

Utah Ethics Opinion

2011.

11-01. UTAH STATE BAR ETHICS ADVISORY
OPINION COMMITTEE Opinion Number 11-01

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MAIN OPINION:

Issued August 24, 2011

1. ISSUE: Two interrelated issues are before the Committee: First, may an attorney representing a plaintiff in a personal injury action indemnify and hold harmless a party being released from any medical expenses and/or liens which might remain unpaid after the settlement funds are fully disbursed? Second, in a personal injury action, may an attorney request another attorney to indemnify and hold harmless a party being released from any medical expenses and/or liens which might remain unpaid after the settlement funds are fully disbursed?

2. OPINION: It is a violation of the Utah Rules of Professional Conduct and improper for a plaintiff's or claimant's lawyer to personally agree to indemnify the opposing party from any and all claims by third persons to the settlement funds. As it is professional misconduct for a lawyer to "knowingly assist or induce" another lawyer to violate the Utah Rules of Professional Conduct, it is improper for a lawyer to request a plaintiff's or claimant's attorney to indemnify or hold harmless a party being released from third party claims which may remain unpaid after the settlement funds are fully disbursed.

3. BACKGROUND: It has become an increasingly prevalent practice in Utah in recent years, as it has in other states, for lawyers representing plaintiffs to be asked to indemnify the opposing party and counsel from any and all claims by third persons to the settlement proceeds. This obviously arises most commonly, but not necessarily always, in personal injury actions where third party providers of medical services have colorable claims upon the funds derived from settlement of the claimant's cause of action against a tort-feasor, usually, but not necessarily always, involving settlement funds provided by an insurer.

4. ANALYSIS: Although these specific issues have not previously come before this Committee, it has the benefit of opinions from several other states which have thoroughly analyzed the questions. All have come to essentially the same conclusion the Committee has reached in this Opinion.

5. The Committee begins its analysis by discussing, at some length, a lawyer's duty with respect to property held for clients or third parties. It should be clearly understood that this discussion is essentially for background purposes. This Opinion is in no way contingent upon whether a third party actually has a matured equitable or legal claim interest sufficient to trigger the duties stated in Utah Rule of Professional Conduct 1.15.

6. The general duty of a lawyer toward clients and third parties is set forth in Utah Rule of Professional Conduct 1.15, which states as follows:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. The account may only be maintained in a financial institution that agrees to report to the Office of Professional Conduct in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

7. The Committee has previously dealt with the question of a lawyer's ethical duties to a third person who claims an interest in proceeds of a personal injury settlement or award received by the lawyer. That Opinion observed that Rule 1.15 of the Utah Rules of Professional Conduct specifically addresses a lawyer's duties when safekeeping property for clients or third persons. The current version of Rule 1.15(a) has been re-stated, *supra*. However, the pertinent portion thereof, to which Opinion 00-04 addresses itself, then Rule 1.15(b), has not. That provision of the Rule is now delineated as Rule 1.15(d), which states as follows:

(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 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.

In respect to this provision, Opinion 00-04 states as

follows:

When a lawyer receives funds or property and knows a third person claims an interest in the funds or property, the lawyer must first determine whether the third person has a sufficient interest to trigger the duties stated in Rule 1.15(b)[the identical language is now set forth in the current subsection 1.15(d)]. Only a matured legal or equitable claim-such as a valid assignment, a judgment lien, or a statutory lien-constitutes an interest within the meaning of Rule 1.15 so as to trigger duties to third persons under Rule 1.15. If no such interest exists, the lawyer may disburse the funds or property to the client. If such an interest exists, the lawyer must comply with the duties stated in Rule 1.15. Where the client does not have a good-faith basis to dispute the third person's interest, the lawyer must promptly notify the third person, promptly disburse any funds or property to the third person to which that person is entitled, and render a full accounting when requested. If the client has a good-faith basis to dispute the third person's interest, and instructs the lawyer not to disburse the funds or property to the third person, the lawyer must promptly notify the third person that the lawyer has received the funds or property and then must protect the funds or property until the dispute is resolved.

8. Not all third party claims stand on the same footing. Only specific third party claims are entitled to be paid from settlement funds. Opinion 00-04 describes those types of third party claims which rise to the level of matured legal or equitable claims, thus triggering a lawyer's duties to third persons. Notwithstanding the fact that Rule 1.15 has been redrafted since that Opinion was issued, neither the substance of the rule nor the analysis of the issue set forth therein have changed. An attorney grappling with a question as to whether a third party claim triggers such duties is advised to carefully review Opinion 00-04. Furthermore, the important question of what level of knowledge a lawyer must have of the existence of third party claims is dealt with as follows:

Rule 1.15(b) does not specify what level of belief or knowledge a lawyer must have to impose the duties specified in the rule. We agree with the analysis of the State Bar of Arizona that a lawyer must have actual knowledge of a third party's interest before acting under Rule 1.15(b). Arizona Ethics Op. 98-06 (Ariz. St. Bar June 3, 1998), (level of cognition must be inferred when not specified; comments to Rule 1.15(b) concerning "just claims," and lawyer's "duty under applicable law to protect" third-party claims, and lawyer's obligation not to "unilaterally assume to arbitrate" matters between client and third party strongly infer that a lawyer must have actual knowledge of a third party's interest before acting). Under the Rules of Professional Conduct, "knowingly," "known," or "knows" "denotes actual knowledge of the fact in question. A

person's knowledge may be inferred from the circumstances." Utah Rules of Professional Conduct, Preamble, comment.

