



Professional Ethics Committee

30 Bank Street
PO Box 350
New Britain
CT 06050-0350
06051 for 30 Bank Street
P: (860) 223-4400
F: (860) 223-4488

Approved June 20, 2012

INFORMAL OPINION 2012 – 06

MAY COUNSEL AGREE TO HOLD A SETTLING DEFENDANT HARMLESS FROM THIRD PARTY LIENS IN CONNECTION WITH THE SETTLEMENT OF A CLIENT'S CLAIM?

You indicate that you regularly represent individuals in personal injury actions. We understand that due, in part, to federal law requirements directing insurers to protect Medicare liens when settling claims, some insurers request that you execute indemnification agreements in connection with settlement of your client's claims. Typically, such an indemnification agreement would require you to hold harmless the settling defendants' against any claims arising out of federal, state or valid private liens against the personal injury settlement funds. You have asked whether such agreements violate the Rules of Professional Conduct.

For several reasons, we conclude that the hold harmless and indemnification agreements you describe are prohibited by the Rules. First, Rule 1.7(b) provides that that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," including situations where (2) "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a third person or by a personal interest of the lawyer." The Committee finds that the indemnification agreements described present a conflict of interest between the plaintiff's attorney and his/her client, because it injects the lawyer's financial interests into the client's decision to settle. As the State Bar of Arizona observed in reaching the same conclusion, such an agreement could influence 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." See Arizona Formal Ethics Opinion No. 03-05. For similar reasons, we conclude that the proposed agreement also

creates a conflict with the lawyer's ability to "exercise independent professional judgment and render candid advice" as required by Rule 2.1.

We further conclude that the arrangement would violate Rule 1.8(e), which provides:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) A lawyer may pay court costs and expenses of litigation on behalf of a client, 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.

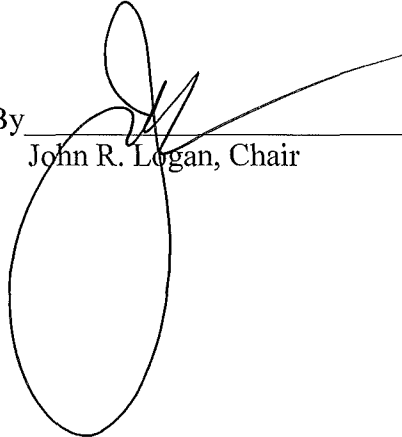
An attorney or firm that agrees to indemnify third parties as a condition of settlement is providing a financial guaranty in the event the client fails to satisfy his or her obligations to those parties. While we recognize that the lawyer is assuming a contingent liability, rather than making a direct payment on the client's behalf, we nonetheless conclude that an indemnification agreement of this nature constitutes impermissible "financial assistance in connection with pending or contemplated litigation" to a client. Rule 1.8(e) does not distinguish between "direct" and "indirect" forms of financial assistance, and a client whose debts to third parties are guaranteed is clearly obtaining a financial benefit from his or her attorney. Moreover, the exceptions provided in Rule 1.8(e) clearly do not apply because the third party liens at issue are not court costs or other expenses necessary to advance the litigation.

We note that ethics opinions issued by several other states have similarly concluded that indemnification/hold harmless agreements described above are impermissible either under Rule 1.7 (conflicts of interest), Rule 1.8 (financial assistance to clients) or both. *See* Arizona Formal Ethics Opinion No. 03-05 (2003); Florida Ethics Opinion 70-8 (1993); Illinois State Bar Association Advisory Opinion on Professional Conduct 06-01 (2006); Indiana Ethics Opinion 2005-01 (2005); Kansas Legal Ethics Opinion 01-05 (2001); Missouri Formal Opinion 125 (2008); New York State Bar Association Ethics Opinion 852 (2011); North Carolina Ethics Opinion RPC 228 (1996); South Carolina Bar Ethics Opinion 2008-07 (2008); Tennessee Formal Ethics Opinion 2010-F-154 (2010) Vermont Advisory Ethics Opinion 96-05; Wisconsin Formal Opinion E-87-11 (1996).¹

¹ We understand that under the Medicare, Medicaid and SCHIP Extension Act of 2007, defendants who settle cases may be subject to liens or claims to the settlement funds from Medicare, and that there are practical

For the reasons set forth above, we conclude that under the Connecticut Rules of Professional Conduct, an attorney may not enter into an agreement to indemnify a client's obligations to a third party in connection with settlement of a client's claim.

THE COMMITTEE ON PROFESSIONAL ETHICS

By  _____
John R. Logan, Chair

reasons why settling defendants would want to be indemnified from any liability arising from such claims. While it is certainly beyond the purview of this Committee to opine on a settling defendant's obligations under federal law, we note that the Rules would not preclude a settling defendant from requiring that a plaintiff provide an affidavit confirming the absence of any Medicare or other liens to settlement funds or conditioning the settlement on plaintiff's agreement to hold the defendant harmless from such claims. We also note that this Committee has separately addressed on several prior occasions plaintiff's counsel's independent obligations under Rule 1.15 with respect to resolving claims to settlement funds in which a third party asserts an interest, *see* Informal Opinions 95-20, 99-06, 2001-08, 2010-01, and 2010-05, and underscore that this Opinion is not intended to change or modify our prior opinions concerning those obligations.