



Risk Manager

Bar Issues Opinion That Indemnification As Condition of Settlement Is Unethical

By: **Justin Ward**. *Monday, October 31st, 2011*

The Virginia State Bar's Standing Committee in Legal Ethics recently issued a legal ethics opinion declaring it unethical for plaintiff's lawyers to agree to indemnify a defendant and/or his insurer for any third party lien claim against settlement proceeds received by the plaintiff. The Standing Committee has opined that it is likewise unethical for the defendant's lawyer to demand such an indemnification agreement as a condition of settlement.

Legal Ethics Opinion 1858 (LEO 1858), issued July 27, 2011, is of particular interest to all parties, especially with the introduction of the SCHIP Extension Act of 2007, which requires certain entities, including liability carriers, to report certain payments made to plaintiffs to the Center for Medicare and Medicaid Services (CMS). The goal of this legislation is to protect Medicare's interest as a secondary payer. Because there are penalties for any party who fails to protect Medicare's interests, plaintiffs and defendants alike are concerned with ensuring that third party liens are satisfied at the time of settlement. However, practically speaking, the attorneys involved do not always know what liens exist, and must rely on the lay parties for that information. It is no surprise, then, that both attorneys and insurers have an interest in protecting themselves from incurring a penalty from CMS to the extent a third party claim exists of which they are unaware.

LEO 1885 examines the issue against the backdrop of the Virginia Rules of Professional Conduct, noting that a plaintiff's attorney would be prohibited from agreeing to indemnify the defendant, as Rule 1.8(e) prohibits a lawyer from providing financial assistance to his client in connection with pending or contemplated litigation (with a few exceptions not applicable here). Also, such an indemnification agreement would violate ethics Rule 1.7(a), since it presents a potential conflict of interest between the lawyer and the client, under the idea that the settlement can only go forward if the indemnification clause is included (making plaintiff's counsel personally responsible for any third party liens), the attorney may be less likely to settle the case despite the plaintiff's wishes.

LEO 1885 also discusses the defendant's attorney's ethical obligations with regard to such an indemnification clause, and concludes that by insisting that the plaintiff's attorney agree to this provision in the settlement agreement, the defense attorney is inducing the plaintiff's attorney to act unethically, which is itself a violation of Rule 8.4(a).

The LEO only discusses the obligations of attorneys under the Virginia Rules of Professional Conduct. There is nothing to prevent a plaintiff (versus his counsel) from personally indemnifying a defense attorney or a carrier from liability for any outstanding third party claims.

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