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So My Case Has Settled: What Do I Have to Worry About Now?

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The settlement of a case usually comes as a relief to the client, who may be nervous about the prospect of trial and about the legal system in general. When finalizing a settlement, both as to the terms of the settlement itself and the ultimate disbursement of proceeds, it is important to ensure that the essential and material issues are addressed and, to the extent possible, resolved favorably for the client. Unfortunately, finalization of settlements today is more complex than in the past, and may present ethical and legal challenges for the plaintiff's attorney.

This paper will discuss some of the major concerns that arise in the settlement process that should be addressed in order to achieve three broad, and often overlapping, goals:

1. Ensuring the client is happy
2. Avoiding ethical problems
3. Avoiding getting sued (both attorney and client)

Although uncertainty concerning the finalization and disbursement of a settlement is sometimes impossible to eliminate entirely, the following sections will discuss considerations and techniques that can minimize problems. The Appendix contains the full text of two provisions that are frequently relevant to personal injury settlements: O.C.G.A. § 33-24-56.1, dealing with health insurance and benefit

reimbursement claims and establishing Georgia's "made whole" rule, and State Bar of Georgia Rule of Professional Conduct Rule 1.15 (I), setting forth an attorney's ethical obligations when holding proceeds that may belong to a third party.

1. Preliminary matters: potential concerns with settlement

Every case has unique facts that must be considered before settlement is finalized and the proceeds are disbursed. The following is a list of some of the most common concerns that can arise in personal injury cases:

Reimbursement and payment issues

- Outstanding medical bills
- Letters of protection/contractual obligations
- Health benefit reimbursement claims
    - ERISA
    - Insurance (including state and local government plans)
    - Medicare
    - Medicaid
    - TRICARE/CHAMPUS
    - FEHBA
    - Medical Payments coverage
- Short-term or long-term disability benefits
- Workers' compensation liens (including FECA)
- Hospital liens
- Attorney liens and fees owed to other attorneys
- Medicare Set Asides
- Medical funding companies
- Litigation loans

Terms-of-settlement issues

- Confidentiality clauses
- Loss of consortium claims
- Hold harmless/indemnity clauses

Party-capacity issues

- Claims of minors
- Incapacitated clients
- Wrongful death vs. estate claims

Other issues

- Coordination of benefits/effect on Social Security, welfare, etc.
- Taxation
- Client understanding of settlement agreement and proceeds
- Other unsecured client debts
- Structured settlements

2. Communicating with the client during case resolution and disbursement

The number one source of Bar complaints is attorneys' alleged failure to communicate with clients. Rule 1.4 of the Rules of Professional Conduct states that an attorney must:

- promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by the Rules

- reasonably consult with the client about the means by which the client's objectives are to be accomplished

- keep the client reasonably informed about the status of the matter

- promptly comply with reasonable requests for information

- consult with the client about any relevant limitation on the attorney's conduct when the attorney knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law

- explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

Client communication is important throughout representation, but a high percentage of complaints against attorneys, formal and informal, concern matters that occur at the end of representation. A client's authorization is necessary to consummate a settlement, and the Georgia Supreme Court has rejected the validity of a blanket authorization by a client to settle for any amount within the discretion of the attorney.[1] Because of the similarity of issues connected with resolution of reimbursement or lien claims, the same principle may apply to those matters.

As a practical matter, the wisest course of action is to reasonably apprise the client of issues that are likely to arise in the course of settlement, particularly those that may ultimately affect the bottom line, such as reimbursement/lien issues or other payments to third parties, as well as the attorneys' fees and costs. With respect to the latter, even with clear language regarding reimbursement of costs and calculation of fees in the representation agreement, clients not uncommonly forget that costs and fees are separate items and are typically taken from the *gross* settlement. Therefore, the client should be reminded of these factors before entering into the settlement. The author's practice is to prepare a preliminary settlement and disbursement statement when seeking the client's approval to settle, which shows the proposed settlement as well as the maximum amount of any payments that must be deducted from the gross settlement, including those to third parties

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1 In re Lewis, 266 Ga. 61 (1995). Note that this decision was decided under an earlier version of the Bar rules.

and to the attorney.[2] Because third-party claims can frequently be reduced, "this worst-case scenario" projection is the safest way to ensure that the client is not surprised if his or her portion of the settlement represents a smaller share of the gross recovery than originally anticipated.

