Arkansas Association of Defense Counsel

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LIENS AND THE DESIRE FOR INDEMNIFICATION

By Adam Franks

Liens, and in particular Medicare liens, are the specters that haunt defense lawyers attempting to settle routine injury cases. Overlooking a lien or improperly protecting a lien can be an expensive mistake for a defendant, his/her insurer or defense counsel. Consequently, one might consider asking plaintiff's counsel to indemnify defendants, insurers or defense attorneys in the event of a lien related claim raised post settlement. Unfortunately, providing or even seeking such indemnification is problematic.

There appear to be no Arkansas cases or decisions directly on point; however, other state ethics entities considering the issue consistently concluded such agreements with defendants, insurance carriers, and defense attorneys violate ethical rules. In an advisory opinion addressing the issue of indemnifying other parties as to non-Medicare/Medicaid medical liens,[1] the Legal Ethics Committee of the Indiana State Bar Association highlighted a number of ethical issues that arise with agreements to indemnify defendants, defendants' insurers, and defense counsel:

> Ind. Professional Conduct Rule 1.2(a), which is identical to Ark. R. Prof'l Conduct 1.2(a), obligates an attorney to abide by a client's decision whether to settle a matter, and that obligation may be compromised where an agreement injects the attorney's own financial exposure into the settlement.
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> Ind. Professional Conduct Rule 1.7(a)(2), which is identical to Ark. R. Prof'l Conduct 1.7(a)(2), prohibits an attorney from representing a client if there is a significant risk the representation will be materially limited by the attorney's own interest, such as when acceptance of an otherwise favorable settlement hinges on the attorney assuming uncertain personal financial exposure.
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> Ind. Professional Conduct Rule 1.8(e), which is identical to Ark. R. Prof'l Conduct 1.8(e), prohibits an attorney from providing financial assistance to a client beyond the advancement of costs and expenses of litigation, and a promise of indemnification effectively makes the attorney a guarantor of the client's legal obligations.
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> Ind. Professional Conduct Rule 1.15(d), which is analogous to Ark. R. Prof'l Conduct 1.15(a)(5), obligates an attorney to promptly return the funds or property of third persons who are entitled to receive upon settlement, although this area of law is unsettled.
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> Ind. Professional Conduct Rule 1.16, which is analogous to Ark. R. Prof'l Conduct 1.16, prohibits an attorney from continuing to represent a client if the representation violates the rules, and the committee noted that "[w]ithdrawal at the end of an otherwise successful settlement negotiation is contrary to the interests of the client, the attorney and justice."
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> Ind. Professional Conduct Rule 2.1, which is identical to Ark. R. Prof'l Conduct 2.1, requires an attorney to exercise independent professional judgment when representing a client, and an attorney's agreement to indemnify other parties places an inappropriate burden on the attorney's independent judgment.

[1] http://www.inbar.org/resource/resmgr/Ethics_Opinions/2005_(1).pdf

In more recent opinions discussing indemnity agreements for all medical liens, including Medicare/Medicaid claims, the Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline[2] and the Formal Advisory Opinion Board of the State Bar of Georgia[3] reached the same conclusion on comparable grounds. Similarly, the Florida Bar[4] opined that it is unethical for a plaintiff's attorney to enter—and defense counsel to request or require—such indemnity agreements. This appears to be the prevailing view among jurisdictions to consider the issue. *See* Alabama State Bar Ethics Op. RO 2011-01; Arizona State Bar Ethics Op. 03-05; Delaware State Bar Association Committee on Professional Ethics Op. 2011-1; Illinois State Bar Association Advisory Op. 06-01; Indiana State Bar Association Legal Ethics Op. No. 1 (2005); Maine Ethics Op. 204 (2011); Missouri Formal Advisory Op. 125 (2008); Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Op. 2010-3; North Carolina RPC 228 (1996); Philadelphia Bar Association Professional Guidance Committee Op. 2011-6 (2012); South Carolina Ethics Advisory Op. 08-07; Utah Ethics Advisory Op. 11-01; Virginia Legal Ethics Op. 1858 (2011); Washington State Bar Association Advisory Opinion 1736 (1997); Wisconsin Formal Op. E-87-11 (1998).

Accordingly, the weight of authority from other jurisdictions indicates an attorney violates a number of ethical rules when he/she agrees to indemnify or hold harmless other parties as part of a settlement agreement. A few states have concluded that defense attorneys who propose such agreements violate ethical rules as well. Some items from practitioner sources reviewed include:

http://mnbenchbar.com/2012/06/secondary-payer-act/

http://mdliability.com/2012/10/19/ethics-opinions-underscore-problems-that-medicare-liens-create-when-negotiating-settlements/

http://www.garretsongroup.com/indemnification-agreements-with-medicare

http://dritoday.org/feature.aspx?id=463

Likewise, an excellent article on the topic is Defense Ethics and Professionalism, 53 No.9 DRI For The Defense 79 (Sept. 2011).

At the end of the day, in light of the decisions from other jurisdictions and the seeming absence of controlling authority in Arkansas, defense counsel may be better served by resisting the urge to seek indemnification from plaintiff's counsel as a condition of settlement.

The thanks of the AADC go out to:

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Adam Franks for writing this article. We welcome your articles and thoughts for future editions.

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[2] http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2011/op_11-001.doc

[3] https://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=569

[4] http://www.specialneedsfirm.com/files/Florida%20Bar%20Staff%20Opinion.pdf