

# Ethics Advisory Opinion

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From the State Bar of New Mexico's Ethics Advisory Committee

## Formal Opinion: 2017-01

**Topic: Agreement by personal injury plaintiff's lawyer to personally indemnify opposing party as a condition of the plaintiff's acceptance of a settlement agreement**

**Rules Implicated: 16-108 (E) NMRA (2016)**

### Disclaimer:

The Ethics Advisory Committee of the State Bar of New Mexico ("Committee") is constituted for the purpose of advising inquiring lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued (the "Rules") to the specific facts as supplied by the inquiring lawyer or, in some instances, upon general issues facing members of the bar. The Committee does not investigate facts presented to it and generally assumes the facts presented are true and complete. The Committee does not render opinions on matters of substantive law. Lawyers are cautioned that should the Rules subsequently be revised or facts differ from those presented, a different conclusion may be reached by the Committee. The Committee's opinions are advisory only, and are not binding on the inquiring lawyer, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the issue.

### Question Presented:

Whether a plaintiff's lawyer may, in the course of settling a personal injury case on behalf of a client agree, as a condition of settlement, to personally indemnify the opposing party from claims to the settlement funds made by third parties.

### Short Answer:

No.

### Factual Background:

The Ethics Advisory Committee understands that the requesting lawyer is a plaintiff's lawyer who is being asked to enter into an agreement with the opposing party, not opposing counsel, to personally pay for third party claims that might be asserted against the settlement funds in the future after the plaintiff's lawyer has already disbursed the settlement funds to known third party claimants, to the lawyer for the lawyer's fee and to the lawyer's client. Presumably, the third party claims would be for amounts either owed by the client or for which the client is responsible and which would likely be asserted against the opposing party as the settling party.

### Analysis:

Rule 16-108 of the Rules of Professional Conduct is comprised of nine specific situations that, because of the lawyer's own interests, are so likely to compromise representation of a client they are recognized as creating per se conflicts between a lawyer and a client. The Rule is entitled "Conflict of Interest; Current Clients; Specific Rules." In most of these situations the conflict cannot be cured by client consent. The lawyer must either avoid the

situation entirely, or comply with conditions designed to protect the client against overreaching.<sup>1</sup>

The question presented squarely implicates subsection (E) of Rule 16-108 which states in pertinent part:

**E. Financial assistance.** A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

...

This Rule prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation. As explained in Comment [10] to the Rule, it prohibits a lawyer from giving or lending money to the client directly. It prohibits a lawyer from guaranteeing loans to the client. One purpose of prohibiting a lawyer from providing financial assistance to the client is to avoid giving the lawyer too great a financial stake in the litigation. The Rule recognizes that a lawyer with too great a financial stake in the litigation creates an essentially per se conflict of interest with the client. As such, there is no provision for the client to waive this conflict and the lawyer must avoid this situation entirely.

The Committee is of the view that subsection (E) prohibits the requesting lawyer from entering into the proposed indemnity agreement. The indemnity agreement is being proposed as a condition of settlement. Whether the requesting lawyer agrees to indemnify the opposing party could affect whether the matter is settled or goes to trial. Therefore, it is being proposed in connection with pending litigation and falls within subsection (E) on that basis. The proposed agreement calls for the lawyer to personally guarantee that the lawyer will pay from the lawyer's personal funds, not from the settlement funds, third party claims that are either owed by the client or for which the client is responsible. As such, the indemnity agreement must be recognized for what it is: an agreement to personally pay the client's bills. In terms of Rule 16-108 (E), it constitutes the provision of financial assistance to the client and is therefore prohibited.

The question presented is a good example for the reason for the prohibition of 16-108 (E). The lawyer's agreement to indemnify the opposing party at the time of settlement would interject the lawyer's own personal interests into the settlement negotiations and unquestionably interfere with the lawyer's ability to provide sound, independent advice to the client concerning settlement of the case. The Rule considers this a per se conflict of such a serious nature that it may not be waived by the client, even if the client desired to waive the conflict. Consequently, even if the client, in order to facilitate a settlement, agreed to repay the lawyer for future payments the lawyer might personally make under the indemnity agreement, it would still be precluded by Rule 16-108 (E).

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Recognizing that there is the exception to subsection (E)'s prohibition, it is the Committee's view that the payments anticipated by the proposed indemnity agreement do not fall within this exception for two reasons. First, Comment [10] to Rule 16-108 explains that court costs and litigation expenses are thought to be indistinguishable from contingent fees and that the advancement of these expenses helps ensure access to the courts. Litigation expenses are not defined in the rule and while Comment [10] to the Rule does not attempt to define expenses of litigation it equates them in passing to "expenses of medical examination and the costs of obtaining and presenting evidence." It is hard to imagine that future claims made after settlement funds have been disbursed are likely to fall within one of those categories. Secondly, the (E)(1) exception explicitly contemplates the lawyer's recoupment of these advanced expenses from, in the context of the question presented, the settlement funds. Even if there were some question about whether a particular post-disbursement third party claim could be said to constitute a litigation expense, the (E)(1) exception does not contemplate payment, even of litigation expenses, from the lawyer's personal funds. In contrast, the payments the lawyer would be agreeing to make under the proposed indemnity agreement would not come from the settlement funds, but from the lawyer's personal funds. The (E)(1) exception thus does not apply.

Finally, because we have concluded that Rule 16-108 (E) prohibits the requesting lawyer from entering into the proposed indemnity agreement, we will distinguish letters of protection which are not prohibited by the Rules of Professional Conduct.

"Letter of protection' is the customary nomenclature for a document by which a lawyer notifies a medical vendor that payment will be made when the case is settled or judgment is obtained. This is a common practice by which

lawyers representing personal injury plaintiffs ensure clients will receive necessary medical treatment, even if unable to pay until the case is concluded." <sup>2</sup>

While a letter of protection is the lawyer's guarantee of future payments to a third party, it clearly commits only those funds the lawyer receives in trust through judgment or settlement of the personal injury case. The lawyer's personal funds are not committed in a letter of protection. The only way the lawyer might become personally liable for the guarantee made in a letter of protection is if the lawyer failed to properly distribute the funds or otherwise failed to abide by the letter of protection. On the other hand, the proposed indemnity agreement is very different from the guarantee a lawyer makes in a letter of protection. As noted previously, it calls for the lawyer to personally guarantee from the outset that the lawyer will pay from the lawyer's personal funds, not from the settlement funds, third party claims either owed by the client or for which the client is responsible. This is the difference that makes a letter of protection acceptable under Rule 16-108 whereas the proposed indemnity agreement is not.

## Conclusion:

A plaintiff's lawyer who, in the course of settling a personal injury case on behalf of a client, signs an agreement as a condition of settlement to personally indemnify the opposing party from claims to the settlement funds that might be made by third parties in the future, violates Rule 16-108 (E).

## Endnotes

<sup>1</sup> American Bar Association, Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* at 146 (7th ed.)

<sup>2</sup> *In re Moore*, 2000-NMSC-019 ¶2 fn1, 129 N.M. 217.