

In this hypothetical, a lawyer represents a plaintiff in a personal injury suit. The defendant is represented by her insurance company's staff counsel. After all other aspects of a settlement offer were negotiated, the defendant's lawyer notified the plaintiff that the insurance company requires plaintiff's lawyer to agree to indemnify the insurer against liens in the event that they are not paid from the settlement proceeds or the plaintiff. Plaintiff's lawyer refuses to agree to indemnify the insurer, arguing that to do so would violate the *Rules of Professional Conduct* by making him personally responsible for the debts of his client. The defendant's lawyer refuses to finalize the settlement without this agreement and is willing to proceed to trial if plaintiff's lawyer refuses to accept the indemnification provision.

QUESTIONS PRESENTED

1. May a plaintiff's lawyer agree to indemnify a defendant and/or his insurer for any third-party lien claim against settlement proceeds received by the plaintiff?
2. May the defendant's counsel request or demand such an indemnification agreement as a condition of settlement?

APPLICABLE RULES

The applicable *Rules of Professional Conduct* are Rules 1.7(a)(2)¹, 1.8(e)², and 8.4(a)³.

ANALYSIS

Every state to consider this issue has found that it violates multiple *Rules of Professional Conduct* for the plaintiff's lawyer to agree to indemnify the defendant's insurer against debts that are owed by the plaintiff or to be paid from the settlement

¹ Rule 1.7 Conflict of Interest: General Rule

(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 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.

² Rule 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.

³ Rule 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;

proceeds.⁴ While not all of those opinions address the role of the defendant's lawyer in the transaction, those that do so uniformly find that it is also unethical for the defendant's lawyer to draft, propose or participate in an agreement that contains such an indemnification provision.⁵

Plaintiff's lawyer

The Committee agrees that the plaintiff's lawyer may not agree to indemnify the defendant's insurer for future claims resulting from the plaintiff's failure to pay liens which he was obligated to pay from the settlement proceeds.

First, the proposed agreement violates Rule 1.8(e). Because the indemnification agreement would obligate the lawyer to pay the client's debts, the agreement constitutes improper financial assistance to the client. According to the hypothetical, the expenses for which the lawyer is assuming responsibility are the subject of the lawsuit, and therefore are undoubtedly connected to the pending or contemplated litigation. Neither of the exceptions to Rule 1.8(e) applies, as the expenses at issue are personal expenses of the client and the hypothetical does not indicate that the client is indigent; in any event, the demand for an indemnification agreement is not limited to cases in which the client is indigent.

Secondly, the proposed agreement creates a conflict of interest between the plaintiff and his lawyer pursuant to Rule 1.7(a). Because the insurer will not agree to the settlement in the absence of an indemnification agreement, the lawyer's personal interest in avoiding liability for the debts of his client may be at odds with his client's desire to settle the case. The lawyer cannot reasonably be expected to provide an objective evaluation of whether the settlement is in his client's best interests when a settlement of any amount could result in personal liability for the lawyer, while any outcome of trial ensures that the lawyer will not be personally liable.

This opinion does not affect the lawyer's responsibilities to third parties as established by Rule 1.15(b)(4) and (5).⁶ To the extent that a third party has a claim to an interest in the settlement proceeds, the lawyer is obligated to protect that claim when the lawyer is in possession of the settlement proceeds. The lawyer does not have, and may not assume, the further obligation to pay his client's debts if the lawyer ethically disburses the settlement proceeds to the client but the client does not fulfill his obligations to third parties.

Defendant's lawyer

⁴ Tennessee Formal Op. 2010-F-154 (2010), New York City Bar Association Formal Opinion 2010-3 (2010), Missouri Formal Op. 125 (2008), South Carolina Ethics Adv. Op. 08-07 (2008), Indiana Opinion No. 1 of 2005 (2005), Arizona Opinion 03-05 (2003), North Carolina Ethics Op. RPC 228 (1996), Wisconsin Formal Op. E-87-11 (1987).

⁵ New York City Bar Association Formal Opinion 2010-3 (2010), Missouri Formal Op. 125 (2008), Arizona Opinion 03-05 (2003), Wisconsin Formal Op. E-87-11 (1987).

⁶ Rule 1.15 Safekeeping Property
(b) Specific Duties. A lawyer shall:

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and
(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

The Committee is of the opinion that it is a violation of Rule 8.4(a) for the insurer's lawyer to include this provision in settlement agreements. According to the hypothetical, the insurer, through its counsel, refuses to offer a settlement that does not include this provision. The insurer's lawyer's insistence that the plaintiff's lawyer enter into this indemnification agreement, as a condition to settlement, is an inducement to the plaintiff's lawyer to violate Rules 1.7(a) and 1.8(e).

This opinion is advisory only based upon the facts as presented, and not binding on any court or tribunal.

Committee Opinion
July 27, 2011