

Medicare Set asides and Tales from the Field

Presented by Steve Franckhauser
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Mr. Medicare

Hey Buddy, can you spare a dime?





Medicare Set asides

- ❑ To preserve a claimant's Medicare and Medicaid benefits, settlement payments must incorporate "Medicare Set Asides" to refund Medicare. 1980 law.
 - ❑ Medicare Secondary Payer Act (the MSP Act) mandates that Medicare be secondary to Workers compensation and tort payments.
 - ❑ Enforced by the Centers for Medicare and Medicaid Services (CMS) {see <http://www.cms.gov/>}.
 - ❑ Regulation by conference call
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Why now

- **Between 2000 and 2030, the number of Medicare beneficiaries is projected to increase from 40 million to 78 million. Because the Hospital Insurance Trust Fund is financed primarily through payroll taxes, its income is related to the number of people in the workforce. As the number of beneficiaries increases, the number of workers per beneficiary is projected to decrease from 4.0 in 2000 to 2.4 in 2030**
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Quick Facts on Medicare Financing Challenges

- Medicare is 14% of the federal budget [\[1\]](#)
 - Between 2010 and 2030, the number of people on Medicare is projected to rise from 46 million to 78 million
 - The Medicare Part A Hospital Insurance Fund will have insufficient funds to pay for full benefits beginning in 2019 [\[2\]](#)
 - [\[1\]](#) The Henry J. Kaiser Family Foundation
 - [\[2\]](#) 2008 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds.
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Set Aside Case Study/Scenario

- Your new office manager is chatting with employees during a going away party in the office. Suddenly, a drunk clerk drives the company golf cart around the office. He swerves to avoid the cake and runs over and severs the right foot of the new manager. He is 45 and will require medical attention on the foot for the rest of his life.
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Here is how it works

- A settlement is going to involve both worker's compensation and a claim against the golf cart company.
 - The settlement of \$4,000,000.00 on the tort side and a commutation on the workers compensation side includes future medical care.
 - You will hire an MSA professional {an RN, insurance professional, lawyer} who is going to calculate the percentage of the settlement to be attributed to post Medicare status care. That money goes to the Feds.
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How does CMS work?

- The Centers for Medicare and Medicaid Services (CMS) will assess the calculations made by the MSA professional and determine whether the settling parties are adequately protecting its interest. This “Proposed Medicare Set-Aside Arrangement” outlines the future anticipated qualified medical expenses.
 - CMS reviews and has full authority for review and approval.
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Laundry List for CMS

1. Letter or Other Summary Documentation
 2. Consent Form
 3. Rated Age Information or Life Expectancy
 4. Life Care Plan
 5. Settlement Agreement or Court Order
 6. Set-Aside Administrator or Copy of Agreement
 7. Medical Records
 8. Payment History
 9. Future Treatment Plan
 10. Supplemental or Additional Information
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Select Criterion

- ❑ **Medicare Set- Aside Arrangements should be Funded Based on the Life Expectancy of the Individual**
 - ❑ **MSA's do not need to be indexed for inflation and may not be discounted to present-day value.**
 - ❑ **The Parties Should Indicate How Much of the Settlement is for Past v. Future Medical Expenses**
 - ❑ **(Ref: 4/21/03 Memo Q3)**
 - ❑ **A settlement that does not specifically account for past vs. future medical expenses will be considered to be entirely for future medical expenses once Medicare has recovered any conditional payments it made.**
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What does it mean for you

- The baby boomers hit age 65 in 2010
 - The federal government is now a stakeholder in millions of worker's compensation and tort cases
 - The states {Medicaid} are sure to follow
 - Your costs just went up even if you are not self funded.
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Your nightmare claims

- ❑ A claim is filed
 - ❑ You settle without securing approval from CMS
 - ❑ You are obligated to pay CMS regardless.
 - ❑ Make sure the notice of claim includes a potential MSA.
 - ❑ Include a mark up in reserves for all WC and tort matters that actuaries believe might infringe on the 65 barrier.
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Tales from the Appalachia

□ Marshall County West Virginia





Facts

- Employee of Company is asked to testify by an adverse party.
 - The Employee has a medical condition protected by the ADA.
 - The employee does not want to testify or reveal the condition.
 - The company is caught between court discovery order and privacy right of employee.
 - Both believe the medical condition will be raised
 - The condition will hinder the testimony
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The dilemma

- Your employee has privacy rights
 - Nothing in the Civil Rules of procedure protect you from violation of privacy laws
 - Discovery order says you have to provide employee witnesses
 - This probably is *not* envisioned by your Personnel Policy Handbook
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The proposed solution



- ❑ Move for a protective order
 - ❑ Assert the privacy rights of the employee
 - ❑ Assert the rights of the Company to avoid violations of privacy laws
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The cost to you \$\$\$\$

- Will you hire an attorney for your employee?
 - Will you risk an order compelling your company to provide the witness or a contempt of court order?
 - Will your case be hindered by the lack of this testimony
 - How long have you known of this and when did you act?
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So what happened??

