

Workers' Compensation Inn of Court //
Charlottesville - May 2023
Double Tree

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NAVIGATING ERISA LIENS IN **WORKERS' COMPENSATION CASES**

I. ERISA PRE-EMPTION

- a. The **Employee Retirement Income Security Act of 1974 (ERISA)** is many things. For our purposes, what matters is how a particular ERISA plan is funded.
- b. “[T]he provisions of this subchapter ... shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...” • 29 U.S. Code § 1144
- c. “It is of no moment that [the state] intrudes indirectly, through a workers' compensation law, rather than directly, through a statute called "pension regulation." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).
- d. “Such laws include ‘all laws, decisions, rules, regulations, or other State action having the effect of law.’ § 514(c)(1), 29 U.S.C. § 1144(c)(1)” *Shaw v. Delta Air Lines, Inc.*, 463 U. S. 85,(1983).
- e. "The preemption clause is conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U. S. 56 (1990),. Its "deliberately expansive" language was "designed to establish pension plan regulation as exclusively a federal concern." *Pilot Life Ins. Co. v. Dedeaux*, 481 U. S. 41 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U. S. 504, 451 U. S. 523 (1981))” *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990)

f. Best Practices –

- i. If you have actual notice of a Self-Funded ERISA Plan Lien, investigate.
- ii. If neither you, nor your client, have actual notice of a Self-Funded ERISA Plan Lien, consult with your client and either:
 1. Get permission to investigate, or
 2. Have your client sign a document acknowledging your advice and acknowledging that you have counseled him/her on the pitfalls of proceeding without making a determination. See *Appendix A*.
 3. See LEO 1865 – Hypothetical 1. See *Appendix B*.
- iii. If investigating: review the **Form 5500**. See *Appendix C*.
 1. <https://www.efast.dol.gov/5500Search/>
 2. You need to know the name of the Plan
 3. Check the section that deals with how the health plan is funded.
 - a. Several different options
 - i. See Pepsico Form 5500 (note this is not current)
 - ii. Insurance – means the company purchases insurance, so it is not a true self-funded plan. So, no ERISA pre-emption, and the Virginia Anti-Subrogation statute may apply.
 1. Va. Code § 38.2-3405 (D.) See *Appendix D*.
 - iii. Trust – this is essentially a self-funded plan
 - iv. General Assets of the company – self-funded plan
 - v. Both Insurance and General Assets?
 1. Blended Plan – consult an expert
 - vi. Caution – the Form 5500 is a great place to get information, but it is not the plan. The only way to know for sure is to request the plan document.

iv. Request the Plan Documents – See *Appendix E*.

1. The plan administrator is required, upon written request of a participant or beneficiary, to provide a copy of the plan, etc. ERISA § 502(c) 29 U.S.C 1024.b.(4)
2. If the plan administrator fails or refuses to supply the documents within 30 days, they are subject to a penalty of \$100.00 per day. ERISA § 502(c), 29 U.S.C. § 1132(c)
3. Send Certified Mail-Return Receipt Requested
 - a. That way you can enforce the penalty.

g. *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 577 U.S. 136, No. 14-723 (Jan. 20, 2016). The Board had sufficient notice, and Montanile’s lawyer had taken sufficient steps to preserve the funds. The lawyer gave the Board 14 days to object to disbursing the funds to Montanile. Instead, the Board waited six months, and Montanile received and spent the money. The Board cannot reach Montanile’s general assets, only traceable assets.

h. EXCEPTIONS –

- i. The Exception of Certain Plans - The provisions of this subchapter shall not apply to any employee benefit plan if (1) such plan is a governmental plan (as defined in section 1002(32) of this title); (2) such plan is a church plan (as defined in section 1002(33) of this title);” 29 U.S.C. §1003(b)
- ii. “The term “governmental plan” means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing...” 29 U.S.C. §1002(32)
- iii. “The term “church plan” means a plan established and maintained ... by a church or by a convention or association of churches which is exempt from tax...” 29 U.S.C. §1002(33)

II. Appendices

a. Potential ERISA Plan Acknowledgment
// Settlement Authorization

b. LEO 1865

c. Form 5500

d. Va. Code §38.2-3405

e. Requesting Plan Documents

**APPENDIX A:
Potential ERISA
Acknowledgment //
Settlement Authorization**

SETTLEMENT AUTHORIZATION

The undersigned client acknowledges being advised by my attorney that an ERISA based, self-funded welfare benefit plan, **may** have paid some or all of my medical and hospital expenses associated with the treatment of the injuries for which I am receiving settlement money in relation to a workers' compensation claim. My attorney has informed me that the plan **may** (if there is such an ERISA Plan), but is not required to; seek reimbursement, restitution or subrogation from these proceeds or from me personally.

I have been advised by my attorney that:

- the plan may cut off (or draw down) future benefits (if applicable) to me or other beneficiaries of the plan until its claim is satisfied
- the plan may sue me or other family members/beneficiaries of the plan seeking reimbursement
- if the plan files a lawsuit I may be liable for the plan's attorney fees if I lose
- if the plan files a lawsuit my attorney is not obligated to represent me in such action

Having been fully informed of the consequences of my decision I authorize and direct my attorney to **NOT contact said plan** and further direct my attorney to proceed with the workers' compensation settlement.

