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SETTLEMENTS & RELEASES

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OUTLINE

- I. The Release Agreement**
- II. Liens**
- III. Court Approval for Minors**
- IV. Court Costs**

I. THE RELEASE AGREEMENT

A. The Release

A few general suggestions to keep in mind when drafting a release are:

1. Specifically Identify All Parties.

Texas rejects the "unity of release" rule, whereby the release of one tortfeasor will serve to release all tortfeasors. In Texas, a release protects only the parties named or specifically identified. Thus, relying on broad, global language-releasing "all parties" is not sufficient. *Lloyd v. Ray*, 606 S.W.2d 545 (Tex. Civ. App.-- San Antonio 1980, writ ref'd n.r.e.). The release language should be broad enough to cover all potential parties, yet should, to the extent possible, specifically identify each particular person and entity meant to be covered by the release. The release should specifically state the name of the defendant, as well as the identity of any persons or entities associated with the defendant. If the defendant is a business entity, it is important to set out the correct corporate name, any d/b/a's, and the names of any related companies such as parent corporations, subsidiaries, successor corporations, etc. The names of all individual employees of the business who could face exposure for the incident in question should also be included.

2. Include Defense Attorneys and Insurers.

Specifically name the law firm for the defendant and, if applicable, the insurer. When naming the insurer, include "without limitation" language to include all insurers rather than just the primary carrier. Specifically name the excess carrier if the identity of the excess carrier is known.

3. Address all Wrongful Death Beneficiaries.

When settling a wrongful death case, be sure to get releases signed by all of the potential statutory beneficiaries, even if they were not all parties to the case. Wrongful death statutory beneficiaries include the surviving spouse, children and parents of the deceased. Tex. Civ. Prac. & Rem Code, §71.004.

II. LIENS

There are several different types of liens which can attach to settlement proceeds. Defense counsel and the claims representative should take steps to discover these liens and to be sure that they are satisfied in connection with the settlement. Most liens can be discovered by checking the applicable lien records, by asking the appropriate questions of the Plaintiffs in interrogatories, and during depositions and recorded statements, and by closely reviewing the injured party's medical records and bills.

A. Hospital Liens

Hospitals have a lien on settlement proceeds pursuant to Chapter 55 of the Texas Property Code. The hospital lien applies to settlement proceeds from causes of action by persons who receive hospital services for injuries caused by the negligence of another person. For the hospital lien to attach, the individual must be admitted to the hospital not later than 72 hours after the accident. The lien covers reasonable and regular charges incurred by the injured individual during the first 100 days of hospitalization. To establish the lien, the hospital must file written notice of the lien with the county clerk of the county in which the treatment was given, and the notice must be filed before money is paid to the claimant. The liens are indexed by the name of the injured person, so they can be easily discovered by calling the county clerk.

A release or settlement agreement is not valid unless the hospital's charges were paid in full before the release was signed or unless the hospital is a party to the release. Cases have held that insurance companies and defendants who pay the injured party remain responsible to the hospital for unpaid bills. *Baylor University Medical Center v. Borders*, 581 S.W.2d 733, 734 (Tex. Civ. App. -- Dallas 1979, writ ref'd n.r.e.); *Baylor University Medical Center v. Travelers Insurance Co.*, 587 S.W.2d 501 (Tex. Civ. App. -- Dallas 1979, writ ref'd n.r.e.).

B. Medicare Liens

In general, Medicare pays for medical expenses for three classes of individuals: (1) those age 65 or over who are eligible for retirement benefits under Social Security, (2) those under age 65 who are entitled to social security benefits because their spouse has died or because they are children who have had a parent die, and (3) those who have been medically determined to have end stage renal disease (kidney failure). 42 U.S.C. §1395(c)(1988). If an injured person falls in one of these categories, chances are good that Medicare will pay for at least a portion of the medical expenses.

If Medicare pays medical expenses for a personal injury claimant, that payment is subject to recovery. 42 U.S.C.A. §1395y(b)(C)(2)(A)(1992); 42 C.F.R. §§411.20, 411.23, 411.24, 411.26. The Medicare regulations characterize settlement or judgment amounts as "third party payments" made by "third party payers." 42 C.F.R. §411.21. If the claimant or the claimant's attorney receives a third party payment, the beneficiary must reimburse Medicare within 60 days from the date of payment. 42 C.F.R. §411.24(h). There is no notice provision. Claimants and their attorneys must therefore reimburse Medicare even in the absence of a written lien or actual notice.

Defendants and their insurers likewise must reimburse Medicare even in the absence of actual notice. The regulations provide that "in the case of liability insurance settlements ... if Medicare is not reimbursed as required by Paragraph (h) of this section, the third-party payer must reimburse Medicare even though it has already reimbursed the beneficiary or other party." The duty to reimburse Medicare when the defendant has already paid the plaintiff arises if the defendant makes its payments to the plaintiff when it is, or should be, aware that Medicare has made a conditional primary payment to pay the plaintiff's healthcare expenses. *42 C.F.R. §411.24(i)(2)*.

