ETHICS ADVISORY OPINION

08-07

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Attorney A orally settled an automobile accident case for a sum exhausting most of the limits of an insurance policy applicable to the accident. Attorney B, the defense counsel in the case, sent a letter confirming the settlement containing the following language:

> . . . you will be solely responsible for satisfying any subrogation lien in favor of Medicare and/or Medicaid at the time of disbursement of the settlement proceeds. To that end, I need written confirmation that you and your client will indemnify, defend and protect the insurance carrier, my law firm, and the Defendant in the event there is any claim or lawsuit by Medicaid and/or Medicare in connection with any subrogated interest that either entity may claim to the settlement proceeds. I would appreciate your confirming that understanding for my file by signing and dating this letter and faxing it back to me.

This language was not part of the settlement negotiation between the parties.

Question Presented:

Is it unethical for Attorney A to agree to language in a settlement agreement obligating her or her firm to indemnify Attorney B and his clients for any subrogation lien claims asserted against them with regard to payment of the settlement proceeds?

Summary

An attorney may not agree to serve as an indemnitor on behalf of her client to protect released parties in a settlement against lien claims asserted by third parties regarding settlement proceeds.

Opinion

Whether the parties have a binding settlement that includes the language set forth above is a legal question that is beyond the scope of the Committee to address. Further, the legal obligations to others, if any, of a lawyer receiving and disbursing settlement funds subject to or potentially subject to a lien are beyond the scope of the Committee's authority to address. Rule 1.15 (a), (d), (e), and (f), and comment 4 to that rule set forth the ethical requirements for lawyers when handling the disbursement of disputed funds subject to claims of third parties such as medical providers. Case law addresses the legal liability of attorneys for failing to properly account for and disburse settlement funds.

The ethical question posed is narrower: may Attorney A ethically agree to serve as an indemnitor of Attorney B and his clients on behalf of her client. She may not.

The request that Attorney A indemnify Attorney B and his clients is improper for three reasons.

First, as pointed out in Arizona State Bar Ethics Adv. Op. 2003-05, the demand creates a potential conflict between Attorney A and her client under Rule 1.7. The injured party's medical expenses associated with a matter may be substantial and represent a significant portion of the money obtained by settlement or judgment. As noted by the Arizona Bar:

> The mere request that an attorney agree to indemnify Releases 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 prevent the client from effectuating a settlement that the client otherwise desires.
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> The insistence upon an attorney's agreement to indemnify as a condition of settlement could, for example, cause the lawyer to recommend that the client reject an offer that would be in the client's best interest because it would potentially expose the lawyer to the payment of hundreds of thousands of dollars in lien expenses, or litigation over such lien expenses.

Second, even if it a lawyer were permitted to and was willing to enter into such an agreement to accept such a financial burden, acceptance of such a duty might compromise the lawyer's exercise of independent professional judgment in violation of Rule 2.1.

Third, Rule 1.8 prohibits providing financial assistance to clients with certain specified exceptions. Payment of general medical treatment, apart from treatment necessary to pursue claims, is not generally permitted. See S.C. Ethics Adv. Ops. 90-40, 89-12. Agreeing to act as an indemnitor, and hence ultimate guarantor of payment of a client's medical expenses, as a condition of settlement indirectly provides financial assistance that could not otherwise be

provided directly by the attorney to the client.

Other states considering the issue have found such indemnity agreements unethical. Ariz. Ethic Adv. Op. 2003-05, N.C. RPC 228 (July 26, 1996), Kan. Ethics Adv. Op. 01-05.