The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2011-1

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SYLLABUS: It is improper for a plaintiff's lawyer to personally agree, as a condition of settlement, to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such agreements are not authorized by Prof. Cond. Rule 1.15(d) and violate Prof. Cond. Rules 1.8(e) and 1.7(a)(2). Further, it is improper for a lawyer to propose or require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such conduct violates Prof. Cond. Rule 8.4(a). The Board recommends that this advisory opinion be prospective in application.

OPINION: This opinion addresses whether, during settlement of a matter, it is ethical for a lawyer to propose, demand, and or agree to personally satisfy any and all claims by third persons as to settlement funds.

> Is it proper for a plaintiff's or claimant's lawyer to personally agree, as a condition of settlement, to indemnify the opposing party from any and all claims by third persons to the settlement funds?

Lawyers who represent plaintiffs in civil actions, such as personal injury or medical malpractice are required to work diligently to obtain a fair settlement for clients who often have incurred substantial medical bills as a result of their injuries. Sometimes it takes months and even years to reach settlement or judgment.

The proper disbursement of settlement proceeds is a huge responsibility for a lawyer who receives the settlement proceeds. Clients are sometimes in dire need of funds from the settlement proceeds. Lawyers need payment for their services too. And, third persons such as medical providers, insurance carriers, or Medicare and Medicaid seek reimbursement of their expenses from the settlement proceeds.

Increasingly, lawyers who represent plaintiffs are being asked to personally indemnify the opposing party and counsel from any and all claims by third persons to the settlement proceeds. Lawyers are concerned not only about whether it is ethical to enter such

agreements, but also whether it is ethical to propose or require that other lawyers enter such agreements.

This opinion advises as to the ethical concerns of a lawyer's personal agreement to indemnify. The opinion does not address legal issues that are outside this Board's advisory authority under Gov.Bar R. V(2)(C).

Applicable Ohio Rules of Professional Conduct

The Ohio Rules of Professional Conduct establish that a lawyer has an ethical duty to safekeep funds of clients *and* third persons. The duties are very specifically set forth in Prof. Cond. Rule 1.15 and apply to settlement funds that come into a lawyer's possession.

One duty is that a lawyer who is in possession of a client's or third person's funds must keep the funds in an interest bearing trust account separate from the lawyer's funds. This is required by Prof. Cond. Rule 1.15(a) which in pertinent part states: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a 'client trust account,' 'IOLTA account,' or with a clearly identifiable fiduciary title."

A second duty is that a lawyer who receives funds in which a third person has a lawful interest must promptly notify the third person and upon request promptly render a full accounting as to the funds; and, unless there is an exception within the rule or otherwise permitted by law or by agreement, the lawyer must promptly deliver the funds the third person is to receive. This is required by Prof. Cond. Rule 1.15(d) which states: "Upon receiving funds or other property in which a client or third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property."

A third duty is that a lawyer who is in possession of funds in which two or more persons claim interest, must hold the funds until the dispute is resolved, but must distribute the undisputed portions of the funds. This is required by Prof. Cond. Rule 1.15(e) which states: "When in the course of representation a lawyer is in possession of funds or other property in which two or more persons, one of whom may be the lawyer, claim interests, the lawyer shall hold the funds or other property pursuant to division (a) of this rule until

the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute."

When Prof. Cond. Rule 1.15 became effective on February 1, 2007, lawyers expressed concern that their responsibility toward third person claims was limitless. That is not so, nor was it ever so, but to alleviate concerns and clarify the duty to third persons Prof. Cond. Rule 1.15(d) and Comment [4] were amended, effective January 1, 2010. [The proposed amendments were based, in part, on OhioSupCt, Bd Comm'rs on Grievances & Discipline, Op. 2007-7 (2007) and on a 2008 report and recommendation of an Ohio State Bar Association committee that reviewed Prof. Cond. Rule 1.15.]

The following clarifying language was added to Prof. Cond. Rule 1.15(d): "For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property." Explanatory language was also added to Comment [4] including this statement: "When the lawyer knows a third person's claimed interest is not a lawful one, a lawyer's ethical duty is to notify the client of the interest claimed and promptly deliver the funds or property to the client." Changes were also made to the first sentence of Comment [4]: "Divisions (d) and (e) address situations in which third persons may claim a lawful interest in specific funds or other property in a lawyer's custody."

In short, a lawyer's ethical duty is to protect a third person's lawful interest of which the lawyer has actual knowledge. The lawful interest must be in the specific funds in the lawyer's custody.

The language in Prof. Cond. Rule 1.15(d) that defines a lawful interest as including "a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property" is not to be construed as a green light for a lawyer to agree to personally indemnify opposing party for any and all third person claims to settlement proceeds. A personal agreement by a lawyer to indemnify the opposing party from any and all claims is distinct from an agreement by a client, or the lawyer on behalf of the client, guaranteeing payment of lawful claims from the funds in the lawyer's possession.

Such a personal indemnification agreement by a lawyer is, in essence, an agreement by the lawyer to provide financial assistance to the client. The lawyer is undertaking an obligation to pay the client's bills. This is unethical for several reasons.

Ohio lawyers are not permitted to provide financial assistance to client, except for very narrow circumstances permitted by rule. Prof. Cond. Rule 1.8(e) states: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may do either of the following: (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." None of the exceptions apply herein.

