

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
PO 2022-1  
Posted for Comment February 1, 2022**

**QUESTION PRESENTED**

Is it a violation of the Texas Disciplinary Rules of Professional Conduct for a plaintiff's personal injury lawyer to enter into an agreement to personally indemnify and hold harmless the defendant, the defendant's lawyer, or the defendant's insurer from medical liens and reimbursement claims? If so, is it a violation of the Texas Disciplinary Rules of Professional Conduct for a defendant's lawyer to demand that the plaintiff's lawyer enter into such an agreement?

**STATEMENT OF FACTS**

Plaintiff sustained serious personal injuries in a motor vehicle accident. Medicare paid most of his medical and hospital bills. Plaintiff sued Defendant. Defendant's insurance company hired a lawyer to defend its insured.

The case settled. The parties agreed that Plaintiff was responsible for satisfying all liens and reimbursement obligations arising out of the medical treatment made the basis of the suit. To protect against the possibility that Plaintiff might not satisfy those liens and obligations, Plaintiff agreed to indemnify and hold harmless Defendant, Defendant's lawyer, and Defendant's insurance carrier (the "Defendant Group") for any claims brought against the Defendant Group for contractual or statutory reimbursement.

Defendant's lawyer sent Plaintiff's lawyer a release, which was to be signed by Plaintiff and Plaintiff's attorney. In addition to requiring that Plaintiff satisfy all liens and reimbursement obligations and indemnify and hold harmless the Defendant Group, the release also provided that Plaintiff's lawyer would personally indemnify and hold harmless the Defendant Group against any claims asserted by lienholders and reimbursement claimants.

When Plaintiff's lawyer expressed a concern about signing a personal indemnity, Defendant's lawyer advised that the execution of a personal indemnity by Plaintiff's lawyer was a condition of settlement. The Defendant's lawyer explained that an indemnity from Plaintiff alone was inadequate because Plaintiff might no longer have funds sufficient to satisfy Plaintiff's indemnity agreement if Medicare or other reimbursement claimants were to seek payment from the Defendant Group.

**DISCUSSION**

An agreement that requires the Plaintiff's lawyer to personally indemnify and hold harmless the Defendant Group effectively makes the Plaintiff's lawyer a personal guarantor of the

client's debts. This Committee has not previously reviewed the propriety of such an agreement, but the professional ethics committees of at least twenty-one other jurisdictions and three local bar associations have done so and have uniformly concluded that such agreements are prohibited. *See generally* Los Angeles County Bar Prof'l Responsibility and Ethics Comm. Opinion No. 532 (2019) (surveying state and local professional ethics opinions on the topic). Indeed, the Committee has not found an ethics opinion from another jurisdiction approving a lawyer's personal indemnity. For the reasons stated below, the Committee likewise concludes that such an agreement violates the Texas Disciplinary Rules of Professional Conduct.

**Execution of a lawyer's personal indemnity agreement would violate Rule 1.08(d).** A lawyer's agreement to personally indemnify an opposing party regarding third-party claims is a form of financial assistance to the lawyer's client. *See, e.g.,* Missouri Advisory Comm. Formal Opinion 125 (2008) ("Financial assistance can take many forms" including "gifts, loans and loan guarantees"). Although most other jurisdictions prohibit lawyers from providing *any* financial assistance to their clients other than payment of court costs and expenses of litigation, Texas allows lawyers to advance or guarantee clients' reasonably necessary medical and living expenses. Rule 1.08(d) provides:

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer *may advance or guarantee* court costs, expenses of litigation or administrative proceedings, and *reasonably necessary medical and living expenses*, the repayment of which may be contingent on the outcome of the matter . . . (emphasis added).

The Committee nevertheless concludes that Rule 1.08(d) prohibits a lawyer from providing financial assistance to a client in the form of a personal indemnity agreement. To the extent Rule 1.08(d)(1) allows a lawyer to "advance or guarantee . . . reasonably necessary medical . . . expenses," it refers to an advance or guarantee made to obtain medical services for the client. By contrast, the purpose of the lawyer's personal indemnity is not to obtain medical services for the client, but rather to protect the Defendant Group in the event of a post-settlement claim. Rule 1.08(d)(1) does not allow the Plaintiff's lawyer to execute a personal indemnity agreement for the benefit of the Defendant Group merely because the agreement relates to past medical services.

