Utah State Bar

Ethics Advisory Opinion Committee

Opinion Number 14-01

Issued January 15, 2014

ISSUE

1. Under what conditions is it appropriate for a personal injury lawyer to "outsource the calculation, verification and resolution of alleged health insurance liens and subrogation/reimbursement claims" and pass the outsourced resolution fee to the client as a "cost." There are two questions posed to the committee. First, can the lawyer appropriately outsource the lien resolution? Second, is the treatment of the lien resolution fee appropriately treated a "cost" to the client?

OPINION

2. It is ethical for a personal injury lawyer to engage the services of a lien resolution company that can provide expert advice or to associate with a law firm providing this service.

3. If properly disclosed in the retention agreement, fee resolution services may be included as "costs" to the client provided the resolution services are professional services equivalent to accountants or appraisers.

4. If the services provided constitute the practice of law, the personal injury lawyer and the lien resolution company must comply with the fee splitting requirements of Rule 1.5(c) and (d). Then, the lawyer cannot treat the lien resolution fee as a cost to the client. If the services constitute the practice of law, it may be proper for a lien resolution company to collect a contingency fee.

BACKGROUND

5. The federal or state government pays many, if not most, seriously injured plaintiffs' medical bills through Medicaid [1] or Medicare.[2] Insurers, industrial unions and other private third-party payers have subrogation rights to monies collected from solvent third parties. Finally, in Utah, Utah Code Annotated 38-7-1 et seq provides for hospital liens on judgments, settlements or compromise in certain accident cases.[3]

6. In straightforward simple cases, little difficulty arises. However, in order to settle complicated injury cases, plaintiff's counsel must account for these liens. This may require substantial expertise. Counsel must ascertain the correct amount payable for each lien. [4] The assistance of experts in lien resolution advances the laudable goal of fair resolution to both the client and the lien holder.

7. In recent years, third party entities have held themselves out as “Lien Resolution” companies. The services offered are often a significant value enhancement for the client. Many plaintiffs’ personal injury lawyers might lack the necessary competence in reading medical bills for the purpose of attributing costs to the plaintiff’s general health as opposed to the accident.

8. The issue of whether such services should be treated as “costs” or as “attorney’s fees” depends upon the factual nature of the work performed. One company describes its services as addressing “Medicare conditional payments, Medicaid, Tricare [5], Veterans Affairs, FEHBA[6], ERISA[7], Private Insurance and Hospital/Provider lien claims.”[8] The services offered include reporting to the appropriate government agency, calculation of the amounts due, verification of the accuracy of the lien, and final resolution of the claim. This firm charges a flat fee for simple Medicaid/Medicare resolution. It charges a contingency fee based upon percentage of saving in cases that are more complex.

9. Other lien resolution companies describe their staff as medical billing specialists, nurses and attorneys familiar with federal law beyond the knowledge possessed by the ordinary plaintiff’s personal injury lawyer. They claim that their services include a determination of the personal injury lawyer’s affirmative obligation to notify healthcare plans. They “will assess the healthcare plans’ rights of recovery and audit the reimbursement claims to ‘carve out’ items unrelated to injury/settlement.” They will then pursue administrative remedies, such as damage allocation, waiver and compromises to ensure the appropriate ‘net recovery’ for the claimant. If the claim is not resolved administratively and goes to adjudication, they provide legal authority and support for the personal injury attorney in dealing with the agency. Those companies charge a flat fee based upon the amount of the total settlement or verdict. They characterize their service as providing the personal injury lawyer with sufficient facts and familiarity with the law. This allows the personal injury lawyer the ability to negotiate liens on equal terms with the lienholder’s lawyer. In essence, they believe that they are providing expert advice coupled with specialized legal resources for the personal injury attorney.

ANALYSIS

10. May attorneys properly use lien resolution companies to assist in the determination of appropriate sums of money owed to third party lien claimants?

11. The propriety of the structure of the lien resolution agreement in any particular case depends upon the relationship between the injury attorney and the lien resolution company. The personal injury lawyer must evaluate her case. If the lien resolution company is providing “legal advice as to contract or statute”, that conduct most likely constitutes the practice of law. The practice of law would require compliance with Rule 1.5(c) and (d) as fee splitting between law firms. On the other hand, if the lien resolution services are the substantial equivalent of accounting or appraising services, such services may not constitute the practice of law.

12. The key determination is when a "lien resolution company" is providing legal services. That question is factually based and unique to each personal injury case. The Utah Supreme Court has stated:

The practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent. It not only consists of performing services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising and assisting others in connection with their legal rights, duties and liabilities.

Utah State Bar v. Summerhayes & Hayden, 905 P.2d 867, 869-870 (Utah 1995). (emphasis added).

