THE PHILADEPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2011-6
(January 2012)

The inquirer represents a plaintiff in a personal injury case in which a tentative settlement has been reached. The defendants and their principals have proffered a form of release requiring, as a condition of settlement, that the client and the inquirer execute a release indemnifying them from any "claims, causes of action, fees, penalties and interest under the Medicare, Medicaid and SCHIP Extension Act of 2007." The inquirer asks whether signing such a release might give rise to a conflict of interest in violation of the Rules of Professional Conduct.

SUMMARY OPINION:

The inquirer is prohibited from executing such a release by Pennsylvania Rules of Professional Conduct 1.7(a)(2) and (b)(4), as well as 1.8 (e). The prohibitions in the cited Rules necessarily implicate other Rules, including 1.15(e)and(f).

DISCUSSION:

From the inquiry (and the terms of the Release, which were shared with the Committee), it appears that that the inquirer is being asked, as an express condition of the settlement of his client's case, to agree to personally indemnify the defendants and their principals against a variety of different claims that might accrue by reason of the client's failure to reimburse health care services providers who would have a statutory and/or contractual right to recover the cost of accident-related medical services from the proceeds of the personal injury settlement. The proposed release singles out, *inter alia*, claims, etc. under the Medicare/Medicaid statutory scheme.

Ordinarily, the duties of a lawyer in this situation are limited to those found in Pennsylvania Rule of Professional Conduct ("Pa.R.P.C.") 1.15(e)and(f) governing the segregation, distribution and accounting of and for the funds claimed by known third parties, including medical services lien holders, vis-à-vis clients.[1] As the Committee

[1]Pa.RPC 1.15 (e) provides in pertinent part that: "Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the property..." Subsection (f) of the Rule states that: "(f) When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property, including Rule 1.15 Funds, as to which the interests are not in dispute."

understands it, the inquirer is aware of a DPW lien in an amount certain which has been specifically acknowledged in the release. Otherwise, the inquirer is not aware of any other liens and has been told by the client that there are no reimbursements due to Medicare or Medicaid.

With this background in mind, the Committee has reviewed the proposed release. The provision which the inquirer questions is found, in pertinent part, at the second paragraph of the "Indemnity" section of the Release, as redacted for purposes of this inquiry:

> Xxxxxxxx and his attorneys, the law firm of xxxxx for themselves, their partners, agents, successors and assigns (hereafter collectively referred to as the "indemnitors")... expressly and specifically covenant and agree that they shall indemnify, defend and hold xxxxxx and their attorneys, xxxxx and their respective heirs, successors, assigns and agents (at times collectively referred to as "indemnitees") harmless from any and all claims liability , causes of action, judgments, attorneys' fees, penalties, and interest under the Medicare, Medicaid and SCHIP Extension Act of 2007, regardless of the identity of the governmental agency, person or entity asserting any such claim and regardless of whether or not it is believed that such claims, causes of action, liability or judgments have merit.[2]

Based on the observations of other ethics authorities as discussed below, as well as the language of the Rules themselves, the Committee concludes that the proposed release language places the inquirer at risk of violating Pa.R.P.C. 1.7(a)(2). Rule 1.7(a) prohibits a lawyer from representing a client if the "representation involves a concurrent conflict of interest." Subsection (2) of Rule 1.7(a) identifies the following as a concurrent conflict of interest:

> ...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 a personal interest of the lawyer.*(emphasis supplied)

When posited as a condition of settlement, the requirement that the inquirer undertake to personally indemnify the defendants and their insurers against all manner of Medicare, Medicaid and SCHIP Extension Act ("MMSEA") claims creates an

[2] The release contains other, similar indemnification obligations running jointly to the inquirer and his client. Additionally, under "Recitals and Promises", the defendant attributes certain representations regarding the absence of liens to both and, in the same breath, requires the inquirer to satisfy any undisclosed lien out his escrow account before making any distributions.

impermissible choice for the inquirer, one that threatens to compromise the inquirer's duties of loyalty to and the exercise of independent professional judgment on behalf of the client. Presumably, the inquirer has determined that under all of the circumstances, the settlement is appropriate to the client's best interests. Nevertheless, the client cannot get the benefit of that settlement unless the inquirer agrees to expose himself (and his firm) to unknown and contingent liabilities which he otherwise does not have and has no duty to his client (or to anyone else) to assume. If the inquirer, in order to protect his own interests, does not want to assume those liabilities via the release, he must reject the settlement and thereby necessarily do damage to the client's interests. Conversely, if the inquirer accepts the release, he has exposed himself to forms of liability to which the attorney-client relationship does not give rise. The dilemma posed by this release language is made worse by the possibility that the indemnity undertaking will, in and of itself, create a further conflict between the inquirer and his client to the extent that the inquirer, if forced to defend and indemnify the defendants for the client's failure to satisfy an undisclosed Medicare/Medicaid lien, can make himself whole, if at all, only by making a claim back against the client. Comment [8] to Rule 1.7(a) underscores this point:

> Even when there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.[3]

The Committee's conclusion is consistent with those of ethics authorities in other jurisdictions. These authorities have uniformly disapproved of the practice of attorneys (as opposed to their clients) agreeing to indemnify defendants against default by clients on lien-satisfaction obligations in personal injury cases on the basis of conflict of interest considerations. See, for example, State Bar of Arizona Ethics Opinion 03-05 (August, 2003):

> The mere request that an attorney agree to indemnify Releasees against lien claims creates a potential conflict of interest between the claimant and the claimant's attorney...The attorney's refusal, for ethical reasons, to accede to such a demand as a condition of settlement could

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[3] The questionable release language under discussion is exacerbated by the complexities of the MMSEA scheme. Although the Committee's opinion is not dependent on those complexities, it is worth noting that the Medicare Secondary Payer Act, as amended, imposes liabilities directly on, *inter alia*, casualty insurers as primary payers and as "Responsible Reporting Entities" where Medicare/Medicaid reimbursement sources - including personal injury settlement proceeds - have not been identified and/or paid. These liabilities can exceed the dollar-for-dollar cost of the healthcare service involved thereby possibly exposing an indemnitor to liability beyond the face amount of the lien.