- **Judge ruled that company did not have standing to assert employee privacy rights**
 - **Judge ignored company rights to not incriminate employee.**
 - **Employee forced to secure counsel to assert privacy rights**
 - **Court ordered an in camera hearing to determine the condition**
 - **Court mandated the deposition occur, under seal.**
 - **Company protected its interests.**
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The attorney client privilege: Boiling communications down to the essentials

Best practices for the CEO and counsel

Steve Franckhauser, Esq.

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Listen do you want to know a secret?

- ***“Three can keep a secret if two are dead.”***

Benjamin Franklin (1706-1790) *American statesman, scientist and philosopher.*

- *“How can we expect another to keep our secret if we have been unable to keep it ourselves”.* François de La Rochefoucauld (1613-1680) *French writer.*

- *“Of course I can keep secrets. It’s the people I tell them to that can’t keep them.”* Anthony Haden

- *“If two people know something, it’s not a secret.”* Steve Franckhauser (1960-present) *American Lawyer, philosopher and overall good guy.*

Pennsylvania law



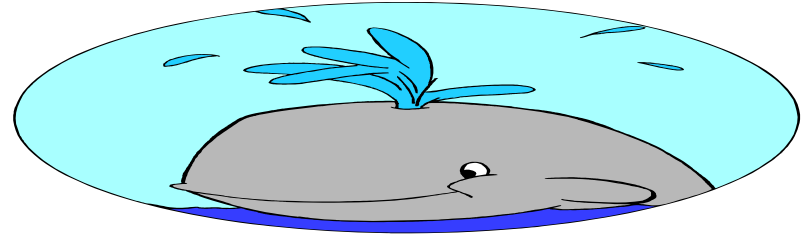
- In a civil matter counsel shall not be competent or permitted to testify to confidential communications *made to him by his client*, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S. § 5928

Critical elements of the ACP

- The asserted holder of the privilege is (or sought to become) a client; and
- The person to whom the communication was made:
 - is a member of the bar of a court, or his subordinate, and
 - in connection with this communication, is acting as an attorney; and
- The communication was for the purpose of securing legal advice.
- The privilege protects the confidential communication, and not the underlying information.
- BUT, there are a boatload of exceptions to the privilege in most jurisdictions, chief among them:
- The communication was made in the presence of individuals who were neither attorney nor client, or disclosed to such individuals,
- The communication was made for the purpose of committing a crime or tort,
- The client has waived the privilege by, for example, publicly disclosing the communication,
- You have the burden of proving the privilege applies.

Thar she blows



- *When an attorney is not acting primarily as an attorney but, for instance, as a member of the Board of Directors, then the privilege generally does not apply.* *North Pacifica, LLC v. City of Pacifica*, 274 F.Supp.2d 1118, 1127 (N.D. Cal 2003); *Handguards, Inc. v. Johnson & Johnson*, 69 F.R.D. 451, 453 (N.D. Cal 1975).



Tell me who are you? 📢



- **Corporate entities** and government bodies, like natural persons, are entitled to the protection of the attorney-client privilege. *Southeastern Pennsylvania Transp. Auth. v. CaremarkPCS Health, L.P.*, 254 F.R.D. 253, 257 (E.D. Pa. 2008)

But what about what my attorney says?

- Communications from counsel to client are *only derivatively* eligible for protection. Any communication from counsel to client is protected if disclosure of that communication would reveal a confidential communication from client to counsel.

Southeastern Pennsylvania Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 257 (E.D. Pa. 2008);



