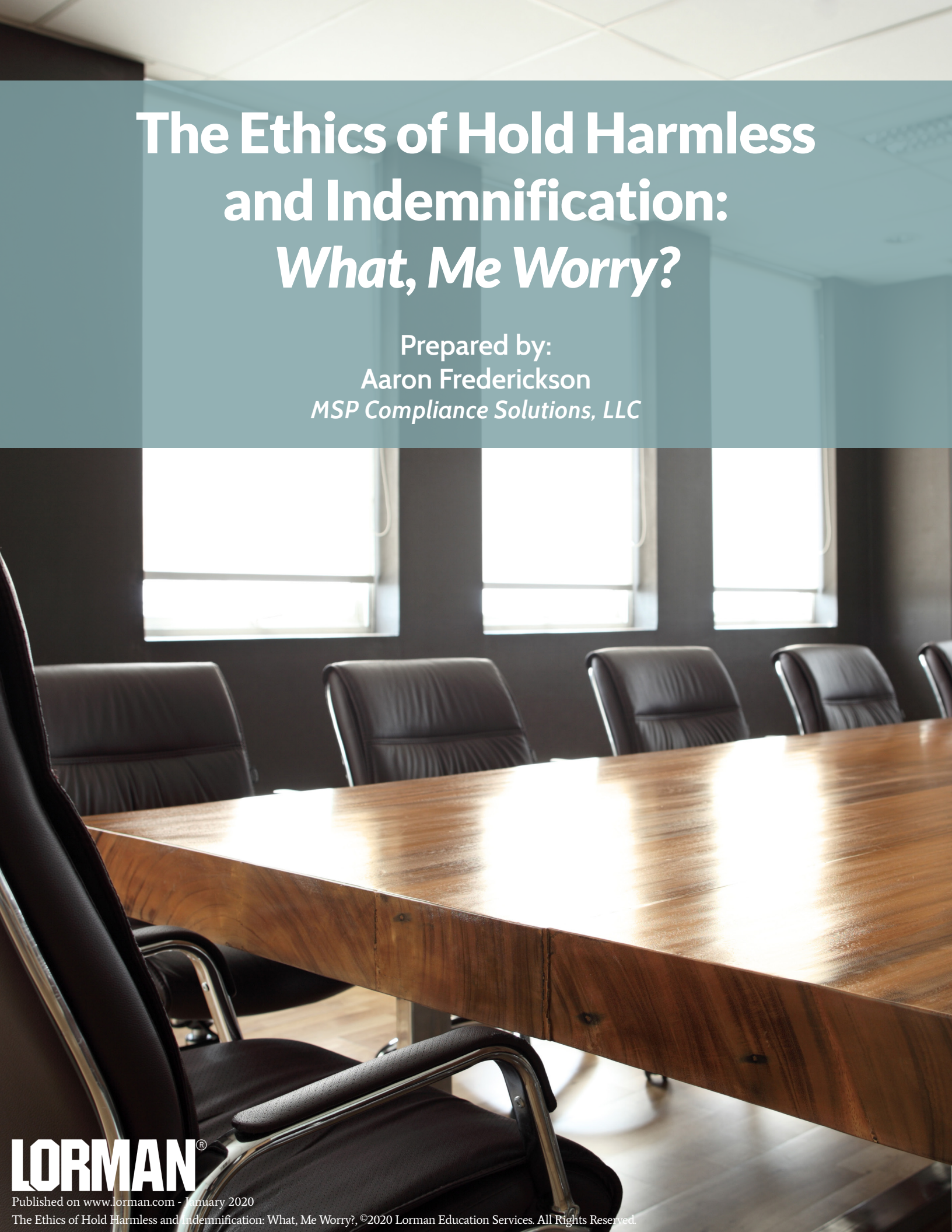
The Ethics of Hold Harmless and Indemnification: *What, Me Worry?*

Prepared by:
Aaron Frederickson
MSP Compliance Solutions, LLC



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THE ETHICS OF HOLD HARMLESS AND INDEMNIFICATION: WHAT, ME WORRY?

By Aaron P. Frederickson, Attorney at Law, MSCC
Direct 651-485-7036
aaron@mspComplianceSolutions.com

In 1952, Americans were introduced to the fictional character Alfred E. Neuman in *Mad* magazine. Since that time, the carefree, and often reckless attitude of Mr. Neuman is characterized by the phrase, "What, Me Worry?"

To some extent, this slaphappy attitude persists in our legal landscape today as attorneys attempt to deal with the scandalon[1] known as the Medicare Secondary Payer Act. In order to avoid these issues, it has become common practice to place hold harmless/indemnification clauses in settlement agreements in an attempt to expedite the settlement process. As a result, state and local bar associations have taken note along with lawyer professional responsibility boards. This article serves as an overview of recent ethics decisions regarding these matters and highlights efforts in West Virginia to limit the use of such agreements.

Can I Hold You Harmless?

In 2005, the Indiana State Legal Ethics Committee issued what is considered the first real attempt to address hold harmless/indemnification agreements by attorneys under the auspices of the Medicare Secondary Payer Act.[2] In examining this issue, the Committee found that such agreements could be unethical for several reasons. This included concerns over an attorney's own financial exposure into the settlement negotiations, whether an attorney would be providing financial assistance to a client that exceeds advancements of costs and expenses, whether such agreements materially limit the attorney's interests and the inherent conflict between the attorney and the client.

