

## Opinion No. 1 of 2005

*Editor's Note: The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The Committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.*

In recent years some defense attorneys and insurance companies have begun seeking a promise of indemnity from the plaintiff's attorney as well as the client. Those paying to resolve the claim are understandably interested in eliminating or reducing any continuing responsibility from the incident. That would include potential exposure to third parties pursuing subrogation for benefits extended to plaintiff. If the settling party is later forced to satisfy the subrogation lien, it may be difficult to obtain reimbursement from the plaintiff. Hence, a commitment of personal responsibility from the attorney may effectively minimize the risk. That attorney may or may not be willing to assume such risk, depending on his relationship with the client, the extent to which he feels comfortable that all such liens are known and will be satisfied, and his views as to the ethics of such a requirement. Attorneys may, in fact, reject the request, but the question is whether it is ethical for the attorney to sign such agreements.

It is possible all terms of the offered settlement may be acceptable to the client and yet the settlement is lost solely because his attorney refuses to assume that risk. The attorney may believe the offer is otherwise fair and in the client's best interests but recommend it be rejected only to avoid his own exposure for unpaid liens. In some cases the lien or unpaid claim may

be substantial in amount but be unknown to the attorney.

The Indiana State Bar Association Legal Ethics Committee ("Committee") has been asked for its opinion as to whether the Indiana Rules of Professional Conduct ("Rules") permit plaintiff's counsel to execute a settlement agreement requiring counsel to hold harmless and indemnify the defendant, defendant's insurer and defense counsel from any subrogation liens and/or third-party claims.

Although the Committee has been unable to find any reported judicial opinions squarely on point, the Committee is nevertheless of the opinion that the practice violates the Rules on several grounds. They include:

- Rule 1.2(a) obligates the attorney to abide by the client's decision whether to settle a matter. That obligation can be compromised by an offer that injects the attorney's own financial exposure into the process;

- Rule 1.7(a)(2) prohibits an attorney from representing a client if there is a significant risk the representation will be materially limited by the attorney's own interest. Acceptance of an otherwise favorable settlement that hinges on the attorney assuming uncertain personal exposure may render the attorney's interests in conflict with those of the client;

- Rule 1.8(e) prohibits an attorney from providing financial assistance to a client beyond the advancement of costs and expenses of litigation. A promise of indemnity may effectively make the attorney a guarantor of the client's legal obligations, which is not the type of assistance permitted by the rule;

- Rule 2.1(a) requires the attorney to exercise independent professional judgment in representing a client. Forcing 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

- Rule 1.16 prohibits an attorney from representing a client if the representation violates the Rules. If any concern listed above violates the Rules, termination of representation is required. Withdrawal at the end of an otherwise successful settlement negotiation is contrary to the interests of the client, the attorney and justice.

Rule 1.15(d) obligates the attorney to promptly deliver to a third person any funds or other property that the third person is entitled to receive upon settlement of an injury claim. *See, e.g., In re Cassidy*, 814 N.E.2d 247 (Ind. 2004) (attorney disciplined for not following a letter of protection he issued to client's doctor promising to honor unpaid medical bills). But *Cassidy* and its progeny deal with attorneys who violated a promise to respect the third-party's interest in the settlement proceeds. Counsel are often notified by those asserting liens against settlement proceeds or claiming to be owed for services rendered, but that is not always the case. Despite the exercise of due diligence, they may not know the identity of all lienholders and third-party providers and the extent of their interests. The extent of an attorney's duty to locate all lienholders and other providers is at best unclear.

Courts are divided as to whether Medicare and Medicaid benefits may be recovered from the claimant's attorney if not reimbursed from the settlement proceeds. Interpreting 42 C.F.R. §411.24(g), compare *U. S. v. Sosnowski*, 822 F.Supp. 570 (W.D. Wisc. 1993) (recognizing the validity of Medicare's claim against the plaintiff's attorney for satisfaction

of its claim) with *Zinman v. Shalala*, 835 F.Supp. 1163 (N.D. Cal. 1993) (holding that Medicare does not truly possess a lien, just the right to bring an action against any entity responsible to pay primarily for the medical expenses). The Medicare and Medicaid contexts, however, are distinguishable because in those contexts counsel has a reliable means of verifying the claimed lien amount.

Ethics committees from at least three other state bar associations have reached the same conclusion as this advisory opinion. *See*, State Bar of Arizona (Opinion No. 03-05, August 2003) (concluding “[a] claimant’s attorney may not ethically enter into any settlement that would require the attorney to indemnify or hold the Releasee harmless from any lien claims.”); Kansas State Bar (Ethics Advisory Committee Op. 01-05, May 23, 2002) (holding that such agreement “places the lawyer in a position where he or she creates a conflict of interest between the client and the insurance company and insured, and/or the lawyer’s own interests.”); and North Carolina State Bar (Ethics Opinion RPC 228, July 26, 1996) (expressing that “a lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor’s liability insurance carrier against the unpaid liens of medical providers.”).

In conclusion, the Committee is of the opinion that non-Medicare and Medicaid settlement agreements that require a counsel to hold harmless and indemnify the opposing party from subrogation liens and/or third-party claims violate our Rules. ☺