Final

Rhode Island Supreme Court
Ethics Advisory Panel Op. 2022-01
Issued Thursday, February 10, 2022

FACTS

The inquiring attorney represents a plaintiff in connection with an automobile accident. The insurance company and attorney representing the defendant insist on a provision in the settlement agreement which provides that the plaintiff and plaintiff's attorney execute a hold harmless agreement that requires both parties "shall hold harmless, indemnify, and defend the insurance company from any and all liens, known or unknown" which arise from the accident."

ISSUE PRESENTED

In third party and first party claims, may an insurance carrier make a condition precedent to paying a settlement on a personal injury claim, that the attorney and the client must first sign a hold harmless agreement which requires both the attorney and client to hold harmless, indemnify, and defend the insurance company from "any and all liens, known or unknown," which have arisen from the accident?

OPINION

No. Such a condition precedent violates Rules 1.8, 1.7, and 8.4 of the Rules of Professional Conduct.

REASONING

While Rhode Island has no precedent on this issue, the Ethics Advisory Panel adopts the reasoning of the Association of the Bar of the City of New York Committee on Professional Ethics, Opinion 2010-3, prohibiting settlement agreements requiring plaintiff's counsel to indemnify defendants as a condition of obtaining a financial settlement. See, also Illinois State Bar Ass'n Adv. Op. 06-01 (2006); Indiana State Bar Ass'n Ethics Comm. Op. 1 (2005); Kansas Ethics Adv. Op. 01-05 (2002); North Carolina Op. RPC 228 (1996); Adv. Comm. of the Supreme Court of Missouri Formal Op. 125 (2008); Arizona Ethics Op. No 03-05 (2003); Florida Ethics Op. 70-8 (rev. 1993).

Defendants and their attorneys who settle personal injury claims are aware that payments made under a settlement agreement may be subject to liens or claims of a plaintiff's insurance providers or other creditors. To protect themselves against any potential liability, defendants may seek to demand that the payment of settlement proceeds be conditioned on plaintiff's execution of a hold harmless agreement protecting defendants from any claims made by creditors. In the instant inquiry, defendants are also demanding that plaintiff's counsel personally guarantee plaintiff's indemnification obligation, and hold defendants harmless from third party claims, "both known

and unknown." The Rules of Professional Conduct prohibit defendant's counsel from requesting such a provision in a settlement agreement and prohibit the inquiring attorney to agree to be bound by it.

Rule 1.8 of the Rules of Professional Conduct entitled "Conflicts of interest: Current clients: Specific rules," applies to this inquiry. It states in pertinent part:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation except under certain conditions not presented by this inquiry. Under this Rule, a lawyer generally may not financially assist a client to pay the client's third-party bills, liens, or claims related to the case. In the event of a settlement, the client has the personal obligation to use the settlement proceeds to satisfy liens or other creditor's claims. A lawyer's agreement to guarantee a client's obligations to its creditors, including third party insurers, to induce a defendant to settle a case, is tantamount to guaranteeing financial assistance to the client in violation of Rule 1.8. The Panel does not believe that the exceptions to the Rule which allow an attorney to advance costs of litigation, such as for copying, filing, and depositions, include a lawyer's assumption of a client's potential liabilities, after litigation has ended, by way of an indemnification agreement.

Rule 1.7(a)(2) also compels our conclusion that an insurance carrier and/or its attorney, cannot make as a condition precedent to paying a settlement of a personal injury claim, that the plaintiff and his/her attorney must first sign a hold harmless agreement that indemnifies the insurance carrier from any and all liens, known or unknown, that have arisen from a claim that is the subject of the settlement. Rule 1.7(a)(2) precludes an attorney from representing a client if the representation involves a concurrent conflict of interest, which exists, when

> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the personal interest of the lawyer.

The Panel agrees with the logic of the New York opinion that generally a lawyer who is retained in a personal injury action pursuant to a contingency fee agreement has the same financial interest as his/her client. However, a serious potential conflict arises when plaintiff's counsel is required as part of a settlement to indemnify the defendant against claims made by third parties as a condition for settlement proceeds to be paid to the plaintiff. The conflict would be between the

plaintiff, who wants the settlement proceeds, and his/her lawyer's own financial, business, and personal interest. If a client wishes to settle, the lawyer is obligated under Rule 1.2(a) to effectuate that directive. A lawyer may not be willing to assume responsibility for indemnifying and holding defendants harmless for a potentially significant sum, for an indefinite period of time, and for known and unknown liens or claims. Viewed in such a context, the conflict is undeniable.

The Panel concurs with the City of New York Committee on Professional Ethics, in concluding 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)." City of New York Comm. on Prof'l Ethics Op. 2010-03 at 3.

Finally, Rule 8.4 of our Rules of Professional Conduct provides that a lawyer's attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, is professional misconduct. Therefore, a plaintiff's counsel may not agree to a hold harmless agreement to indemnify defendants in exchange for the payment of settlement proceeds to his/her client; nor can defendant's counsel request indemnification without violating Rule 8.4(a). See, Comm. Of Supr. Ct. of Missouri, Formal Op. 125 (2008).