



COMMITTEE ON PROFESSIONAL ETHICS

Opinion 852 – 2/10/11

Topic: Settlement agreements requiring attorney to indemnify client's obligation to third party

Digest: An attorney may not agree to indemnify a client's obligations to a third party as part of a settlement of the client's claim.

Rules: 1.2(a); 1.8(e); 5.6(a); and 8.4(a).

QUESTION

1. May a lawyer agree to indemnify a client's obligations to a third party as part of a settlement of the client's claim?

OPINION

2. The inquirer represents several plaintiffs in asbestos litigation. She notes that, under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA"), defendants and insurance carriers have new reporting requirements in connection with settlements of personal injury claims. Under these new requirements, whenever there is a settlement, the defendant and its insurer have a duty to report certain payment details to the government and can be fined significantly if they fail to report. According to the inquirer, "the defendants and their insurers have been formulating ways to cover themselves in the event that plaintiffs provide them with the wrong information." The inquirer notes that one of the things frequently requested from the plaintiff's attorney is an indemnification with regard to Medicare liens owed by the attorney's client.

3. The applicability and requirements of the MMSEA are questions of law beyond the scope of this Committee's jurisdiction. We note, however, that the scenario posed by the inquirer is strikingly similar to those addressed in several recent ethics opinions. For example, in N.Y. City 2010-3, the New York City Bar's Committee on Professional and Judicial Ethics addressed whether an attorney representing a settling plaintiff may

enter into a hold harmless/indemnity agreement for the benefit of the settling defendants. The opinion noted that plaintiffs in personal injury litigation frequently obtain financial assistance from Medicaid, Medicare, workers compensation carriers, or private insurance coverage. Furthermore, when a plaintiff is entitled to funds through a damages award or settlement at the conclusion of the litigation, such carriers or agencies may be entitled by statute or contract to reimbursement from the plaintiff for any payments the carriers or agencies have made to the plaintiff. These entities therefore frequently seek to recoup amounts the defendant has paid to the plaintiff in the litigation. *See, e.g., Fasso v. Doerr*, 12 N.Y.3d 80 (2009) (plaintiff's health insurer permitted to intervene in plaintiff insured's medical malpractice action to assert an equitable subrogation claim against defendant doctor for reimbursement of the payments the health insurer made for plaintiff's medical expenses); *Teichman v. Community Hosp. of Western Suffolk*, 87 N.Y.2d 514 (1996) (noting that if an injured party receives settlement monies from a tortfeasor to cover medical expenses that were paid by plaintiff's insurer, the insurer may recoup its disbursements from its insured).

4. As noted in N.Y. City 2010-3, defendants and their attorneys who settle cases generally are aware that payments made under a settlement agreement may be subject to the liens or claims of plaintiff's insurance providers or other creditors. In addition, defendant tortfeasors may be subject to subrogation claims brought by plaintiff's health insurers. *See Fasso*, 12 N.Y.3d at 86-87 ("It is well established that when an insurer pays for losses sustained by its insured that were occasioned by a wrongdoer, the insurer is entitled to seek recovery of the monies it expended under the doctrine of equitable subrogation"). To protect themselves against any potential liability for those claims, defendants frequently demand language in the settlement agreement stipulating that the settling plaintiff will hold defendants harmless from any claims made by insurers or other creditors. Defendants also frequently demand that the plaintiff's attorney personally guarantee the plaintiff's indemnification obligation and hold defendants harmless from any third party claims.

5. Rule 1.8(e) provides, in pertinent part, "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client." Rule 1.8(e)(1)-(2), however, states exceptions providing that the lawyer may "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter," and may pay court costs and expenses of litigation on behalf of "an indigent or pro bono client."

6. "Financial assistance" comes in many forms, including gifts, loans, and guarantees. *See, e.g., ABA 04-432* (lawyer's posting or arranging for the posting of a bond to secure release from custody of a client the lawyer represents in the matter in which the client has been detained constitutes "financial assistance" under Model Rule 1.8(e), but falls within the ambit of the exception in subparagraph (e)(1) for "court costs and expenses of litigation"); Missouri Opinion 125 (2008) ("Any type of guarantee to cover a client's debts constitutes financial assistance."). *Cf. New York Rule 1.8, cmt. [10]* ("Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living

expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.”). An attorney’s agreement to indemnify the client for the client’s failure to meet her own obligations, such as the payment of a Medicare lien, constitutes a “guarantee [of] financial assistance” that is prohibited by Rule 1.8(e). See N.Y. City 2010-3.

7. As noted above, Rule 1.8(e)(1)-(2) creates exceptions to the prohibition against advancing or guaranteeing financial assistance to the client in connection with litigation and permits the lawyer to advance or pay “court costs and expenses of litigation” in certain situations. A lawyer’s agreement to indemnify or guarantee the client’s obligations under a settlement does not fall within this exception because the settlement obligation does not constitute a “court cost” or “expense of litigation.” As Comment [9B] to Rule 1.8 explains:

[P]aragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

See N.Y. City 2010-3 (“a client’s obligation to use settlement proceeds to satisfy a lien or other indebtedness is a personal obligation of the client, and, for purposes of the Rule, is indistinguishable from the client’s obligation to pay other expenses such as medical expenses or residential rent”).

8. While Rule 1.2(a) requires a lawyer to “abide by a client’s decision whether to settle a matter,” the lawyer cannot pursue or enter into a settlement that violates the Rules. See Rule 1.2, cmt. [1] (a lawyer should “take whatever *lawful and ethical* measures are required to vindicate a client’s cause or endeavor”) (emphasis added); see also Rule 5.6(a)(2) (“A lawyer shall not participate in offering or making . . . an agreement in which a restriction on a lawyer’s right to practice is part of the settlement of a client controversy.”); Rule 5.6, cmt. [2] (“Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.”). Therefore, a lawyer cannot pursue or enter into a settlement agreement that requires the lawyer to advance or guarantee financial assistance to the client in violation of Rule 1.8(e) even if the client desires such a course of action.

9. Insofar as a lawyer may not agree to indemnify his or her own client’s obligations to a third party as part of a settlement of the client’s claim, it is also impermissible for another lawyer to enter into a settlement that requires such an indemnification. See Rule 8.4(a) (“A lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct [or] knowingly assist or induce another to do so”).

CONCLUSION

10. Rule 1.8(e) prohibits a lawyer from agreeing to indemnify a client's obligations to a third party as part of a settlement of the client's claim, and Rule 8.4(a) prohibits another lawyer's participation in a settlement that requires such an indemnification.

(46-10)