

# Be Aware of Ethnic

Defendants may try to insert terms in medical negligence settlements that would violate rules of professional conduct. Know what to look out for.

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**D**efense attorneys have long used unscrupulous tactics to gain more favorable settlement terms by exploiting a medical negligence plaintiff's immediate financial need, knowing that many plaintiffs will sign almost anything to get their claim resolved.

As plaintiff attorneys, we are familiar with problematic confidentiality clauses and lien repayment provisions that routinely arise in settlement agreements.

Recently in our practice, we have encountered defendants' attempts to expand these already problematic provisions by insisting on unethical indemnity agreements and unethical restrictions on the use of the plaintiff's medical information. This would create significant conflicts of interest between us and our current and future clients and place unreasonable restrictions on our right to practice in future cases. Here is an overview of each of these subversive settlement terms and the ethical rules they implicate.

## Unethical Indemnity Agreements

Medical negligence and personal injury plaintiffs often have medical expenses that were paid by private health insurers or federal and state assistance programs. If the case is settled, the release usually requires a plaintiff to resolve any valid liens and to indemnify and hold the defendant, the defense attorney, and the insurer harmless against claims made as a result of the plaintiff's failure to do so.

If the plaintiff refuses to or is unable to pay those liens, lienholders may make a claim or file suit against the other parties who settled with the plaintiff.<sup>1</sup> Indeed, for years, the standard practice when resolving medical negligence cases with outstanding health care liens has been for the plaintiff to warrant in the release that he or she would pay the lien from the settlement proceeds and agree to indemnify the other parties if the lien was not paid. Typically, the recourse for the other parties would then be against the plaintiff who agreed to indemnify them against all lien claims.

Lately, however, some insurers have begun seeking further assurances by insisting as a condition of settlement that the plaintiff's attorneys agree to hold them harmless and indemnify them against subrogation interests, reimbursement claims, and statutory liens asserted by government entities, private insurers, and health care providers. The rationale behind these demands is that the plaintiff's lawyer will ensure the liens are paid before distributing the settlement proceeds to the plaintiff because he or she has a financial interest in resolving the liens.

At least 23 ethics committees in jurisdictions across the country have found that a plaintiff's attorney cannot ethically agree to enter into such agreements.<sup>2</sup> Most of these committees have concluded that attorney indemnification clauses violate ethics

rules—namely Rules 1.2(a), 1.7(a)(2), 1.8(e), and 2.1 of the ABA Model Rules of Professional Conduct and substantially equivalent state rules.

**Rules 1.2(a) and 2.1 violations.** Ethics committees in Arizona, Indiana, Los Angeles County, Maine, Maryland, Montana, and Tennessee have determined that a settlement agreement requiring a plaintiff's lawyer to hold harmless and indemnify the opposing party from claims asserted against the plaintiff's settlement proceeds violates Rule 1.2(a) of the respective rules of professional conduct in those states.<sup>3</sup>

Pursuant to Model Rule 1.2(a), a lawyer must abide by the client's decision on whether to accept a settlement offer. If the client chooses to accept an offer that is conditioned on his or her attorney agreeing to indemnify the defendant and the insurer, the indemnification condition may cause the lawyer to reject the settlement offer or dissuade the client from accepting it to protect his or her own financial interests.<sup>4</sup>

Such reluctance to incur personal liability, as well as any concessions made to avoid potential liability, interferes with the lawyer's obligation to effectuate the settlement that his or her client desires.<sup>5</sup> For example, the Indiana Legal Ethics Committee noted that a lawyer's Rule 1.2(a) obligation to a client "can be compromised by an offer that injects the attorney's own financial exposure into the process."<sup>6</sup>

Most lawyers will not risk financial exposure to secure a settlement for their clients. However, "even if the lawyer were willing to accept that potential financial burden, and even if the lawyer were ethically permitted to provide such financial assistance, such an agreement might compromise the lawyer's exercise of independent professional judgment and rendering of candid advice in violation of [Rule] 2.1."<sup>7</sup>

Model Rule 2.1 requires that

an attorney exercise independent professional judgment and render candid advice in representation of the client.<sup>8</sup> If a lawyer is forced to balance the benefits of the settlement to the client with his or her own financial risk, the lawyer's judgment may be clouded and ability to provide advice compromised.

