Compliance Connection

A Conversation About Lawyer Ethics and MSP Compliance

By Bruce A. Cranner
and John V. Cattie, Jr.

Why parties and their counsel need to take certain steps or risk incurring penalties amounting to double damages plus interest or worse under the MSP.

When resolving any workers' compensation, automobile, liability claim (including self-insurance) or a no-fault claim, compliance with the Medicare Secondary Payer (MSP) Act, 42 U.S.C. §1395y(b)(2), as well as rules and regulations enacted in support of the Act (collectively, the MSP provisions), can involve three distinct obligations: (1) reporting certain data to the Center for Medicare & Medicaid Services (CMS) about claims resolved involving Medicare beneficiaries under the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), sometimes referred to as "Section 111"; (2) verifying and resolving Medicare's reimbursement claim for injury-related care from the date of injury through the date of settlement; and (3) evaluating obligations associated with future costs of care that may be provided to a claimant from the date of settlement onward.

Thanks to agency guidance in the form of rules and regulations, these distinct obligations have started to come into focus in 2014 such that all parties to settlements involving Medicare-enrolled beneficiaries and future beneficiaries—claimants and defendant insurance carriers—have more clarity with respect to what steps should be taken to ensure compliance. In light of the new rules and regulations providing official agency interpretation of the MSP Act, it is important for lawyers representing these parties to understand these issues not only from the practical compliance perspective, but also from the ethical perspective.

This article analyzes the lawyer's MSP obligations from the ethical perspective, via a series of hypothetical conversations between plaintiff and defense counsel. In

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so doing, we hope to offer a better understanding about why parties and their counsel need to take certain steps, or risk incurring penalties amounting to double damages plus interest or worse under the MSP. 42 U.S.C. §1395y(b)(2).

Setting the Stage

This conversation relies on and applies the American Bar Association Model Rules of Professional Conduct. While these Model Rules cannot be applied to an individual attorney's actions for sanctioning purposes, a practitioner should know that most states use the Model Rules as a guide to draft and promulgate their own rules of professional conduct, which do apply for sanctioning purposes. Because each state has its own distinct set of professional rules, this article broadly discusses ethical issues referring to the Model Rules. The authors highly encourage you to review your own state's rules for specific guidance.

The conversation below is between Bruce A. Cranner, Esq., a Partner at Frilot LLC in New Orleans, Louisiana, and John V. Cattie, Esq., of the Garretson Resolution Group in Charlotte, North Carolina. Mr. Cranner is the immediate past chair of the DRI MSP Task Force. In his practice he counsels defendants/payers regarding MSP Section 111 compliance. His clients include many top-ranked insurance carriers and self-insured corporations. Mr. Cattie is the current chair of the DRI MSP Task Force, and his work focuses primarily on MSP reimbursement compliance, and specifically on the future medical aspects of MSP compliance. For the hypothetical discussion below, Mr. Cranner will speak from the defense perspective while Mr. Cattie will address potential concerns plaintiffs' counsel may have.

Mr. Cranner: We know that the federal government intends to release rules and regulations later this year that will affect all MSP obligations. MMSEA reporting, conditional payment reimbursement and future medicals or Medicare Set-Aside (MSA) obligations are about to all change.

> **Someone is going to be** that guy within the next five years and lose his license due to this exact fact pattern because he has not paid attention to the significant enforcement changes to the MSP Program.

Mr. Cattie: Right. The promulgation of final rules and regulations in these areas then triggers certain rules of professional conduct to which an attorney will need to pay particular attention. A review of the ABA Model Rules of Professional Conduct leads to the conclusion that attorneys must pay close attention to certain rules when claims involve MSP compliance issues. Here's the first fact pattern.