The terms of settlement agreements can often have significant implications for the client, and sometimes for the attorney, beyond merely memorializing the payment of consideration and release of the claim. Indemnity agreements often call for the client, and sometimes the attorney, to protect the releasee from certain obligations asserted by third parties, although seeking to bind an attorney to such an agreement now appears to be prohibited.[3] While some indemnity agreements may be acceptable and necessary to secure a suitable settlement, the attorney should take all reasonable actions to ensure that there are no outstanding liens or claims that would actually trigger the indemnity provisions such that the releasee could take action to enforce them, or at least ensure that such claims are paid from the proceeds of the settlement.

Confidentiality agreements are also an increasingly-frequent item in settlement agreements. Although personal injury settlements are generally not

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[2] The settlement statement should also contain information regarding payments to any other attorneys so as to properly comply with the terms of Rule 1.5(e) of the Rules of Professional Conduct.

[3] State Bar of Georgia, Formal Advisory Opinion, No. 13-2; Georgia Bar Journal, December 2013, p. 74.

taxable,[4] authority exists for taxation of any consideration paid for confidentiality provisions.[5] Therefore, at a minimum, a specific (and ideally minimal) amount should be designated as consideration of that item, and such a request, if not part of the initial demand, may serve as a way to obtain additional compensation.

Beyond the items mentioned in this Section, there may be numerous other considerations that should be discussed with the client prior to final settlement or disbursement of proceeds, including those referenced in Section 1 above. One commonly-overlooked consideration is how a receipt of settlement funds may affect disability, welfare, or other needs-based benefits. If the attorney is not well-versed in these matters and they appear to be relevant, it is best to advise the client to speak with an attorney who is experience in those areas, and if the client declines to do so, obtain confirmation and consent of the client to proceed with the settlement nevertheless. Another common issue involves payment of settlement proceeds to the parents of minors for the minors' claims. Care should be taken at all states of the litigation to ensure that parents are properly advised as to the effect of such a settlement and that the proper procedures are instituted, including establishment of a conservator where warranted or court approval of the settlement.[6] If a case is mishandled, such as payment of a minor's settlement to a parent without the claim being properly handled under O.C.G.A. §§ 29-3-1 and 29-3-3, it is theoretically

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[4] 26 U.S.C.A. § 104(a). This general rule may be subject to exceptions in particular cases, however.

[5] Amos v. Commissioner of Internal Revenue, 2003 WL 22839795, 2003 Tax Ct. Memo LEXIS 330 (U.S. Tax Ct. 2003)

[6] O.C.G.A. §§ 29-3-1 and 29-3-3.

possible that the attorney could face a malpractice claim by the minor many years later, once the minor reaches the age of majority. Finally, as discussed in the next section, the issue of payments to be made to third parties must be carefully evaluated to avoid future claims against both the client and the attorney.

3. Dealing with third parties (and their money)

Although attorneys have a duty to zealously represent their clients, the fact that attorneys receive proceeds that could potentially be the legal property of third parties necessitates taking those interests into account in many cases. Unfortunately, this can create great difficulties when clients are reluctant (or refuse) to permit payment to third parties who have a valid, or at least arguably valid, claim, and therefore these claims require special consideration. These issues typically arise when there is an enforceable claim against the settlement proceeds, whether resulting from a contractual, equitable, or statutory duty or undertaking. Such claims may include ERISA reimbursement claims, letters of protection/liens, attorneys' fees, and litigation loans. In some cases, claimed rights to payments may not be valid or enforceable, although it is sometimes difficult to make a definite determination.

