

How to Outsource Lien Resolution Ethically

By Jason D. Lazarus, J.D., LL.M., MSCC

Introduction

Given the fact that litigating trial lawyers focus on personal injury law (proving causation, liability and damages), they may require outside assistance with certain areas beyond their scope of representation. Historically, personal injury law firms have sought the help of outside legal counsel along with non-attorney specialists to professionally and efficiently deal with a variety of complex issues that arise at settlement. Lien resolution is no different than when an attorney seeks the assistance of experts in other complex areas of law that he or she may be unfamiliar with.

For example, such outsourcing occurs regularly when an attorney is faced with dealing with probate, guardianship, government benefit preservation, tax, or bankruptcy situations that can and often do arise out of an underlying personal injury matter. Personal injury attorneys also frequently engage experts to help with accident reconstruction, valuation of economic damages and Medicare compliance, among many other areas. Subrogation experts are just one more type of expert that a personal injury lawyer can turn to that will enhance the bottom-line net recovery while helping to navigate the pitfalls commonly encountered during the resolution process.

The law governing health insurance subrogation claims are often litigated and are complicated as well as extensive. ERISA, the Medicare Secondary Payer Act, Medicaid, FEHBA and other types of private insurance liens are specialties unto themselves; each rest on their own statutory and regulatory authority, can be governed by different state regulations and

can often exist in concert with each other on the same case. Additionally, the fact that oftentimes a personal injury victim will have multiple different types of liens asserted against their recovery, significantly complicates the lien resolution function. A good example of this is Medicare, where Parts A/B will have a conditional payment obligation to be satisfied, a Part C Advantage Plan lien (which Medicare itself doesn't provide information about) and then a Part D prescription plan which could have a claim as well. All stemming from one accident. If a client has treated over the course of years post-injury, they could have jumped between these plans each year.

Therefore, it makes sense to ethically allow trial lawyers to outsource this function. This is especially so to get the best possible outcome for the client and because liability falls on the trial lawyer to make sure that all subrogation claims, reimbursement obligations and liens are resolved in accordance with the law.

Before moving away from the point of liability, it is important to realize that as a trial lawyer you can expose your client to litigation and possibly loss of health care coverage by failing to pay a valid lien holder. In addition, a personal injury lawyer might be guilty of legal malpractice by paying a lien holder who doesn't have a valid claim or by reimbursing a lien holder too much. And worse yet, in the case of Medicare conditional payments or Medicare Advantage liens, you could be held personally liable for double the lien amount under the Medicare Secondary Payer Act's double damages provision. To further reinforce the point, ABA Model Rule 1.15, in the comment (4) states:

“Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds

recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.”

Many states have ethical rules or opinions which mirror Model Rule 1.15 which can be read to impose a duty upon trial lawyers to safeguard disputed funds, for example, when a lien holder claims more than they are entitled to from a settlement, judgment, or award. This makes this area even more treacherous for personal injury law firms. In addition, Model Rule 1.1 requires a lawyer to have the requisite knowledge, skill, thoroughness, and preparation necessary for lien resolution if they undertake the responsibility. Under my reading of 1.1’s comments, if a lawyer lacks the necessary expertise to resolve liens, then they must ensure competent representation through other means, such as by retaining other experts.

Since resolving health care liens is complex from a procedural and legal perspective, a personal injury lawyer who lacks necessary knowledge, experience, and expertise to effectively resolve health-care liens potentially jeopardizes the client’s interests in their settlement and creates professional liability for himself/herself as well as the firm.

ABA Ethics Opinion on Outsourcing

That brings us to the question at hand, what are the ethical rules guiding the outsourcing of lien resolution services to experts? The ABA’s Formal Ethics Opinion 08-451 is a great

starting point for the analysis. While it does not address lien resolution directly, it does give the guiding framework for outsourcing. The operative provisions of the ethics opinion state:

“A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with "direct supervisory authority" over them.

In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.”

To summarize, if you are going to outsource you must remain ultimately responsible for the work and provide “direct supervisory authority” over those to whom you outsource. You must protect confidential information and ensure that the provider who will be outsourced to is competent and suitably trained. Disclosure and informed consent of the outsourcing should be obtained from the client.

State Specific Ethical Rules on Lien Resolution Outsourcing

While that is the general framework, some states have further defined what is ethically required when outsourcing lien resolution. One great example of this is New York. In an

opinion issued in July of 2008, the NYCLA Professional Ethics Committee permitted New York lawyers to retain an outside lien resolution law firm and charge its fee as an expense of litigation paid by the client. According to the opinion, NYCLA, Ethics Op. 739 (7/7/2008), with the client's informed consent, a personal injury law firm may contract with a lien resolution firm and assess its fee as a cost in a contingency fee arrangement as long as the fee is reasonable.

The definition of the fee being reasonable was analyzed in terms of "net benefit to the client." The example was given that 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." The general parameters of outsourcing in New York were laid out as:

"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. If counsel cannot comply with all of the above conditions, the fee for said services should be charged against the attorney contingency fee."

