

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS**

OPINION 2010 - 3

**SETTLEMENT AGREEMENTS REQUIRING
THE FINANCIAL ASSISTANCE OF COUNSEL**

- TOPIC:** Settlement agreements requiring plaintiff's counsel to hold defendant harmless for making settlement payments to plaintiff.
- DIGEST:** Plaintiff's counsel may not agree to hold defendant harmless from claims arising out of defendant's payment of settlement consideration and defendant's counsel may not ask plaintiff's counsel to provide such financial assistance.
- RULES:** 1.2(a), 1.7(a), 1.8(e), 1.15(c), 1.16(b), 8.4(a)
- QUESTION:** May plaintiff's counsel, at the request of defendant's counsel, agree to hold defendant harmless from third party claims arising out of defendant's settlement payments to plaintiff?

OPINION

I. Background

Before entry of final judgment in personal injury litigation, plaintiffs often seek financial assistance from workers compensation carriers, Medicaid, Medicare, or private insurance coverage. Such carriers or agencies may be entitled by statute or contract to be reimbursed by the plaintiff for any payments made to her in the event she obtains a damages award or settlement payment at the conclusion of the litigation, and therefore may seek to recoup any amount paid to plaintiff by defendant.

For this reason, defendants and their counsel who settle such cases generally are aware that payments made under the parties' settlement agreement may be subject to the liens or claims of plaintiff's insurance providers or other creditors. To protect themselves against any potential liability for those claims, defendants may demand that their settlement agreement stipulate that the settling plaintiff hold defendants harmless from any claims made by insurers or other creditors by reason of the settlement payments. Defendants may also demand that plaintiff's counsel personally guarantee her client's indemnification obligation and hold defendants harmless from any third party claims. In this opinion, we address the question of whether the New York Rules of

Professional Conduct (the "Rules") permit defendants' counsel to request such a provision in a settlement agreement and whether plaintiffs' counsel may agree to be bound by it.

II. Counsel May Not Guarantee Client Settlement Obligations

Rule 1.8(e)(1) bears directly on the question of whether, and to what extent, an attorney may provide financial assistance to a client in connection with pending or contemplated litigation. The rule provides as follows:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that . . . a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter

N.Y. Prof'l Conduct R. 1.8(e)(1) (2010).

Under this Rule, a lawyer generally may not assist a client in meeting its financial obligations to third parties stemming from the settlement of litigation. In the event of a settlement, a client's obligation to use settlement proceeds to satisfy a lien or other indebtedness is a personal obligation of the client,¹ and, for purposes of the Rule, is indistinguishable from the client's obligation to pay other expenses such as medical expenses or residential rent. A lawyer's agreement to guarantee a client's obligations to third party insurers to induce a defendant to settle thus amounts to "guarantee[ing] financial assistance to the client" in violation of Rule 1.8(e).

The agreement of plaintiff's counsel to indemnify defendants in this context would not fall within the exception under Rule 1.8(e)(1) permitting lawyers to "advance court costs and expenses of the litigation, the repayment of which may be contingent on the outcome of the matter." Id. This exception is strictly limited to those expenses and costs incurred in litigating a lawsuit to completion, such as the cost of copying documents or purchasing deposition transcripts. It does not cover potential liabilities arising out of the performance of a settlement agreement after the litigation has been concluded.

¹ In addition, under Rule 1.15(c), a lawyer is obligated to "promptly notify a client or third person of the receipt of funds . . . in which the client or third party has an interest," to safeguard the funds and to "promptly pay or deliver to the client or third person as requested by the client or third person the funds . . . in the possession of the lawyer that the client or third person is entitled to receive." N.Y. Prof'l Conduct R. 1.15(c)(1), (2), (4) (2010). To the extent a lawyer is aware of a lien or other claim against settlement funds she receives on behalf of a client, she has an obligation under the Rule to notify the interested claimant of the receipt of the funds, to segregate and protect the funds claimed, and to pay them over if the claimant is entitled to receive them. See id.

In a settlement agreement, a covenant by plaintiff's counsel to indemnify defendants for third party claims arising out of settlement payments also implicates Rule 1.7(a)(2), which provides, in pertinent part, that:

a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

Id. 1.7(a)(2).

When a lawyer is retained in a damages action pursuant to a contingent fee agreement, the financial interests of the plaintiff and her lawyer are generally aligned. However, a conflict may arise if plaintiff's counsel is asked, as part of a settlement, to indemnify the defendant against liability to third parties for settlement payments made to plaintiff. The conflict would be between the plaintiff's interest in procuring a settlement and her lawyer's own "financial, business . . . and personal interest." Id. If a client wishes to settle the case for a fixed amount and has instructed her lawyer to proceed with the settlement, her lawyer must proceed as instructed under Rule 1.2(a), which provides that "[a] lawyer shall abide by a client's decision whether to settle a matter." Id. 1.2(a). Therefore, once the client has made the decision to settle, the lawyer generally has a professional obligation to take all steps necessary and appropriate to effectuate the client's goals. See id. cmt. 1.

A lawyer may not be willing, however, to assume responsibility for indemnifying and holding harmless defendants for a potentially significant sum of money for an indefinite period of time, an obligation encompassing not only known liens, but also presently unknown claims, including possible payment of defendants' legal fees. A lawyer's reluctance to incur such personal liability may conflict with the client's direction to resolve the case. Despite the client's instruction to settle, the lawyer's own "financial" "business" and "personal" interests not to incur such liability could conflict directly with the lawyer's duty to complete the settlement as the client has directed.

We therefore conclude that counsel to a settling plaintiff may not enter into a hold harmless/indemnity agreement for the benefit of settling defendants because such an agreement would both violate the prohibition against financial assistance under Rule 1.8(e) and create an impermissible conflict of interest in violation of Rule 1.7(a). Accord Illinois Advisory Op. 06-01 (2006), available at 2006 WL 4584284; Indiana Op. 1 (2005); Kansas Op. 01-05 (2002); North Carolina Op., RPC 228 (1996); Advisory Committee of the Supreme Court of Missouri, Formal Op. 125 (2008) ("Missouri Formal Op."); Arizona Op., No. 03-05 (2003); Florida Op. 70-8 (rev. 1993).

III. Counsel for Defendants May Not Seek Indemnification from Plaintiff's Counsel

Rule 8.4(a) provides that a "lawyer or law firm shall not . . . 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." N.Y. Prof'l Conduct R. 8.4(a) (2010). In light of our conclusion that plaintiff's counsel may not agree to hold defendants harmless for performance of their payment obligations pursuant to a settlement agreement, it necessarily follows that defendants' counsel may not request such indemnification without violating Rule 8.4(a). See Missouri Formal Op. 125 (2008).