interests. Put another way by Arizona's Ethics Committee, the attorney's obligation to abide by the client's decision whether to settle can be compromised by an offer "that injects the attorney's own financial exposure into the process." Arizona Ethics Opinion 03-05, at 3. South Carolina's Ethics Committee opined that the lawyer'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." Insistence upon a lawyer's agreement to indemnify as a condition of settlement could "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." South Carolina Ethics [Op. 08-07](#), at 1. In short, while a client may have no problem agreeing to the lawyer's future liability, the proposed indemnification asks too much of lawyers in service to their clients.

The Rule 1.7 Violation:

The second challenge flows straight from the first, in the potential for creation of Rule 1.7(a)(2) conflicts between plaintiffs and their lawyers. Montana's Rule 1.7-*Conflict of Interest: Current Clients* provides in pertinent part:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person *or by a personal interest of the lawyer* [emphasis supplied].

All 13 of the other states' Ethics Committees held that the proposed indemnification agreement pits a lawyer's personal interests against the client and materially limits the lawyer's relationship with their client. This Committee

agrees. In the facts presented, the client wants to settle. Standing in the way is her attorney, who does not want to absorb the responsibility and liability of known and unknown potential liens. The conflict is real and the conflict is not one that a client can waive. Rule 1.7(a)(2) directly prevents a Montana lawyer from agreeing to indemnify a client's future liabilities.

The Rule 1.8 Violation:

The third challenge to the proposed indemnification agreement is Rule 1.8-*Conflict of Interest: Current Clients: Specific Rules* which provides, in pertinent part:

(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, 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;
- (3) a lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client [emphasis supplied].

Comment [10] to Rule 1.8 explains that lawyers may not subsidize lawsuits on behalf of their clients, "because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation."

The potential financial assistance included in the proposed indemnity language is for known and unknown future medical bills and liens. Medical liens are clearly not court costs and are far broader than litigation expenses. The indemnification language is the lawyer's guarantee to pay the client's debts after the case settles. On this all of the other jurisdictions' ethics committees agree: A guarantee to pay a client's debts falls squarely within the prohibition on direct financial assistance of Rule 1.8(e). While Montana's Rule 1.8(e) contains a mechanism allowing

attorneys to guarantee certain loans to provide financial assistance to clients (and so differs from the ABA's Model Rule and most other states' rules on financial assistance to clients), Montana's mechanism does not allow direct indemnification of medical liens.

The Rule 2.1 Violation:

Finally, the proposed indemnity language runs afoul of Montana's Rule 2.1—*Advisor* which provides:

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.

Several of the other states' ethics opinions explain that “even if the lawyer were ethically permitted to provide such financial assistance [contrary to Rule 1.8(e)], such an agreement might compromise the lawyer's exercise of independent professional judgment and rendering candid advice in violation of Rule 2.1.” Arizona Ethics [Op. 2003-05](#), at 3; see also Indiana Ethics [Op. 1](#) of 2005, at 14 stating that “[f]orcing 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 South Carolina Ethics [Op. 08-07](#), at 2 “[E]ven if a lawyer were permitted and willing to enter into such an agreement to accept such a burden, acceptance of such a duty might compromise the lawyer's exercise of independent professional judgment in violation of Rule 2.1”. Montana's advisors should not be placed in a position of balancing their best advice against their own financial or business interests.

Conclusion

It is understood that to mitigate risk, defendants and their insurers may attempt to include in settlement agreements indemnification provisions by which the plaintiff's lawyer promises to hold the defendant or its insurer harmless from any lien claims that might be asserted, and to indemnify them against any claims that the plaintiff should have paid out of the settlement proceeds. Plaintiffs' lawyers are likely a more reliable source of indemnity than are their clients. While plaintiffs' counsel may be more reliable, the proposed indemnification is not a bargaining chip available for use in Montana. This practice presents a number of professional responsibility challenges. In addition to the creation of direct conflict

between counsel and client, the arrangement violates the prohibition on direct financial assistance, as well as undermines the attorney-client balance on whether to settle a matter, impairing the lawyer's role as advisor. The proposed overbroad indemnification should not be accepted by plaintiff's counsel.

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