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**Posted: June 24, 2015**

## **Emerging Regional Consensus: Prohibiting Indemnification by Plaintiffs' Counsel**

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In 1997, the WSBA issued an ethics advisory opinion—No. 1736—addressing whether a claimants' counsel could indemnify a settling defendant to protect the defendant from outstanding liens that might encumber the settlement. The WSBA concluded that the answer was “no” because that would constitute a form of “financial assistance” beyond the narrow parameters of RPC 1.8(e). Then, as now, RPC 1.8(e) limited permissible financial assistance to court costs and similar litigation expenses. Then, as now, RPC 8.4(a) prohibited a lawyer from inducing another lawyer to violate the RPCs. Read together, these two provisions effectively prohibited a defense lawyer from asking for an indemnity and a claimants' counsel from agreeing to one. By contrast, a settling *client* could agree to indemnify a settling defendant.

When it was issued, WSBA Advisory Opinion 1736 most often arose in the context of traditional hospital or physicians' liens. Those continue to fall within the opinion, which remains available on the WSBA web site. More recently, however, Advisory Opinion 1736 has found new life as Medicare liens have come to figure more prominently in settlements in areas such as asbestos litigation that often involve older claimants. Under the Medicare, Medicaid and SCHIP Extension Act of 2007, the federal government has a right of action against

settling defendants (among others) in personal injury cases for reimbursement of Medicare payments made to a plaintiff for the injuries involved unless the settlement is first reported to and the lien resolved with Medicare. In an effort to protect themselves from Medicare and other liens, defendants commonly ask for indemnity agreements from plaintiffs on settlement. Still others re-examined the possibility of extending the indemnity to the plaintiffs' counsel. In Washington, however, the broad sweep of Advisory Opinion 1736 precluded the latter.

Although Washington's ethics opinion preceded the more recent focus on Medicare liens, its approach foreshadowed an emerging consensus regionally (and nationally) on this issue. Last year, Alaska issued an ethics opinion—2014-4—adopting the same logic and conclusion as its Washington counterpart. The Alaska opinion, which is available on the Alaska Bar's web site at [www.alaskabar.org](http://www.alaskabar.org), addresses both traditional medical liens and more recent Medicare liens. It also usefully collects many similar ethics opinions nationally on this point. Like Washington, the Alaska opinion concludes that Alaska's version of RPC 1.8(e) prohibits a claimant's attorney from indemnifying a settling defendant. The Alaska opinion also expressly finds that a defense lawyer cannot ask for a prohibited indemnity under the Alaska formulation of RPC 8.4. This year, Oregon followed. Oregon State Bar Formal Opinion 2015-190, which is

available on the OSB's web site at [www.osbar.org](http://www.osbar.org), covers both traditional and newer Medicare liens. As with Washington and Alaska, the Oregon opinion concludes that Oregon's version of RPC 1.8(e) also prohibits a claimant's lawyer from indemnifying a settling defendant. Although the Oregon opinion does not discuss the role of defense counsel, Oregon's version of RPC 8.4 also prohibits a lawyer from inducing another lawyer to violate the RPCs and, therefore, effectively reaches the same parallel position as Washington and Alaska. Idaho does not currently issue ethics opinions, but Idaho's versions of RPCs 1.8(e) and 8.4(a) are similar to their Northwest counterparts.

## **ABOUT THE AUTHOR**

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Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA NWLawyer (formerly Bar News) and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark has also taught legal ethics as an adjunct for the University of Oregon School of Law's Portland campus. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.