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Navigating Ethical Minefields in Personal Injury Litigation

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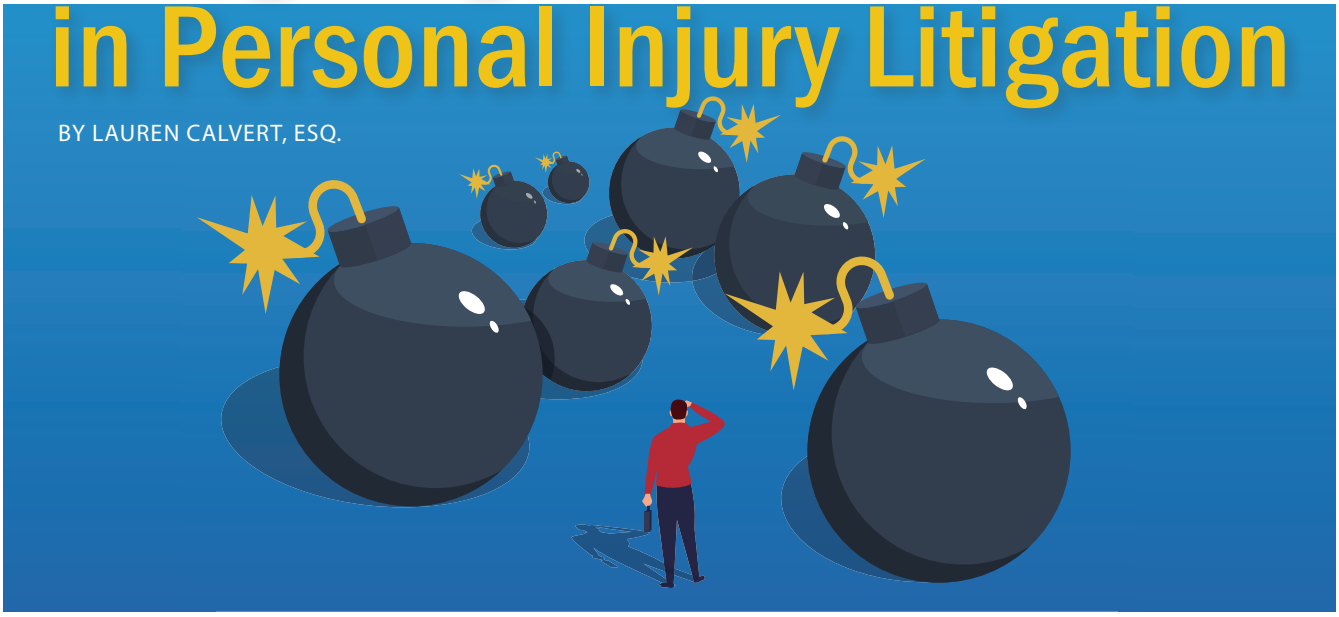

Personal injury attorneys and insurance defense attorneys are often characterized in a not-so-flattering light. Sometimes they are portrayed to the public as greedy or unscrupulous. The importance of ethics in personal injury law is obvious to those practicing in the field. Failure to navigate ethical pitfalls unique to personal injury carries potential harm to the lawyer and client alike, and undermines public respect for, and confidence in, our profession.

Potholes for Plaintiff's Counsel

Retainer Agreements

A written retainer agreement, executed by the parties, is mandatory in contingent fee cases. The retainer agreement defines the scope of the engagement, and vague terms can lead to ethical dilemmas. If the engagement does not include resolving liens of healthcare providers or giving tax advice as to the recovery, that should be made explicit. When representing several clients in the same matter, counsel should address waiver of potential or existing conflicts, including what will happen where multiple clients have differing settlement demands.

It is unethical for an attorney to include in the retainer agreement a provision granting the attorney full and absolute discretion and authority to settle the case upon terms decided by the attorney. The decision to settle belongs to the client.[1] A general relinquishment of the right by the client in favor of the lawyer creates a conflict that violates the attorney's fiduciary duty to the client. The attorney has a duty to consult with the client about settlement and explain the matter to the extent necessary to permit the client to make an informed decision.

Use of Non-Lawyers

It is commonplace for administrative staff, law clerks and paralegals to conduct significant prelitigation work within personal injury firms. However, conducting initial client consultations, deciding whether the representation should be accepted, negotiating clients' claims with the insurance company (which includes making legal arguments in support of the clients' position), signing demand letters and serving as the clients' sole contact in the firm constitute the practice of law. These tasks cannot be performed by a non-attorney.[2]

Third-Party Litigation Funding

In mass tort claims involving personal injury and product liability, expenses to prosecute the claim can be substantial. In such cases, counsel may need to personally borrow funds for litigation costs. This is permissible.[3] The attorney must agree to be responsible for the repayment of the loan, interest and associated reasonable fees. Repayment of the loan may not be contingent on the success of the litigation for which the loan is obtained, and the client must give written consent prior to counsel taking the loan.

Duties to Lienholders

An attorney who represents an injured party in a personal injury case owes a duty of loyalty to that client. However, once the case is settled, if there are lienholders or interested third parties, the attorney's duty is then split between the client and the interested third parties.[4] In situations where the client does not want the attorney to pay the lienholders, this split duty can become precarious rather quickly.