Client: _____

Date: _____

Witness: _____

Date: _____

APPENDIX B:
LEO 1865

LEGAL ETHICS OPINION 1865

OBLIGATIONS OF A LAWYER IN HANDLING SETTLEMENT FUNDS WHEN A THIRD PARTY LIEN OR CLAIM IS ASSERTED

In this opinion the Committee revisits a lawyer's ethical responsibilities when, in the course of representing a client, the lawyer receives funds for the client that may be subject to a third party's claim to a portion of the funds held by the lawyer. The applicable rule of conduct is Rule 1.15(b), which requires a lawyer to:

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

Comment 4 to Rule 1.15 provides helpful guidance on the lawyer's ethical duty when faced with third party claims asserted against the funds that the lawyer is handling:

Paragraphs (b)(4) and (b)(5) do not impose an obligation upon the lawyer to protect funds on behalf of the client's general creditors who have no valid claim to an interest in the specific funds or property in the lawyer's possession. However, a lawyer may be in possession of property or funds claimed both by the lawyer's client and a third person; for example, a previous lawyer of the client claiming a lien on the client's recovery or a person claiming that the property deposited with the lawyer was taken or withheld unlawfully from that person. Additionally, a lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. For example, if a lawyer has actual knowledge of a third party's lawful claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien (e.g., medical, workers' compensation, attorneys' lien, a valid assignment executed by the client, or a lien on the subject property created by a recorded deed of trust) the lawyer has a duty to secure the funds claimed by the third party. Under the above described circumstances, paragraphs (b)(4) and (b)(5) require the lawyer either to deliver the funds or property to the third party or, if a dispute to the third party's claim exists, to safeguard the contested property or funds until the dispute is resolved. If the client has a non-frivolous dispute with the third party's claim, then the lawyer cannot release those funds without the agreement of all parties involved or a court determination of who is entitled to receive them, such as an interpleader action. A lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the validity of a third-party's claim or lien.

When Is a Third Party "Entitled" to Funds Held By the Lawyer?

Rule 1.15 (b) requires that a third party be "entitled" to funds in the lawyer's possession. Although Rule 1.15 (b) does not make the third party a "client" of the lawyer, the lawyer's duty with respect to funds to which the third party is entitled is the same as if the person were a client.¹ As Comment 4 states, a third party must have a valid claim to an interest in the specific funds held by the lawyer. In the absence of a valid third party interest in the funds, the lawyer owes no duty to a creditor of the client and must act in the best interests of the client.² The mere assertion of an unsecured claim by a creditor does not create an "interest" in the funds held by the lawyer.³ Therefore, claims unrelated to the subject matter of the representation, though just, are not sufficient to trigger duties to the creditor without a valid assignment or perfected lien.

All ethics opinions and legal authorities agree that an "interest" in the funds held by the lawyer include a statutory lien, a judgment lien and a court order or judgment affecting the funds.⁴ Likewise, agreements, assignments, lien protection letters or other similar documents in which the client has given a third party an interest in specific funds trigger a duty under Rules 1.15 (b)(4) and (5) *even though the lawyer is not a party*

to such agreement or has not signed any document, if the lawyer is aware that the client has signed such a document.⁵ In other words, a third party's interest in specific funds held by the lawyer is created by some source of obligation other than Rule 1.15 itself.⁶ Whether they create binding contractual obligations, assurance of payment from the lawyer may also create ethical duties to third parties under Rule 1.15.⁷ The basis for such duties is the fundamental duty of lawyers to deal honestly with third parties. Rules 4.1 and 8.4(c). Before the lawyer may give a third party an assurance of payment, the lawyer should discuss the matter with the client, because it is ultimately a matter for the client to decide.⁸ If the lawyer is asked to sign a document assuring payment, the lawyer should explain to the client the ramifications, including the lawyer's potential ethical and civil liability, ensure that the client is competent to understand the explanation, and obtain the client's informed consent.⁹

The Committee understands that there will be occasions when a lawyer may not be able to determine whether a third party is entitled to funds held by the lawyer, for example, when there exists a dispute between the client and the third party over the third party's entitlement. Legal and factual issues may make the third party's claim to entitlement or the amount claimed uncertain. *Rule 1.15 (b)(4) and (5) does not require the lawyer to make that determination.* When faced with competing demands from the client and third party the lawyer must be careful not to unilaterally arbitrate the dispute by releasing the disputed funds to the client.¹⁰ Conversely, a lawyer should not disburse the client's funds to a third party if the client has a non-frivolous dispute with the third party.¹¹ When the client and a third party have a dispute over entitlement to the funds, the lawyer should hold the disputed funds in trust for a reasonable period of time or interplead the funds into court.¹² To avoid or reduce the occurrence of such conflicts, the Committee recommends that at the outset of the representation, preferably in the engagement letter or contract, the lawyer clearly explain that medical liens will be protected and paid out of the settlement proceeds or recovery.

Does Rule 1.15(b) Require that the Lawyer Have Actual Knowledge of a Third Party's Lien or Claim to the Funds Held by the Lawyer?

Rules 1.15(b)(4) and (5) and Comment 4 appear to require that a lawyer have "actual knowledge" of a third party's interest in funds held by the lawyer. Comment 4 states in pertinent part:

[a]dditionally, a lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. For example, if a lawyer has *actual knowledge* of a third party's *lawful* claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien (e.g., medical, workers' compensation, attorney's lien, a valid assignment executed by the client, or a lien on the subject property created by a deed of trust), the lawyer has a duty to secure the funds claimed by the third party. (emphasis added)

Other authorities have likewise adopted the view that Rule 1.15(b)(4) and (5) requires that the lawyer have actual knowledge of a third party's lawful claim to an interest in the specific funds held by the lawyer. Arizona Ethics Op. 98-06; Conn. Bar. Op. 95-20. However, in some situations under federal and state law, the lawyer need only be aware that the client received medical treatment from a particular provider or pursuant to a health care Plan. In those instances, notice of lien or a lien letter may not be required in order for that third party to claim entitlement to funds held by lawyer.¹³ The effect of such state and federal laws on a lawyer's obligation to a third party is a question of law beyond the purview of this Committee. The lawyer will need to know and understand the law in order to determine whether it creates a valid interest in the funds held by the lawyer.¹⁴

Prior Opinions

In Legal Ethics Opinion 1747 (rev. 2000), the Committee opined that if a third party has a legal interest in settlement funds by virtue of a statutory lien, consensual lien, contract or court order, the lawyer may not

ignore that third party's interest in the funds held by the lawyer and disburse those funds to the client, even if the client so directs.¹⁵ As this Committee observed in Legal Ethics Opinion 1747:

Well before LEO 1413 was issued, the Virginia Supreme Court concluded, in the context of a settlement attorney handling a real estate closing, that the lawyer's fiduciary duties under Canon 9 extended to protecting funds owed to or claimed by third parties, and not simply the client. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986) (decided under former DR 9-102). Pickus, a new attorney, allowed a coercive client, the seller, to receive directly the settlement proceeds without having determined whether a prior deed of trust lien on the subject real estate had been released. As things turned out, the prior lien had not been satisfied. The Court upheld the disciplinary board's finding that DR 9-102 had been violated, holding that DR 9-102 was promulgated to protect third parties as well as clients. 232 Va. at 14.

