Fall 2015 Oregon Association of Defense Counsel *The Verdict*

New OSB Ethics Opinion Prohibits Indemnification by Plaintiffs' Counsel

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Defendants and their lawyers have always been careful to address outstanding liens when settling, such as hospital and physician liens.[1] To ensure that claimants satisfy liens, it has also long been common to include a provision in settlement agreements requiring the plaintiff to indemnify and hold the defendant harmless from liens.[2] This issue has come into much sharper focus in recent years in light of the Medicare, Medicaid and SCHIP Extension Act of 2007. Under that statute, the federal government has a right of action against (among others) settling *defendants* 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 Government's lien is resolved with Medicare.[3] Particularly in areas like asbestos personal injury litigation where the nature of the diseases often means that claimants are Medicare beneficiaries, resolution of Medicare issues has become a central element in many settlements.

Reflecting this new Medicare risk, some defendants began proposing that plaintiffs' counsel join indemnification/hold harmless provisions as parties. Again, the idea was not new.[4] In fact, several bars around the country had issued opinions on the subject over the years, including, regionally, Washington and

Alaska.[5] Many of the older opinions—which were not specific to Medicare—generally concluded that a plaintiff's lawyer could not indemnify a settling defendant because doing so would amount to improper financial assistance to a client under state variants of ABA Model Rule of Professional Conduct 1.8(e).[6] The more recent opinions generally continue that trend and many now specifically discuss Medicare.[7]

Earlier this year, Oregon joined the jurisdictions addressing this topic with Oregon State Bar Formal Opinion 2015-190. The new opinion, which is available on the OSB web site, concludes that a claimant's lawyer cannot agree to indemnify a settling defendant (or its insurers). In doing so, the Oregon opinion tracks an emerging consensus nationally.

The Oregon Opinion

The Oregon opinion broadly encompasses indemnification generally and Medicare specifically. Opinion 2015-190 finds that indemnification by a claimant's lawyer would effectively constitute a form of "financial assistance" to a client. The opinion notes that permissible financial assistance under Oregon RPC 1.8(e) is limited to court costs and other similar litigation expenses. Opinion 2015-190 then concludes that indemnification would not fit this narrow definition of permissible financial assistance and, therefore, would violate RPC 1.8(e).[8] In

doing so, the Bar's approach is similar to the methodology used by the Supreme Court in interpreting the professional rules: generally limiting them to their plain text.[9]

The Oregon opinion focuses on claimants' counsel. It is important for defense counsel to remember, however, that RPC 8.4(a)(1) makes it "professional misconduct" to "induce another" lawyer to violate the RPCs. Read together, therefore, the Oregon rules make it impermissible to both "ask" or "agree."

Emerging National View

The new Oregon opinion is in keeping with other recent ethics opinions from a variety of states around the country. Many of these have issued opinions that address responsibilities from the perspective of both plaintiffs' counsel and defense counsel—including Alabama, Alaska, Florida, New York, Ohio, Virginia, Utah and West Virginia.[10] Like the Oregon opinion, these other states conclude that it is improper under state variants of ABA Model Rule 1.8(e) for a plaintiff's lawyer to agree to indemnify a settling defendant. They then find that it is equally improper for defense counsel under state equivalents to ABA Model Rule 8.4(a) to ask. Although it is apparent from the recent opinions that Medicare was a

driving force, it also is important to note that—like their Oregon counterpart—they extend beyond Medicare to indemnification of liens and related claims generally.

ABOUT THE AUTHOR

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[1] *See* ORS 87.555, 87.581.

[2] *See* Oregon State Bar, *Oregon Civil Litigation Manual* §15.30 (2004 rev ed).

[3] *See* 42 USC §1395y(b)(2).

[4] *See, e.g., In re Brown*, 255 Or 628, 631, 469 P2d 763 (1970) (noting that settling insurer required attorney to hold it harmless from liens).

[5] *See, e.g.*, WSBA Advisory Op. 1736 (1997); Alaska Bar Ethics Op. 2014-4 (2014).

[6] *See, e.g.,* Arizona State Bar Ethics Op. 03-05 (2005); Illinois State Bar Advisory Op. 06-01 (2006).

[7] *See, e.g.,* New York City Bar Formal Op. 2010-3 (2010); Philadelphia Bar Op. 2011-6 (2012).

[8] The Oregon opinion also finds that a claimant's counsel would have a conflict under RPC 1.7, the current client conflict rule.

[9] *See, e.g., In re Gatt*i, 330 Or 517, 532-33, 8 P3d 966 (2000) (invoking ORS 174.010's rule of statutory construction when interpreting professional rules).

[10] Alabama State Bar Ethics Op. 2011-01 (2011), Alaska Bar Ethics Op. 2014-4 (2014), Florida Bar Staff Op. 30310 (2011), New York State Bar Ethics Op. 852 (2011), Ohio Supreme Court Bd. of Comm. Ethics Op. 2011-1 (2011), Virginia State Bar Ethics Op. 1858 (2011), Utah Ethics Advisory Op. 11-01 (2011), and West Virginia Ethics Op. 2013-01 (2013).