

**NYCLA Professional Ethics Committee**

Ethics Opinion 739

July 10, 2008

Topic: Fees for specialized counsel retained to negotiate a plaintiff's complex Medicare, Medicaid or private health insurance lien may be charged to the settlement as a disbursement under certain conditions.

Code: DR 6-101, 2-106, 5-104

**Digest:**

It is ethically permissible for a plaintiff's personal injury attorney to retain a specialty firm to handle the resolution of a Medicare, Medicaid or private healthcare lien on a settled lawsuit. Under the following conditions, the fee for said outside service may be charged as a disbursement against the total proceeds of the settlement: (a) at the outset of the representation, the Retainer Agreement with the client provides that the attorney may do so, and the client has given informed consent thereto; (b) the actual charges are passed on to the client at cost (without any overage or surcharge) and must be reasonable; (c) the transaction results in a net benefit to the client on each lien negotiated; (d) the transaction complies with all principles of substantive law, including the fee limitations on contingent fees in the New York Judiciary Law and Appellate Division rules; and (e) the referring attorney remains responsible for the overall work product.

**Discussion:**

A cottage industry of specialty law firms has evolved in the last few years that specialize in negotiating Medicare, Medicaid and private healthcare liens on behalf of personal injury plaintiffs. Said services are marketed to attorneys representing personal injury clients. Resolving liens is a complex area of law with many traps for the inexperienced and unwary. These specialty law firms charge fees for their work and describe their services as being akin to other legal areas that often effect personal injury settlements. Often, ancillary legal services involved with personal injury settlement such as bankruptcy, probate and disability planning do result in a separate fee chargeable to the client. However, negotiating liens has frequently been done by the plaintiff's attorney at no extra charge (and included in the contingency fee). By posturing Medicare, Medicaid and private healthcare lien resolution as an ancillary area, the specialty law firms are suggesting that fees for their service may be considered a legal disbursement chargeable to the total proceeds of the settlement. The alternative would be for the personal injury attorney to pay such fees out of the attorney's contingency fee, as may be done with legal services provided by trial counsel or appellate counsel.

## Increasingly Complicated Lien Resolution

In every personal injury case, plaintiff's counsel has to address possible liens charged to the client's claim. This is a developing area of law, where the policies governing recovery of Medicare, Medicaid and private insurance liens have become much more aggressive over the past few years. The attorney must ferret out and track the liens that are asserted against the claim, and under the new federal rules, has to actively investigate any possible lien held by Medicare (42 CFR 411.25). When there is a recovery, before any funds are disbursed, a determination has to be made as to whether the asserted liens have merit, and if so, which portions of those liens are valid. Repeated contact with the lienholder may be needed, often through a third party collection agency, and extensive negotiations, or even litigation, may ensue before an agreement can be reached.

Lien issues are made more difficult to handle because of constantly changing regulations and protocols. There are four major entities likely to have a lien on a personal injury claim: Medicare, Medicaid, employee health plans, and private health insurance. Each is governed by a different body of law (federal Medicare code, state Medicaid code, ERISA, and state insurance law, respectively). The rules governing each, and the opinions interpreting them, are often subject to change.

Further complicating matters, some clients may have multiple healthcare liens associated with their recovery. A client, for instance, who is initially covered under her employer's healthcare plan may, due to a permanent disability, cycle off of the private plan and onto Medicare during the time between the date of injury and the date of settlement. Furthermore, many clients who are entitled to Medicare are actually 'dual beneficiaries,' having Medicaid pay the coinsurance and deductible applicable to their Medicare coverage. Finally, a client who is only a Medicare beneficiary may have to deal with three separate healthcare reimbursement claims in the end (a Medicare plan outsourcing to multiple administrators -- Medicare Part A, Part B, Part D & MCO's -- all with unique rights of recovery, tort recovery departments and associated protocols to develop, offset, compromise and perfect claims).