**Rule 1.7(a)(2) violation.** Nearly every ethics body to consider this indemnification issue has determined that doing so is improper because it has the potential to create conflicts of interest between the lawyer and client in violation of Model Rule 1.7(a)(2). This rule states that a conflict of interest can arise when "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."<sup>9</sup>

Attorney indemnity agreements may create such a conflict because the client—who might desperately need the settlement money—may wish to accept a settlement offer that requires the lawyer to take on a financial burden that he or she is unwilling to, and cannot, assume.<sup>10</sup> Then the attorney's representation would be materially limited by his or her financial interest because the attorney would be inclined to reject the settlement to avoid personal liability for the client's debts.<sup>11</sup>

Furthermore, a conflict may arise if a plaintiff's lawyer enters into an indemnity agreement because "the client's failure or refusal to repay a lien could make the client's lawyer its guarantor."<sup>12</sup> Thus, if the plaintiff's lawyer is forced to defend and indemnify the opposing party against reimbursement claims, the lawyer's only recourse is to make a claim against his or her client.<sup>13</sup>

**Rule 1.8(e) violation.** Several ethics authorities also have found that attorney indemnity agreements are prohibited by their jurisdictions' equivalent to Model Rule 1.8(e), which precludes

attorneys from directly or indirectly providing financial assistance to their clients.<sup>14</sup> Agreeing to an indemnification agreement would violate this rule because the attorney is essentially agreeing to pay the client's debts if the client cannot.<sup>15</sup>

As the Los Angeles County Bar Ethics Committee observed, personal indemnification agreements by lawyers essentially provide the client with credit, which is undoubtedly a form of financial assistance.<sup>16</sup> Moreover, if the client ultimately defaults on the payment of the liens, "the plaintiff will be benefited because the settling defendants would have little incentive to pursue the plaintiff to obtain its recovery."<sup>17</sup> Instead, the defendant would "much more readily look to the lawyer" who is more likely to have the financial ability to indemnify the defendant.<sup>18</sup>

While an exception in Rule 1.8(e) allows attorneys to advance court costs and litigation expenses, several ethics committees have found that these indemnification clauses do not fall within this exception.<sup>19</sup> As the Illinois State Bar Association Ethics Committee explained, guaranteeing payment in these circumstances doesn't qualify for the exception because the payment is not required to pursue the litigation.<sup>20</sup> Providing a guarantee that liens or subrogation claims will be paid would occur in the resolution of the litigation and has nothing to do with ensuring that the litigation itself may be properly prosecuted.

***What to do when faced with an indemnity agreement.*** In the last few years, we have seen a proliferation

of requests by defense counsel and insurance carriers for indemnity agreements. We have declined each request. In the rare instances when this settlement term becomes an obstacle, we have allowed the insurer to pay the liens directly before issuing the settlement funds.

We also have let our clients agree to escrow a portion of the settlement in an amount equal to or greater than the lien until the final lien is negotiated. Then, liens are paid from the escrow account, and the balance is disbursed to the client.<sup>21</sup> Finally, we often front these issues with the mediator, to be addressed explicitly at the mediation before any tentative agreement is reached. Although these methods are

more time-consuming and may delay the disbursement of the settlement to the client, they help avoid failure at or after mediation and allow for an ethical resolution.

## **Unreasonable Restrictions on a Lawyer's Right to Practice**

Our firm recently represented multiple clients in a series of more than 15 medical negligence cases against a hospital. All the cases involved the same defendant-physician; however, each case comprised separate and distinct acts of medical negligence. After reaching a tentative settlement in the first case, the defense attorneys proposed as a written condition of the

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settlement that the settling plaintiff prohibit the use of his or her medical records in any subsequent companion cases against the defendant hospital. The defense strategy here was that as more of the cases resolved, the more difficult it would be for the remaining plaintiffs to establish a historical pattern and practice of misconduct.