On the other hand, if the third party has not taken the steps necessary in order to perfect its lien or claim to the funds in the lawyer's possession, or has no contract, order or statute establishing entitlement to the funds, the lawyer's primary duty is to the client. Under those circumstances, the lawyer may ethically follow the client's direction to disregard the third party claim and deliver the funds to the client.¹⁶ Of course, if the lawyer releases the funds to the client, the lawyer should inform the client of the risks involved in disregarding a third person's claim.¹⁷ For example, the lawyer should explain that while the lawyer may not have an *ethical* duty under the rules to deliver funds to the third party, the third party may nonetheless have a civil claim or other remedies against the client that may be pursued after the funds have been released to the client. With these basic principles in hand, the Committee turns to three hypothetical situations in which the ethical obligations of the lawyer in handling funds claimed by a third party are discussed.



Hypothetical One – Duty to Investigate Potential Lien

A client retains a lawyer to pursue a claim for personal injuries. The client advises the lawyer that at least some of his medical bills were paid by an employer-sponsored health Plan (“the Plan”).¹⁸ The lawyer is aware that Virginia has an anti-subrogation statute that bars health insurers from asserting subrogation rights. Va. Code § 38.2-3405. The lawyer is also aware that some health Plans are self-funded ERISA Plans that may preempt state law.¹⁹ The lawyer does not know if the client's Plan is self-funded and even if it is self-funded, the lawyer does not know if the Plan provides for reimbursement rights. The lawyer does not know if the Plan's administrator is aware of the client's personal injury claim.

Do the Rules of Professional Conduct permit the lawyer to disburse the settlement proceeds to the client without investigating whether the Plan is entitled to assert a claim against the client's settlement?

Under the circumstances presented in Hypothetical 1, the Committee believes that the answer is a qualified “yes.” The facts presented in the instant hypothetical are quite different from those in the cited authorities requiring the lawyer to protect a third party's claim to the funds being administered by the lawyer. A lien or claim has not been asserted and the lawyer has insufficient information to know whether a valid lien or claim even exists. Here, the lawyer would have to affirmatively investigate both the facts and the law to determine whether the Plan has a lien on or entitlement to a portion of the funds held by the lawyer. In so doing, it is likely that the lawyer would have to communicate with the Plan to determine if the Plan is exempt from Virginia's anti-subrogation statute. The lawyer would also have to find out if the Plan has a right of reimbursement and, if so, the amount to which the Plan claims to be entitled.²⁰ By having these communications with the Plan the lawyer would be disclosing to the Plan's agents that a Plan beneficiary is seeking a recovery or settlement against a third party. Communication with the Plan could remind or encourage the Plan to perfect a lien or claim to the client's settlement of which the Plan was not aware. Depending on the circumstances, such a disclosure could be detrimental to the client and contrary to the client's interests. Rule 1.6(a) prohibits a lawyer from disclosing information that the client has requested not be disclosed “or the disclosure of which would be likely to be detrimental to the client, unless the client consents after consultation. . . .”

A lawyer faced with the circumstances presented in Hypothetical 1 must first consult with the client about whether to have communications with the Plan, explaining to the client both the risks and benefits of having such communication and obtain the client's informed consent to affirmatively investigate the Plan's possible claim to an interest in the client's settlement. If after warning the client of the possible consequences of not reimbursing the Plan, the client directs the lawyer to not communicate or further investigate the Plan's right of reimbursement, the lawyer should confirm in writing the client's direction and the possible consequences of that course of action.²¹ Although the lawyer will not violate Rules 1.15(b)(4) or (b)(5) and is therefore not subject to professional discipline by the bar, the lawyer and/or the client may suffer civil liability under federal law if the Plan seeks reimbursement of medical expenses that have not been paid out of the settlement. Therefore, the lawyer has an ethical duty to advise the client of the potential liability of disbursing the funds without preserving any funds to reimburse the Plan. See Rules 1.2 and 1.4.

While a lawyer may not knowingly disregard a lien or third party claim that has been properly asserted against the settlement funds, the question raised in this hypothetical is whether the lawyer has an ethical duty, without authorization from the client, to actively investigate a third party's potential claim against the settlement funds. The Committee believes that, under the circumstances presented in the first hypothetical involving ERISA Plan claims, the Rules of Professional Conduct do not impose such a duty on the lawyer unless the client has authorized further communication with the Plan and further investigation of the Plan's unasserted right of reimbursement.

Hypothetical Two – Reasonable Effort to Determine Validity of Claim

Assume now that the Plan administrator has sent to the lawyer a letter asserting subrogation rights. The lawyer has responded in writing requesting documents to determine whether the Plan has a meritorious claim to portions of the settlement funds. Specifically, the lawyer has requested documentation that the Plan is self-funded and documentation that the Plan has a right of reimbursement. The lawyer has requested the documentation in thirty days. After waiting thirty days with no response, the lawyer sends a second request to the health Plan administrator notifying the Plan administrator that if the requested documents are not received in fifteen days the lawyer will disburse the settlement without preserving any funds to reimburse the Plan.

If the Plan administrator does not respond to the lawyer's second request within fifteen days, do the Rules of Professional Conduct permit the lawyer to disburse the settlement funds to the client without preserving any funds to reimburse the health Plan?