Not only do the Medicare regulations require a defendant, his insurer, and his attorney to be aware of the lien, the statute creates a private cause of action against any insurer liable to Medicare who refuses or otherwise fails to pay such expenses. This statute allows recovery by Medicare of double the disputed amount. *42 U.S.C.A. §1395y(b)(3)(A)(1992) (emphasis added); 42 CFR 411.24(c)(2)*.

C. Physician's Bills

Physicians cannot perfect liens as hospitals and the federal government can. Typically, a physician will obtain a "letter of protection" from a claimant or, most often, the claimant's attorney. The letter will state that the medical bills incurred will be satisfied from any settlement or judgment collected. A letter of protection is a binding agreement, and a claimant or claimant's attorney who is aware of a physician's claim is bound to satisfy the obligation. In fact, a lawyer is obligated by the Texas Disciplinary Rules of Professional Conduct to promptly notify physicians who may have an interest in any funds that the lawyer receives by virtue of settlement. *Texas Disciplinary Rules of Professional Conduct 1.14(b)*.

D. Worker's Compensation Liens

If the lawsuit you are defending arises out of an on-the-job injury, chances are good that the injured party was covered by worker's compensation insurance. Worker's compensation payments entitle the compensation carrier to a lien in any suit by the injured party against those allegedly responsible for causing the injuries. The compensation carrier does not have to formally intervene as a party in the suit to protect its lien rights. *Guillot v. Hix*, 838 S.W.2d 230, 235 (Tex. 1992).

E. Health Insurance Carriers

Many times, the injured party's expenses will be paid by health insurance. The health insurance carrier does not ordinarily have the ability to file a lien against the settlement proceeds, but will often have subrogation rights that will need to be addressed at the time of the settlement.

F. Other Liens

Other liens that may be applicable to settlement proceeds include liens arising under the Federal Medical Care Recovery Act, 42 U.S.C.A. §2651, *et. seq.*, and liens for state Medicaid funds arising under Texas Human Resources Code §32.033.

G. Release of Liens

When a significant lien is involved, it may be advisable to require the Plaintiff's attorney to have the lienholder execute a separate release, in a shorter form than would be signed by the Plaintiff.

III. COURT APPROVAL FOR MINORS

Minors under the age of 18 do not have the capacity to contract. As a result, a release agreement signed by a minor would be voidable by the minor once the minor reached the age of majority. In order to protect the defendant in a settlement involving a minor, defense counsel should obtain judicial approval of the settlement. Such judicial approval will then prevent the

minor from voiding the settlement agreement and bringing another suit against the defendant once the minor turns 18.

Judicial approval is acquired through a "friendly suit" when a claim involving a minor is settled prior to litigation. The plaintiff files a petition (which is sometimes actually prepared by the defense attorney), the defendant answers, the court appoints a guardian ad litem, and the court conducts a hearing in the "friendly" lawsuit. If the court approves the settlement, a judgment is then entered to conclude the case. If the case is already in litigation when the settlement with the minor is reached, the court simply appoints a guardian ad litem, proceeds to hear evidence regarding the settlement, then enters the judgment.

A. Applicable Rules of Civil Procedure

Texas Rule of Civil Procedure 44 provides that judgments entered by the court to approve of a settlement with a minor are binding on the minor. TRCP 173 sets forth the rules for the appointment of a guardian ad litem.

Texas Rule of Civil Procedure 44 states:

Minors, lunatics, idiots or persons non-compos mentis who have no legal guardian may sue and be represented by "next friend" under the following rules:

- (1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.
- (2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit.

Rule 173 of the Texas Rules of Civil Procedure states:

When a minor, lunatic, idiot or a non-compos mentis may be a defendant to a suit and has no guardian within this State, or where such person is a party to a suit either as plaintiff, defendant, or intervenor and is represented by a next friend or a guardian who appears to the court to have an interest adverse to such minor, lunatic, idiot or non compos mentis, the court shall appoint a guardian ad litem for such person and shall allow him a reasonable fee for his services to be taxed as a part of the costs.

B. Appointment of Guardian Ad Litem

Except in rare cases, a guardian ad litem is appointed when a settlement with a minor is involved. The guardian ad litem's role is to represent the minor and to advise the Court whether or not the settlement is a fair one to the minor. The ad litem's primary role is to protect the minor's interests when a conflict of interest is present between the minor and the guardian or next friend. This classically occurs when the guardian or next friend seeks to recover some of the same settlement proceeds that the minor is seeking to recover.

In a personal injury case, the parents (who typically act as the guardian/next friend) are allowed to recover for the loss of services of the child, the loss of earnings, and the medical expenses prior to the child reaching majority. Pattern jury charges regarding the damages recoverable by the minor child and by the parents can be found at P.J.C. 7.4 and P.J.C. 7.5. Basically, the child is allowed to recover for physical pain and mental anguish, disfigurement, and physical impairment. The child is also permitted to recover loss of earning capacity and medical expenses after the age of majority. The conflict of interest that most often arises is that the parents are seeking to recover their elements of damage out of the same settlement proceeds as the minor. The potential therefore exists for the parents to seek to recover more money for themselves than they should, thereby cutting into the money that should go to the minor.

