

Issue Outline For Possible Opinion On Settlement Offers

I. Issue Presented

Defense counsel makes a settlement offer that requires the plaintiff's counsel to agree to indemnify and hold harmless the defendant and defense counsel for any liens on the settlement.

The fact pattern raises questions for the lawyers on both sides of the settlement offer:

1. Is it ethical for the defense counsel to make such a settlement offer requiring indemnification?
2. Is it ethical for the plaintiff's counsel to agree to such a settlement offer?

II. Issue Background

A 2011 Delaware Ethics Opinion describes the issue background as follows:

Lawyers who represent plaintiffs in civil actions, such as personal injury or medical malpractice often represent clients who have incurred substantial medical bills as a result of their injuries. In many cases, a settlement agreement provides an outcome beneficial to both parties.

The settlement funds received by lawyers on behalf of their clients are subject to many considerations, both practical and ethical. It may take months or years to reach settlement and clients may be in dire need of a quick disbursement of funds from the settlement proceeds. Often, under the terms of a settlement agreement, the lawyers' payment for their services on the case will be taken from the settlement funds and the clients must satisfy, by payment in full or in compromise, all valid liens out of the clients' share of the settlement proceeds. In some cases, these third party liens may not yet be known, valid, or identified at the time a settlement agreement is reached.

However, if a lawyer's client refuses, or is unable to repay a lien (for example, because the client has spent his or her share of the properly distributed settlement funds), it is possible that a lien holder may make a claim, or file suit, against any releasees for payment of such liens. Ordinarily, the recourse of the releasees would be against the claimant who signed the settlement agreement and agreed to indemnify or hold the releasees harmless against any and all liens claims.

The desire of the releasees not to be involved in subsequent litigation over liens after settlement of the underlying claims has increasingly led releasees to request or demand that, in addition to an agreement with the claimant to hold releasees harmless or indemnify them against such claims as a condition of settlement, the claimant's attorney also enter into such an agreement with releasees. These requests present significant problems.

Further complicating the issues, various amendments to the Medicare and Medicaid laws and related regulations of the United States ("US") arguably create new and enhanced rights of the US to have priority in proceeds arising out of a personal injury settlement, and/or to create a

lien in those settlement proceeds. *See generally* 42 U.S.C. § 1395; 42 C.F.R. § 411.37 (hereinafter, the "Medicare Amendments").

The Medicare Amendments further impose upon the "primary payer" or "entity that receives payment from a primary payer" an obligation to reimburse the US for any payments made to the claimant upon notice. 42 C.F.R. § 411.22. The genesis for these Medicare Amendments is that the US pays medical bills and related expenses relating to the injury of a claimant, on an upfront and on-going basis. After a pot of money has been created through a personal injury settlement, the US desires to recoup monies it paid to the claimant out of the settlement proceeds.

Therefore, the "primary payer" is often an insurance company. Naturally, an insurance company does not wish to be found liable for a reimbursement obligation to the US, and the various insurance companies who find themselves confronted with this situation have therefore attempted to insulate themselves and/or transfer their obligations by requiring plaintiff's counsel to indemnify the insurance company.

III. Ethical Rules Implicated By The Issue

Rule 1.2 (Scope of Representation and Allocation of Authority): a lawyer ordinarily must abide by a client's decisions concerning the objectives of representation, and a lawyer "shall abide by a client's decision whether to settle a matter." The plaintiff's lawyer cannot meaningfully comply with this Rule if confronted with a settlement offer the acceptance of which would violate other Rules.

Rule 1.7 (Conflicts of Interest: Current Clients): the plaintiff's counsel's acceptance of such a settlement condition would create a conflict because the client's failure or refusal to repay a lien or similar obligation could make the client's lawyer its guarantor. That might materially limit the representation because of the lawyer's own interest in having the client (rather than the lawyer) pay the obligation.

Rule 1.8.5 (Payment of Personal or Business Expenses Incurred by or for a Client): an attorney generally cannot ethically provide financial assistance to a client by paying or advancing the client's personal or business expenses.

Rule 1.15 (Safekeeping Funds and Property of Clients and other Persons): if the plaintiff's lawyer assumes indemnity obligations, that may violate this Rule and create the possibility of wrongful release of settlement proceeds. There might be a tension between the lawyer's obligations to disperse funds consistent with its client engagement agreement, governing substantive law, this Rule, and the indemnification agreement.