A lawyer owes an ethical duty to act with reasonable diligence and competence in handling a client's legal matter. Rules 1.1 and 1.3. The Rules of Professional Conduct are rules of reason.²² A lawyer cannot be reasonably expected to hold or preserve funds indefinitely on the possibility that the Plan might at some point in the future demonstrate its entitlement to the funds it claims. Most opinions hold that the lawyer may not sit on the funds for a prolonged period of time because of the lawyer's obligation to act diligently under Rule 1.3 and Rule 1.15(b)(4)'s requirement that the lawyer "promptly pay or deliver" funds to the client or third party.²³ As stated in Comment [4] to Rule 1.15, "[p]aragraphs (b)(4) and (b)(5) do not impose an obligation upon the lawyer to protect funds on behalf of the client's general creditors who have no valid claim to an interest in the specific funds or property in the lawyer's possession."

In this hypothetical, the lawyer has exercised reasonable diligence to determine whether the Plan has a valid subrogation claim or lien but the Plan has not responded to the lawyer's inquiries. The lawyer still does not know whether the Plan has a valid claim or lien. Comment [4] to Rule 1.15 provides further: "[a] lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the validity of a third-party's claim or lien." As discussed in the Committee's analysis of Hypothetical 1, the lawyer must first consult with the client regarding the course of action to take, informing the client to the fullest extent possible of the risks and benefits of further communication with the Plan to determine the existence and extent of the Plan's claim; or, alternatively, disregarding the Plan's claim and releasing the funds to the client. Under the circumstances presented in hypothetical 2, the Committee believes that the

lawyer has acted reasonably and in good faith to determine if the Plan has a claim to or interest in the funds in the lawyer's custody or control and may, after consultation with the client, disburse the settlement funds to the client without holding back funds to reimburse the Plan.

Hypothetical Three – Reasonable Effort to Determine Validity and Amount of Claim

Another question is raised by a different hypothetical. Lawyer represents an 80 year client who fell at a hospital and sustained a hip fracture. She had a Medicare Advantage (MA) Plan which paid most of the medical bills. The lawyer settled with the hospital in mediation. The lawyer sent the Plan's lawyer an email indicating that the lawyer does not believe it has subrogation rights, based on the written health Plan, which is silent on subrogation, and the relevant case law. Lawyer received a written response from the Plan's lawyer asserting subrogation rights and citing to the federal regulations.²⁴ The letter did not provide the lawyer with the amount of its claim. The letter invited the lawyer to provide cases and the Plan language the lawyer was relying upon to challenge the Plan's right of subrogation. The lawyer promptly emailed a letter back to the Plan, citing cases in support of the lawyer's position and referencing the absence of a subrogation provision in the health Plan. The lawyer specifically requested the amount of the claim and any legal authority the Plan relies upon to counter the cases cited by the lawyer. A month has now passed since the lawyer replied to the health Plan and the lawyer has not received a response back from the Plan's lawyer even though the lawyer has sent at least 3 follow-up emails and left a voicemail message with the Plan's lawyer.

Under these circumstances, has the lawyer exercised reasonable diligence and good faith to determine both the validity and amount of the Plan's claim such that the Rules of Professional Conduct permit the lawyer to disburse the settlement funds to the client without preserving any funds to reimburse the health Plan?

As in hypothetical 2, the Committee believes that the lawyer has exercised reasonable diligence and good faith to determine both the validity and the amount of the Plan's claim, such that the lawyer may, after consultation with the client, disburse the settlement funds to the client without preserving any funds to reimburse the health Plan.

Conclusion

The mere assertion of a claim by a third party to funds held by the lawyer does not necessarily entitle the third party to such funds. A lawyer must exercise competence and reasonable diligence to determine whether a substantial basis exists for a claim asserted by a third party.²⁵ If no such basis exists, or if the third party has failed to take the steps required by law to perfect its entitlement to the funds, a lawyer may release those funds to the client, after appropriate consultation with the client regarding the consequences of disregarding the third party's claim.

If the lawyer reasonably believes that the third party has an interest in the funds held by the lawyer, the lawyer may not disburse to the client funds claimed by the third party, even if the client so directs. In prior opinions this Committee has held that a lawyer may not disregard the valid claims of a third party,²⁶ and lawyers have been subject to discipline for disbursing to the client funds to which a third party claimed entitlement.²⁷ When the client has a non-frivolous dispute over the third party's entitlement to funds, or the lawyer cannot determine, as between the client and the third party, who is entitled to the funds, the lawyer should hold the disputed funds in trust until the dispute is resolved or interplead them into court. A lawyer who chooses to hold or interplead the disputed funds instead of releasing the funds to the client does not violate Rule 1.15(b). A lawyer who acts in good faith and exercises reasonable diligence to determine the validity of a third party's claim or lien is not subject to discipline under Rule 1.15(b). Whether the lawyer faces civil liability for failing to protect a third party lien or claim is a legal issue beyond the purview of this Committee.²⁸

This opinion is advisory only and not binding on any court or tribunal.

Committee Opinion

November 16, 2012

¹ *Oklahoma Bar Assn. v. Taylor*, 4 P.3d 1242 (Okla. 2000); Utah Bar Advisory Op. No. 00-04; *Advance Finance Co. v. Trustees of Client's Security Trust Fund of Bar of Maryland*, 652 A.2d 660 (Md. App. 1995) (holding that since Rule 1.15 imposed fiduciary obligations to maintain funds for benefit of clients or creditors, the state fund that pays for lawyers' violations of fiduciary obligations was liable to a creditor).

² *Klancke v. Smith*, 829 P.2d 464 (Colo. App. 1991); Alaska Bar Assn. Ethics Comm. Op. 92-3.

³ *Silver v. Statewide Grievance Comm.*, 679 A.2d 392 (Conn. App. 1996), *cert. dismissed*, 699 A.2d 151 (Conn. 1997).

⁴ For example, a judgment lien creditor of a client may garnish funds held in a lawyer's trust account. *Marcus, Santoro & Kozak v. Wu*, 274 Va. 743, 652 S.E.2d 777 (2007) (lien of a writ of fieri facias validly executed against lawyers' trust accounts by client's judgment lien creditor to whom lawyers directed to pay funds).

