

ETHICS OPINION

RO 2011-01

Lawyer's Indemnification of Defendants for Unpaid Liens

QUESTION:

May a plaintiff's or claimant's lawyer, on behalf of his client, personally indemnify an opposing party, their insurer or their lawyer for any unpaid liens or medical expenses? May a lawyer request or require another lawyer to personally indemnify the lawyer's client against any unpaid liens or medical expenses as a condition of settlement?

ANSWER:

Pursuant to Rules 1.7 and 1.8(e), *Alabama Rules of Professional Conduct*, a plaintiff's or claimant's lawyer, on behalf of his client, may not agree to personally indemnify the opposing party for any unpaid liens or medical expenses due to be paid from the settlement proceeds or underlying cause of action unless the liens or expenses are known and certain in amount at the time of the proposed settlement. Likewise, a lawyer representing the defendant or the defendant's insurer may not request or require the opposing lawyer to personally indemnify defendant(s) for unpaid liens or medical expenses as a condition of settlement unless such liens and expenses are known and certain in amount at the time of the proposed settlement.

If the amount of the lien or expense is known at the time of settlement, the plaintiff's attorney may agree on behalf of the client to use the settlement funds to satisfy such liens or expenses, and, thereby, relieve the defendant or his insurer of any further liability. However, a settlement agreement may not contain language requiring an attorney to indemnify an opposing party, their insurer or their lawyer for unknown liens or expenses or where the amount of such liens or expenses is unknown at the time of settlement. Such a request would violate Rule 8.4(a), *Ala. R. Prof. C.*, which prohibits an attorney from "induc(ing) another" to violate the *Rules of Professional Conduct*.

DISCUSSION:

The Disciplinary Commission has been asked to issue a formal opinion regarding the growing trend of defense counsel requiring, as a condition to settlement, that plaintiff's counsel personally indemnify the defendant, his insurer, and counsel against any unpaid liens, medical bills or third-party claims against the plaintiff arising from the litigation. In examining the issue, the Disciplinary Commission notes that 13 bars have issued formal opinions expressly prohibiting plaintiff's counsel from entering into such indemnification agreements.¹ In finding that such indemnification agreements are prohibited, these bars found that such agreements may create an impermissible conflict of interest and/or constitute improper financial assistance to the client.

For instance, the New York City Bar Association determined that such indemnity agreements by a client's lawyer to "guarantee a client's obligations to third party insurers . . . amounts to 'guaranteeing financial assistance to the client'". Rule 1.8(e), *Ala. R. Prof. C.*, provides as follows:

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, 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;

¹ See Arizona Opinion 03-05; Indiana Opinion No. 1. of 2005; Illinois Adv. Op. 06-10; Kansas Op. 01-05; Missouri Formal Op. 125; New York City Bar Op. 2010-03; North Carolina Ethics Op. RPC 228; South Carolina Ethics Adv. Op. 08-07; Tennessee Formal Op. 2010-F-154; Vermont Ethics Op. 96-05; Wisconsin Formal Op. E-87-11, and Washington State Bar Op. 1736.

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer; and

(4) in an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, for his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

Under Rule 1.8(e), a lawyer may not provide any financial assistance to a client except in limited circumstances as set out in the rule. An indemnification agreement in which the lawyer agrees to be personally liable for any outstanding liens or medical expenses incurred by the client would not fall under any of the exceptions to the rule and would, therefore, constitute impermissible financial assistance to the client.

Other bars have focused on the fact that indemnification agreements create an impermissible conflict between the financial interests of the lawyer and those of the client. Rule 1.7(b), *Ala. R. Prof. C.*, provides as follows:

RULE 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.

As noted by the Arizona Bar in Ethics Op. 03-05 “[t]he 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.” Such a conflict involves the lawyer’s own financial interests in seeking to avoid such exposure and liability for the client’s debts and the client’s own desire to settle the matter on favorable financial terms.

While the Disciplinary Commission agrees that a plaintiff’s or claimant’s lawyer may not generally indemnify an opposing party, their insurer or their lawyer for any unpaid liens or medical expenses, a lawyer may agree, on behalf of the client, to use settlement funds to satisfy liens and expenses that are known and certain at the time of settlement. In order to do so, the amount of the lien or expense must be known at the time of the settlement. The liens or expenses to be satisfied under the terms of the settlement must be included in the settlement agreement. Further, the client must agree, in writing, that the settlement funds will be used to satisfy those liens or expenses. Such would be akin to the lawyer’s issuing a letter of protection to the opposing party, their insurer or their lawyer that the settlement funds will be used to satisfy a particular lien or expense. Once an agreement has been entered into amongst the parties, the plaintiff’s or claimant’s lawyer would have an ethical obligation to ensure the payments are made.

Just as a plaintiff’s or claimant’s lawyer may not agree to sign a general indemnification agreement on behalf of a client, a lawyer representing a defendant may not require the plaintiff’s lawyer to personally and generally indemnify the defendant against any unpaid liens or medical expenses as a condition of settlement. Requiring general indemnification as a condition of settlement is analogous to when a lawyer is required to agree to refrain from representing other persons against the defendant in exchange for settling a claim on behalf of a client. Rule 5.6(b), *Ala. R. Prof. C.*, expressly prohibits any lawyer from offering or making any agreement that would place a restriction on a lawyer’s right to practice as part of a settlement between private parties. Just as a lawyer cannot participate in making or requiring any agreement that would limit a lawyer’s right to practice, a lawyer cannot agree to or require another lawyer to personally enter into a general indemnification agreement on behalf of a client.

Further, Rule 8.4(a), *Ala. R. Prof. C.*, provides, in part, as follows:

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 . . .

As discussed previously, a plaintiff's or claimant's lawyer, on behalf of the client, may not agree to personally and generally indemnify the opposing party and his lawyer against all unpaid liens and medical expenses without violating Rules 1.7(b) and 1.8(e), *Ala. R. Prof. C.* Rule 8.4(a) provides that is an ethical violation for any lawyer to "induce another" to "violate the *Rules of Professional Conduct*." As such, a lawyer cannot require or ask opposing counsel to agree to generally indemnify as a condition of settlement since that would constitute inducing and assisting another to violate the *Rules of Professional Conduct*.

JWM/s

2-25-11

[Note: Formal Opinion RO-2011-01 was revised on July 12, 2017 by the Disciplinary Commission of The Alabama State Bar. The revision is in reference to a point requiring clarification in the last paragraph on the first page. In the second sentence of the paragraph the original opinion read "However a settlement agreement may not contain language indemnifying an opposing party, their insurer or their lawyer..." This revised opinion will now read, "However a settlement agreement may not contain language requiring an attorney to indemnify an opposing party, their insurer or their lawyer..."]

J. Douglas McElvy
General Counsel