

Advisory Committee of the Supreme Court of Missouri

Formal Opinion 125

AGREEING TO INDEMNIFY OPPOSING PARTY AS A TERM OF SETTLEMENT

Reference Note: Rule 4-1.8, Conflict of Interest: Prohibited Transactions, was amended effective November 23, 2021. This formal opinion predates that amendment and should be read with Rule 4-1.8(e)(3) and Comments [11], [12], and [13].

Reference Note: Rule 4-1.15, Trust Accounts and Property of Others, was amended effective July 1, 2013. This formal opinion predates that amendment and should be read with Rule 4-1.15(e) and Comments [7] and [8].

We have been asked whether it is a violation of the Rules of Professional conduct for an attorney to agree to indemnify the opposing party for debts owed by the attorney's client. We have further been asked whether it is a violation for an attorney to request or demand that another attorney agree to such indemnification.

Rule 4-1.8 (e) provides:

- (e) 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, including medical evaluation of a client, the repayment of which may be contingent on the outcome of the matter; and
 - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(emphasis added).

Financial assistance can take many forms. It includes gifts, loans, and loan guarantees. Any type of guarantee to cover a client's debts constitutes financial assistance. If a client owes a debt to a third party who expects payment from the client's recovery by settlement or judgment, 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.

We note that this opinion is consistent with opinions from Illinois, Arizona, Florida, and North Carolina.¹

¹ IL Adv. Op. 06-01, 2006 WL 4584284 (Ill.St.Bar.Assn.); Arizona Ethics Opinion No. 03-05; FL Eth. Op. 70-8, 1970 WL 10144 (Fla.St.Bar Assn.); 2000 NC Eth. Op 4, 2001 WL 473974 (N.C.St.Bar.)

Under Rule 4-1.15(f):

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 provided in this Rule 4-1.15 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 other 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.

If the third parties have a legal interest in the particular funds the attorney is holding and the attorney has notice of that legal interest, the attorney must either disburse the funds to the third party or hold the funds in trust for a reasonable time to allow the dispute between client and the third party to be resolved. If the dispute is not resolved within a reasonable time, the attorney usually² must interplead the funds.

An attorney may include a provision in a settlement agreement in which the attorney agrees to perform obligations that the attorney already has under the Rules of Professional Conduct. An attorney may not assume the further obligation to indemnify the opposing party if the attorney ethically disburses the funds to the client but the client does not use the funds to pay a debt to a third party.

A client may owe a debt to a third party under circumstances that will not require an attorney to hold the amount of the debt in the trust account, if the client does not want the attorney to disburse the funds to the third party. A debt, even one reduced to a judgment, does not establish a legal claim against the particular funds held by the attorney. However, a valid lien against, or garnishment of, those funds would place the attorney under an obligation to hold the funds in trust if the client directs the attorney not to disburse the funds to the third party.

Because an attorney who agrees to indemnify an opposing party will violate Rule 4-1.8(e), it is a violation for another attorney to request or demand that an attorney enter into such an agreement. The second attorney would violate Rule 4-8.4, which provides, in part:

It is professional misconduct for a lawyer to:

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

² Exceptions would include instances when the amount in dispute is less than the cost of the interpleader action or when other litigation that will resolve the dispute has already been filed.

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

Therefore, it is a violation of Rule 4-8.4(a) for an attorney to propose a settlement that includes a provision that would involve a violation of any of the Rules of Professional Conduct by another attorney.

November 13, 2008

(Updated January 18, 2022, to include Reference Note)