Lawyer Disciplinary Board Request for Comments: Settlement Agreement Committee

The Lawyer Disciplinary Board has received a request for an opinion concerning the "indemnify and hold harmless" language contained in settlement agreements. The Committee has drafted an L.E.O. to address this issue, and is soliciting public comments thereon.

Please submit your written comments to the Settlement Agreement Committee, c/o Office of Disciplinary Counsel, 4700 MacCorkle Avenue SE, Suite 1200C, Charleston, WV 25304.

Deadline for submissions: October 12, 2012.

L.E.O. 2012 - 02

SETTLEMENT AGREEMENTS CONTAINING "INDEMNIFY AND HOLD HARMLESS" LANGUAGE THAT RESTRICT AN ATTORNEY'S ONGOING REPRESENTATION VIOLATE THE RULES OF PROFESSIONAL CONDUCT

INTRODUCTION

The Lawyer Disciplinary Board has been asked to address the question of whether it is a violation of the Rules of Professional Conduct for an attorney to personally agree, as a condition of settlement, to indemnify and hold harmless the opposing party from any and all claims to the settlement funds by third persons. Several disciplinary authorities have addressed this issue in recent years, and the Lawyer Disciplinary Board sees the need to issue a formal advisory opinion on this topic, as well.

The Lawyer Disciplinary Board finds that such an agreement by an attorney to indemnify the opposing party violates Rules 1.8(e) and 1.7(b) of the West Virginia Rules of Professional Conduct. Rule 1.8(e) prohibits an attorney from providing financial assistance to a client beyond the advancement of costs and expenses of litigation. A personal agreement by a lawyer to indemnify the opposing party from any and all future claims creates a situation wherein the lawyer undertakes an obligation to pay the client's bills which are not considered to be court costs or expenses of the litigation. Rule 1.7(b) prohibits an attorney from representing a client if the representation will be materially limited by the attorney's own interest. Acceptance of an otherwise favorable settlement that hinges upon the assumption by the attorney of personal exposure above any to which the attorney may already be obligated may render the attorney's interests in conflict with those of his client.

In addition, Rule 8.4(a) of the Rules of Professional Conduct provides that a lawyer may not knowingly assist or induce another to violate the Rules of Professional Conduct. Since such an agreement to indemnify the opposing party would violate Rules 1.8(e) and 1.7(b) for the reasons set forth above, the Board finds that it would be a violation of Rule 8.4 (a) for defense counsel to propose or require, as a condition of settlement, that the plaintiff's lawyer make a personal agreement to indemnify the opposing party from any and all claims by third persons to the settlement funds.

This Board recognizes that the requests for such indemnification are born out of the desire to protect settling defendants from claims by third parties who have an interest in the settlement proceeds which are being distributed by the plaintiff's counsel. The Board also recognizes that the proper disbursement of settlement proceeds is one of the most important responsibilities for a lawyer under the Rules of Professional Conduct. Lawyers who receive settlement funds are often faced with clients who are in dire need of their funds from the settlement proceeds and who are often insistent on being paid first regardless of whether money is also owed to the attorney or third persons, such as medical providers, insurance carriers, or Medicare and Medicaid. However, Rule 1.5(b) of the Rules of Professional Conduct requires that a plaintiff's lawyer also protect the lawful interests of third persons and deliver to those third persons any funds from the settlement proceeds to which they are entitled. Although delays in the process of determining the amounts to which such third parties are entitled can place a strain on both the client who may need money and the lawyer who is holding the funds in trust, plaintiff's counsel remains ethically bound by his or her obligations to those third parties.

The Lawyer Disciplinary Board also advises that, even if a lawyer is ethically bound or under a legal obligation such as that found in the Medicare Secondary Payor Act ("MSPA") to set aside settlement funds, counsel still should not enter into an agreement to personally indemnify the defendant and defense counsel should not make the request

to plaintiff's counsel. While the purpose of this L.E.O. is not to address the legal requirements of the MSPA, it is generally acknowledged that there are notification of settlement requirements under the MSPA and that a plaintiff's counsel must determine if a client is a Medicare beneficiary and, if so, whether there are past or future medical Medicare expenses associated with the claim which is being settled. Furthermore, it is acknowledged that, if a plaintiff's medical bills were or may be paid by Medicare, then plaintiff's counsel generally withholds an amount of the settlement funds which is sufficient to satisfy the client's obligations to Medicare. In addition, plaintiff's counsel will often negotiate with the Centers for Medicare and Medicaid Services ("CMS") regarding the final amount to be paid. Consequently, in cases involving Medicare beneficiaries, the plaintiff's counsel already has actual knowledge that Medicare's interests must be protected and mechanisms by which determinations can be made concerning the amounts to be withheld and eventually paid back. If Medicare is not paid, CMS has a right of action to recover its payments from certain entities, including plaintiff's attorneys, under the MSPA.[1] While the Lawyer Disciplinary Board recognizes the competing interests and concerns among parties and their counsel in these situations, lawyers must remember that they are still bound by the Rules of Professional Conduct and settlement agreements which contain language requiring plaintiffs' counsel to personally indemnify the defendant for a Medicare lien or other future obligation should not be contemplated.

[1] In United States v. Paul J. Harris, 2009 WL 891931 (N.D.W. Va.), the federal government filed a complaint against Mr. Harris for declaratory judgment and money damages owed to CMS. Mr. Harris represented a client in a personal injury matter. His client's medical bills were paid by Medicare and the case was eventually settled for $250,000. Mr. Harris notified Medicare concerning the details of the settlement and Medicare determined that it was owed approximately $10,253.59. Mr. Harris was subsequently notified of the lien amount and the request for payment. However, the lien was not paid and the federal government initiated suit against Mr. Harris. The Court, in granting the government's Motion for Summary Judgment, held Mr. Harris responsible for the reimbursement since neither he nor his clients availed themselves of their administrative appeal process after being notified of the request for reimbursement. The Court found that Mr. Harris was now precluded from protesting the reimbursement determination and awarded the government a judgment in the amount of $11,367.78, plus interest.

CONCLUSION

The Lawyer Disciplinary Board reviewed ethics opinions from other states and determined that its position on this issue is consistent with the majority of the ethics opinions issued in other states.[2] In conclusion, settlement agreements that require an attorney to make a personal agreement to indemnify and hold harmless the opposing party from subrogation liens and/or third party claims violate the Rules of Professional Conduct.

Charles J. Kaiser, Jr. Chairperson
Lawyer Disciplinary Board

[2] *See*, Ohio Ethics Opinion 2011-11; North Carolina State Bar Ethics Opinion RPC 228; Arizona Ethics Opinion 03-05; Illinois Ethics Opinion 06-01; Indiana Ethics Opinion 1 (2005); Missouri Ethics Opinion 125; South Carolina Ethics Opinion 08-07; Tennessee Ethics Opinion 2010-F-154; Wisconsin Ethics Opinion O.E.-87-11; New York City Formal Opinion 2010-3; and Florida Bar Staff Opinion 30310 (2011). However, only Indiana and Florida addressed the issue in terms of Medicare.