When the client instructs the lawyer not to pay a third party who appears to have a cognizable interest in the funds, there is a dispute concerning their respective interests in the funds. In that situation, the lawyer is ethically obligated not to decide who prevails in the dispute, although counsel may ethically attempt to mediate a consensual settlement between the client and third party. If the parties do not readily agree to a resolution, the lawyer is ethically obligated to keep the portion of the funds in dispute separate until resolved. As a result,

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this is a rare circumstance in which the lawyer has ethical duties running in favor of someone other than the lawyer's client. Furthermore, the lawyer may have these ethical obligations even though the client has instructed the lawyer to the contrary.

The lawyer has no ethical duty to affirmatively seek to discover third parties with an interest in settlement funds. The lawyer's ethical obligations toward third parties only extend to interest holders of whom the lawyer has actual knowledge. The mere assertion of a "claim" by a general, unsecured creditor is not an "interest" in the funds themselves in the hands of the lawyer.

Lien Negotiation

Failing to attempt to negotiate a reduction in the medical care provider's fee on behalf of a client is an ethical violation because it demonstrates a lack of competence.

"[A]n attorney has a duty to negotiate for the client to the best of his or her ability, whether those negotiations be with the opposing side, the opposing side's insurer or the client's own medical providers."[5] Accordingly, the Nevada Supreme Court has concluded that counsel does not act competently when he or she fails to attempt to reduce the client's medical bills.

The duty of competent representation also extends to obtaining a client's medical payment monies, holding them in trust and negotiating the fee of the medical care provider. An attorney can charge a contingency fee for obtaining the med pay, so long as not unreasonable pursuant to NRCP 1.5(a).[6]

Prompt Payment of Settlement Funds

Under NRCP 1.15, lawyers have the ethical duty to "promptly" pay settlement funds to persons with an interest in them. Clients regularly demand or pressure counsel to issue settlement checks the moment a resolution is negotiated. However, an attorney may not disburse proceeds of a settlement check until the funds have cleared and are deposited into the attorney's trust account.[7] An attorney also may not use his or her own funds to "cover" a bounced settlement check.

Defense Counsel Dilemmas

The Policyholder's and Carrier's Rights

The insurance defense attorney's primary client is the policyholder. The liability insurer and its policyholder have usually agreed by contract that the insurer may control the defense and settlement of the case. *In the absence of a conflict*, counsel represents both the insured and the insurer and has duties of confidentiality and care to both as co-clients.[8] Because the insurer-appointed attorney owes obligations to both, a conflict of interest may arise because the outcome of litigation may also decide the outcome of a coverage determination—a determination that may pit the insured's interests against the insurer's. When the insured and the insurer have opposing legal interests, Nevada law requires insurers to fulfill their contractual duty to defend their insureds by allowing insureds to select their own independent counsel and paying for such representation.[9]

The insurer ordinarily has rights to the attorney's case file per the parties' contracts, provided that ethically protected materials potentially adverse to the policyholder are redacted. Because the policyholder is counsel's primary client, counsel must remove from the materials provided to the insurer documents that may bear on any actual or reasonably likely coverage disputes between insurer and policyholder.

The insurer may have a separate right to demand such protected information from the policyholder, however, under a duty to cooperate or similar clause in the contract of insurance. Therefore, defense counsel has a duty to pass along to the client such requests for information and to inform the client of the ramifications for disclosure and non-disclosure. If the underlying contract of insurance contains a clause that would penalize the client for not revealing information indicating that there is no insurance coverage, counsel would have to inform the client of the potential damages for non-disclosure.

Indemnity

Plaintiffs' lawyers recognize that they potentially face personal liability if they release funds to clients for which they know third parties to be legitimately interested. Similarly, a settling defendant or its liability insurer wants to be certain when it pays a settlement that it achieves finality. If the insurance carrier fails to protect Medicare, for example, when it settles a case, it can be called on or sued to pay Medicare. If the defendant or insurer is required to satisfy a lien in that instance, it may be difficult to obtain reimbursement from the plaintiff.

To mitigate this risk, defendants and their insurers may attempt to include in settlement agreements indemnification provisions by which the plaintiff's lawyer promises to hold the defendant harmless from any lien claims and indemnify it against any claims that the plaintiff should have paid out of the settlement proceeds. Defendants and their insurers recognize that plaintiffs' lawyers are a more reliable source of indemnity than are their clients. It appears that every ethics authority that has considered the issue has concluded that it is unethical for plaintiffs' lawyers to enter into such agreements.[10] These opinions have further found it is unethical for defense lawyers to even seek such from plaintiffs' lawyers.

Plaintiffs' and defense lawyers representing clients in personal injury claims face numerous ethical pitfalls every time they look for, evaluate, accept and handle a new case. Honesty, common sense, a solid understanding of the rules and cooperation with opposing counsel will protect most of us from making costly mistakes.

1. Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 35 (2006).
2. NRPC 5.5; *In the Matter of Discipline of Glen Lerner*, 124 Nev. 1232 (2008).
3. Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 36 (2007).
4. NRPC 1.15(d)-(e); Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 31 (2005).
5. Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 42 (2009), quoting *In re Discipline of Laub,* Order of Suspension, Case No. 36322 (Nev. Jan. 9, 2002).
6. Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 42 (2009).
7. Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 44 (2011).
8. *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44 (2007).
9. *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. 743 (2015); NRPC 1.7(a).
10. *See, e.g.,* Kansas Ethics Op. 11-02; Missouri Formal Ethics Op. 125 (2008); New York City Ethics Op. 2010-3, at 3; Ohio Supreme Court Ethics Op. 2011-1; Wisconsin Formal Ethics Op. E-87-11

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