

Trial Strategy

Clients Should Use Their Health Care Coverage First

By Laurel Kaufer

Attorneys who seek to use their client's existing health care coverage for the treatment of the client's injuries not only improve their client's claims, but often facilitate settlement and bolster the attorney-client relationship. Yet lawyers who send their clients to doctors who provide treatment on liens without regard to existing coverage and have reputations for inflating the extent of the injury and/or the reasonable treatment in order to build a case for litigation often sabotage their clients and cases.

Frequently, when a patient goes to a doctor even sometimes a long-term treating physician with an injury stemming from an accident involving a third-party, the patient is instructed to sign a lien, rather than having the treatment billed through their insurance as usual. These patients are often misinformed as to the nature of what they are signing and misled into believing that they won't have to pay the bill because it will be taken care of through their "claim." Many unsophisticated patients, believing that they have no other option for treatment, accept this explanation and don't understand that it will be paid out of their recovery or, if there is no recovery, that they will be responsible for the bill. Moreover, too many health care providers, once they agree to treat these patients on a lien basis, often provide them with excessive or unnecessary care, accompanied by extraordinary billing.

Unscrupulous counsel have taken advantage of, or worse, guided their clients into this situation and used it as an opportunity to build the value of the potential litigation. This has caused a backlash by the defense bar, which has resulted in these personal injury claims, particularly in mild to moderate impact accidents or slip-and-fall cases, being assessed as inherently fraudulent.

This problem is not limited to plaintiff's counsel. Many defense counsel hire similarly unscrupulous doctors to review records and examine the personal injury claimant, who will then invariably determine and testify that the claimant is not injured or that the injury is far less significant than claimed, regardless of the reality.

The obvious and unfortunate result of this is that success in litigation often becomes more about the credibility of the doctors on the stand than about the accident and injuries. More importantly, this scenario, which usually results in large medical bills and increases the cost of litigation, hampers the opportunity for resolution prior to trial. Defendants refuse to evaluate these medical bills as reasonable and plaintiffs refuse to take responsibility for the excess. Therefore, by referring clients to and accepting the practices of these health care providers, attorneys on both sides of the table undermine the legitimate practice and purpose of personal injury litigation.

When retained by a client who has or has had medical insurance that would have covered the treatment but who was treated on a lien basis instead, the lawyer should explain these potential issues to the client and contact the medical provider immediately to discuss the extent of the treatment and whether the insurance issue was addressed and coverage sought.

Dealing with this issue directly is necessary, but must be done delicately, particularly when the testimony of the medical provider may be crucial to the plaintiff's case at a later stage. Contacting

the provider as early as possible will also give you the opportunity to tactfully advise the doctor that there may be an issue with the lien, such as when the doctor provided an excessive level of care or an inappropriate course of treatment.

In addition to contacting the provider, you should contact your client's health insurance company immediately to see if your client has coverage for this treatment and if there's still time to submit a claim. If so, you can submit the bills on behalf of your client and allow the insurance company to pay the provider. In many situations, knowing the ramifications, the medical provider will treat their failure to look to insurance as an oversight and excuse the lien as a mistake or reduce it to the amount of the co-payments due.

In situations where it is too late to obtain coverage for your client, you can wait until the case has been resolved to address the situation with the medical provider. It is likely that if the provider is a "participating provider" in your client's plan, given a tactful explanation of the circumstances, he will be willing to accept a negotiated fee equal to what the patient would have paid in co-payments had the claim had been submitted appropriately. If the doctor does not, he risks allegations of fraud and cancellation of his contract as a provider with that plan.

Regardless, as counsel you should fully explore at the earliest possible opportunity whether your clients have medical coverage available to them for the treatment of an injury, even if it is only Medicare or Medi-Cal coverage. In almost every situation in which an injured plaintiff has health insurance coverage, there are qualified medical professionals who can provide the necessary health care at a fraction of the cost of a lien. Although, your clients come to you to seek redress against a party they believe has caused them injury, your client is nevertheless an injured person first and a plaintiff second. If their injuries have not been treated, your obligation to them include assisting them in minimizing their personal exposure when obtaining the appropriate health care, regardless of the potential value of their litigated claim.

You may not be able to control this in every situation, or your client may need specialized medical care that is outside the limitations of his coverage, but whenever possible you should strongly guide your clients toward using their available coverage before allowing them to be treated on liens.

Your client may still be obligated to the insurer under a right of recovery. But because that right extends only to the amount actually paid out on claims which is almost always a negotiated rate, rather than the full amount of the bill pursuant to a lien, using existing health insurance will allow the client to keep a greater share of the recovery, or will significantly reduce the treatment expense if there is no recovery. This practice will protect you from the potential of a malpractice claim and maximize your client's net recovery, credibility and satisfaction quotient.

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