**The proposed indemnity agreement creates a potential conflict of interest prohibited under Rule 1.06(b)(2).** Another reason that a plaintiff's lawyer may not execute a personal indemnity agreement regarding medical liens or reimbursement claims is that such an agreement creates a potential conflict of interest between the lawyer and the client. Rule 1.06(b) provides:

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person: . . .

(2) reasonably appears to be or become adversely limited by . . . the lawyer's or law firm's own interests.

Here, representation of a client is adversely limited by the lawyer's own interests because the demand for personal indemnity requires the lawyer to decide whether to accept personal liability for the client's debts. *See, e.g.*, State Bar of Arizona Ethics Opinion 03-05 (2003) (“[t]he 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”); Alabama State Bar Formal Advisory Ethics Opinion RO 2011-01 (2011) (“Such a conflict involves the lawyer's own financial interests in seeking to avoid such exposure and liability for the client's debts and the client's own desire to settle the matter on favorable financial terms”).

Further, a demand for personal indemnity may adversely limit a lawyer's representation by causing the lawyer to refuse to abide by a client's settlement decision. *See* Rule 1.02(a)(2) (“a lawyer shall abide by a client's decisions . . . (2) whether to accept an offer of settlement of a matter, except as authorized by law”). If the client “chooses to agree to the proposed indemnification language, the indemnification demand could cause the lawyer to refuse the settlement offer or try to dissuade the client from settling in order to protect the lawyer's own personal, financial or business interests.” Montana State Bar Ethics Opinion 131224 (2013). The defendant's insistence that the lawyer personally indemnify and hold harmless the defendant and lawyer against liens or reimbursement claims could “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.” South Carolina Bar Ethics Advisory Opinion 08-07 (2008).

**The proposed indemnity agreement may interfere with a lawyer's duty to exercise independent professional judgment.** Rule 2.01 provides: “In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” A settlement agreement that requires a lawyer to sign a personal indemnity agreement may prevent the lawyer from exercising independent judgment because the agreement exposes the lawyer to material personal risk. *See, e.g.*, Indiana State Bar Association Legal Ethics Committee Opinion 2005-1 (2005) (“[f]orcing the attorney to weigh the settlement's benefits to the client with his own personal risk places an inappropriate burden on the essential element of independence”); South Carolina Bar Ethics Advisory Opinion 08-07 (2008) (“even if a lawyer were permitted 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”); Montana State Bar Ethics Opinion 131224 (2013) (lawyers “should not be placed in a position of balancing their best advice against their own financial or business interests”).

**Requiring a lawyer to sign an indemnity agreement as a condition of settlement may violate Rule 8.04.** Rule 8.04(a)(1) prohibits a lawyer from “knowingly” inducing another lawyer to violate the Rules. *See* Opinion 566 (February 2006) (a lawyer acting as a receiver may not pay a portion of the lawyer's fee to lawyers representing the parties in the case because it would induce those other lawyers to violate Rule 1.08(e)). Likewise, because the Committee concludes that the Rules do not permit a plaintiff's lawyer to agree to personally indemnify and hold harmless a defendant or its lawyers or insurers against future reimbursement claims, the Committee also

concludes that a lawyer violates Rule 8.04(a) if the lawyer knowingly induces another lawyer to violate the Rules by requesting or requiring such a personal indemnity agreement.

## **CONCLUSION**

Under the Texas Disciplinary Rules of Professional Conduct, a plaintiff's lawyer may not enter into an agreement that requires the lawyer to personally indemnify or hold harmless the defendant, the defendant's lawyer, or the defendant's insurer from any contractual or statutory reimbursement claims arising from the medical treatment made the basis of the suit. Likewise, a lawyer may not knowingly induce a plaintiff's lawyer to enter into such an agreement.

PROPOSED OPINION