⁵ See, e.g., *Virginia State Bar v. Timothy O'Connor Johnson*, CL 09-2034-4 (August 11, 2009) (while Respondent did not sign the agreement, his client did, and Respondent was aware that his client had directed that his chiropractor be paid directly out of settlement proceeds administered by his lawyer). See also LEO 1747 and Comment 4.

⁶ Alaska Bar Ass'n Ethics Comm., Op. 92-3 (1992); Colo. Bar Ass'n Ethics Comm., Op. 94-94 (1993); Conn. Comm. on Prof'l Ethics, Informal Op. 02-04 (2002) and Informal Op. 95-20 (1995); Utah Ethics Advisory Op. Comm., Op. 00-04 (2000).

⁷ R.I. Ethics Advisory Panel, Op. 94-46 (1994) (lawyer's response to hospital's inquiry about status of the personal injury case that the payment of bills was "contingent upon a 'successful' outcome" was sufficient to raise Rule 1.15 duties).

⁸ Colo. Bar Ass'n Ethics Comm., Op. 94-94 (1993). Va. Rule 1.2, Comment 1 (lawyer should defer to client regarding expenses to incurred).

⁹ ABA Standing Comm. on Ethics and Prof'l Responsibility, Informal Op. 1295 (1974).

¹⁰ *Virginia State Bar v. Timothy O'Connor Johnson*, *supra* (lawyer acted unethically by making unilateral decision to disburse to client's chiropractor funds less than the full amount of the lien); LEO 1747.

¹¹ See *In re Smith*, 625 So. 2d 476 (La. 1993) (lawyer disciplined for improperly withholding client's money to pay outstanding medical bills); see also Connecticut Informal Ethics Op. 95-20 (1995) (lawyer cannot pay money to third person over client's objection); Pennsylvania Ethics Op. 92-89 (1992) (lawyer, whose client was ordered to pay arrearage in child support, cannot release escrow proceeds from real estate sale without client consent).

¹² Ariz. Comm. On Rules of Prof'l Conduct, Formal Op. 98-06 (1998); Ga. State Disciplinary Bd., Advisory Op. 94-2 (1994); Va. Standing Comm. on Legal Ethics, Op. 1747 (2000)

¹³ A written notice of lien is not required if the lawyer is on notice that the client's medical care was provided or paid for by the Commonwealth of Virginia. Va. Code §8.01-66.5(A). Medicare liens do not require notice and there is no statute of limitations. See 42 U.S.C. §§ 1395y(b)(1) & (2), 2651-2653. Beginning January 1, 2011, personal injury claims from Medicare-eligible claimants are required to be

reported to Medicare. Further, Medicare is entitled to 100% recovery of the benefits it paid during treatment for the injury minus its pro rata share of the client's legal fees and expenses and will seek reimbursement from any settlement or payment for the claim. Failure to comply with the reporting or reimbursement requirements can result in a \$1,000 daily fine per claimant, interest, and double damages. For more information see 42 U.S.C. 1395y, 42 CFR § 411.37 (2009), and the webpage for the Centers for Medicare and Medicaid Services (CMS), the federal agency that oversees Medicare, at <http://www.cms.hhs.gov/MandatoryInsRep/>.

¹⁴ Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2000-3 (2000).

¹⁵ See *Aetna Cas. & Sur. Co. v. Gilreath*, 625 S.W.2d 269 (Tenn. 1981) (lawyer has duty to honor employer's statutory workers' compensation lien); Alaska Bar Ass'n Ethics Op. 92-3 (1992) (lawyer may not follow client's instruction to disregard facially valid assignment or statutory lien in favor of third party; lawyer should advise client that he will hold disputed funds in trust until dispute is resolved). California Formal Ethics Op. 1988-101 (lawyer whose client agreed to pay recovery proceeds to health care provider may not ignore agreement and disburse all money to client upon client's request); Connecticut Informal Ethics Op. 06-09 (2006) (firm that drafted promissory note in which client promised to pay third party out of settlement may not give all proceeds to client despite unsuccessful effort to locate third party; firm must continue to hold money in interest-bearing account until third party is found or until firm receives copy of judgment, stipulation, or binding decision stating that it shall release funds); Maryland Ethics Op. 94-19 (1993) (lawyer must disregard client instruction not to pay creditor where client had valid agreement with creditor); Ohio Supreme Court Ethics Op. 95-12 (1995) (lawyer must disregard client's instructions not to pay physician from proceeds when client entered earlier agreement to pay medical expenses from such proceeds); South Carolina Ethics Op. 94-20 (1994) (if lawyer knows client has executed valid doctor's lien he may not comply with client's instruction that lawyer disregard it; no principle of client loyalty or confidentiality permits lawyer to violate ethical obligations to third persons of notification and delivery).

¹⁶ *Janson v. Cozen & O'Connor*, 676 A.2d 242 (Pa. Super. Ct. 1996) (lawyer who holds client's funds in escrow owes no special fiduciary duty to third person who makes claim against funds where there is no agreement between client and third person regarding those funds); *Farmers Ins. Exch. v. Zerin*, 61 Cal. Rptr.2d 707 (Cal. Ct. App. 1997) (lawyer who recovered tort settlement on clients' behalf is not legally obligated to clients' medical insurer to withhold portion of funds from distribution to ensure insurer's reimbursement); Maryland Ethics Op. 97-20 (1997) (lawyer may disburse entire settlement to client where hospital failed to timely submit bills to insurer and thus had no legally valid claim). See also Arizona Ethics Op. 88-6 (1988) (third-party claim that is not perfected lien or assignment does not affect client's right, and lawyer should advise claimant to take issue up with client); Colorado Ethics Op. 94 (1993) (lawyer must distribute promptly to client if third person's claim against client property does not arise out of statutory lien, contract, or court order); Connecticut Informal Ethics Op. 95-20 (1995) (lawyer has no duty to act on mere assertions of third-party interests or to investigate whether third persons have interests in client property); Maine Ethics Op. 116 (1991) (lawyer who represents client in both real estate transaction and divorce must turn real estate proceeds over to client even if lawyer reasonably believes that client does not intend to comply with divorce order); Maryland Ethics Op. 97-9 (1997) (settlement money may be disbursed to client even though two lawyers assert claim to proceeds for services in other, unrelated matters); Philadelphia Bar Ass'n Ethics Op. 86-134 (1986) (lawyer must disburse to client without retaining anything for physicians who are owed payment, provided that there is no agreement between doctors and client regarding proceeds from settlement); South Carolina Ethics Op. 89-13 (1989) (lawyer not required to pay half of injury settlement to client's ex-wife under divorce decree where lawyer was not served with process as required by decree). See generally 1 G. Hazard & W. Hodes, *The Law of Lawyering* §19.6 (3d ed. 2001 & Supp. 2005-2) (lawyer not a "neutral observer" and "must favor the client when the other party's claims are not solid").