## Traditional Handling of Liens in Personal Injury Cases

Historically, the resolution of liens on recoveries was considered a routine part of case management. The increasingly complex development of the law, rules, and regulations of lien resolution, however, has made proper lien resolution far more difficult and involved than it was in the past. Many plaintiffs' attorneys view themselves as skilled in proving tort liability and damages, and plaintiffs' personal injury lawyers often develop expertise in the substantive litigation and tort law relevant to establishing the plaintiff's personal injury claim, but have no special skills in the field of lien law and lien resolution. The law and legal processes associated with personal injury claims are distinct from the law and legal processes associated with resolving reimbursement claims and health insurance liens. Therefore, it is increasingly more

difficult for a personal injury lawyer also to be expert in the law of Medicaid liens, ERISA subrogation, and the like. While personal injury lawyers could develop further expertise through study, experience, and consultation, there are advantages to retaining specialized professionals who perform this work on a constant basis, whose work enables them to be up to date on changes in the law and procedures, and who can take advantage of established and ongoing relationships with various carriers and of economies of scale. The complexity of these lien-related issues may make the retention of such outside assistance desirable.

The plaintiff's attorney faces the risks of liability associated with lien resolution. When an attorney undertakes a personal injury lawsuit, she impliedly represents that she has the legal knowledge, skill, and preparation necessary to represent the client's interests competently in that area of the law. See, DR 6-101. If the attorney unwittingly declines to pay a valid lien, she may expose his client to future litigation and possible loss of healthcare coverage. If an attorney overpays the lien, or pays an invalid lien, she may be liable for legal malpractice; if the attorney fails to discover or pay an outstanding Medicare lien, she can be held personally liable for twice the amount of the original lien, plus interest. (See, 42 U.S.C. §1395y (b) (2) (A) (ii-iii)).

Lien resolution may take months or even years after a case is resolved and can delay disbursement of the case proceeds to the client and payment of the attorney's fee. From the plaintiffs' attorney's perspective, lien resolution is often viewed as a troublesome distraction that saps resources from the prosecution of the case and diminishes the recovery to the client. From the client's perspective, said liens delay distribution of proceeds, may affect the continuing entitlement to certain benefits and can even make obtaining representation more difficult.

In the last several years, the option to "outsource" lien resolution has become available to the plaintiffs' bar through the emergence of specialized law firms that focus on lien resolution and settlement disbursement. Typically, such firms hire case workers who do nothing but handle liens on a large scale. Faced with the stark realities outlined above, plaintiffs' attorneys have begun to take advantage of these new services. This option alleviates the time consumption and frustration of handling lien resolution in-house and may generate a better outcome for the client (i.e. a net benefit) than could be obtained through in-house lien resolution.

### Fees for Lien Resolution

Addressed below are some of the factors to be considered in determining whether the fees for such lien resolution attorneys are a disbursement to be shared by the client and the attorney, rather than included in the contingency fee, *i.e.* absorbed solely by the attorney. Assessing the costs of outsourced lien resolution as a disbursement apportions those costs to the client and the attorney in the same manner and proportion that the client and attorney share in the net recovery; *i.e.* neither one is saddled with the entire cost or burden to the exclusion of the other.\* The client

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\* When any disbursement (such as the cost of lien resolution) is charged to a case, the net recovery is reduced by the amount of the disbursement. Because the attorney's fee is based on the net recovery, the attorney's fee is likewise

benefits from the lien resolution, while the plaintiff's attorney benefits by being relieved of having to represent the client in an area of law with which she may be unskilled or unfamiliar. The end result benefits both the attorney and the client. The attorney is not burdened with the difficulties of lien resolution and can focus on the areas in which she has true expertise, and the client's lien-related interests are represented by those with specialized knowledge and expertise in such claims, thereby optimizing recovery.

A common practice in personal injury matters when the client's case requires ancillary legal services related to other specialized fields of law, such as bankruptcy, the calculation of Medicare Set Aside accounts, and disability planning (e.g., special needs trusts), is to charge the fee for said services as a disbursement against the entire proceeds of the settlement. Fees incurred in the resolution of complex Medicare, Medicaid, and private healthcare liens may be charged in the same manner provided certain conditions and safeguards are met:

- (A) At the outset of the representation, the retainer agreement with the client provides that the attorney may engage an outside law firm for lien resolution and that the fee for said service will be charged as a disbursement.