Following the issuance of this decision, several years elapsed before another state specifically examined hold harmless/ indemnification in settlements involving Medicare beneficiaries. In 2010, the Tennessee Board of Professional Conduct determined that such agreements are unethical in certain circumstances.[3] They also went on to note that "nothing in this opinion is intended to relieve any individual or any entity, including plaintiff's counsel, of any obligations, including reporting and/or payment obligations, and posed by the MSP Act, 42 U.S.C. §1395y *et seq.* Counsel (defense or plaintiff) may be subject to a direct action suit by the Center for Medicare and Medicaid Services (CMS) recovering attorney's fees collected through a settlement or release that has not been properly reported and negotiated consistent with the obligations of this statute."

Following the Tennessee opinion, a similar decision was issued in the state of Ohio.[4] In this instance, the Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline relied on advisory opinions from Arizona, Illinois, Kansas, Missouri, North Carolina, South Carolina, Tennessee and Wisconsin. Based on its findings, the Ohio Board determined that personal indemnification by a lawyer is essentially "an agreement by the lawyer to provide financial assistance to the client."[5]

The Florida State Bar also considered this issue in 2011. In rendering their decision, the Florida Bar opined that a defendant lawyer should not request that a plaintiff lawyer enter into such an indemnification agreement as it would violate its rules, "nor should they knowingly assist or induce others to do so."[6]

Aftershocks of *United States v. Harris*?

In September 2012, the West Virginia Lawyer Disciplinary Board sought comment on the question as to "whether it is a violation of the Rules of Professional Conduct for an attorney to personally agree, as a condition of settlement, to indemnify and hold harmless the opposing party from any and all claims to the settlement funds by third persons."[7] Based upon a reading of the proposed Legal Ethics Opinion (L.E.O.), the Board seemed to be concerned about the events surrounding *United States v. Paul J. Harris*[8], where Harris, a plaintiff attorney, was found responsible to fully reimburse Medicare for $11,367.78, plus interest in conditional payments. This was based on the decision of Harris not to avail himself or his client to the administrative appeals process for conditional payment reimbursement.

Accordingly, the Lawyer's Board noted, "the purpose of this L.E.O. is not to address the legal requirements of the MSPA (Medicare Secondary Payer Act), it is generally acknowledged that there are notification of settlement requirements under the MSPA and that a plaintiff's counsel must determine if a client is a Medicare beneficiary and, if so, whether there are past or future medical Medicare expenses associated with the claim which is being settled."[9] In conclusion, the

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Board recommended, "settlement agreements that require an attorney to make a personal agreement to indemnify and hold harmless the opposing party from subrogation liens and/or third party claims violate the Rules of Professional Conduct."[10]

Practice Pointers for Attorneys

At this time, there are a number of ethical issues involving indemnification and/or hold harmless agreements. While ethical standards in one state are not controlling in other jurisdictions, they certainly do have persuasive value. This is demonstrated by the consistent line of opinions that have been issued to-date.

Notwithstanding this fact, attorneys falling outside the purview of a controlling ethical advisory opinion should take heed to the following tips:

Investigate all Medicare Secondary Payer issues early in the process when handling a personal injury or workers' compensation claim involving Medicare beneficiaries, or someone who will become eligible for Medicare benefits in the foreseeable future.

All attorneys (plaintiff and defense) should note that they are under an **affirmative obligation to investigate matters concerning Medicare Secondary Payer compliance** and place Medicare on notice through the Coordination of Benefits Contractor (COBC).

Openly communicate with opposing counsel on all non-privileged matters and correspondence received from CMS and their contractors regarding Medicare compliance.

Address all issues concerning Medicare Secondary Payer compliance in your settlement agreements. While CMS does not have a formal review process for Medicare Set-Aside agreements in non-workers' cases, it is still imperative this occurs. It is also implied in the above ethics opinions that efforts to avoid Medicare Secondary Payer compliance in personal injury and workers' compensation cases via "Medicare Savings"[11] clauses are not enforceable and likely unethical.

If you have questions regarding ethics and professional responsibility, take advantage of prospective ethical advisory opinion services from your local or state bar associations. Additional information regarding the topic of ethics and Medicare Secondary Payer compliance can be found at The Medicare Secondary Payer Act: Ethical Considerations in Settling Cases.http://mnbenchbar.com/2012/06/secondary-payer-act/

1 The word "scandalon" comes from the Greek word, *proskomma*, which means "a stumbling block an obstacle in the way which if one strikes his foot against he stumbles or falls that over which a soul stumbles, *i.e.* by which is caused to sin."
2 Indiana Opinion No. 1 (2005).
3 Tennessee Formal Op. 2010-F-154 (2010).
4 Ohio Board of Commissioners on Grievances and Discipline, Opinion 2011-2 (2011).
5 *Id.*
6 Florida Ethics Op. 30310 (2011).
7 W. Va. Ethics L.E.O. 2012-02 (Proposed).
8 2009 WL 891931 (N.D.W. Va. 2009).
9 W. Vir. Ethics L.E.O. 2012-02.
10 *Id.*
11 "Medicare Savings" clauses tend to note the affirmative obligations Medicare beneficiaries and their legal counsel have under the Medicare Secondary Payer Act, but do not specifically address how Medicare's interests were considered in the settlement. This classic form of burden shifting is discussed in detail and cautioned against in 42 C.F.R. §411.46. It is also noted that if there is even an attempt to maximize the value of a settlement, the entire settlement is void and all parties (and their attorneys) are subject to the enforcement provisions contained in 42 C.F.R. §411.24.