Another great example is Ohio. The Ohio Opinion 2009-9 (12/4/09) stated:

“If a plaintiff’s personal injury lawyer retains an outside law firm to provide health care lien resolution services in a settled matter, the plaintiff’s lawyer may use professional judgment as to whether to charge the client for the service as part of the contingent fee or as an expense of litigation. Either way, the client’s consent to the outsourcing and the fee arrangement must be obtained prior to outsourcing the service. Either way, the fees and expenses must be reasonable, not excessive. Either way, the nature and basis of the fee arrangement must be communicated to the client and pursuant to Rule 1.5(c) a contingency fee agreement must be in writing. If the outsourced legal fee is included as part of a contingency fee, there is a division of fee among lawyers not in the same firm and that triggers the requirements of Rule 1.5(e). If the outsourced service is charged to the client as a litigation expense, the contingency fee rate must be appropriately set to not result in a duplicative and excessive legal fee charged to a client for a service that is billed separately as an expense.”

Similarly, Utah has directly addressed the outsourcing of lien resolution by personal injury lawyers to lien resolution specialists. The Utah opinion, 14-01 (2/3/14), addressed two questions. First, can a lawyer ethically and appropriately outsource lien resolution? Second, should the fees associated with lien resolution be treated as a “cost” to the client? The opinion addressed both those questions and found that the answers to both questions were yes. The opinion stated:

“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. 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.”

While most states have not directly addressed the outsourcing of lien resolution, the New York, Ohio, and Utah opinions give a general framework to use when deciding to outsource and then passing along the fee as a case “cost.” These opinions all find that it is permissible to outsource and pass along the fee as a case cost if: (a) the personal injury lawyer’s retainer agreement with the client provides that the attorney may do so and the client has given their informed consent; (b) the fees charged are reasonable and are passed on without any surcharge; (c) the lien resolution service results in a net benefit to the client on each lien negotiated; (d) the outsourcing transaction complies with state-specific bar rules and substantive law, including fee limitations for contingent fees; and (e) the referring attorney maintains ultimate responsibility for the work product.

Therefore, if you desire to outsource lien resolution services, the first step is amending your fee contract and providing information to the client about outsourcing these functions thereby securing informed consent. The remainder of the parameters outlined in these opinions are typically easily met.

Key Takeaway: The ethical landscape supports the outsourcing of lien resolution by personal injury lawyers. Given the complexity of dealing with healthcare liens—which can involve multiple layers of statutory and regulatory law—outsourcing to experts is not only advisable but may be necessary to safeguard the client’s interests and to comply with professional obligations. Such outsourcing is in alignment with ABA Model Rules and

various state-specific guidelines, so long as the lawyer maintains ultimate responsibility for the work, charges reasonable fees which does not include a surcharge, and obtains informed consent from the client. This approach also protects lawyers from potential legal malpractice or other liabilities, as they are responsible for resolving all liens properly under the law. Therefore, lawyers considering this route should amend their fee contracts to clearly articulate the possibility of outsourcing lien resolution and obtain informed consent from their clients.

Conclusion

There are strong reasons for outsourcing lien resolution to a team of experts with deep subrogation experience. First, it makes your law firm more efficient by reducing operating expenses as well as removing the burden on a firm's staff in terms of time spent on liens. Second, since health insurance plans and government employ recovery vendors who are their experts, a law firm should have its own team of experts to help fight and resolve liens. Third, and probably most importantly, to make sure that the client's net proceeds are protected by negotiating the deepest reduction of the amount claimed by a lien holder.

The Utah ethics opinion mentioned above recognized that in a complicated injury case, with multiple liens, plaintiff counsel bears much responsibility to resolve these liens which can require "substantial expertise." The retention and assistance of lien resolution experts serves the "laudable goal" of fair resolution to both the client and lien holder. The lien resolution services offered, according to the Utah ethics opinion, "are often a significant value enhancement for the client" since many plaintiffs' personal injury lawyers may lack the necessary competence to evaluate medical billing. These services allow a personal injury lawyer the ability to negotiate

liens on equal terms with the lienholder's lawyer by providing expert advice coupled with specialized legal resources for the personal injury attorney.

In terms of the ethical issues surrounding outsourcing of lien resolution, the burgeoning complexities around lien resolution, potential impact to the client's net proceeds as well as law firm liability related to liens, leads to the conclusion that outsourcing may be in everyone's best interest.

The question then turns to how to make sure outsourcing is done in compliance with applicable rules. As discussed above, the ABA's model rules certainly contemplate outsourcing of certain functions by lawyers. The survey of states that have directly addressed the outsourcing of lien resolution has concluded that it is permissible but with protections put into place to address client confidentiality along with informed consent. An outsourcing attorney must make sure that the lien resolution firm it hires has the competence, expertise, and suitable training to provide those services.

Passing along lien resolution fees to the client requires that the client agree to the outsourcing as part of the retainer agreement and that the lawyer obtains informed consent for the outsourcing of lien resolution functions. The use of a lien resolution group must produce a net positive outcome for the client with the fees being reasonable and no surcharge added on to the fees.

The health insurance industry has known for decades the benefits of hiring subrogation experts. A knowledgeable lien resolution partner can help even the playing field to protect your hard work and at the end of the day, your client's recovery. It makes sense to outsource for all of

the reasons enumerated herein and ethically it can be done by adhering to the principles outlined above.

Understanding why to outsource and how to do it ethically sets the stage for determining which types of liens are suitable for outsourcing. This decision requires a nuanced understanding of the different lien types and their particular characteristics which you can learn more about by requesting Synergy's white paper on the different lien types to outsource.