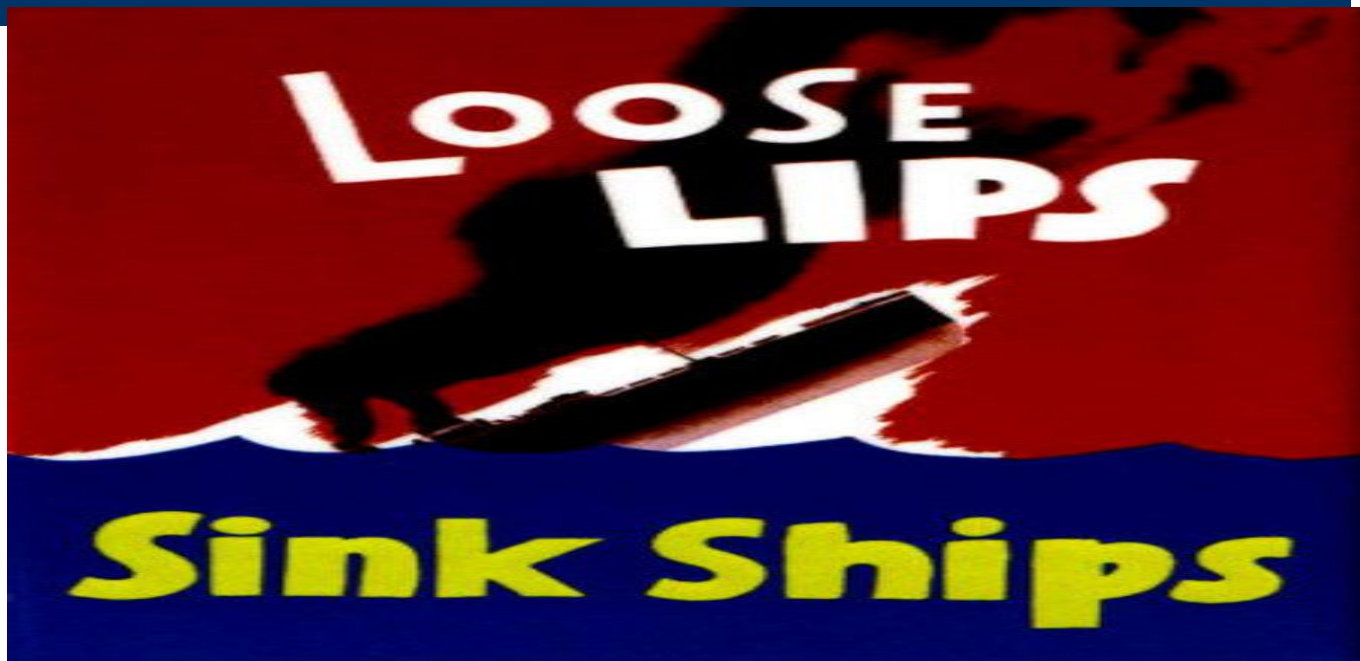
Are the communications from counsel subject to the ACP?

- Not unless revelation of them would reveal your communications by necessity.
- The “*work product doctrine*” likely protects this information.
- Locker Room talk can blow it for you?
- The privilege protects the communication, not facts. You can't use the ACP to shield others from what are otherwise facts.

The Board Room: Much like the Bedroom {sort of }



Silence is Golden



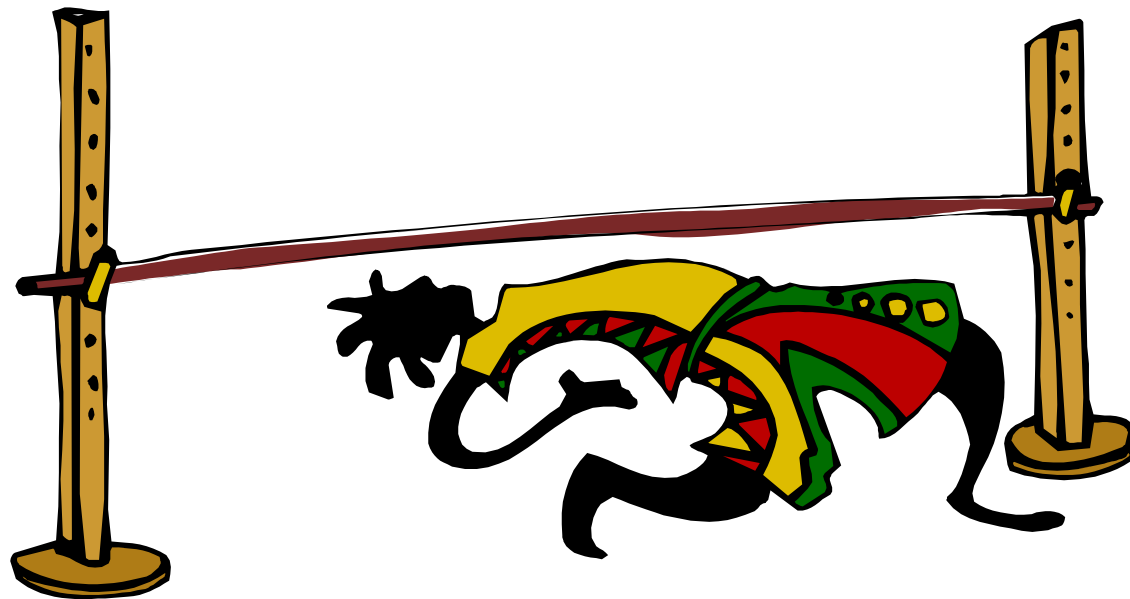
The Board Room and Attorneys

- The focus is on Legal Advice.
- Adelpia, where art thou? ***Special Counsel.***
- If the Atty is a member of the Board, ACP is in jeopardy. The Attorney is not there for legal advice.
- If the Atty is there for legal advice, then table the issue for legal consultation.

