



**ILLINOIS STATE  
BAR ASSOCIATION**

# **ISBA Advisory Opinion on Professional Conduct**

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**This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.2(a), 1.7, 1.8(e), and 1.15(d). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.**

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## **Opinion No. 06-01 July 2006**

**TOPICS:** Advancing Client's Expenses and Costs;  
Safekeeping of Property

**DIGEST:** A lawyer may not provide a personal guarantee that s/he will pay the liens and subrogation claims chargeable against a client's settlement proceeds.

**REF.:** Illinois Rules of Professional Conduct, Rules 1.2(a), 1.7(b), 1.8(d), 1.15(a), 1.15(b)

ISBA Opinion Nos. 92-9, 95-6

Arizona Ethics Opinion No. 03-05

Kansas Bar Association Legal Ethics Opinion No. 01-05

North Carolina State Bar Opinion RPC 228

*Western States Insurance Co. v. Olivero*, 283 Ill. App. 3d 307, 670 N.E.2d 333, 218 Ill. Dec. 836 (3d Dist. 1996)

## FACTS

During the pendency of plaintiff's personal injury lawsuit, various medical care providers perfected their liens against possible proceeds of the suit for the unpaid medical bills. Additionally, plaintiff's automobile insurance carrier asserted a subrogation claim for the amounts paid by it to other care providers under the medical payments provision of the policy.

Upon settlement of the case, defendant's lawyer submitted to plaintiff's lawyer a general release to be signed by plaintiff and a personal guarantee to be signed by plaintiff's lawyer indicating that plaintiff's lawyer would satisfy all pending liens and subrogation claims out of the settlement proceeds. The release and personal guarantee also provided that both the plaintiff and the plaintiff's lawyer would indemnify defendants against any claims asserted by the lienholders and subrogation claimant.<sup>1</sup>

Defendant's lawyer advised that s/he required plaintiff's lawyer's personal guarantee that all lien and subrogation claims would be paid based on defendant's concern that plaintiff would not pay the medical care providers or the automobile insurance company and, as a result, the lien/subrogation claimants would seek to collect the amounts owed to them from defendant.

## QUESTION

Whether the Illinois Rules of Professional Conduct prohibit a lawyer representing a party receiving money in a settlement from entering into an agreement in which that lawyer provides his/her personal guarantee that the settlement funds will be paid to all persons who have a claim on the funds and indemnifies the defendant against such claims?

## OPINION

Recently there has been a proliferation of liens and subrogation claims in personal injury lawsuits. It is not unusual to find several such claims in a single matter. These claims can be statutory, contractual, or equitable in nature and provide their holders with legal rights to be reimbursed for the amounts which they have advanced on behalf of the plaintiff. The disposition of these various third party claims has sometimes proven to be a hindrance to the resolution of such lawsuits.

To address the issue, some lawyers request a personal guarantee and indemnification that the liens/subrogation claims will be paid. These personal guarantees have, at times, been proposed by the lawyer representing the plaintiff (to ensure a quicker settlement), and at other times have

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<sup>1</sup> Although guarantees and agreements to indemnify are different contractual devices, they are ordinarily both included within the same "release" and their effects are the same for the purposes of this opinion. Therefore any reference to a "guarantee" herein is intended to address both guarantees of payment of liens/subrogation claims and agreements to indemnify against such claims.

been requested by the lawyer representing the defendant (to limit potential future exposure to unreimbursed lien claims).

In response to the inquiry at hand, a lawyer has an obligation under Rule 1.15 of the Illinois Rules of Professional Conduct to safekeep property of others, including settlement funds. Rule 1.15 (a) provides, in part, “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.”

Rule 1.15(b) reads:

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 an agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or the third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Accordingly, under Rule 1.15(b), a lawyer representing a plaintiff has an obligation to segregate the settlement funds over which a third party has a claim, to notify persons who have an interest in those funds (including lien/subrogation claimants) and then distribute the funds owed to said persons.

This obligation was addressed in *Western States Insurance Co. v. Olivero*, 283 Ill. App. 3d 307, 670 N.E.2d 333, 218 Ill. Dec. 836 (3d Dist. 1996). In that case, plaintiff’s lawyer settled a personal injury case, received defendant’s settlement check - which identified the payees as the plaintiff, plaintiff’s lawyer, and the medical insurance company subrogation claimant obtained the endorsements of the payees on that check (including the subrogation claimant), and deposited the funds into a trust account.

Thereafter, however, plaintiff’s lawyer did not disburse those monies to the subrogation holder. A few months after the funds had been received by the plaintiff’s lawyer, the client filed for bankruptcy and the lawyer argued that the Bankruptcy Code prevented release of the funds to the subrogation claimant (although the lawyer released a share of the funds to the client and the remainder to himself to pay for fees and costs).

The court concluded that plaintiff’s lawyer was directly liable to the third party subrogation claimant because the lawyer wrongfully released funds and failed to pay the subrogation claim. The court further noted that “under the Rules of Professional Conduct [citing Rule 1.15(b)], the [plaintiff’s lawyer] had an affirmative duty to disburse [the subrogation claimant’s] share of the settlement proceeds.” 283 Ill. App. 3d at 310.