Further, such agreement creates a conflict of interest for a lawyer because there would be substantial risk that the lawyer's representation of the client would be materially limited by the lawyer's concerns about having personal financial responsibility for known and unknown claims against the client. Prof. Cond. Rule 1.7(a) states: "A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if . . . (2) 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 responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests." Even if this conflict of interest could be ameliorated under Prof. Cond. Rule 1.7(b), the agreement still would be improper under Prof. Cond. Rule 1.15 and 1.8(e).

It is also this Board's view that it is improper for a lawyer to propose or require that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such conduct violates Prof. Cond. Rule 8.4(a). Prof. Cond. Rule 8.4(a) states that it is professional misconduct for a lawyer to "violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another."

This Board is not alone in finding such agreements unethical.

Advisory opinions from other states

An Arizona ethics committee advised that "[a] claimant's attorney may not ethically enter into any settlement agreement that would require the attorney to indemnify or hold the Releasee harmless from any lien claims against the settlement proceeds." State Bar of Arizona, Op. 03-05 (2003). The committee concluded that such agreements would violate several of the Arizona Rules of Professional Conduct, ER 1.7, 2.1, 1.8, 1.16(a). Id.

An Illinois ethics committee was asked: "Whether the Illinois Rules of Professional Conduct prohibit a lawyer representing a party receiving money in a settlement from entering into an agreement in which that lawyer provides his/her personal guarantee that the settlement funds will be paid to all person who have a claim on the funds and indemnifies the defendant against such claims?" Illinois State Bar Assn., Op. 06-01 (2006). The Illinois committee stated that "a plaintiff's lawyer's personal guarantee to pay the lien and subrogation claims against his client (even if such payments are to be made by the settlement funds) constitutes the provision of financial assistance to his client and violates Rule 1.8(d) of the [Illinois] Rules of Professional Conduct." The committee did not take a position of whether Rule 1.7(b) would be violated by such personal guarantees. Id.

An Indiana ethics committee was asked "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." Indiana State Bar Assn., Op. 1 (2005). The committee noted that the practice violates the Rules on several grounds that include Rule 1.2(a), 1.7(a)(2), 1.8(e), 2.1(a), 1.16, 1.15(d). The committee noted that "[c]ourts are divided on whether Medicare and Medicaid benefits may be recovered from the claimant's attorney if not reimbursed from the settlement proceeds." Id. "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." Id.

A Kansas ethics committee advised that "[a] lawyer for a personal injury plaintiff or claimant signing a blanket indemnification provision whereby the lawyer agrees to hold the insurance company and the insured harmless from 'any and all subrogation liens of every kind and nature whatsoever, both known and unknown' 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." Kansas Bar Assn, Op. 01-5 (2001).

A Missouri ethics committee was asked "whether it is a violation of the Rules of Professional Conduct for an attorney to agree to indemnify the opposing party for debts owed by the attorney's client" and "whether it is a violation for an attorney to request or demand that another attorney agree to such indemnification." Missouri SupCt, Advisory Committee, Op. 125 (2008). That committee advised "[i]f a client owes a debt to a third party who expects payment from the client's recovery by settlement or judgment, an attorney may not agree to pay the third party from the attorney's own funds, if the client does not pay the third party." Further, the committee advised that "[b]ecause an attorney who agrees to indemnify an opposing party will violate Rule 4-1.8(e), it is a violation for another attorney to request or demand that an attorney enter into such an agreement. The second attorney would violate Rule 4-8.4." Id.

A North Carolina ethics committee advised that under Rule 5.1(b) of the North Carolina Rules of Professional Conduct a lawyer for a personal injury client may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers as part of the settlement of the client's claims. North Carolina State Bar Assn. Op. 228 (1996).

A South Carolina ethics committee advised that "[a]n attorney may not agree to serve as an indemnitor on behalf of her client to protect released parties in a settlement against lien claims asserted by third parties regarding settlement proceeds." South Carolina Bar, Op. 08-07 (2008).

In Tennessee, an ethics committee noted that "[r]equiring a plaintiff's lawyer to enter agreements posed in the inquiry, particularly requiring that the attorney indemnify and/or hold harmless any party being released or subrogation interest holder from medical

expenses or liens, creates a conflict between the interests of the plaintiff's attorney and those of their client." Tennessee SupCt, Board of Professional Responsibility, Op. 2010-F-154 (2010). The committee advised that "an attorney cannot ethically agree to such agreements and/or clauses." The committee cited Rules 1.7(b), 2.1, 1.2 and 1.8(e). Id.

A Wisconsin ethics committee was asked: "Do any standards of professional conduct preclude attorneys from proposing, demanding and/or entering into settlement agreements that include indemnification and hold harmless provisions binding an attorney to personally satisfy any unknown lien claims against the settlement funds or property?" State Bar of Wisconsin, O. E-87-11. The committee advised that "inclusion of such indemnification and hold harmless provisions in settlement agreements is improper" under both the Code of Professional Responsibility and the Rules of Professional Conduct for Attorneys. Id. "Accordingly, lawyers may not propose, demand or enter into such agreements." Id.

Conclusion

In conclusion, the Board advises as follows. It is improper for a plaintiff's lawyer to personally agree, as a condition of settlement, to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such agreements are not authorized by Prof. Cond. Rule 1.15(d) and violate Prof. Cond. Rules 1.8(e) and 1.7(a)(2). Further, it is improper for a lawyer to propose or require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such conduct violates Prof. Cond. Rule 8.4(a). The Board recommends that this advisory opinion be prospective in application.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.