Fact Pattern 1

Mr. Cattie: Let's say that the parties agree at mediation to settle a product liability claim involving a 67-year-old male in which the plaintiff will require future medical care. The settlement is for $200,000. However, neither side has been paying attention to the MSP concerns. In fact, the plaintiff's attorney tells the defense attorney, "I don't understand that stuff and the government can't possibly police the issue, so I am going to ignore it. It will take forever to get all

of the payment information we may need from the government and by then my client may not want to settle." The defense attorney knows that his or her client wants the case settled and the file closed FAST to reduce litigation costs. So, both lawyers ignore their MSP obligations and settle. The defense attorney counsels his or her client to disburse the settlement proceeds to the plaintiff's attorney. The plaintiff's attorney takes his or her fees and then disburses the rest of the proceeds to his or her client. The defense attorney does not advise his or her client about Section 111 reporting or MSP reimbursement obligations. The defendant payer does not report as required by the MMSEA, nor does the defendant ensure that any conditional payments have been verified and resolved or take any steps to address future medicals. The plaintiff undergoes back surgery 13 months after the parties settle, and Medicare finds out about the injury and the settlement. What ethical concerns does this pose?

In addition to the claimant's indemnity (which I do require), defense counsel must insist upon evidence of satisfaction of Medicare as a condition subsequent to the agreement.

Mr. Cranner: Well, that is outrageous! Let's talk through it. Since the enactment of the MMSEA, defendants and insurance carriers have had an obligation to report under MMSEA Section 111 certain information to CMS about resolved claims involving Medicare beneficiaries. To assess this potential obligation to report, a defendant or carrier must determine if a claimant is enrolled in the Medicare program. The way to do this is to submit a query file to CMS with basic claimant demographic data. Over the past six years, the insurance community has spent millions to update its protocols, and most companies are fully compliant and aware of what they must do. However, there are still entities that have not yet updated their settlement and claims management protocols to ensure MSP and MMSEA reporting compliance. This can open an ethical Pandora's Box for a defense lawyer. From a defense lawyer's perspective, I see violations based on lack of competence, absence of diligence, or poor communication with the client, and just plain misconduct.

But here's a good question: Has the defense attorney in this fact pattern violated Model Rule 3.2 about expediting litigation? No. While the defense attorney did expedite the litigation and settle the case fast, this attorney did so in a way that was inconsistent with the client's interest since the client will now face a discretionary $1,000 per day penalty for failure to report to the government, as well as double damages plus interest for any conditional payments made by Medicare but not reimbursed. 42 U.S.C. §1395y(b)(8). Either way, this defense counsel faces potential malpractice claims and is in ethical hot water.

Mr. Cattie: The plaintiff's attorney faces the same problems here but for slightly different reasons. Because the Section 111 reporting is solely a defense obligation, the plaintiff's attorney does not face scrutiny for the defense's failure to report. But, the plaintiff's attorney still is on the hook for failure to reimburse Medicare for its conditional payments, and the plaintiff's attorney has the added bonus of potential exposure for failing to address the future medicals issue. Additionally, Medicare will likely terminate the plaintiff's federal benefits, even including a federal tax refund, when CMS officials find out that the plaintiff has not reimbursed Medicare's past funding of his or her care, and the settlement does not address future medical care by determining if an MSA is needed based on the facts of the case.

The plaintiff's attorney's failing to investigate his or her client's Medicare enrollment status properly may violate the Model Rules. First, that attorney arguably lacks the competence to provide representation to the claimant (Model Rule 1.1). Second, that attorney failed to act with reasonable diligence and promptness (Model Rule 1.3). Third, that attorney has not communicated with his or her client in a manner that allowed the client to make an informed decision about representation, or whether an offer to settle should have been accepted (Model Rule 1.4). Fourth, that attorney certainly is not safekeeping client property (Model Rule 1.15). While both the plaintiff and the plaintiff's attorney have exposure to Medicare for double damages plus interest, that attorney also faces the remote possibility of disbarment. That may be an extreme result, but we have seen at least one plaintiff attorney disbarred based on a fact pattern involving an MSA. *In re Gammage,* 2012 Ga. Lexis 90 (Jan. 23, 2012).

