Hon. Elizabeth R. Feffer (Ret.)
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Mediating cases with large medical liens

PROTECTING MEDICAL-LIEN CLAIMS AND THE PLAINTIFF THROUGH TIMELY NEGOTIATION AND DISCLOSURE OF LIENS

A plaintiff's medical liens may present an obstacle to successfully resolving your client's personal-injury action at mediation. Success is far more likely when the plaintiff counsel's preparation includes implementing a strategy designed to prevent medical liens from derailing settlement.

Medical-lien-claim history

Long past are the days when plaintiffs who obtained medical treatment on a lien basis were those who lacked health insurance or whose insurance did not authorize the treatment sought (such as the disk-replacement surgery performed on the plaintiff in *Moore v. Mercer* (2016) 4 Cal.App.5th 424). Indeed, in 2018, the California Court of Appeal held that an insured plaintiff could forgo using available medical insurance coverage, obtain medical treatment on a lien basis, and be treated as "non-insured" to determine economic damages. Further, the defendant may not argue to the jury that the plaintiff failed to mitigate damages by not using available health-insurance coverage. (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1266-68.)

Settlement demand

Regardless of how a plaintiff's medical treatment is to be paid in any personal-injury case, it is prudent to provide defense counsel with a settlement demand well before a scheduled mediation. Particular attention must be directed to preparing a breakdown of medical damages and support for those damages. Mediation should not be the first time the defense is presented with a settlement demand listing incurred medical damages.

Every plaintiff's counsel wants the defense to have the appropriate decision-makers present at the mediation. To facilitate this, give defense counsel a settlement demand well in advance of the mediation, along with supporting evidence regarding liability and damages. That way defense counsel will have the opportunity to notify the insurance adjuster or other representative to assess the case and discuss the amount of settlement authority before the commencement of the mediation session.

After providing the relevant reports, photographs, medical records, and medical bills to the defense, the defense response to the plaintiff's offer may reveal whether the defense has decided to mount an attack on the reasonableness of the plaintiff's treatment and/or claim the "lien doctor" has "overtreated" the plaintiff to run up the medical specials. The defense may also contend that the treatment costs are unreasonable and bear no relation to the actual market cost of the medical services…and, in any event, the lien amounts aren't "real" because they are always negotiable.

Medical liens and the mediator

If you anticipate the defense will tell the mediator that the "true" value of the plaintiff's case is far less than the amount plaintiff demands because of "overbilling" or "overtreatment" by the "lien doctor," use your mediation brief as the opportunity to educate the mediator. Explain that your client's treatment is reasonable and why the treatment costs are, in fact, consistent with reasonable market rates. Even if the defense does not retain a billing expert, it may be prudent for plaintiff to do so instead of relying upon the treating doctor to opine on the reasonableness of their bill (and lien).

Your mediator likely has encountered the scenario where, hours into negotiations at a mediation session, plaintiff's counsel suddenly reveals the existence of a medical lien and declares the lien "non-negotiable." As a result, negotiations stall, or worse.

If a mediator is given a choice between (1) learning before the mediation session the details about the plaintiff's medical liens and of counsel's attempts to negotiate them, or (2) remaining wholly ignorant about such liens until well into the mediation session, it is fair to say most mediators would choose the first option.

Your mediator's preparation goes beyond reviewing the briefs and whatever exhibits counsel provided. Mediation preparation also includes learning the likely obstacles to settlement and strategizing how to overcome them. Mediators, therefore, would like to read about the identity of all lienholders, the current amounts of the liens, and each lienholder's position concerning compromising the liens in the plaintiff's mediation brief.

Yet, despite the confidential nature of the mediation process, it is completely understandable why a plaintiff's attorney will not divulge any of this information to the mediator. Counsel may want to keep certain information about payment of a client's medical treatment confidential and not want to divulge the negotiations with lien holders that are protected by attorney-work-product privilege.

An attorney's decision of how much, if any, work product to disclose to the mediator is case- and client specific. There is no "one size fits all" answer to the question of how much information an attorney shares with the mediator about negotiating the client's medical liens.