Counsel seeking to charge a lien resolution fee as a disbursement must consider the timing and notification given to the client. A client will likely object to bearing a cost that has only been brought to her attention late in the course of her case. As a result, courts, ethics boards, and committees have taken a dim view of costs or fees that are sprung upon the client after the parties have signed a fee agreement. Epstein Reiss & Goodman v. Greenfield, 102 A.D.2d 749, 476 N.Y.S.2d 885 (1<sup>st</sup> Dept. 1984); Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 798 N.Y.S.2d 379 (1<sup>st</sup> Dept. 2005); ABA Opinion No. 93-379; Maryland State Bar Assoc., Committee on Ethics, Op. No. 2001-1. The burden of establishing the existence of a retainer contract, with full knowledge by the client of all material circumstances, is on the attorney. (Matter of Howell, 215 N.Y. 466, 109 N.E. 572 (1915); Kiser v. Bailey, 92 Misc.2d 435, 400 N.Y.S.2d 312 (1977); see also Whitehead v. Kennedy, 69 N.Y. 462 (1877)). For this reason, it is necessary that the original fee agreement provide that the attorney may, at her discretion, obtain outside expertise on the matter of lien resolution and that the cost may be charged as a disbursement.

Specialized lien counsel often insures their services against future lien claims for which the attorney may be held liable. Relieving counsel of responsibility for future lien claims is a benefit to the attorney and not an assurance to the client, and should be disclosed in the retainer agreement as well.

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reduced by the added amount of the disbursement. Thus, the additional disbursement is shared by the client and the attorney in the same proportion that the fee is taken. For example, if a \$1000.00 disbursement is charged to a file on a 33.3 percent contingency fee case, the net recovery is reduced by \$1000.00, and the attorney's fee is reduced by \$333.33. Thus, the attorney absorbs \$333.33 of the disbursement in the form of reduction of the fee and the client's net share is reduced by \$666.67.

- (B) The actual charges are passed on to the client at cost and said charges must be reasonable.

In assigning these costs to the client as a disbursement, the arrangement must comply with substantive law, as well as the Code. First and foremost, the cost of outsourcing lien resolution on any claim must be “reasonable” under DR 2-106, which proscribes “excessive” fees. Some may question whether any such assignment of this cost could be ethical, as lien resolution has traditionally been included as a part of the overall contingency fee. ABA Op. No. 00-420 offers some concise guidance: the client may only be assigned the actual cost of the disbursements, without any surcharge added by the attorney. ABA 93-379 provides that no surcharge can be added by the lawyers absent informed consent by the client. The court has inherent authority to review such a fee for reasonableness, Gair v. Peck, 6 N.Y.2d 97, 188 N.Y.S.2d 491 (1959), cert. denied, 361 U.S. 374, 80 S. Ct. 401 (1960).

- (C) The transaction results in a net benefit to the client on each lien negotiated.

The reasonableness of the fee depends on the net benefit to the client. A lawyer who outsources a complex lien problem to another attorney who, in turn, resolves it for a fraction of the lien amount, gains a net benefit to her client. As such the additional fee is justified. The overall outsourcing of lien resolution must benefit the client. It would not be reasonable for a client to be asked to pay an additional fee for lien resolution in excess of the benefit to the client. For example, it would not be reasonable for a lawyer to post a disbursement in an additional amount of, say, \$10,000, in order to negotiate a lien of \$5,000. Any risk of miscalculation should fall upon the lawyer, as fiduciary, and not the client.

It should be noted that some of these law firms require prepayment for their services. If the result of the lien resolution is less than the entire fee, the attorney may not charge this fee as a disbursement. Before initiating use of such a service, the referring counsel is expected to evaluate the size and complexity of the lien to determine if said service will be of real value to the client. Ultimately, the attorney who outsources negotiation of a lien for a pre-determined fee should be solely responsible for said fee. If the service fails to reduce the lien by an amount that exceeds its fee the attorney bears the risk. (This restriction serves to prevent the automatic reflexive referral of liens issues to outside counsel, where the case does not merit it.)

- (D) The transaction complies with all principles of substantive law, including the fee limitations on contingent fees in the New York Judiciary Law and Appellate Division rules.