¹⁷ Cleveland Ethics Op. 87-3 (1988); South Carolina Ethics Op. 93-31 (1993).

¹⁸ Most employer-sponsored health care Plans are governed by the Employment Retirement Income Security Act of 1974 (“ERISA”), 29 U. S. C. §1001 *et seq.*

¹⁹ The pivotal issue is whether the client has received medical care paid under an insured Plan—in which case the Plan may be subject to the anti-subrogation statute, or a self-funded Plan—in which case the ERISA laws may preempt state law and the anti-subrogation statute may not apply. Thus, ascertaining the nature of the employer-sponsored Plan is a critical step in determining whether the Plan is entitled to funds held in settlement of the client’s case. If the Plan is self-funded, the terms of the Plan documents control the extent of its claimed right

of subrogation or reimbursement. If the Plan is not self-funded, but fully insured, the Virginia anti-subrogation statute bars subrogation in contracts of health insurance.

²⁰ In Hypotheticals 1 and 2 the Committee assumes that the client has not executed any writing creating a contractual obligation to reimburse the Plan.

²¹ Possible consequences that the lawyer should consider discussing with the client include the fact that the Plan documents might contain a requirement that the client notify the Plan of third party recovery actions and that the Plan might have the right to refuse payment of future medical expenses if the Plan is not reimbursed, as well as to hold the client civilly liable for non-payment.

²² Preamble to Virginia Rules of Professional Conduct (Scope).

²³ *The Dishonored Medical Lien: A New Trend in Bar Complaints*, 25 Ariz. Att’y 17 (1989) at 17; *Attorneys’ Ethical Obligations to the Clients’ Creditors*, 67 N.Y. St. B.J. 40 (1995); Phila. Bar Ass’n Prof ’1 Guidance Comm. Op. 91–6 (1991).

²⁴ 42 C.F.R. 422.108 (Medicare secondary payer (MSP) procedures).

²⁵ The Committee acknowledges with great concern the increasing complexity of the task a lawyer faces in resolving liens. This is caused in part by more recent state and federal laws and regulations in this area. The time and expense necessary to handle such matters properly has increased dramatically over the years. As one expert has noted:

The phenomenon has spawned a whole new industry with many companies taking on the task of “lien resolution” and providing an alternative to the personal injury bar. Personal injury attorneys may now hire experts in these complex areas. It may be cost effective and result in a better outcome for the client if these issues are contracted out to firms or companies with knowledge and expertise in these issues. Additionally, the increased recovery actions by governmental agencies has had another impact on this area. It has and will continue to delay the ability to settle the claims that exist as the government agencies become flooded with more and more of these claims. It can tie up the resources of plaintiffs’ attorneys and result in funds languishing in non-interest bearing or IOLTA accounts for extended periods of time.

Pi-Yi Mayo, *Medicare and Medicaid Claims*: State Bar of Texas Advanced Personal Injury Law Course (2011) at 3.

²⁶ Va. Legal Ethics Op. 1747 (2000) (unethical for lawyer to disburse funds to client when client had agreed to pay third party medical group out of the settlement proceeds held by lawyer; lawyer owed duty to hold funds if third party claim was in dispute or interplead the disputed funds into court if client would not authorize disbursement to medical group).

²⁷ *Virginia State Bar v. Timothy O’Connor Johnson*, Case No. CL09-2034 (Richmond Cir. Ct. August 11, 2009). Lawyer violates former Rule 1.15 (c)(4) when refusing to honor chiropractor’s consensual lien with

client, directing client's lawyer to pay total amount owed to chiropractor out of settlement of client's personal injury case. Although lawyer was not a party to the assignment of benefits, lawyer knew that client had contracted with chiropractor to pay the medical bill out of settlement. When the chiropractor refused to reduce his bill, lawyer unilaterally arbitrated the dispute by disbursing to chiropractor an amount less than what was owed. Lawyer owed a duty to either pay the full amount owed to chiropractor or hold the amount in dispute in trust until client and chiropractor could resolve their dispute, or interplead the disputed funds into court. The court cited with approval Legal Ethics Opinion 1747 and comment [4] to Rule 1.15 and affirmed the District Committee's finding of misconduct.