We promptly rejected the proposed settlement provision as a violation of Rule 5.6(b) of our New Hampshire Rules of Professional Conduct, which mirrors Model Rule 5.6(b) and prohibits an attorney from agreeing to a settlement term that would directly or indirectly restrict his or her right to practice.<sup>22</sup>

**Model Rule 5.6(b).** Among the many ethical duties imposed on lawyers, perhaps the most well-known and fundamental duty is that an attorney must abide by his or her “client’s decisions concerning the objectives of representation”—including through the settlement process.<sup>23</sup> A lawyer may not, however, enter into a settlement agreement that would violate another ethics rule.<sup>24</sup>

Rule 5.6(b) is one such rule that attorneys must carefully consider. According to the ABA’s Standing Committee on Ethics and Responsibility, “Rule 1.2 must be read as limited by the provisions of Rule 5.6(b)” in the context of settlement discussions.<sup>25</sup> Model Rule 5.6(b) states that “a lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.”<sup>26</sup>

So although a client may want to accept a settlement offer that impermissibly restricts his or her lawyer’s future right to practice, and the lawyer may feel obligated to do so pursuant to Rule 1.2(a), Rule 5.6(b) precludes the lawyer from complying with the client’s instructions under these circumstances.<sup>27</sup>

The ABA has articulated three policy considerations underlying Rule 5.6(b)’s mandatory prohibition. First, restricting an attorney’s right to practice denies the public access to counsel who, “by virtue of their background and experience,” may be the most qualified for a representation.<sup>28</sup> Second, the restriction may be driven by the goal of “buying off” counsel to prevent them from representing future plaintiffs against the same defendant rather than resolving a particular controversy on the merits.<sup>29</sup> Third, the restriction may

both existing and future clients with similar claims.<sup>33</sup>

Certainly, a lawyer cannot simply pull the plug on the knowledge he or she obtained during the course of representing a client and “forget” it. It would be challenging, if at all possible, to refrain from using this knowledge in his or her representation of other clients in similar situations, particularly against the same defendant.<sup>34</sup>

Moreover, Rule 5.6(b) preserves “the ability of attorneys to utilize the legal experience and substantive knowledge

**Settlement agreements that indirectly prevent an attorney from representing future clients with similar claims violate ethics rules.**

place the lawyer in a conflict between the objectives of the present client and the interests of other existing or future clients.<sup>30</sup>

Settlement agreements that indirectly prevent an attorney from representing future clients with similar claims also violate Rule 5.6(b). If a settlement agreement prohibits a plaintiff’s attorney from using any information acquired during that case in other cases, it effectively bars the plaintiff’s attorney from representing future clients with similar claims because they could do not so adequately without that information.<sup>31</sup> Model Rule 1.7 and state equivalents would forbid the representation of the future client, thereby restricting the attorney’s right to practice.<sup>32</sup> Finally, an attorney who agrees to a ban on the use of information may create a conflict of interest between the lawyer’s clients and

gained during their practices in a manner that does not risk materially limiting responsibilities to a client under Rule 1.7 (Conflicts of Interest), nor disadvantage a former client under Rule 1.9 (Duties to Former Clients).<sup>35</sup>

**Applying 5.6(b) to our cases.** In those 15 related medical negligence cases discussed earlier, our position was that defense counsel’s proposed restriction on the use of each of our client’s medical records in subsequent cases against the same defendants constituted an indirect restriction on our right to practice.


When faced with a similar situation, explain that such a restriction would deprive other existing clients, as well as potential future clients, of the knowledge and experience obtained through the representation of the first client. This would contravene one of the policy reasons underlying Rule 5.6(b)—that

existing and future clients have access to the benefit of the knowledge obtained in the course of representing all of your clients involved in a matter.<sup>36</sup>

Moreover, a prohibition on the use of a client’s medical records in subsequent cases could materially impact the ability to represent existing clients and future clients because you would not be able to use previous clients’ records or the information learned from them to their benefit.

For example, in our medical negligence cases against the same doctor, the first client’s (and other clients’) medical records established a pattern of negligent conduct and were relevant to the other cases. We argued that prohibiting the use of the records or information would adversely affect our representation of our existing and future clients. Agreeing to defense counsel’s proposed condition would have put us in a conflicted position under Rule 1.7(a)(2), which forbids representing a client if doing so would materially limit the lawyer’s responsibility to another client.<sup>37</sup> We could not have represented our other clients, which is an impermissible restriction on our right to practice under Rule 5.6(b).<sup>38</sup> This also would have denied qualified representation to our remaining clients.