Mr. Cranner: And don't forget that the claimant has a potential legal malpractice claim against his or her lawyer and the defense due to the termination of his or her Medicare benefits. But I really think that this stuff does go on today. Someone is going to be that guy within the next five years and lose his license due to this exact fact pattern because he has not paid attention to the significant enforcement changes to the MSP Program.

Fact Pattern 2

Mr. Cranner: In this fact pattern, the parties agree to resolve a claim involving a current Medicare beneficiary. At the time of the settlement the parties are waiting for a Conditional Payment Letter (CPL), which is correspondence from CMS containing a listing of the conditional payments that Medicare made for the plaintiff's claimed injury based on the date of incident and ICD-9 injury code. However, the plaintiff and the plaintiff's attorney have agreed to indemnify the defendant on all Medicare-related issues, in accordance with agreed upon language in the release. After waiting a year, the plaintiff's attorney never receives the CPL and fails to follow up with CMS. He or she eventually takes his or her fees and distributes the settlement proceeds to the claimant without reimbursing Medicare. Further, the action arose in a state where it is ethically impermissible for a plaintiff's attorney to provide indemnification to the defendant on lien issues.

Mr. Cattie: As a preliminary matter, it is important for defense counsel to understand that at least 18 states have concluded that it is ethically impermissible for a plain-

tiff's counsel to indemnify a defendant on lien resolution issues. So the issue is whether that defense attorney should rely on that indemnification, right?

It is commonly believed that a defendant or an insurance carrier may simply rely on indemnification from a claimant as sufficient to address these MSP obligations. While it might suffice for the future medicals obligation when defense exposure is very low or nonexistent, such indemnification is inadequate for conditional payment reimbursement, in and of itself. An interpretation of the ABA Model Rule 1.7(a)(2) (Conflict of Interest: Current Client), may go as far as to find it unethical to even *ask* a plaintiff's attorney to provide such indemnification. I'm not certain to what extent the defense and insurance community understands this. Conditional payment reimbursement is a subset of the lien resolution topic. As the trend grows across the country, using such a strategy is ill advised. Further, obtaining indemnification from claimants themselves inadequately addresses the issue. These days, settling parties should collaborate on what more they must do to address Medicare's repayment rights compliantly.

If CMS had intended for defense entities to be on the hook for future medicals that is exactly what the CMS Reference Guide would state.

Mr. Cranner: Well, when the claimant has indemnified the defense and then failed to reimburse Medicare for conditional payments, Medicare still possesses the right to pursue its own action as well as a right of subrogation against all of the parties. Such indemnification would likely be insufficient to prevent the federal government from pursuing a defendant. So, here the defense attorney violated Model Rule 1.1 (Competence). Even if such conduct is not unethical, it certainly is ill advised. In addition to the claimant's indemnity (which I do require), defense counsel must insist upon evidence of satisfaction of Medicare as a condition subsequent to the agreement. Have claimant's counsel forward to you evidence that CMS's final demand for reimbursement asserted has been satisfied. I usually insist that plaintiff's counsel forward me any CMS correspondence showing that payment has been received and CMS has closed the file. Then, the payer can close its file with reasonable certainty that the matter is fully and finally resolved.

Mr. Cattie: I think that a plaintiff's attorney providing evidence of satisfaction to the payer represents best practices today. At the same time, in this second hypothetical fact pattern the plaintiff's attorney has most assuredly violated the Model Rules. While defense counsel might not be aware of this conflict of interest that arises when a plaintiff's attorney provides indemnification on lien resolution issues in one of those 18 states, the plaintiff's attorney should know better. Beyond the conflict issue under Model Rule 1.7, you're looking at Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4 (Client Communication). Rule 1.15 (Safekeeping Client Property) and Rule 8.4 (Misconduct).

