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## ISBA reviews liens and recoverable costs in personal-injury cases

What are the ethical implications when a personal-injury case is settled, but the defense counsel requests that the plaintiff counsel agree to guarantee the plaintiff's payment of liens or recoverable costs? The interests of the defendant and any insurers in obtaining such guarantees are obvious. But can the plaintiff's counsel accommodate the defense request, even when a refusal to provide the guarantee may prevent a favorable settlement for an injured client?

The ethical issues presented have been addressed by several state bar associations, including the Illinois State Bar Association. In general, their conclusion is that the plaintiff's counsel must satisfy valid liens from settlement proceeds, but he may not personally guarantee a client's payments. Some bar associations have said that defense counsel may not ethically make such a request of the plaintiff's counsel.

### ISBA advisory opinion

In July 2006, the ISBA addressed the issue in its Advisory Opinion on Professional Conduct, No. 06-01, which concludes that "a lawyer may not provide a personal guarantee that he/she will pay the liens and subrogation claims chargeable against a client's settlement proceeds." The opinion was affirmed in 2010 based upon the new 2010 rules.

The ISBA opinion relied in part on a former version of Illinois Rule of Professional Conduct 1.15(b) and *Western States Ins. Co. v. Olivero*, 283 Ill.App.3d 307, 670 N.E.2d 333 (3d Dist. 1996). The ISBA's starting point was that an attorney must use settlement proceeds to satisfy any existing, undisputed liens.

In *Western States*, a plaintiff counsel refused to satisfy an insurer's subrogation claim for medical expenses from the proceeds of the clients' settlement. When the clients failed to pay the insurer, the insurer sued their lawyer. The appellate court held that the lawyer's conduct constituted conversion.

Rule 1.15 imposed "an affirma-

tive duty" on the lawyer to pay the insurer. The lawyer could not refuse to pay the insurer, even if the clients had not authorized the lawyer to do so. Similarly, in *Cirincione v. Johnson*, 184 Ill.2d 109, 703 N.E.2d 67 (1998), the Illinois Supreme Court affirmed a jury's award of punitive damages against an attorney, holding that the lawyer's failure to disperse settlement funds to satisfy an undisputed subrogation claim constituted conversion.

The ethical problem arises when the defense requests a lawyer's personal guarantee of payment of existing or future liens or recoverable amounts. In concluding that such a guarantee would be unethical, the ISBA relied on former Rule of Professional Conduct 1.8(d) by which a lawyer may not "advance or guarantee financial assistance to the client," except for certain litigation expenses in contingency fee cases. The ISBA concluded that an attorney's personal guarantee of payment of liens and similar expenses constitutes prohibited "financial assistance."

The benefit to the client from the attorney's guarantee arises from the likelihood that, in the event of a problem with payment, the subrogation claimant will look to the lawyer, not to the client. The ISBA further concluded that subrogation claims and liens are not "expenses of litigation," within the meaning of Rule 1.8(d).

The committee declined to clarify the application of former Rule 1.7(b) which prohibits "material limitation" conflicts of interest created by a lawyer's own interests.

### Other jurisdictions

Other state courts and bar associations that have examined this issue have also concluded that it is unethical for lawyers to indemnify opposing parties for their own client's debts. Missouri, like Illinois, determined that an attorney's agreement to indemnify an opponent for his client's debt violates the Missouri Rules of Professional Conduct prohibiting a lawyer from rendering financial assistance to a client. In Formal

### THE PRACTICAL ADVOCATE



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Opinion 125, the Missouri Supreme Court stated, "Any type of guarantee to cover a client's debts constitutes financial assistance." Similarly, "an attorney may not agree to pay the third party from the attorney's own funds, if the client does not pay the third party."

Furthermore, the Missouri Supreme Court reasoned that the attorney who requested opposing counsel's indemnification violated the rule by requesting opposing counsel to violate the rules. In KBA Legal Ethics Opinion No. 01-5 (2001), the Kansas Bar Association recognized that an ethical problem might exist for the defense attorney who requests the indemnification, but it did not express an opinion on the issue.

Likewise, the Kansas Bar Ethics Advisory Committee said that a lawyer's agreement to indemnify his client created a conflict of interest "between the client and

"the lawyer's own interests" in violation of Kansas Rule of Professional Conduct 1.7(b). It too recognized that a lawyer's agreement to indemnify a client would violate Rule 1.8(e) by providing financial assistance to the client.

The Vermont Bar Association examined a similar issue in Advisory Ethics Opinion 96-05 when it reviewed a medical lien form seeking both the client and his attorney's signature. It determined that the attorney who signed the "medical lien" form promising to withhold funds for the provider's benefit "create(s) an impermissible ethical conflict," stating: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of [the] client and free of compromising influences and loyalties." (See also, Alaska Ethics Opinion No. 86-4 that considered disputes between a client's direction to his attorney and a third party seeking funds.)

In essence, the weight of state bar authority supports the conclusion that it is unethical to ask an attorney to pay medical expenses when the client fails to do so. An attorney who signed such an indemnify agreement could be violating the Rules of Professional Conduct by conferring financial benefit on his client. In addition, the agreement could create a conflict of interest between the lawyer, his client and possibly third parties.

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