Finally, accepting a settlement agreement barring the use of medical records in other cases could create a conflict between the interests of the first client and existing and future clients with claims against the same defendants. In our cases, it was possible that the first client would have wanted to accept the settlement offer with the restrictive term. Our non-settling clients, however, would have wanted to use the first client’s records because of their potential to enhance the non-settling clients’ claims. Rule 5.6(b) does away with this dilemma by prohibiting the proposed restriction outright.

Although it may be tempting to agree to a restrictive term to settle a case, you cannot do so if it creates a conflict of interest or violates your jurisdiction’s ethics rules. Insurers and defense attorneys have grown bolder in their willingness to straddle—sometimes cross—ethical lines in their proposed settlement release terms. That boldness has only increased in the present climate, when the delays of firm trial dates due to the pandemic can reduce a plaintiff’s leverage to timely resolve a case. We are the only shield for our clients and for our profession, and it is our duty to identify such subversive settlement terms and stop them in their tracks. 



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**NOTES**

1. See, e.g., 42 U.S.C. §1395y(b)(2)(B)(ii) (2021); 42 C.F.R. §411.24(e), (g) (2012) (providing that Medicare has a “direct right of action” against a primary plan, entity, insurer, physician, or lawyer that has received primary payment). In medical negligence and personal injury cases, the primary payer is usually the defendant’s insurance carrier. See also N.H. Rev. Stat. Ann. §448-A:3 (1987) (providing that for one year from the date of settlement or payment of a plaintiff’s claim, the party paying the settlement to the plaintiff, whether the third-party defendant or the attorney disbursing funds, remains liable for the lien asserted by a hospital or home health care provider).
2. See, e.g., L.A. Cty. Bar Ass’n Op. 532 (2019); Or. State Bar Formal Op. 2015-190 (2015); Alaska Bar Ass’n Op. 2014-4 (2014); Ga. Adv. Op. 13-2 (2013); Mont. State Bar Ethics Op. 131224 (2013); Md. Ethics Op. 2012-03 (2012); Philadelphia Bar Ass’n Prof’l Guidance Comm. Op. 2011-6 (2012); Del. State Bar Ass’n Ethics Op. 2011-1 (2011); Me. Bar Overseers Ethics Op. 204 (2011);

- Supreme Court of Ohio Op. 2011-1 (2011); Fla. Bar Staff Op. 30310 (2011); Okla. Bar Ass’n Ethics Op. 328 (2011); Utah State Bar Ethics Adv. Op. Comm. Op. 11-01 (2011); Va. Legal Ethics Op. 1858 (2011); Bd. of Prof’l Responsibility of the Supreme Court of Tenn. Formal Ethics Op. 2010-F-154 (2010); Adv. Comm. of the Supreme Court of Mo. Formal Op. 125 (2008); S.C. Bar Ass’n Ethics Comm. Ethics Adv. Op. 08-07 (2008); Ill. State Bar Ass’n Op. 06-01 (2006); Ind. State Bar Ass’n Ethics Op. 1 of 2005 (2005); State Bar of Ariz. Ethics Op. 03-05 (2003); Kan. Bar Ass’n Op. 01-05 (2001); Bd. of Prof’l Responsibility of the Supreme Court of Tenn. Formal Ethics Op. 97-F-141 (1998); N.C. State Bar Ethics Op. RPC 228 (1996); Wisc. State Bar Ass’n Formal Ethics Op. E-87-11 (1987).
3. See Mont. State Bar Ethics Op. 131224; Me. Bar Overseers Ethics Op. 204; Ind. State Bar Ass’n Ethics Op. 1 of 2005; State Bar of Ariz. Ethics Op. 03-05.
4. State Bar of Ariz. Ethics Op. 03-05.
5. See Del. State Bar Ass’n Ethics Op. 2011-1.
6. Ind. State Bar Ass’n Ethics Op. 1 of 2005 (discussing agreements to indemnify against claims related to non-Medicare and Medicaid liens).
7. State Bar of Ariz. Ethics Op. 03-05; see also L.A. Cty. Bar Ass’n Op. No. 532.
8. See N.H. R. Prof’l Conduct 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”).
9. See N.H. R. Prof’l Conduct 1.7(a)(2).
10. See Utah State Bar Ethics Adv. Op. Comm. Op. 11-01; Va. Legal Ethics Op. 1858; Ind. State Bar Ass’n Ethics Op. 1 of 2005.
11. Model R. Prof’l Conduct 1.7(a), cmt. [8] (Am. Bar Ass’n 2022).
12. State Bar of Ariz. Ethics Op. 03-05.
13. See Alaska Bar Ass’n Op. 2014-4; Philadelphia Bar Ass’n Prof’l Guidance Comm. Op. 2011-6.
14. See N.H. R. Prof’l Conduct 1.8(e).
15. See, e.g., Supreme Court of Ohio Op. 2011-1; Va. Legal Ethics Op. 1858; State Bar of Ariz. Ethics Op. 03-05; S.C. Bar Ass’n Ethics Comm. Ethics Adv. Op. 08-07.
16. See L.A. Cty. Bar Ass’n Op. 532.
17. Ill. State Bar Ass’n Adv. Op. 06-01.
18. *Id.*
19. See L.A. Cty. Bar Ass’n Op. 532; Ga. Adv. Op. 13-2; Mont. State Bar Ethics Op. 131224; Philadelphia Bar Ass’n Prof’l Guidance Comm. Op. 2011-6; Va. Legal Ethics Op. 1858; Supreme Court of Ohio Op. 2011-1; Ill.