Liens that *must* be disclosed

There are, of course, instances where information about certain medical liens should be disclosed. Well before a mediation session (ideally, prior to taking a client's case), plaintiff's counsel should investigate, for example, lien

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claims involving Medicare, ERISA, Veterans Administration, Medi-Cal, workers' compensation, or any emergency and ongoing care liens covered by California's Hospital Lien Act (Civ. Code, § 3045.1.) This includes determining whether appropriate claims have been made, a Medicare case has been opened (and a Rights and Responsibilities letter received), and any of the liens perfected.

Note that under the Hospital Lien Act, given a defendant's statutory responsibility to the hospital, insurance companies will not settle a case without resolving the hospital lien. Before the mediation session, plaintiff's counsel should determine whether the hospital has perfected its lien claim by giving the notice required by statute to the tortfeasor's insurance carrier. (Civ. Code, § 3045.3.)

Another essential protection for the client is to ensure the treating medical providers' lien claims are amounts within the defendant's insurance coverage. It is therefore wise to seek assurances from lien claimants that their lien claims are flexible in line with potential recovery and assure the plaintiff client will not be required to pay a lien claim balance if recovery is inadequate to cover the lien claim. Additionally, a client needs to know their exposure to medical lien claims if the case does not resolve in their favor.

Again, while every case presents different facts, effective pre-mediation preparation should include searching for and reviewing all medical liens and claims.

Negotiating liens before mediation

Whether or not you disclose all your client's lien information to the mediator or opposing counsel, your preparation should include learning all of the financial details of your client's medical treatment before the mediation session.

Documenting, for example, each provider, the charged amount, the paid amount, and any outstanding lien or balance before your mediation will help you determine the value of your client's case. This is particularly important in light of the reductions authorized by the California Supreme Court in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541. Knowing the value of your client's case helps you create and implement a negotiation strategy.

Plaintiff's counsel should not be "shocked" that defense counsel will argue that all (or nearly all) treatment liens are negotiable and, by extension, patently unreasonable. That treatment liens are negotiable is far from an industry secret. Indeed, in *Nager v. Allstate Ins. Co.* (2000), 83 Cal.App.4th 284, 291, the court observed that "... medical liens are frequently reduced during the process" of personal injury litigation. (*Ibid.*) As another court stated more bluntly: "some medical providers with liens may overtreat patients to run up medical special costs, thereby increasing their chances of getting paid." (*Lovett v. Carrasco* (1998) 63 Cal.App.4th 48, 57.)

Negotiate the lien before mediation

Many plaintiffs' counsel focus their pre-mediation preparation exclusively on liability or demanding a total amount of damages. It is a mistake, however, to assume a lienholder will accept a reduced amount and then attempt to negotiate the lien claim with the lienholder after the case has settled.

The importance of negotiating a treatment lien before mediation cannot be overstated. Part of plaintiff's counsel's preparation for mediation involves discussing with each lienholder the amount of their lien claim and the expectations for payment. Does the lienholder know about the third-party case? Whether the defense has disputed liability? If, for example, the defense has mounted a vigorous attack on the reasonableness of a bill, tell that lienholder.

Conclusion

While researching and negotiating medical liens before mediation is time-intensive, such preparation is more likely to yield a successful and satisfying resolution for the plaintiff client. Waiting until after a successful mediation to negotiate a client's medical-lien claims may undermine the closure your client had hoped to achieve.

As a rule, plaintiff's counsel has more leverage to successfully negotiate a medical-lien claim before mediation commences than after a settlement has been reached. If a lien claim is truly "non-negotiable," and the lienholder expects your client to satisfy the entire amount claimed, it is best to know this before mediation.

Additionally, knowing pre-mediation the ultimate payout to lienholders helps plan an effective negotiation strategy. Your client, in turn, will want to know the net recovery before giving the necessary consent for settlement. An important aspect of the mediation process is the opportunity to provide finality and certainty for the client.

Hon. Elizabeth R. Feffer (Ret.) has provided full-time mediation, arbitration, and referee services since retiring from the Los Angeles Superior Court in 2020. In her 13 years serving on the Los Angeles Superior Court, Judge Feffer served in various roles, including an unlimited jurisdiction civil independent calendar court for six years and a civil trial court for three years. Contact information: Caseworker at ADR Services, *Inc.: ella@adrservices.com.*