



May 19, 2011

Florida Bar Opinion – Unethical for Plaintiff’s Counsel to Agree to Indemnify the Defendant for Medicare Liabilities

On April 1, 2011, the Florida Bar issued Staff Opinion 30310. The opinion arose out of a dispute between opposing counsels in a personal injury lawsuit. The attorneys specifically sought the Florida Bar’s ethical opinion on whether an attorney, in a personal injury matter, “may personally sign a settlement release containing a hold harmless and indemnification agreement in favor of the opposing party which would obligate the plaintiff’s attorney to indemnify and hold harmless the defendant for any future liability under the Medicare Secondary Payer Act (MSP).”

The Florida Bar found that such an agreement violates Florida Bar Rule 4-1.8(e)¹ and 4-1.7(a)(2)², in essence finding that such an indemnification agreement would amount to providing improper financial assistance as well as creating a conflict of interest with the Plaintiff attorney’s client.

The Florida Bar reasoned that Rule 4-1.8(e) would not allow such an indemnification agreement due to the fact that “(a) Plaintiff’s agreement to hold harmless and indemnify a Defendant from third-party claims arising out of the defendant’s settlement payments to the plaintiff is not a court cost or expense of litigation. Therefore, it is prohibited by the Rule.”

The Florida Bar also reasoned that Rule 4-1.7(a)(2) would be violated by such an indemnification agreement because “. . .it creates a substantial risk that the representation of the

¹ 4-1.8(e) **Financial Assistance to Client.** 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; and
- (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

² 4-1.7(a)(2) **Representing Adverse Interests.** A lawyer shall not represent the client if the representation of that client will be directly adverse to the interests of another client, unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the lawyer’s responsibilities to and relationship with the other client; and
- (2) Each client consults after consultation.



client would be materially limited by the lawyer’s personal interest in not having to pay the client’s debts.”

This is an interesting interpretation by the Florida Bar since under the MSP, specifically 42 US§ 1395(y)(b)(2)(B)(iii), Medicare can seek recovery from any responsible party/entity that has received the proceeds of a settlement, judgment, or award. This recovery right includes the plaintiff/Medicare beneficiary, **Plaintiff’s attorneys**, providers and other entities. The U.S. government exercised this recovery right in a famous decision of U.S. v. Harris, 2009 WL 891931 (N.D. W.Va.), wherein Mr. Harris, a Plaintiff attorney, was forced to personally reimburse Medicare for conditional payments which had not been satisfied. Here, the Florida Bar is apparently drawing a clear distinction between (a) the government’s statutory right to seek repayment under the MSP and (b) a private party’s ability to indemnify via an agreement.

Therefore, as it relates to conditional payments, while it is unethical under this Florida Bar opinion for a Plaintiff attorney to promise to do something (indemnify the Defendant), it is also clear that the Plaintiff attorney is already liable under the MSP. Furthermore, when Medicare has not been reimbursed for conditional payments, and has the choice of seeking recovery against a Plaintiff or Plaintiff’s counsel, clearly Medicare will seek recovery from the deeper pocket first, which would generally be the Plaintiff attorney and not the Plaintiff. In summary, while the Florida Bar has concluded that a conflict of interest can be created between the client and Plaintiff attorney through these indemnification provisions, one cannot ignore the ultimate fact that both parties have a duty to make sure Medicare’s interests are satisfied under the MSP.

Although this Florida Bar ethics opinion does not appear consistent with the aims of the MSP, Florida attorneys should be aware of this opinion nonetheless and should take this ethics opinion into consideration when crafting settlement documents.

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