State Bar Ass'n Adv. Op. 06-01; Ind. State Bar Ass'n Ethics Op. 1 of 2005.

20. Ill. State Bar Ass'n Adv. Op. 06-01 (allowing a lawyer to 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," provided the client

remains ultimately liable for those costs or reimbursement is contingent on the outcome of the litigation or the client is indigent).

21. According to Montana's ethics committee, "it is ethical for plaintiff's counsel to hold money in a trust account to resolve the lawyer's obligation to secure funds that are subject to a lien by a third party." Mont.

State Bar Ethics Op. 131224.

22. See N.H. R. Prof'l Conduct 5.6(b); see also N.H. Bar Ass'n Ethics Comm. Adv. Op. 2009-10/06 (2009).
23. N.H. R. Prof'l Conduct 1.2(a). Rule 1.2(a) provides "a lawyer shall abide by a client's decision concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."
24. See N.H. Bar Ass'n Ethics Comm. Adv. Op. 2009-10/06 (explaining that an attorney's obligation to abide by his or her client's decision "does not permit the attorney to engage in conduct that would violate another Rule of Professional Conduct").
25. ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 93-371 (1993).
26. N.H. R. Prof'l Conduct 5.6(b).
27. ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 00-417 (2000) ("Although a lawyer normally would be required, pursuant to Rule 1.2 (Scope of Representation), to abide by the client's instructions to accept a settlement offer, the proscription in Rule 5.6(b) (Restrictions on Right to Practice) makes it impossible for the lawyer to comply with a client's instructions.").
28. ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 93-371 (acknowledging that Rule 5.6(b) protects the rights of "non-settling clients to identify and hire qualified counsel whose judgment and expertise remains free from restrictive, private settlement arrangements").
29. See *id.*; N.H. Bar Ass'n Ethics Comm. Adv. Op. 2009-10/06.
30. See *id.*
31. ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 00-417 (interpreting 5.6(b)'s prohibition to extend to indirect restrictions on an attorney's right to practice); N.H. Bar Ass'n Ethics Comm. Adv. Op. 2009-10/06.
32. See N.H. R. Prof'l Conduct 1.7(a)(2). The rule provides "a lawyer shall not represent a client if . . . 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 [or] a former client."
33. N.H. Bar Ass'n Ethics Comm. Adv. Op. 2009-10/06.
34. *Id.*
35. *Id.*
36. *Id.*
37. See N.H. R. Prof'l Conduct 1.7(a)(2).
38. See ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 00-417 (finding that a prohibition against the use of information is a restriction on the lawyer's right to practice).

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