Based on language of Rule 1.15 and the court’s opinion in *Western States Insurance Co. v.*

*Olivero*, it is clear that a lawyer representing a plaintiff is ethically obligated to identify the portion of funds which are due and owing to a lien/subrogation claimant and to ensure that those funds are properly paid to those entities.

Additionally, pursuant to Rule 1.8(d) of the Illinois Rules of Professional Conduct, a lawyer is prohibited from advancing or guaranteeing financial assistance to a client, unless such advance is for payment of litigation expenses. Rule 1.8(d) of the Rules of Professional Conduct, Conflict of Interest: Prohibited Transactions, reads:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including, but not limited to, court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence if:

- (1) the client remains ultimately liable for such expenses; or
- (2) the repayment is contingent on the outcome of the matter; or
- (3) the client is indigent.

The question of whether a lawyer is prohibited from guaranteeing the payment of the client's medical care providers'/insurers' claims for reimbursement from the proceeds of a lawsuit is dependent on whether that guarantee constitutes "financial assistance" given "to" the client.

This Committee has previously interpreted Rule 1.8(d) to prohibit a lawyer from paying his/her client's medical expenses. ISBA Opinion No. 95-6. Accordingly, if the client of the inquiring lawyer had requested the lawyer to pay the client's medical bills, directly, that would be a clear violation of Rule 1.8(d).

In this instance, however, the lawyer will not be assuming the primary responsibility to pay the bills, but, rather, will guarantee that the bills will later be paid out of the settlement proceeds and will indemnify the defendants if those claims were not paid.

In ISBA Opinion No. 92-9, this Committee found there was no violation of Rule 1.8(d) when a lawyer helped a client obtain financing from a third party to pay for the costs of legal representation. In that opinion the lawyer's "assistance" was permissible because the lawyer was not directly involved in the making or guarantee of the loan. Instead, the lawyer provided information and help to the client and the third party which permitted the financing.

Under the facts presented, the plaintiff's lawyer is not directing his guarantee to the client or to the medical care providers/insurers. Instead, the lawyer is making the guarantee to the defendant. Because the lawyer's guarantee of payment is not provided to the client, there is no

direct financial assistance to the client. Nevertheless, the Committee notes that Rule 1.8(d) does not distinguish between “direct” and “indirect” financial assistance.

If the plaintiff’s lawyer does guarantee the payment of the lien/subrogation claims - which the plaintiff would ordinarily be required to pay - the guarantee is a plaintiff benefit. Such a benefit has real value to the plaintiff in that the lawyer’s guarantee ensures that the settlement will take place more smoothly and promptly. Moreover, in the event that a problem arises after the settlement, the plaintiff will be benefited because the settling defendant would have little incentive to pursue the plaintiff to obtain its recovery. Instead, the defendant would much more readily look to the lawyer who provided the guarantee to reimburse the lien or subrogation claim.

Based on the foregoing, a plaintiff’s lawyer’s personal guarantee to pay the liens and subrogation claims against his client (even if such payments are to be made by the settlement funds) constitutes the provision of financial assistance to his client and violates Rule 1.8(d) of the Rules of Professional Conduct.

Providing a personal guarantee that lien/subrogation claims will be paid does not fall within the exception to Rule 1.8(d) that “a lawyer may advance or guarantee the expenses of litigation.” The Rule’s reference to such expenses relates to those costs which are important to ensure that the litigation can be pursued. Providing a guarantee that liens or subrogation claims will be paid would be done in resolution of the litigation and has nothing to do with ensuring that the litigation may be properly prosecuted. Therefore, such claims are not “expenses of litigation.”

Our conclusion that Rule 1.8(d) prohibits these transactions also finds support in conclusions reached in Arizona Ethics Opinion No. 03-05. Arizona’s professional conduct rule, Rule 1.8(e), relating to the provision of financial assistance to clients is similar to Illinois Rule 1.8(d). The Arizona Committee on the Rules of Professional Conduct determined that a lawyer representing a plaintiff would violate Arizona Rule 1.8 if that lawyer entered into an agreement to personally indemnify the defendants from a lien claim. The rationale expressed therein was that such an indemnification is the provision of financial assistance to the client.

Finally, the Committee also notes that three other states<sup>2</sup> have analyzed this issue under the general conflict of interest provisions found in Rule 1.7(b). Illinois Rule 1.7 (b) reads:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

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<sup>2</sup> Arizona Ethics Opinion No. 03-05, Kansas Bar Association Legal Ethics Opinion No. 01-05, and North Carolina State Bar Opinion RPC 228.

(2) the client consents after disclosure.

Those states have concluded that a lawyer's personal guarantee to pay liens/subrogation claims violates Rule 1.7(b). Based on this Committee's conclusion that the more specific conflict of interest provision of Rule 1.8(d) prohibits such transactions, no position is taken on whether Rule 1.7(b) would also bar such personal guarantees.