Best practices in Board Room

- Re-discover the face to face meeting and the telephone.
- Prep counsel before the meeting. Surprises are for birthday parties, not Board meetings.
- Instruct counsel to *listen* and *not to shoot from the lip*...the hardest thing for any lawyer, but it is a must.

How low can you go?



How far does the ACP extend

- It must be with a decision maker
- It must be for the purpose of seeking legal advice—generally restricted to a few but in contract situations it may go further.
- The answer changes with the context and depth of the corporate entity
- Safe answer is to “officers” and “directors”
- After that, the focus is on “decision makers”

It depends on who



you are

- A fortune 1000 is probably limited to decision makers.
- In a closely held Corporation the ACP might apply to all the shareholders if they actively participate in the operations of a business (See *Agster v. Barmada* 43 Pa D&C 4th 353 (CP Allegheny County 1999 Judge Wettick))
- If the closely held corporation is ruled by one shareholder, likely that this shareholder gets the benefit of the ACP.
- Counsel hired by trustee does not protect the information from being disclosed to the beneficiaries. *Follansbee v. Gerlach* 56 Pa. D&C 4th 483 (CP Allegheny County 2002)



Nightmares on Elm Street

- *STATE OF WEST VIRGINIA EX REL. UNITED HOSPITAL CENTER, INC., A CORPORATION, Petitioner v. HONORABLE THOMAS A. BEDELL, JUDGE OF THE CIRCUIT COURT OF HARRISON COUNTY, AND MARY MOBLEY, ADMINISTRATRIX OF THE ESTATE OF AGNES BECKER,*

Party got cute and listed their attorney as a corporate witness—the West Virginia supreme court holds that the ACP IS LOST!

- *Carbis & Walker v. Hill Barth & King:* Attorney for CPA firms inadvertently faxed ACP info to the other side. The other side returned it and 18 days later, the privilege was claimed. Ship sailed.
- Attorney appointed by the Insurance company to represent you can waive the privilege by revealing information to the insurer. {Classic reservation of rights matter}.

Best Practices:

- Corporate counsel represents the company.
- Set up a different e-mail account for communications between you and counsel.
- If at all possible, speak with counsel about issues before ever committing them to writing (e-mail)
- You hold the privilege. You can waive it!

E-Mail, the ACP and You

- One click and poof...life as you know it is over
- In reality, the host of other rules will apply: was it for legal advice, were others copied on the message, did the author publish it (waive the ACP) by sending to third parties.
- Pennsylvania law is adopting this approach but Federal law looks at the matter differently. [Query: Will my *choice of law* clause control this?]

Best practice & E-Mail:

- If the “primary purpose” is legal advice, the ACP will apply:
- It is the purpose, not the lawyer recipient or the number of lawyers to whom you send it that controls application of the ACP.
- Legal corrections to “legal” documents: working on press releases is not.

Substance over Form: E-Mail disclaimers *{who writes these things?}*

- **Confidentiality Notice:** This message, together with any attachments, is intended only for the addressee. It may contain information that is confidential. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, use or any action or reliance on this communication is strictly prohibited. If you have received this e-mail in error, please delete the message, along with any attachments, and notify the sender immediately.



Don't bet on the Disclaimer



- The inadvertent recipient *is the addressee*.
- **May contain information that *used to be confidential*.**
- “If you have received this e-mail in error, please delete the message, along with any attachments, and notify the sender immediately”. **I didn't receive it in error, you sent it in error.**
- **Consider using the “RE BAR”.**

Disclaimer Best Practices:

- Add the ACP and the Work Product Doctrine to the disclaimer.
- Change the “error” from that of the recipient to that of the sender. At least that passes the smell test.
- Add language that any error by the sender specifically does not waive the ACP or the WPD.

Common scenarios

- Notes from meeting w/Atty
- Drafts of letters sent to counsel for review
- Client identity
- Fee Agreements
- Joint Defense meetings, co-defendant meetings, etc...
- Board of Directors Meeting Minutes
- Probably ACP
- Probably ACP
- Client Id not ACP
- Fee Agreement not ACP
- Generally “yes” but counsel should be careful to secure written agreement
- Once published beyond the Board, the privilege is waived.