

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2014-4**

Lawyer's Indemnification of Opposing Parties

Questions Presented

Is it ethically permissible for a plaintiff's lawyer, as part of settlement of the plaintiff's claims, to agree personally to indemnify the defendant from third-party claims to the settlement funds?

Is it ethically permissible for a defendant's lawyer to propose a condition of settlement requiring the plaintiff's lawyer to agree personally to indemnify the defendant from third-party claims to the settlement funds?

Conclusion

A lawyer may not agree personally to satisfy third-party claims to settlement funds. With the issuance of this opinion, Alaska joins other bar associations that have concluded such agreements are ethically impermissible.¹ Accordingly, defense counsel may not attempt to require that a plaintiff's lawyer personally indemnify the defendant from third-party claims to the settlement funds.

Introduction

In personal injury lawsuits, it is not uncommon for various entities to have a claim to a portion of the plaintiff's recovery. For example, a plaintiff may owe various third parties for medical expenses, including healthcare providers, insurers, and state and federal assistance programs. These third parties may hold liens against the plaintiff's recovery from any settlement. The plaintiff must satisfy valid liens out of any settlement proceeds.²

When on notice of a tort suit on the plaintiff's behalf, lienholders may inform the defendant of the lien and threaten litigation if a settlement is made without addressing the lienholders' interests. If a plaintiff fails to pay those liens, it is possible that a lienholder could make a claim or file suit against the defendant who settled with the plaintiff. Typically, a settlement agreement contains language where the plaintiff agrees to indemnify the defendant from such claims. Such a provision involving a promise by the plaintiff raises no ethical concerns.

¹ AZ Bar Ethics Op. 03-05 (2003); DE Bar Ethics Op. 2011-1 (2011); FL Bar Ethics Op. 30310 (2011); GA Bar Ethics Op. No. 13-2 (2013); IL Bar Ethics Op. 06-01 (2006); IN Bar Ethics Op. 1 (2005); KS Bar Ethics Op. 01-05 (2001); MO Bar Ethics Op. 125 (2008); NC Bar Ethics Op. 228 (1996); OH Bar Ethics Op. 2011-1 (2011); SC Bar Ethics Op. 08-07 (2008); TN Bar Ethics Op. 2010-F-154 (2010); AL Bar Op. 2011-01 (2011); VA Bar Ethics Op. 1858 (2011).

² See, e.g., *Arkansas Dep't of Health and Social Servs. v. Ahlborn*, 547 U.S. 268 (2006).

However, defendants in some civil cases also have demanded as a condition of settlement that the plaintiff's attorney, as well as the plaintiff, agrees to indemnify the defendant in the event of claims arising from liens asserted against the plaintiff's settlement funds.

The Committee has been asked whether the plaintiff's attorney ethically may agree to such a demand, and conversely, whether a defense attorney may ethically make such a demand.

Relevant Authorities

Several provisions from the Alaska Rules of Professional Conduct are relevant to the analysis of whether such agreements are ethical.

Rule 1.2 mandates a lawyer follow the client's objectives in litigation and abide by a client's decisions with respect to settlement. Section (e) provides an exception "[w]hen a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law."³

Rule 1.7 addresses conflicts of interest, which include instances where there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interests. Rule 1.8 then lists some specific conflicts of interest. Rule 1.8(e) provides (with limited exceptions not applicable here) that a lawyer shall not provide financial assistance to a client.

Rule 1.16(a)(1) provides that a lawyer shall not continue representing a client if "the representation will result in violation of the rules of professional conduct or other law."

Finally, Rule 8.4 provides that it is professional misconduct for a lawyer to violate the rules of professional conduct or "knowingly assist or induce another to do so."

Analysis

(1) Rule 1.7 Precludes a Lawyer from Agreeing to Personally Indemnify an Opposing Party

A lawyer's personal agreement to indemnify the opposing party from any and all claims is distinct from an agreement by a client. Such an agreement by the lawyer to act as a personal guarantor violates Rule 1.7 because the agreement creates an actual or potential conflict of interest between lawyer and client. That is, a lawyer's personal indemnification of the defendant as part of a settlement agreement creates a financial risk for the lawyer that would not otherwise exist, and is not inherent in the attorney client relationship. To effectuate settlement, the lawyer might feel pressure from the client to accept the risk. Or a lawyer might discourage an otherwise worthwhile settlement if the lawyer's personal guarantee is required. Further, the agreement to

³ Rule 1.2(e).

indemnify poses the risk of an additional conflict of interest in the future. If the plaintiff's lawyer is forced to defend and indemnify the opposing party, the lawyer's only recourse will lie in a claim against his or her client.

According to Rule 1.7(a), a lawyer's representation of a client creates a conflict of interest if "there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited . . . by the lawyer's own personal interests." If a lawyer could commit to an agreement to indemnify the tort defendant, the very consideration of whether to accept that obligation would create a substantial risk that the lawyer's advice to the client would be materially affected by the lawyer's own financial interest – and entering into such an agreement would set up the potential for a future situation where the lawyer and client have directly opposite interests.

Rule 1.7(b) identifies ways that a lawyer may proceed notwithstanding a conflict of interest – but the specific prohibition in Rule 1.8(e) against providing financial assistance to a client, because of the inherent conflict of interest in that situation, argues against allowing compliance with Rule 1.7(b) to supersede the express prohibition in Rule 1.8(e).⁴ By agreeing to indemnify the defendant, the lawyer is agreeing to potentially pay some of the client's lawful obligations – and in this way the lawyer is rendering financial assistance to the client.⁵ Although that obligation may never actually arise, by providing a personal financial guarantee at the time of settlement, the lawyer is providing financial assistance – a source of credit the client would otherwise not have. Rule 1.8(e) clearly precludes a lawyer from paying his or her client's medical bills directly. A lawyer's promise to indemnify a defendant against third-party liabilities (medical or otherwise) that his or her client fails to satisfy is a prospective obligation, which may never come to pass, but still violates the rule.

(2) Rule 8.4 Precludes the Defendant's Lawyer from Inducing the Plaintiff's Lawyer to Violate the Rules of Professional Conduct

Rule 8.4 provides that that it is professional misconduct for a lawyer to violate the rules of professional conduct or "knowingly assist or induce another to do so." Therefore, if, as discussed above, the plaintiff's lawyer may not provide a personal promise to indemnify the defendant, it is professional misconduct for the defense lawyer to request such an agreement as part of settlement discussions.

Approved by the Alaska Bar Association Ethics Committee on October 2, 2014.

Adopted by the Board of Governors on October 30, 2014.

⁴ Rule 1.8(e) provides two exceptions. Neither applies to the situation addressed in this opinion.

⁵ Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client both in connection with a pending case as well as in contemplated litigation.