²⁸ For a lawyer's civil liability under such circumstances, *see, e.g., Kaiser Found. Health Plan, Inc. v. Aguiluz*, 54 Cal. Rptr. 2d 665 (Ct. App. 1996) (attorney who knew client had agreed to repay medical provider from settlement proceeds was liable for amount client owed provider); *Shelby Mut. Ins. Co. v. Della Ghelfa*, 513 A.2d 52 (Conn. 1986) (insurer could enforce lien against lawyer who disbursed proceeds to insured); *Unigard Ins. Co. v. Fremont*, 430 A.2d 30 (Conn. Super. Ct. 1981) (lawyer liable for conversion because of failure to honor a statutory insurer's lien); *Bonanza Motors, Inc. v. Webb*, 657 P.2d 1102 (Idaho Ct. App. 1983) (law firm liable for failing to honor assignment that client, but not firm, had signed); *W. States Ins. Co. v. Louise E. Olivero & Assocs.*, 670 N.E.2d 333 (Ill. App. Ct. 1996) (firm's failure to honor subrogation lien constituted conversion); *Roberts v. Total Health Care, Inc.*, 709 A.2d 142 (Md. 1998) (liability based on lawyer's knowledge of statutory lien or valid assignment); *Leon v. Martinez*, 638 N.E.2d 511 (N.Y. 1994) (if enforceable assignment is proven, lawyer is liable to pay the creditor the assigned amount); *Prewitt v. City of Dallas*, 713 S.W. 2d 720 (Tex. App. 1986) (a lawyer's constructive notice of the city's right to the first money paid to the firm's client rendered the law firm liable after it paid those monies out to its client).

APPENDIX C:
Form 5500

<p>Form 5500</p> <p>Department of the Treasury Internal Revenue Service</p> <hr/> <p>Department of Labor Employee Benefits Security Administration</p> <hr/> <p>Pension Benefit Guaranty Corporation</p>	<p>Annual Return/Report of Employee Benefit Plan</p> <p>This form is required to be filed for employee benefit plans under sections 104 and 4065 of the Employee Retirement Income Security Act of 1974 (ERISA) and sections 6047(e), 6057(b), and 6058(a) of the Internal Revenue Code (the Code).</p> <p>▶ Complete all entries in accordance with the instructions to the Form 5500.</p>	<p>OMB Nos. 1210-0110 1210-0089</p> <hr/> <p style="font-size: 24pt; font-weight: bold;">2011</p> <hr/> <p>This Form is Open to Public Inspection</p>
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Part I Annual Report Identification Information	
For calendar plan year 2011 or fiscal plan year beginning 01/01/2011 and ending 12/31/2011	
<p>A This return/report is for:</p>	<input type="checkbox"/> a multiemployer plan; <input type="checkbox"/> a multiple-employer plan; or <input checked="" type="checkbox"/> a single-employer plan; <input type="checkbox"/> a DFE (specify) ____
<p>B This return/report is:</p>	<input type="checkbox"/> the first return/report; <input type="checkbox"/> the final return/report; <input type="checkbox"/> an amended return/report; <input type="checkbox"/> a short plan year return/report (less than 12 months).
<p>C If the plan is a collectively-bargained plan, check here.....▶ <input type="checkbox"/></p>	
<p>D Check box if filing under:</p>	<input checked="" type="checkbox"/> Form 5558; <input type="checkbox"/> automatic extension; <input type="checkbox"/> the DFVC program; <input type="checkbox"/> special extension (enter description)

Part II Basic Plan Information —enter all requested information					
<p>1a Name of plan PEPSICO EMPLOYEE HEALTH CARE PROGRAM</p>	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:80%;">1b Three-digit plan number (PN) ▶</td> <td style="width:20%; text-align: center;">725</td> </tr> <tr> <td colspan="2">1c Effective date of plan 12/31/1996</td> </tr> </table>	1b Three-digit plan number (PN) ▶	725	1c Effective date of plan 12/31/1996	
1b Three-digit plan number (PN) ▶	725				
1c Effective date of plan 12/31/1996					
<p>2a Plan sponsor's name and address, including room or suite number (Employer, if for single-employer plan)</p> <p>PEPSICO, INC.</p> <p>MEGAN BRODERICK 2/2 700 ANDERSON HILL ROAD PURCHASE, NY 10577-1444</p>	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:80%;">2b Employer Identification Number (EIN) 13-1584302</td> </tr> <tr> <td>2c Sponsor's telephone number 914-253-2000</td> </tr> <tr> <td>2d Business code (see instructions) 312110</td> </tr> </table>	2b Employer Identification Number (EIN) 13-1584302	2c Sponsor's telephone number 914-253-2000	2d Business code (see instructions) 312110	
2b Employer Identification Number (EIN) 13-1584302					
2c Sponsor's telephone number 914-253-2000					
2d Business code (see instructions) 312110					

Caution: A penalty for the late or incomplete filing of this return/report will be assessed unless reasonable cause is established.

Under penalties of perjury and other penalties set forth in the instructions, I declare that I have examined this return/report, including accompanying schedules, statements and attachments, as well as the electronic version of this return/report, and to the best of my knowledge and belief, it is true, correct, and complete.

SIGN HERE	Filed with authorized/valid electronic signature.	10/02/2012	MEGAN BRODERICK
	Signature of plan administrator	Date	Enter name of individual signing as plan administrator
SIGN HERE			
	Signature of employer/plan sponsor	Date	Enter name of individual signing as employer or plan sponsor
SIGN HERE			
	Signature of DFE	Date	Enter name of individual signing as DFE

For Paperwork Reduction Act Notice and OMB Control Numbers, see the instructions for Form 5500.

Form 5500 (2011)
v.012611

3a Plan administrator's name and address (if same as plan sponsor, enter "Same") PEPSICO, INC. MEGAN BRODERICK 2/2 700 ANDERSON HILL ROAD PURCHASE, NY 10577-1444	3b Administrator's EIN 13-1584302 <hr/> 3c Administrator's telephone number 914-253-2000
--	---

4 If the name and/or EIN of the plan sponsor has changed since the last return/report filed for this plan, enter the name, EIN and the plan number from the last return/report: a Sponsor's name	4b EIN <hr/> 4c PN
---	-------------------------------------

5 Total number of participants at the beginning of the plan year	5 106637
---	-----------------

6 Number of participants as of the end of the plan year (welfare plans complete only lines 6a, 6b, 6c, and 6d).	
a Active participants.....	6a 113521
b Retired or separated participants receiving benefits.....	6b
c Other retired or separated participants entitled to future benefits.....	6c
d Subtotal. Add lines 6a, 6b, and 6c.....	6d 113521
e Deceased participants whose beneficiaries are receiving or are entitled to receive benefits.....	6e
f Total. Add lines 6d and 6e.....	6f
g Number of participants with account balances as of the end of the plan year (only defined contribution plans complete this item).....	6g
h Number of participants that terminated employment during the plan year with accrued benefits that were less than 100% vested.....	6h
7 Enter the total number of employers obligated to contribute to the plan (only multiemployer plans complete this item)	7

