

**BAR ASSOCIATION OF ERIE COUNTY**  
**COMMITTEE ON PROFESSIONAL ETHICS**

Opinion 11-02

**Topic:** Settlement agreements requiring plaintiff's counsel to hold defendant harmless for making settlement payments to plaintiff

**Digest:** Plaintiff's counsel may not agree to hold defendant harmless from claims arising out of defendant's payment of settlement consideration, and defendant's counsel may not ethically demand that plaintiff's counsel provide such financial assurance

**Rules:** 1.7(a), 1.8(e), 8.4(a)

**QUESTION**

May plaintiff's counsel, at the request of defendant's counsel, agree to hold defendant harmless from third party claims arising out of defendant's settlement with plaintiff?

**OPINION**

**I. Background**

Injured plaintiffs will often seek financial assistance from various sources. Those sources may include Workers Compensation carriers, Medicaid, Medicare, or private insurance coverage. Sometimes payments to plaintiffs are controlled by statute and require the plaintiff to make reimbursement from the proceeds of any settlement. Other payments do not require re-payment by the plaintiff from the settlement proceeds.

To protect themselves from later claims by third parties for reimbursement of benefits those parties had provided to the plaintiff, defendants and their counsel often seek a personal guarantee from plaintiff's counsel that all claims by such third parties will be satisfied by plaintiff from the proceeds of the settlement and that the defendants will be held harmless in the event that any third parties seek to recover reimbursement or payment from the defendants directly.

## II. Counsel May Not Guarantee Client Settlement Obligations

Rule 1.8(e)(1) of the New York Rules of Professional Conduct provides as follows:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that: (1) a lawyer may advance court costs and expenses of litigation, the payment of which may be contingent on the outcome of the matter; . . .

Pursuant to this rule, a lawyer may not assist a client in meeting a financial obligation to a third party. Thus, a lawyer may not agree to guarantee a client's obligations to third parties to induce a defendant to settle. Such an agreement would be in violation of Rule 1.8(e).

In addition, Rule 1.7(a)(2) provides in pertinent part as follows:

[A] lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

A conflict will arise between the lawyer's own financial, business, property, or other personal interests, and the interests of the plaintiff, in the event that the lawyer assumes responsibility for indemnifying and holding defendant harmless against claims for potentially significant sums of money for an indefinite period of time. Upon the plaintiff making a decision to settle, the lawyer is obligated to consummate that settlement. His own financial, business, property or other personal interests should not affect that decision. In the event that the lawyer has an obligation to pay plaintiff's third party obligations, the interest of the lawyer will conflict with the interest of the plaintiff in completing the settlement. For example, the lawyer would have an incentive to retain part of the recovery in escrow as security for the guarantee, whereas the client may be opposed to such a retention.

For the reasons set forth above, a settling plaintiff may not enter into a hold harmless/indemnity agreement for the benefit of settling defendants because such an agreement would 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).

## III. Counsel for Defendants May Not Ethically Demand Indemnification from Plaintiff's Counsel

Since indemnification by plaintiff's counsel would violate the rules set forth above, it would be a violation of the rules for defendant's counsel to request such indemnification. The request for indemnification would violate Rule 8.4(a), which provides:

A lawyer or a law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or to do through the acts of another; . . .

This opinion is in concert with and has relied upon New York State Bar Association Ethics Op. 852 (2011) and The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2010-3: Settlement Agreements Requiring the Final Assistance of Counsel.

#### CONCLUSION

Plaintiff's counsel may not agree to hold defendant harmless from claims arising out of defendant's payment of settlement consideration, and defendant's counsel may not ethically demand that plaintiff's counsel provide such financial assurance.