Rule 1.16 (Declining or Terminating Representation): if the client insisted on acceptance of such a settlement offer, that would/may require the lawyer to withdraw since acceptance would result in a violation of other Rules of Professional Conduct.

Rule 2.1 (Advisor): the plaintiff's counsel's ability to exercise independent professional judgment and render candid advice might be compromised by the settlement condition.

Rule 8.4 (Misconduct): the plaintiff's counsel cannot violate other Rules in order to enter into the settlement agreement, and the defense counsel cannot knowingly assist, solicit, or induce another to violate a Rule.

IV. Other Ethics Opinions Addressing The Issue

There are numerous state and local bar ethics opinions addressing this or similar issues involving indemnification by the plaintiff's lawyer as a settlement condition. All of the opinions essentially reach the same conclusion: it is *not* ethical to either propose or accept a settlement offer requiring such indemnification.

The opinions are split in terms of scope. Some of the opinions analyze the issue in the context of unpaid medical liens. Other opinions more broadly analyze the issue in terms of any type of request for indemnification, regardless of whether it occurs in the context of medical liens. For reference, these opinions include:

- Wisconsin Formal Op. E-87-11 (1987)
- North Carolina Ethics Op. RPC 228 (1996)
- Arizona Opinion 03-05 (Conflicts of Interest; Settlements; Creditors of Client; Indemnify Releasee; Liens, 2003)
- Indiana State Bar Op. No. 1 (2005)
- Illinois State Bar Association Advisory Opinion No. 06-01 (July 2006)
- Missouri Supreme Court Advisory Committee Formal Op. No. 125 (Nov. 2008)
- Tennessee Formal Op. 2010-F-154 (September 10, 2010)
- NYC Bar Assoc. Op. 2010-03 (Settlement Agreements Requiring the Financial Assistance of Counsel, November 2010)
- Alabama State Bar Op. 2011-01 (Lawyer's Indemnification for Unpaid Liens, issued in 2011 but revised in 2017 for non-substantive reasons)
- Philadelphia Bar Association Op. 2011-06 (Jan. 2011)
- Ohio Bd. of Commissioners on Grievances and Discipline Op. 201-01 (Feb. 2011)
- Florida Bar Staff Opinion 30310 (April 2011)
- Virginia State Bar Opinion 1858 (May a Lawyer Agree to Indemnify an Insurance Company as a Condition of Settlement, July 2011)
- Delaware State Bar Association Op. 2011-1 (November 2011)
- Maryland State Bar Association Op. 2012-03 (2012)
- Vermont Bar Op. 2013-1 (2013)
- Oregon State Bar Op. 2015-190 (Lawyer Indemnification of Defendant for Failure to Reimburse or Set Aside Sufficient Funds to Reimburse Third-Party Payer for Medical Expenses Already Advanced, or for Future Liability under Medicare Secondary Payer Act, 2015)

Upon initial review, a COPRAC ethics opinion has been cited once in connection with the above-referenced issue and prior opinions. Delaware State Bar Opinion 2011-1 cites COPRAC Formal Opinion No. 1981-55 for the proposition that a lawyer may not personally satisfy or indemnify any claims to settlement funds by a third party. The issue presented in Formal Opinion No. 1981-55 was: "May an attorney act as guarantor on a client's cost bond?"

The Opinion concluded that an attorney is not ethically prohibited from acting as a surety for his or her client and guaranteeing his or her client's obligation to a surety on a litigation bond. If the bond is relatively large, however, the attorney may thereby be acquiring a pecuniary interest adverse to his or her client, and the client should therefore consent in writing in advance. The Opinion observed that "We can imagine situations where the lawyer's concern that the client maintain the wherewithal to meet his or her bond obligations might interfere with the attorney's judgment with respect both to the particular case for which the bond is required, and to other matters. This is prohibited by rule 5-101[.]"

V. Recommendations/Questions For Committee Discussion

- Given (a) the number of ethics opinions on this issue already, and (b) the seemingly universal consensus on the ethical "answers" to this issue, would a COPRAC opinion add value? Is our time better spent tackling a different issue?
- Do we have anything new or different to say or conclude with respect to this issue when compared with the many prior ethics opinions?
- If we do tackle this issue, a recommendation would be not to limit the opinion to just "liens," but to take a broader approach to these types of settlement offers so that it is clear that in any context such offers create ethical problems.