> prevent the client from effectuating a settlement that the client otherwise desires.[4]

Similarly, in Florida Bar Staff Opinion 30310(April 4, 2011), the following inquiry was presented:

> May plaintiff's counsel, at the request of defendant's counsel, agree to hold harmless and indemnify a defendant from third party claims arising out of defendant's settlement payments to plaintiff, including a potential claim by Medicare resulting from liability arising under the Medicare Secondary Payer Act?

After quoting with approval from ethics authorities in other jurisdictions and noting the apparent unanimity on this issue among these authorities, the Bar Staff decided that an agreement to indemnify of this nature would violate both the ban on providing financial assistance to the client and the prohibition against representation in the face of a concurrent conflict of interest.

In the Committee's opinion, a conflict of interest of the type posed by this Inquiry, absent other ethical considerations under the Rules of Professional Conduct, can be waived provided that the criteria set forth in Rule 1.7(b((1) - (4) are met.[5] The putative waivability of the concurrent conflict under Rule 1.7 (a)(2), however, is meaningful only in the abstract. This is because the proposed indemnification language in the release which the inquirer is being asked to sign also contravenes Pa.R.P.C. 1.8(e):

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

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[4] See also Tennessee Formal Op. 2010-F-154 (September 10, 2010; Virginia State Bar Legal Ethics Opinion 1858 (July 27, 2011) Missouri Supreme Court Advisory Committee Formal Opinion No. 125 (November 13, 2008) and Ohio Ethics Opinion 2011-1 (February 11, 2011),

[5] Rule 1.7(b) provides:

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent.

(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.

Obviously, an agreement to pay sums (plus enhancements) otherwise owed by the client to third parties is financial in nature and facilitates avoidance by the client of an existing financial obligation. Moreover, such an agreement relates neither to court costs nor to expenses of litigation. (This is in accord with prior opinions of this Committee; see, Philadelphia Bar Association Ethics Opinion 2002-5 in which the Committee concluded that the provision of computer and internet services by a lawyer to clients constituted impermissible financial assistance in violation of Rule 1.8(e)).[6] Because the attorney indemnification issue posed by this Inquiry violates Rule 1.8(e) and because neither Rule 1.8(e) specifically or Rule 1.8 generally allow for consentability or other circumvention of the Rule's mandatory application, the ability of the inquirer's client to waive the Rule 1.7 conflict of interest is moot.

Again, the Committee's view with respect to the applicability of Rule 1.8(e) is in line with those of other ethics authorities. Where Rule 1.8(e) has been found to preclude attorney indemnification, these authorities have found the practice either *per se* prohibited [see, New York State Bar Association Committee on Professional Ethics No. 852 (February 10, 2011) and Missouri Supreme Court Advisory Committee Formal Opinion No. 125 (November 13, 2008)] or found the Rule 1.8(e) restriction, as applied to the attorney's indemnity obligation, to create a conflict of interest between the attorney and his/her client under RPC 1.7(a)(2) [see, Virginia State Bar Legal Ethics Opinion 1858 (July 27, 2011).][7]

In addition, the New York State Bar Association Committee on Professional Ethics, in Opinion No. 852 (February 10, 2011), commented on an inquirer's perception that "defendants and their insurers have been formulating ways to cover themselves [from liability under the reporting and payment obligations under Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007] in the event that plaintiffs provide them with the wrong information" by requesting indemnification from plaintiffs' attorney. While abjuring any comment on MMSEA requirement as "questions of law" the Committee in reliance, *inter alia,* on a prior New York City Bar opinion, N.Y. City 2010-3 (agreement by a lawyer to indemnify defendant for client's failure reimburse provider for items such as a Medicare lien, or was impermissible "financial assistance") opined that

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[6] The Committee did, however, decide that under the peculiar facts of that inquiry, the practice was permissible.

[7] See also Ohio Ethics Opinion 2011-1 (February 11, 2011).

indemnification of this nature would, in fact, violate Rule 1.8(e). In the words of the Committee:

> 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.[8]

The Committee is in agreement with this view. Specifically, for purposes of application of the Rules of Professional Conduct, it does not appear to the Committee that there is any substantive difference between the attorney agreeing to directly indemnify his/her client's adversaries against a failure by the client to honor a DPW, workers' compensation or other subrogation lien - or for that matter any client debt secured by the proceeds of a personal injury settlement- on the one hand and a Medicare/Medicaid lien on the other.

Thus, to summarize, the indemnification proposal put forward by the defendants in this matter, when made a condition of settlement, creates an concurrent conflict between the client's interest in achieving an optimal settlement and the inquirer's personal interest in avoiding a gratuitous financial obligation, a conflict proscribed by Rule of Professional conduct 1.7(a)(2). While such a conflict might, in theory, be waived upon informed consent, the same indemnification obligation, were it to be assumed by the inquirer, would be prohibited by Rule 1.8(e) as inappropriate financial assistance to a client, a Rule which does not allow for waiver.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

[8] New York RPC 1.8(e) differs from its Pennsylvania counterpart in utilizing the "advance or guarantee" phraseology but otherwise is the same except for 1.8(e)(3) allowing for advances of court costs and litigation expenses in a representation governed by a contingent fee agreement.