Whether Medicare, Medicaid and Healthcare lien resolution is included in the scope of the usual personal injury contingency fee retainer agreement is a mixed question of law and of

ethics. This Committee only has jurisdiction to interpret the Lawyer's Code of Professional Responsibility. To the extent that fees charged for lien resolution present a question of law, this committee does not have jurisdiction to resolve legal issues. The New York Judiciary Law (principally, Secs. 474 and 474-a) and the rules of the Appellate Divisions set maximum fees in contingency fee cases for personal injury plaintiffs. (See, 22 N.Y.C.R.R. §603.7; 22 N.Y.C.R.R. §691.20; 22 N.Y.C.R.R. §806.13; 22 N.Y.C.R.R. §1022.31; and 22 NYCRR §1200.11 et seq.). Federal law and rules impose limits on contingency fees in claims against the United States and its subdivisions. This Committee does not have jurisdiction to interpret the Judiciary Law, Appellate Division rules, or federal law and rules, but does note that a lawyer who charges a fee in excess of the fees permitted, will have acted both unethically and illegally.

(E) The referring attorney remains responsible for the overall work product.

DR 6-101 of the Lawyers Code of Professional Responsibility requires an attorney to act competently. If a lawyer “knows or should know that he or she is not competent to handle [a matter, he or she should...] associate with a lawyer who is competent to handle it.” This Rule encourages attorneys to associate with more knowledgeable peers when confronted with issues beyond their abilities, and appears to facially encourage bringing in lien resolution specialists if the attorney thinks it would be necessary or beneficial to the client’s interests.

As a matter of common sense, if an outside lien resolution firm is utilized, the attorney should properly investigate the firm he chooses. It is important that the lien resolution firm be familiar with the various aspects of the relevant law, with the professionals being employed of particular importance. Lien resolution outsourcing may be more appropriately classified as an expense if the firm employs experts who are familiar with the lien resolution process, such as former case workers from the Medicare and Medicaid system, healthcare data processing professionals, and billing and coding experts. The firm retained must be capable of complying with the appropriate standard of care. Failure to secure the services of a competent firm will not relieve an attorney of any liability for lien resolution, and may actually increase it.

#### NYSBA Opinion 769

Our research suggests that this is an inquiry of first impression in New York. However, some guidance is furnished by New York State Bar Association Ethics Opinion 769 (Nov. 4, 2003), in which the New York State Bar Association opined that an attorney may represent a personal injury contingency fee client in securing financing for the costs of their case. Based on the assumption that the original contingency fee agreement only contemplated representation in the underlying personal injury matter, and did not contemplate the proposed transaction with the financing company, the attorney’s work in connection with the financing transaction “would be a new and different matter for which the attorney may appropriately charge a separate fee,” provided that the fee is not excessive and does not exceed the maximum contingency fee under the appellate division rules (22 NYCRR 603.7(e)). Thus, the State Bar opined that while the

attorney could charge an additional fee, the fees must not exceed the maximum fees set by the Appellate Division. Moreover, the lawyer must guard against conflicts between the interests of the client and the attorney herself.

Here, some of the logic of NY State 769 is instructive. The client's lien can often be distinct from the subject matter of the tort which the plaintiffs' attorney is retained to prosecute. The client's obligation to satisfy any existing liens does not directly arise out of the client's claim against a tortfeasor. Rather, these obligations arise out of a pre-existing contract (private health insurance) between the client and the health plan, or by a statutory 'assignment of rights' that occurs when a recipient of government-paid (Medicaid or Medicare) healthcare receives medical services. Thus, the two representations are different.

#### Conclusion:

The fee for a specialty firm to handle the resolution of a complex Medicare, Medicaid or private healthcare lien on a settled lawsuit may be charged as a client disbursement provided: (a) that at the outset of the representation, the Retainer Agreement with the client provides that the attorney may do so, and that the client has given informed consent thereto; (b) the actual charges are passed on to the client at cost (without any overage or surcharge) and the actual charges are reasonable; (c) the transaction results in a net benefit to the client; (d) the transaction complies with all principles of substantive law, including the fee limitations on contingent fees in the New York Judiciary Law and Appellate Division rules; and (e) the referring attorney remains responsible for the overall work product.