8a If the plan provides pension benefits, enter the applicable pension feature codes from the List of Plan Characteristic Codes in the instructions:

b If the plan provides welfare benefits, enter the applicable welfare feature codes from the List of Plan Characteristic Codes in the instructions:
 4A 4D 4E

9a Plan funding arrangement (check all that apply) (1) <input checked="" type="checkbox"/> Insurance (2) <input type="checkbox"/> Code section 412(e)(3) insurance contracts (3) <input type="checkbox"/> Trust (4) <input checked="" type="checkbox"/> General assets of the sponsor	9b Plan benefit arrangement (check all that apply) (1) <input checked="" type="checkbox"/> Insurance (2) <input type="checkbox"/> Code section 412(e)(3) insurance contracts (3) <input type="checkbox"/> Trust (4) <input checked="" type="checkbox"/> General assets of the sponsor
--	--

10 Check all applicable boxes in 10a and 10b to indicate which schedules are attached, and, where indicated, enter the number attached. (See instructions)

a Pension Schedules (1) <input type="checkbox"/> R (Retirement Plan Information) (2) <input type="checkbox"/> MB (Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information) - signed by the plan actuary (3) <input type="checkbox"/> SB (Single-Employer Defined Benefit Plan Actuarial Information) - signed by the plan actuary	b General Schedules (1) <input type="checkbox"/> H (Financial Information) (2) <input type="checkbox"/> I (Financial Information - Small Plan) (3) <input checked="" type="checkbox"/> <u>29</u> A (Insurance Information) (4) <input type="checkbox"/> C (Service Provider Information) (5) <input type="checkbox"/> D (DFE/Participating Plan Information) (6) <input type="checkbox"/> G (Financial Transaction Schedules)
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APPENDIX D:
Va. Code §38.2-3405(D)

§ 38.2-3405 (D.) Whenever benefits paid or payable under workers' compensation are excluded from coverage under the terms of any such contract, subscription contract or health services plan, the issuer thereof shall not exclude coverage for any medical condition pursuant to such exclusion if (i) an award of the Workers' Compensation Commission pursuant to § 65.2-704 denies compensation benefits relating to such medical condition and no request for review of such award is made pursuant to and within the time prescribed by § 65.2-705 or (ii) an award of the Workers' Compensation Commission, after review by the full Commission pursuant to § 65.2-705, denies compensation benefits relating to such medical condition. Following the entry of a workers' compensation award pursuant to clause (i) or (ii) having the effect of prohibiting the application of any such exclusion, the issuer shall immediately provide coverage for such medical condition to the extent otherwise covered under the contract, subscription contract or health services plan. If, upon appeal to the Court of Appeals or the Supreme Court, such medical condition is held to be compensable under the Virginia Workers' Compensation Act (Title 65.2), the issuer may recover from the applicable employer or workers' compensation insurance carrier the costs of coverage for medical conditions found to be compensable under the Act.

APPENDIX E:
Request Plan Documents

Andrew J. Reinhardt†††
Stephen T. Harper
Craig B. Davis**
Joel W. Young
Julia A. Childrey
Brooke P. Taylor
Jonathan T. Wood
Michael J. Beste*



REINHARDT | HARPER | DAVIS PLC
Virginia Work Injury Lawyers

Please reply to:
600 Westwood Office Park
Fredericksburg, VA 22401
Main: (540) 371-4444
Toll Free: (800) 884-9507
Fax: (540) 368-1025

*On sabbatical
**Also admitted in West Virginia
† Also admitted in Maryland
†† Also admitted in the District of Columbia

www.vacomplaw.com

Direct Dial: (540)369-8909 (JWY)
Email: joel@vacomplaw.com

Direct Dial: (540)369-8901 (AMW)
Email: anne@vacomplaw.com

<<<DATE>>>

<<<PLAN ADMINISTRATOR>>>

Re: Plan Participant: <<<>>>
Date of Accident: <<<>>>

Dear Plan Administrator:

Pursuant to my right as a participant and beneficiary of the above referenced plan, I respectfully request copies of the following materials:

- Copies of the Summary Plan Description (SPD), Master Plan Document (MPD), any and all other Plan Documents relating to this plan participant's health insurance from the year preceding the date of loss until present.
- The Form 5500 for the plan from the year preceding the date of loss until present, with all schedules attached.
- An itemization, including diagnosis/procedural codes and/or ICD codes, for all alleged medical benefits provided which relate to the above referenced date of loss.
- The latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.
- Administrative Services Contract (ASA) between the Plan and any Third Party/Claim Administrator and between the Third Party/Claims Administrator and (if any) Subrogation/Reimbursement Recovery Vendors from the year preceding the date of loss until present.
- Copies of all contracts including, but not limited to: Insurance Contracts, and Administrative Services Insurance Contracts, Insurance Intermediary Services Contracts,

and Administrative Services Contracts serving Plan participants plan from the year preceding the date of loss until present.

- Copies of the Summary of Material Modifications (SMM) statements from the year preceding the date of loss until present.
- Amendments to the Plan Documents (including, but not limited to the Summary Plan Description) from the year preceding the date of loss until present.

This request is being made by the plan participant pursuant to 29 U.S.C. § 1024(b)(4). Be advised that failure to provide these materials within thirty (30) days may result in a fine of \$110.00 per day. 29 U.S.C. § 1132(c)(1)(b) & 29 CFR § 2575.502c-1.

Please forward these materials to: **Joel W. Young, Esquire, Reinhardt|Harper|Davis, PLC., 600 Westwood Office Park, Fredericksburg, VA 22401.**

Thank you,

Plan Participant/Beneficiary
Print

Plan Participant/Beneficiary
Sign