Dynamic Chiropractic

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The DC Lien in Lean Times

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The other side victimized your patient, opposed just compensation and battled to avoid liability. Now the plaintiff's attorney wants you to significantly reduce your lien. Should you cooperate?

It is a common practice in a personal injury case involving a vehicular collision for the doctor of chiropractic to accept a lien for medical services, with the condition that the plaintiff's attorney will protect that lien out of the funds generated by settlement or verdict.

As a personal injury attorney who has practiced for about 25 years, I've seen dramatic changes in how insurance carriers handle claims. Recent studies indicate that insurance companies are earning record profits. The reason most commonly given by the insurance companies is that the newfound profits are due to "claims handling procedures." Translation: they're paying less per claim.

In the "good old days," personal injury attorneys typically would use a "rule of thumb" in soft-tissue cases by attempting to achieve a settlement of three times the medical expenses plus loss of earnings and property damage. Those days are long gone.

Artificial "formulas" have been completely discarded. The amounts insurance carriers typically pay to settle low-to-moderate impact soft-tissue cases do not exceed twice the medical expenses. Moreover, the carrier usually sends out the DC's bill for "peer review," which invariably substantially reduces charges for purposes of negotiation.

The plaintiff's personal injury attorney still has the responsibility to honor the chiropractic lien. Merely because an insurance company believes the bill ought to be 50% less and bases its settlement proposal on 50% of charges does not mean that the plaintiff's attorney can unilaterally reduce the charges of the DC by 50% (or any percent, for that matter).

This unfair method produces unfortunate results when considered in the context of the questions often posed by DCs when confronted by the attorney requesting significant reductions. Some of those questions might be:

Why are you asking me for reductions? This is going to have an adverse impact on our relationship.

Many attorneys develop professional relationships with DCs to whom they routinely refer because of the quality of care provided. One of the unfortunate consequences of the manner in which insurance companies handle claims is that attorneys are forced to become adversaries of their own client and the DC. It is a basic truth that with law firms which specialize in handling soft tissue claims, if reductions are not obtained, cases are often not going to settle. When insurance companies paid three times medical bills, there might have been a result of one-third to the patient, one-third to the doctor and one-third to the lawyer. However, when the available fund for distribution is reduced by one-third (or more) as a result of the insurance carrier basing offers on reduced medical expenses due to peer review (as mentioned above), this does not leave enough money available to pay the attorney and the doctor of chiropractic and still leave anything for the patient. If the attorneys do not ask and obtain a significant reduction from the DC, they will

probably be unable to settle the case. If they are unable to settle the case, they cannot support their office. Most attorneys who have a volume personal injury practice support the practice on soft-tissue cases and litigate cases involving injuries more objectively defined such as herniated discs, fractures and surgeries.

How much is the settlement?

While this is a reasonable question, this is confidential information. The attorney is not allowed to disclose this unless the client consents. Still, the DC might simply refuse to grant a reduction unless provided this information first.

If you are asking me to reduce my charges, are you willing to reduce your attorney's fees by an equivalent percentage?

This is the question the attorney hates most. Be wary of the attorney who answers, "Yes," but refuses to provide documentation. The usual answer given, however, is "No." The justification most often provided is that the attorney's fee is in keeping with what is typically charged (assuming the attorney is charging the "normal" one-third), while the insurance company has determined that the DC's charges are not "typical" (as identified by peer review) and excessive (length of treatment, amount of gross charges or amount of charges per visit). Attorneys may indicate that all they're asking of the doctor of chiropractic in granting the reduction is to reduce the charges down to the norm.

What factors should be considered by DC in determining whether or not to grant a reduction?

The answer depends upon numerous factors: whether or not the DC believes that the charges are reasonable and in keeping with other doctors in the same locale; whether the bill contains an excessive amount of diagnostic versus charges for treatment; whether this is an attorney with whom the DC has an ongoing relationship with respect to referrals, whether the charges exceed the "norm" per visit; and whether the impact in the accident is mild, moderate or severe.

Contractual Lien Enforcement Rights

Merely because the attorney for the plaintiff/patient requests a reduction does not mean that a reduction must be granted. The DC needs to weigh (before making a decision) if an ongoing relationship with the particular law firm is advantageous and if that law firm is a good referral source for additional patients.

Assume the DC possesses a valid contractual lien. That lien, contrary to popular belief and despite the attorney's acknowledgment of same, is not a license to charge whatever the DC wishes to charge. Courts will evaluate chiropractic charges based on their "reasonableness" in the particular locale. When the DC and the plaintiff's attorney are unable to reach a mutually acceptable compromise of the bill (if a request for reduction has been made), the attorney is still duty-bound to protect the lien. The sanctity of medical liens is well-known. Case law in most states re-emphasizes the right of health care providers to recover directly from attorneys if the attorney knows the existence of a lien for services and to honor it.

Ethically, the attorney is required to hold the disputed funds in trust. Often a compromise is reached. The patient, doctor and attorney agree that the undisputed portion should be released; the disputed amount remains in trust. Alternatively, the funds, at the request of the client, will remain in trust until such time as: 1. a later agreement is reached on disbursement; 2. the patient instructs the attorney to disburse in trust or 3. the DC files suit in small claims court (or elsewhere) naming the patient and attorney as defendants, and a court order is obtained after the judge hears

the dispute.

Competing Claims

There are often numerous individuals and entities competing for a limited amount of dollars. It is common that almost all insurance policies, including health insurance and casualty policies issued on automobiles and boats, will contain a third party recovery clause. These subrogation clauses require the plaintiffs, when amounts are collected from the third-party tortfeasor (person who commits a tort) to repay their insurance carrier(s) for amounts that may be applicable to property damage, medical pay payments, uninsured motorist coverage and health benefits paid under health care plans.

Who has priority regarding the funds when the DC also has a lien? The answer is complex. Legislatures of various states have enacted statutory provisions promoting lien rights to recover amounts from third-party wrongdoers.

When payments are made by governmental entities, such as Medicaid, or if Medicare has made payments, federal and state laws typically afford priority of lien rights to governmental agencies providing payment for medical care.

In certain states, hospitals have statutory lien priority rights over all other claimants (except federal and state agencies), particularly in connection with hospitals providing emergency medical care.

Attorneys will likely claim a senior lien right based upon the date their contingency fee agreements executed, since the attorneys' fee agreements usually predate the medical lien signature. There may also be multiple doctors competing for the available dollars in the settlement pool.

With the exception of senior priorities granted by virtue of federal or state law, the usual rule is that liens are considered based on priority of time of lien execution. This is not uniform, however. Some states will virtually always grant attorneys a priority lien for their fees and costs under a doctrine known as "common fund," which will be discussed in a later article.

Conclusion

A review of the law with respect to liens illustrates how extremely important it is to analyze what liens will potentially apply in a given situation. This analysis must be accomplished early on, with the attorney contacting any potential lienholder. An attorney is duty-bound to protect a lien claimant once the attorney has knowledge of the lien. If the attorney does not, the attorney may be forced to pay the DC directly, as the attorney is supposed to hold the funds that are the subject of the lien in constructive trust for the lien claimant upon gaining knowledge of the existence of the lien.

Without the proper analysis and contact with potential lienholders at the outset of a case, a subsequent attempt to secure reductions will often be met with considerable resistance, especially in light of reduced settlement funds available and statutory lien rights afforded governmental entities, which further reduces the amount available for distribution to the chiropractor, patient and attorney at the successful conclusion of a personal injury case.