

FORMAL OPINION NO 2015-190

Lawyer Indemnification of Defendant for Failure to Reimburse, or Set Aside Sufficient Funds to Reimburse Third-Party Payer for Medical Expenses Already Advanced, or for Future Liability under Medicare Secondary Payer Act

Facts:

Lawyer *A* represents Party *A* against Party *B* in a personal-injury case. Party *A*'s Third-Party Payers¹ have advanced funds to provide medical care for injuries related to the claims Party *A* asserts against Party *B*.

In order to settle Party *A*'s case, Party *B* asks Lawyer *A* to join with Party *A*, as a condition of the disbursement and receipt of settlement proceeds, to agree to indemnify Party *B*, and his/her insurers, agents, and lawyers (collectively "representatives"), for any failure to reimburse, or set aside sufficient funds to reimburse, the Third-Party Payer for medical expenses already advanced and for future liability under the Medicare Secondary Payer Act.

Questions:

1. As a condition of receipt and disbursement of settlement proceeds, may Lawyer *A* join with Party *A* in agreeing to indemnify Party *B* and her/his representatives for a failure to reimburse, or set aside sufficient funds to reimburse, Third-Party Payers for medical expenses already advanced for Party *A*'s care?²

¹ By "Third-Party Payer" we mean Medicare under the current law. As mandatory insurance coverage expands, the definition of Third-Party Payer may also change.

² Example of indemnification language:

I and my lawyer hereby agree to satisfy and hold defendant harmless from any and all bills, liens, subrogation claims, or other settlement rights or interests, whether known or unknown, including but not limited to any claims, demands, liens of Welfare, or conditional payment claims of Medicare or Medicaid, arising out of the above

2. As a condition of receipt and disbursement of settlement proceeds, may Lawyer A join with Party A in agreeing to indemnify Party B and her/his representatives for a failure to reimburse, or set aside sufficient funds to reimburse, Third-Party Payers for future payment of Party A's care?³

Conclusions:

1. No.
2. No.

Discussion:

Question 1 involves a proposed indemnification for an amount hypothetically known, but not yet quantified or asserted by the Third-Party Payer.⁴

Question 2 involves a proposed indemnification for an amount that is unknown and might never materialize. Under Question 2, a set-aside

described incidents or events, the consequences thereof, or any medical care or treatment obtained as a result thereof or any expense incurred as a result.

³ Example of indemnification language:

I and my lawyer hereby agree to hold harmless, defend, and personally indemnify the settling party, as well as the settling party's corporations, hospital, clinics, officers, directors, shareholders, employees, agents, assigns, lawyers, and professional liability insurance companies, should I and my lawyer fail to establish, obtain approval for, and/or fund a Medicare set-aside account.

⁴ Assume that: (1) Medicare is Party A's primary Third-Party Payer; (2) Party A suffers from a pre-existing condition, chronic fibromyalgia; and (3) Medicare pays for the pain management treatment. Party A's "claim" is based upon an automobile accident. Before submitting its claim for "conditional payment," Medicare must determine which portion of the current round of pain management was for treatment of the precondition (fibromyalgia) and which portion was related to the automobile accident. This situation will result in a delay of Medicare's "claim" for reimbursement for an undetermined period of time.

account to cover future payments for medical care may never be required because an amount may never materialize, in which case lawyer will never be liable for indemnification. If, however, the funds have been disbursed, no set-aside account is created, and future payments for medical care are made for which client is financially unable to pay, the lawyer becomes squarely liable for indemnification.

Lawyer A's agreement to join with Party A to indemnify Party B as part of any settlement agreement is proscribed by Oregon RPC 1.7, which provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

By joining with Party A to indemnify Party B and his/her representatives, Lawyer A would become a surety for Party A and Party A's

duty to pay present and future medical providers.⁵ As a surety, Lawyer A would have inchoate claims against Party A that could mature into claims against Party A if Party A fails to pay the Third-Party Payer or establish a required set-aside account to cover future payments for medical care.⁶ Those inchoate claims could include claims for reimbursement, restitution, and subrogation.⁷ As a result, there is a significant risk that Lawyer A's personal interest in avoiding such liability would materially limit Lawyer A's representation of Party A, the client. For example, Lawyer A may recommend that client reject an offer of settlement that is in the client's interest, but not in the lawyer's interest. Moreover, in advising client regarding whether to use settlement funds to pay Third-Party Payer, lawyer's own interests in avoiding personal liability would likely interfere with lawyer's independent professional judgment in advising the client.

Notwithstanding the conflict, Oregon RPC 1.7(b) might allow Lawyer A to continue representation of Party A with Party A's informed consent, confirmed in writing.

Even if that were achieved, however, Oregon RPC 1.8(e) would still prevent Lawyer A from agreeing to indemnify Party B in either scenario. Oregon RPC 1.8(e) provides:

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.

⁵ *U.S. v. Frisk*, 675 F2d 1079, 1083 (9th Cir 1982).

⁶ *South Trust Bank of Alabama, N.A. v. Webb-Stiles Co., Inc.*, 931 So2d 706, 712 (Ala 2005).

⁷ *Restatement (Third) of Suretyship and Guaranty* §§ 22, 26, 27 (1996) (supplemented periodically).

Lawyer A's agreement to indemnify Party B and his/her representatives for not yet quantified conditional medical payments advanced by Third-Party Payers for Party A's expenses would constitute "financial assistance" to Party A. The indemnification agreement in Question 1 would require Lawyer A to pay the pre-settlement medical expenses if Party A fails to do so. Correspondingly, the indemnification agreement presented in Question 2 would require Lawyer A to maintain a set-aside account with sufficient funds for future medical expenses if Party A fails to do so. In either case, Lawyer A would be providing financial assistance to Party A, the client.

Approved by Board of Governors, April 2015.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.5-7(c) (advances of costs and disbursements), § 9.2-1 to § 9.2-1(b) (personal-interest conflicts) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 36, 121, 125 (2000) (supplemented periodically).

