

Advisory Opinion No 2013-1

Synopsis

It would be a violation of Vermont Rule of Professional Conduct 1.8(e) for Plaintiff's lawyer to sign a Hold Harmless Agreement agreeing to hold Defendant's liability carrier harmless in the event his client (Plaintiff) fails to satisfy his health insurance carrier's subrogation in a personal injury claim and in the further event the liability carrier is required to pay that claim. Signing this document would constitute prohibited financial assistance in connection with litigation and would not be subject to one of the Rule 1.8's exceptions.

Facts

Attorney represents Plaintiff in a personal injury action and has tentatively settled the case. Plaintiff's health insurer has notified Attorney it has a right to reimbursement for the medical bills it has paid for Plaintiff. Defendant's liability insurer has asked Attorney to sign a "Hold Harmless Agreement" that obliges Attorney "to resolve the full amount of any and all liens, by accord and satisfaction or otherwise, and ... to save and forever hold harmless [at fault insured driver] and [auto insurer] from any and all liability." A full copy of the proposed "Hold Harmless Agreement" is attached to this Opinion.

Questions Presented

May Attorney sign the proposed Hold Harmless Agreement? If so, is he obliged to?

Relevant Provision of the Vermont Rules of Professional Conduct

Rule 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d) [not applicable here], a lawyer shall abide by a client's decision concerning the objectives of representation.... A lawyer shall abide by a client's decision whether to settle a matter....

Rule 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

....

(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 a personal interest of the lawyer.

(b) 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, confirmed in writing.

Rule 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

....

(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 or guarantee court costs and expenses of litigation, including expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, 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 a client.

Rule 1.15 SAFEKEEPING PROPERTY

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(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property 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 such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim an interest, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Analysis

Upon receiving funds in which a third person has an interest, a lawyer shall promptly notify the third person and deliver the property to the third person, unless there is a dispute. Rule 1.15(d). In case of a dispute, the lawyer shall hold the property until the dispute is resolved. Rules 1.15(e). Since Attorney has been notified by his client's health insurer that the health insurer has a right to reimbursement for the medical bills it has paid for Plaintiff, it is arguably entitled to notice of and payment from the settlement proceeds. Presumably, if all liens are paid out of the settlement in this fashion, there will be no need for anyone to hold Defendant's liability carrier harmless. However, the proposed Agreement goes beyond Attorney's obligation under Rule 1.15(d) and seeks to oblige Attorney to hold the liability carrier harmless if the health insurance carrier is not satisfied from the settlement and if the liability carrier is later obliged to pay the health insurance carrier.

Numerous ethics opinions say such a commitment by a lawyer would violate Rule 1.8(e)'s prohibition against providing financial assistance to a client in connection with pending litigation. "A plaintiff's counsel's agreement to hold harmless and indemnify a defendant from third party claims arising out of the defendant's settlement payments to the plaintiff is not a court cost or expense of litigation. Therefore it is prohibited by the rule." Florida Bar Staff Opinion 30310 (April 4, 2011). Accord, Ohio Commissioners on Grievances and Discipline Opinion 2011-1 (February 11, 2011); Board of Professional Responsibility of the Supreme Court of Tennessee Formal Ethics Opinion 98-F-141 (February 4, 1998); Legal Ethics Committee of the Indiana State Bar Association Opinion 1 of 2005 (October, 2005); North Carolina State Bar Ethics Opinion RPC 228 (July 26, 1996); State Bar of Arizona Ethics Opinion 03-05 (March 29, 2011); Illinois State Bar Association Opinion 06-01 (July, 2006); Missouri S. Ct. Adv. Committee Formal Opinion No. 125 (November 13, 2008); South Carolina Bar Ethics Advisory Committee Opinion 08-07 (August 22, 2008); Board of Professional Responsibility of the Supreme Court of Tennessee Formal Ethics Opinion Number 2010-F-154 (September 10, 2010); State Bar of Wisconsin Formal Opinion E-87-11 (July 1998); Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2010-3; Washington Ethics Advisory Opinion 1736 (January 1, 1997); Kansas Ethics Opinion No. 11-02 (April 12, 2011); Kansas Ethics Opinion No. 01-5 (2001); Connecticut Informal Opinion 12-06 (June 20, 2012); and Utah State Bar Ethics Advisory Opinion Committee Opinion 11-01 (August 24, 2011).

In addition, these decisions say a lawyer's signature on the Hold Harmless Agreement would create an impermissible conflict of interest under Rule 1.17(a)(2) between the client and the lawyer since it could pit the lawyer's obligation to abide by his client's decision to settle (Rule 1.2) against the potential financial risk to the lawyer as the result of the proposed Hold Harmless Agreement.

Conclusion

Whether or not the potential conflict of interest between the lawyer and the client might be knowingly waived (a matter not discussed in the other opinions), it appears clear that a lawyer's participation in the Hold Harmless Agreement would constitute a violation of Rule 1.18(e)'s prohibition against a lawyer giving financial assistance to the client. Although not addressing the specific question raised, we also point out that several of the cited opinions go on to say it would be a violation of Rule 8.4(a) (inducing or assisting another lawyer to violate the Rules of Professional Conduct) for a defense lawyer to request a plaintiff's lawyer to sign such an agreement.

Since we conclude that participation in this Agreement would be a violation of Vermont's Rules of Professional Conduct, we do not discuss the second part of Attorney's question (if Attorney may sign the Agreement, is he obliged to?).

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