Rule 1.15(I) of the Georgia Rules of Professional Conduct, the full text of which is contained, with its comments, in the appendix, requires attorneys to safeguard funds that may belong to clients and third parties, and provides that

attorneys may not disregard the third party's interest where the attorney is aware of the interest and the interest is based upon

1. A statutory lien;
2. A final judgment addressing disposition of those funds or property; or
3. A written agreement by the client or the attorney on behalf of the client guaranteeing payment out of those funds or property.

The Rule provides an exception, however: an attorney may disregard the third party's claimed interest if the attorney reasonably concludes that there is a valid defense to such lien, judgment, or agreement. Thus, the attorney is required to address a third-party claim only where it falls into one of these categories and is not subject to a valid defense. In discussing such matters with a client, it should be made clear that there may well be debts that the client owes that the attorney is not obligated to pay out of the settlement proceeds. For example, a client may be obligated to pay an outstanding medical bill, but, unless a valid medical lien has been filed and perfected,[7] or unless the client or attorney has signed a contract with the provider guaranteeing payment *out of the proceeds of the settlement*,[8] then the attorney has no ethical obligation to ensure that the provider is paid. The client's

[7] See O.C.G.A. § 44-14-470 et seq.

[8] It is important to note that the rule does not require the attorney to have signed the agreement; a client who signs a contract guaranteeing repayment out of settlement proceeds generally establishes a duty on the part of the attorney under Rule 1.15(I)(b) to properly handle the funds, even if the attorney never signed anything.

acknowledgement of the debt should be documented, however, to ensure that there is no misunderstanding as to who will pay the bill.[9]

As noted, it is not always clear whether certain claims fall under the provisions of Rule 1.15 such that the attorney's ethical obligation is created. For example, an apparently enforceable ERISA plan reimbursement claim could be argued to arise under a "written agreement," i.e., the health benefit plan terms, and thus be subject to the Rule. On the other hand, it could also be argued that the client never acquiesced to those terms if he or she never signed a contract, and thus the attorney is absolved of ethical duties regarding those funds. The answer to this *ethical* question is unclear, as is whether the attorney has any *legal* exposure to a claim by the ERISA plan, as discussed below. Attorneys may be on safer ground with respect to claims for reimbursement of Medical Payments or non-preempted ERISA or other health benefit reimbursement claims, such as state-law-governed health insurance policies where reimbursement is subject to Georgia's made-whole doctrine under O.C.G.A. § 33-24-56.1.[10]

The issue of whether an attorney may face legal exposure for failing to pay claims of third parties is distinct from this ethical duty. Fortunately, generally speaking, an attorney will not be obligated to pay a mere debt of a client, even if connected with the claim (such as a medical bill for which a statutory lien has not been filed, as discussed above), absent some agreement by client or attorney to pay.

[9] This is easily accomplished on the settlement and disbursement statement.
[10] The full text of this statute is provided in the appendix.

With respect to ERISA reimbursement claims, however, there is currently substantial uncertainty regarding whether attorneys may be liable for disbursing settlement funds without resolving the claim. [11] Extreme caution is urged in this area.

Unfortunately, it is sometimes impossible to reach a suitable settlement with respect to third-party interests, or the client may refuse to allow payment of those interests, regardless of any such agreement. This illustrates the benefit of obtaining prior approval by the client of settlement with the knowledge of the potential third-party claims. In situations where the client refuses to permit payment, the attorney may have little recourse except to file an interpleader action in order to have the court determine the ultimate disbursement.[12] Where a case remains in litigation, it may be advisable to seek the intervention of the court where the case is pending. While interpleader actions are somewhat uncommon in personal injury matters they are not unheard of, and, absent court direction, the attorney may face serious repercussions, whether legal, ethical, or both, by paying the proceeds either to the client or the third party at the objection of the other.

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[11] See, e.g., Longaberger Co. v. Kolt, 586 F.3d 459 (6th Cir. 2009).
[12] See, e.g., O.C.G.A. §§9-11-22, 9-11-118, 23-3-90.