Fact Pattern 3

Mr. Cattie: Something I've seen recently is parties resolving an accepted workers' compensation (WC) claim assuming that Medicare has not made any conditional payments because the carrier accepted the claim. But we know that mistakes are made, and perhaps a claimant was treated somewhere unbeknownst to the carrier. We just saw this fact pattern in the *Caldera* case from the Fifth Circuit: the claimant failed to seek preauthorization and Medicare ended up paying $42,000 or so for his care. Is it ethical for the parties to ignore MSP issues in a WC case when the carrier has accepted the claim?

Mr. Cranner: Nope. This means trouble. Let's flesh this one out.

The parties agree to resolve a WC claim and "close" future medicals. To date, the WC carrier has had primary responsibility to pay all medicals because it accepted the claim, but that responsibility will be closed under the settlement agreement, and the claimant, who's in possession of the settlement proceeds, becomes the primary payer under the MSP provisions going forward. The claimant is a current Medicare beneficiary. The parties, under the assumption that the WC carrier has paid all past medical costs, think that it is a waste of time to verify conditional payments with CMS, believing they will only get a $0 CPL after waiting more than six months. Since they are impatient and want to close their respective files, the parties move forward without verifying and resolving conditional payments. However, CMS has made $10,000 in what its officials classify as "conditional payments" for an injury, even though the WC carrier did not accept responsibility for that body part/component of the overall injury claim. 42 C.F.R. §411.21. Further, the claimant will require future surgeries on that same body part, but the parties only agreed to fund an MSA for $15,000, a figure that "sounded good" without any rhyme or reason to it. What ethical concerns exist?

Mr. Cattie: OK. Let's break it down into the three MSP obligations. First, let's discuss Section 111 reporting. Nothing in the third fact pattern indicates that the WC carrier does not intend to report, so let's assume that it does so in a timely manner during the quarter after the settlement. If that is the case, there would be no ethical violations for either defense or plaintiff's counsel linked to Section 111 reporting.

Mr. Cranner: Right. But how about the conditional payment issue?

Mr. Cattie: Well, from the plaintiff's perspective, if the plaintiff's attorney ignores Medicare and does not verify or resolve conditional payments, then both the attorney and the client are on the hook to Medicare for double damages plus interest. 42 U.S.C. §1395y(b)(2)(B)(ii). The fact that the conditional payments are asserted incorrectly by Medicare is neither here nor there. If the plaintiff's attorney had opened a record and asked for a conditional payment letter, he or she would have seen this error and raised it with CMS, asking that the item be stricken from the record based on the fact that it was for a body part unrelated to the compensable insurance claim. Because the plaintiff's attorney did not, I see potential violations based on Model Rule 1.1 (Competence), Model Rule 1.3

(Diligence), Model Rule 1.4 (Client Communication), and Model Rule 1.15 (Safekeeping Client Property). I guess you can go ahead and throw Model Rule 8.4 (Misconduct) in there as well.

Mr. Cranner: I agree. Plaintiff's counsel has issues, but the defense attorney faces the same ethical concerns since Medicare can pursue any party that makes or receives a payment under 42 U.S.C. §1395y(b)(2)(B)(ii). So I agree that violations based on competence, diligence, communication, safekeeping client property and misconduct could all be in play. Now, what about the future medicals? I don't see this being a big concern for the defense attorney, or even a concern at all. Specifically, the CMS WCMSA Reference Guide dated February 3, 2014, states in §3.0 that it is claimants and other parties who are receiving payments who must take Medicare's future interest into account.

Mr. Cattie: And it does not talk about any type of defense entities, right? The CMS WCMSA Reference Guide does not mention defendants, defense attorneys, insurance carriers, claims adjustors, primary plans, primary payers, third party administrators? Any parties who make payments in the WC context? So contrary to popular opinion, CMS does not look to the payer for future medicals as long as conditional payments are verified and resolved at date of settlement?