13. In Summerhayes, the Court found the practice of third party insurance adjusting as the practice of law. Importantly, the court found negotiating a claim is the practice of law. [9]

14. In both examples set forth above, the lien resolution companies are advising on the applicability of contract and statutory law. Both provide services in administrative settings that are adversarial in nature. The scope of unauthorized practice is beyond this opinion. Nevertheless, depending upon the services provided in a particular case, the personal injury lawyer must determine if the lien resolution company's services constitute the practice of law. The personal injury attorney retains responsibility for categorizing the nature of the lien resolution company's services. She may treat such services as a cost to the client but only if the services are the equivalent of accounting and assistance falling short of legal advice. [10]

15. The collection of a contingency fee may be proper if the relationship with the lien resolution company is viewed as a co-counsel lawyer agreement. However, if the lien resolution company provides expert testimony, it must be borne in mind that a lawyer cannot pay a witness a contingent fee. UCA 78B-1-152 prohibits expert witness contingency fees. Rule 3.4(b) precludes offering an inducement to a witness prohibited by law. Further, Rule 1.5(c) allows for contingency fee agreements only among lawyers. Thus, a contingency fee agreement is appropriate only where the lien resolution company is qualified to engage in the practice of law. If the lien resolution company is engaged on a contingency fee basis, the lien resolution company could not provide testimony in any adjudicatory proceedings as an expert witness. Obtaining a testifying witness would be an additional cost to the client and likely require disclosure of the additional cost in the fee agreement.

16. If the lien resolution company is practicing law, the injury lawyer must comply with the dictates of Rule 1.5(c) and (d). A contingency fee agreement must be in writing, signed by the client and state the method by which the fee is to be determined. The division of fees between the personal injury lawyer and the lien resolution services lawyer must be in proportion to their individual proposed

services. [11] The combined fee must be reasonable. The rules require the written agreement of the client.

17. If, on the other hand, the lien resolution company provides expert analysis and ultimate testimony along with a legal research component, it would be appropriate to charge those non-contingent fees as a cost to the client. The lawyer however must comply with the cost disclosure provisions of Rule 1.5(c). The lawyer must notify the client in writing of any expense to be deducted from the recovery and "whether such expense are to be deducted before or after the contingent fee is calculated."

CONCLUSION

18. The propriety of a lien resolution agreement will vary from case to case depending upon the services to be rendered. If the lien resolution company is engaged in the practice of law, the personal injury lawyer must comply with the fee-splitting requirements of Rule 1.5 (c) and (d). If there is a contingency fee involved, the personal injury lawyer cannot use the lien resolution company as a witness in subsequent adjudicatory proceedings.

19. If the lien resolution company were providing non-legal services such as accounting or appraising, it would be appropriate to charge the lien resolution fees as costs to the clients provided proper disclosure of the treatment of the cost is disclosed in the contingency fee agreement.

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[1] Medicaid is a joint federal/state program providing medical care for the indigent. Given the amount of medical bills generated in severe personal injury claim, often the injured party will fall into poverty. Thus, Medicaid is often the source of initial payment of such claims. The state government as paying party is responsible to collect Medicaid payments from solvent third parties. See generally Arkansas v. Ahlborn, 547 US 268 (2006).

[2] Medicare is a federally administered medical services program. It covers not only the elderly but also any person who is disabled and receiving social security disabilities payments. The federal government has the same obligation to collect payments for injury from solvent defendants.

[3] Complicating hospital liens is the requirement for the liable party or its insurer to pay the hospital directly. See UCA 38-7-3.

[4] Proper resolution of liens implicates the duty of competence (Rules of Professional Conduct Rule 1.1) and diligence (Rules of Professional Conduct Rule 1.3.) Upon receipt of settlement funds belonging to a third party lien claimant, an attorney must safeguard the funds as provided by Rule 1.15. "Upon receiving funds …in which a third person has an interest, a lawyer shall notify the…third person. Except as otherwise permitted by law, a lawyer shall promptly deliver to…the third person any funds…that the third party is entitled to receive, and upon request by …the third person, shall promptly render a full accounting regarding such property." Rule 1.15(d).

[5] Tricare is a federal program for military service members and their dependents.

[6] Federal Employees Health Benefits Act.

[7] In this context, ERISA is the federal law governing employee benefits including insurance.

[8]Utah law does not allow a provider lien. See UCA 38-7-1 for the extent of a hospital lien.

[9] A third party adjuster is a layperson who advices a client on legal principals including comparative fault, statutes of limitations, jurisdictional issues. "[T]he acts of negotiating, evaluating and settling third-party personal injury or property claims constitutes the practice of law." Summerhayes at 870.

[10] Accountants often give advice as to tax treatment. Giving advice to the personal injury attorney as to the proper treatment of contingent liens in some cases may be equivalent conduct and not the practice of law. This determination is beyond the scope of this opinion.

[11] See Rules of Professional Conduct 15(e).

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