



IN BRIEF

MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

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LIENS, SETTLEMENTS, AND OTHER TRAPS

Here are a few simple, but critical, tips for avoiding malpractice while handling personal injury claims.

CLIENT INTAKE

Resolving claims to everyone's satisfaction begins when clients first walk into your office. You can prevent many problems by reviewing issues with your clients at an early stage in your representation.

- **Advise Clients That Bills Have to Be Paid Back:** Many clients do not understand that money they have received for medical expenses or wages may have to be paid back to insurance carriers of PIP, health, disability, or workers' compensation. Informing the client early helps everyone have the same expectations going into a case.
- **Find Out if Health Insurance Exists:** If you know who the health insurance carrier is, call and find out if a lien exists. Also, ask what the reimbursement agreement is (including whether there are attorney fee discounts or future health care benefits). Inquire about medical providers so you can determine if there are any bills you were not aware of.
- **Find Out What Other Insurance Exists:** The sooner you learn what insurance exists, the sooner you can look for liens, bills, and providers that might be relevant to the case settlement. Examples are: PIP, UIM, workers' compensation, and disability carriers.
- **Find Out Where Your Clients Received Medical Treatment:** The sooner you learn everywhere your clients have received medical

care, the sooner you can begin locating bills, liens, and records. This is especially important for the invoices that slip through the cracks because they are billed separately (e.g. ambulance, radiology, surgery, and anesthesiology). Quite often these bills do not show up on a hospital summary and can be missed. Also, they are often sent to collection much sooner than other bills and many providers won't accept a lien or promise to pay on a case.

- **Find Out About Ages:** The time limit for a minor's claim against a public body (Tri-Met, a city, a school district, the police, etc.) is short – it must be filed within **two years**. ORS 30.275(8); *Lawson v. Coos Co. Sch. Dist. No. 13*, 94 Or App 387, 765 P2d 829 (1988). Also watch out for minor's medical bills. A parent's action to recover the medical expenses of a child is governed by the two-year statute of limitations contained in ORS 12.110(1).

THINGS TO DO BEFORE SETTLING

- **Check with the UIM Carrier:** Before you settle, evaluate whether your client has an underinsured motorist claim or potential claim. If your client has a potential UIM claim, you *must* obtain the insurance company's *written* consent to the underlying settlement *before* you settle the case. Failing to obtain written consent to the settlement can defeat any potential claim.
- **Check with the PIP Carrier:** Before a settlement conference:
 - (1) Write the PIP carrier and obtain an updated lien *in writing*. Lien totals can change and you can't negotiate effectively if you don't have the correct amount. If the lien is in writing, there can be no dispute later.

DISCLAIMER

This newsletter includes claim prevention techniques that are designed to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented and readers should conduct their own appropriate legal research.

- (2) Find out about the reimbursement plan. Is the PIP carrier recovering its own lien or are you supposed to obtain it? Do you get an attorney fee? Can you negotiate the lien?
- (3) Confirm which bills have been paid by the PIP carrier and that the total of the payments equals the amount of the PIP lien. Make sure that the PIP carrier, if it paid a discounted amount, is not credited for paying the full bill (thus reducing your total limit of PIP available).
- **Invite Lien Holders to the Settlement Conference:** If a significant lien or future benefits are at issue, request that the lien holder be at the settlement conference or available by phone. The more important the lien issue, the more you need the lien holder's attendance. The lien holder is more likely to reduce its lien if the defense lawyer is explaining the comparative fault facts or other reasons why your client should lose. Calling the lien holder after the case is settled is much less effective.
 - **Get Updated Lien Totals in Writing:** Obtaining written confirmation of the lien totals *before* the settlement helps prevent problems later. If a bill or adjusted lien comes in after the settlement, you have a written confirmation of the lien from the provider. This is much more effective than your telephone notes.
 - **Send Your Client a List of Bills:** Create a list of medical providers and the amounts they tell you they are owed. Send this list to your client and request confirmation that it is accurate and complete. You may even want to have the client sign off on the list. If you are missing a bill, your client may spot it. If your client comes back to you later with a new bill, you have written confirmation of the bills you were given.
 - **Obtain Workers' Compensation Carrier Approval:** If there is a comp lien, the carrier must approve of the settlement (ORS 656.593). Make sure you get this approval in writing, including the amount of any future disability, medical or other payments estimated by the comp carrier.

THINGS TO DO ONCE THE CASE SETTLES

- **Report the Case Settled To Court:** Advising the court when a case has settled helps keep the courthouse staff happy.
- **Prepare a Settlement Summary:** Prepare a settlement accounting for your client showing the breakdown of attorney fees, costs, liens, and all

outstanding bills you are aware of that need to be repaid. Include a statement that the client is responsible for paying any additional bills. Have your client sign the statement. This protects you in the event another bill surfaces.

- **Pay the PIP Lien:** Make sure you either pay the full lien (less any agreed-upon attorney fees or discount) or the other side pays it. If the other side is to pay, be sure to get proof of payment and a release.
- **Pay the Workers' Compensation Lien:** Repayment of the workers' compensation lien is governed by statute (ORS 656.593) or as otherwise agreed in writing. If there is a future disability rating or if medical bills are outstanding, consider (1) waiving future rights or payments so that the case can be resolved or (2) holding the comp carrier's portion in your trust account until there is closure of the claim. The general distribution is as follows: (1) attorney fees and costs, (2) one-third of the **balance of the recovery** to the client, and (3) the remainder or its total lien to the workers' compensation carrier. If there is any money remaining it goes to the client. ORS 656.593. Always check the statute to make sure your case falls within the general guidelines.
- **Pay Outstanding Bills or Liens:** When you pay all outstanding bills or liens, include them in your settlement summary for the client (see "Prepare a Settlement Summary"). Verify if any providers will give an attorney fee discount on their bill and try to negotiate the extent any settlement affects your client's future medical coverage with a provider. If there is no future medical coverage for this injury and the carrier is unwilling to negotiate, be sure to list the exact amount of money going to your client for future medical care and send this to the provider.

By following all of these tips, you are protecting your clients and yourself.

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Our thanks to Jana Toran, Jana Toran PC, for reviewing this article.

Editors Note: The Professional Liability Fund offers sample settlement and judgment disbursal forms, a checklist for commencing and settling personal injury cases, and other litigation practice aids. See the Practice Aid Order Form inserted in this issue.