Mr. Cranner: Right. If CMS had intended for defense entities to be on the hook for future medicals that is exactly what the CMS Reference Guide would state. Since there is no such wording and the CMS Reference Guide has gone through three separate versions at this point, there is currently no indication that MSAs are a defense concern. Perhaps the most defendants should do is to advise plaintiffs that they believe the settlement is funding a certain dollar amount for future medicals and then let the plaintiff address the situation. Counsel could put language in the release that recites what the plaintiff chooses to do. You know, I really think that is the way to do it now… but that must be done to prove to CMS that the issue was discussed and noted by the defense attorney and that the settlement was not intended to defraud Medicare. I worry about a Federal False Claims Act charge in these situations, but I think that risk is remote and defensible with evidence that no collusive fraud was intended.

Mr. Cattie: That's vastly different from how the insurance community currently addresses the issue, but I agree 100 percent. From a plaintiff's perspective, defendants are overly concerned about MSA issues in the absence of even a scintilla of evidence or guidance from CMS to the contrary. Instead, focusing on Section 111 reporting and receiving evidence of satisfaction on the conditional payment issue should be their focus. For those defendants and insurance carriers who remain concerned about future medicals, they might want to look into using a 468B Qualified Settlement Fund (QSF) as a part of the resolution process. You know that those allow a defendant to extinguish all MSP reimbursement exposure completely by passing that to the QSF through a novation process, right? And a defendant likely gets the benefit of a current year income tax deduction as well.

Mr. Cranner: Right. I've been talking to my clients about those and that process makes a lot of sense to them. Now, the MSA issue looms large for the plaintiff instead, right?

Mr. Cattie: Absolutely. This MSA issue is one that sits squarely on the shoulders of plaintiff's counsel based on the current regulations proposed by the federal government. If plaintiffs' attorneys do not address MSAs correctly, then they may be subject to sanctions. For example, what if an MSA is underfunded and the claimant spends down and exhausts the MSA, then begins submitting bills to Medicare? Medicare rejects those bills, essentially forcing the plaintiff to pay out of pocket. Who is the plaintiff going to blame? Potentially, his or her attorney will receive the first phone call. Additionally, I see competence, communication, and safekeeping property as ethical issues here.

Conversely, what if an MSA is overfunded? While the plaintiff never has to worry about Medicare cutting off his or her benefits, his or her attorney faces the opposite concern that by overfunding the MSA, the plaintiff is deprived of a property right granted by virtue of agreeing to settle his or her claim. Specifically, the plaintiff is deprived of the money over and above the proper funding amount for the MSA. In fact, based on recent changes to the Reference Guide in Section 4.1.4 (Hearing on the Merits of the Case), I would tell you that solely relying on an MSA report that only takes into account medicals (as opposed to non-medicals such as indemnity/wage loss) no longer represents best practices as it would lead directly to an overfunded MSA. The plaintiff could report the attorney to the state bar for ethical violations. Presuming that the state's ethics regulations mirror the Model Rules, then rules pertaining to competence (Model Rule 1.1), communication (Model Rule 1.4), and safekeeping of client property (Model Rule 1.15), could all apply. Furthermore, the client could file a legal malpractice action against his or her attorney. Ultimately, if the plaintiff's attorney permits an MSA to be funded without the proper support, the attorney risks facing issues down the road. As an aside, if the defense attorney asked the plaintiff attorney to rely solely on such a report for closing future medicals, absent any sort of non-medicals analysis, he or she would, from my perspective, be aiding an attorney to violate the rules under Rule 8.4 (Misconduct).

Conclusion

We hope that these specific scenarios have conveyed the importance of complying with ethical obligations when addressing MSP issues on your clients' claims. We don't want anyone to join that group. Thus, having a cursory understanding of MSP issues is no longer sufficient. Instead, practitioners should understand how the MSP Act and the regulations promulgated in support of it should be used to ensure compliance both for a client and a practitioner from the practical perspective, but also from the ethical perspective. In sum, MSP compliance is not only important to our clients, but if improperly addressed, it can lead to serious ethical issues for the attorneys involved in resolving claims with Medicare beneficiaries. The DRI MSP Task Force works to educate DRI members on managing these issues effectively. We encourage you to review these issues thoroughly and determine the best method for handling them in your cases. FD