If a dispute arises as to entitlement to any portion of funds held by a lawyer, Rule 1.15 addresses that issue in the following subsection:

(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 interests, 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.

For purposes of this Opinion, suffice it to say that a lawyer's ethical duty is to protect a third person's lawful interest of which the lawyer has actual knowledge and the lawful interest must be in specific funds in the lawyer's custody and control.

9. With this general background regarding a lawyer's duties to third persons in relation to funds or property held by the lawyer, the primary question posed is whether a lawyer may be required to indemnify an opposing party against claims of potential but unknown third parties. As one recent prominent ethics opinion on this issue has stated,

A personal agreement by a lawyer to indemnify the opposing party from any and all claims is distinct from an agreement by a client, or the lawyer on behalf of the client, guaranteeing payment of lawful claims from the funds in the lawyer's possession.

Such a personal indemnification agreement by a lawyer is, in essence, an agreement by the lawyer to provide financial assistance to the client. The lawyer is undertaking an obligation to pay the client's bills. This is unethical for several reasons.

The referenced Ohio opinion cites Ohio Rule of Professional Conduct 1.8(e), which is substantially the same as Utah Rule of Professional Conduct 1.8(e). Utah's Rule 1.8(e) states as follows:

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

(e)(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

(e)(2) a lawyer representing an indigent client may pay court costs and expenses of litigation, and minor expenses reasonably connected to the litigation, on behalf of the

client.

The Committee is therefore in accord with Ohio's opinion, which is consistent in substance with virtually all of the opinions referenced in footnote 1, *supra*, that neither of these exceptions applies to the issue at hand, and therefore such an indemnification agreement on the part of a claimant's lawyer constitutes a violation of Rule 1.8(e).

10. The tension created between the lawyer, who wishes to obtain the best possible settlement for his client without putting herself personally on the line to the client's creditors, and client who may desperately want and need the settlement proceeds after what may be many months and perhaps years of litigation and/or negotiation, is simply untenable. The lawyer's interest in avoiding potential liability in an unknown amount to an unknown third party is pitted against the client's need to achieve settlement and receive funds. This poses a clear concurrent conflict of interest in violation of Utah Rule of Professional Conduct 1.7(a)(2), which states,

(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:

(a)(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.

In the circumstances presented, there is a "significant risk" that the representation of a client would be "materially limited" by the lawyer's perceived responsibilities to a third person as well as by a personal interest of the lawyer. And, the Committee again concurs in the words of the Ohio Opinion, that, "(e)ven if this conflict of interest could be ameliorated under (Utah's) Rule of Professional Conduct 1.7(b), the agreement still would be improper under (Utah's) Rules 1.15 and 1.8(e) as discussed, *supra*." The further observation that this Committee would make is that, because a lawyer's duty to a third party under Rule are not distinguishable from a lawyer's duty to his or her client, it is the sense of the Committee that "informed consent" via Rule 1.7(b) would be very difficult to achieve as a practical matter, where a third party claim and a client's claim stand in *pari materia*, as a third party claim to specific funds carries the same weight in relation to the lawyer's duty as a lawyer's duty to his client.

11. Lastly, with respect to the second question put to the Committee, the Utah Rule of Professional Conduct 8.4 states that It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional

Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

As discussed previously, a plaintiff's or claimant's lawyer, on behalf of the client, may not agree to personally and generally indemnify the opposing party and his lawyer against all unpaid liens and medical expenses without violating Rules 1.7(b) and 1.8(e). Rule 8.4(a) provides that is an ethical violation for any lawyer to "induce another" to "violate the Rules of Professional Conduct." As such, the conclusion cannot be avoided that a lawyer cannot require or ask opposing counsel to agree to generally indemnify as a condition of settlement since that would constitute inducing and assisting another to violate the Rules of Professional Conduct.

12. CONCLUSION: It is a violation of the Utah Rules of Professional Conduct 1.7(a), 1.8(e) for a plaintiff's or claimant's lawyer to personally agree to indemnify an opposing party from any and all claims by third persons to settlement funds. It is professional misconduct for a lawyer to "knowingly assist or induce" another lawyer to violate the Utah Rules of Professional Conduct pursuant to Utah Rule of Professional Conduct 8.4(e). It is therefore improper for a lawyer to request or demand that a plaintiff's or claimant's attorney indemnify or hold harmless a party being released from third party claims which may remain unpaid after the settlement funds are fully disbursed.

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