1. Conflict of Interest Determination

When the court determines there is a conflict of interest between the next friend and the minor, the court must appoint a guardian. *Newman v. King*, 433 S.W.2d 420, 421-22 (Tex. 1968); *Texas Employers Ins. Corp. v. Keenom*, 716 S.W.2d 59, 67 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.). The court determines if there is a conflict of interest from the record and the evidence before it. *Texas Employers Ins. Corp. v. Keenom*, 716 S.W.2d 59 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Scucchi v. Woodruff*, 503 S.W.2d 356, 361 (Tex. Civ. App. -- Fort Worth 1973, no writ). The determination of the conflict of interest is entirely within the discretion of the court. *Keenom*, 716 S.W. 2d at 67; *Gibson v. Blanton*, 483 S.W.2d 372, 373 (Tex. Civ. App. -- Houston [1st Dist.] 1972, no writ). However, the court should appoint a guardian ad litem only when necessary because "[t]o do otherwise increases the cost of litigation and unduly burdens the trial process." *Saad v. National Child Care Center, Inc.*, 612 S.W.2d 660, 661 (Tex. Civ. App. -- Houston [14th Dist.] 1981, no writ).

2. **Example of Case Not Requiring Guardian Ad Litem**

In *Leigh v. Bishop*, 678 S.W.2d 572, 573 (Tex. Civ. App. -- Houston [14th Dist.] 1984, no writ), the trial court abused its discretion by appointing a guardian ad litem where a father, as next friend, told the trial judge that he had no interest in a \$10,000 settlement and wanted the entire amount to be deposited into the registry of the court for the benefit of his son.

C. **The Guardian Ad Litem's Fee**

1. **Entitlement to Fee.**

Rule 173 Specifically provides that a guardian ad litem should be allowed a reasonable fee for his or her services to be taxed as a part of the costs.

2. **Amount of Fee.**

The amount of the guardian ad litem fee is within the discretion of the trial court and will not be set aside unless a clear abuse of a discretion is apparent from the record. *Smith v. Smith*, 720 S.W.2d 586, 591 (Tex. App. -- Houston [1st Dist.] 1986, no writ); *Dawson v. Garcia*, 666 S.W.2d 254, 264 (Tex. App. -- Dallas 1984, no writ). The court may hear evidence in support of the guardian ad litem fee, but evidence is not required. *Alford v. Whaley*, 794 S.W.2d 920, 925 (Tex. App. -- Houston [1st Dist.] 1990, no writ); *Smith v. Smith*, 720 S.W.2d at 591. The factors used to determine the reasonableness of a guardian ad litem fee were set forth by the Supreme Court in *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793 (Tex. 1987). The factors listed included the difficulty and complexity of the case, the amount of time spent by the attorney, the benefit derived by the client, and the skill and experience reasonably needed to perform the service.

D. General Procedures

1. Selecting the Guardian ad Litem

Never suggest who the guardian ad litem should be. Defense counsel should play no role in the selection of the guardian ad litem, as doing so could lead to a later argument by the minor that the defendant paid an unreasonably low settlement amount and then colluded with a carefully chosen guardian ad litem to deceive the court into approving the settlement. It is best that the guardian ad litem be a completely unbiased attorney who is appointed independently by the court without the influence of any of the attorneys or parties involved in the case.

2. Multiple Children Require Multiple Ad Litem

It is best to have one guardian ad litem for every child. It is possible for one guardian ad litem to oversee multiple minors in rare cases, but this is seldom done because there is normally a conflict between the minors. Typically, the minors are making competing claims to a finite

amount of settlement funds. Each minor needs an independent ad litem to insure that the minor gets his or her fair share of the available money.

E. Prove-up Hearing

An outline for the evidence to be developed at the prove up hearing is attached as Exhibit "A". There is nothing magic about this list of questions, and all of them do not need to be asked in every case. However, the outline should provide a guide for the type of evidence that the defense attorney should be sure is in the record at the hearing. The hearing will usually go more smoothly if plaintiff's counsel will ask the questions of the plaintiffs, with defense counsel following behind to cover anything that was missed. The plaintiffs will be much more cooperative when their attorney is questioning them instead of the defense attorney.

IV. TAXABLE COURT COSTS

Something that should be covered in every settlement is how the taxable court costs are to be paid. Usually, this boils down to whether the parties will bear their own costs or whether the defendant is to pay all costs. A secondary issue that often develops is what expenses are considered to be taxable court costs.

A. Rules of Civil Procedure

The Rules of Civil Procedure that govern which party pays the court costs are:

1. "Rule 131 -- Successful Party to Recover -- The successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided."
2. "Rule 141 -- Court May Otherwise Adjudge Costs -- The court may, for good cause, to be stated on the record, adjudge the costs otherwise than as provided by law or these rules. "

As a result of these rules, the defendant ends up paying the court costs in many instances, especially when liability is fairly clear.

B. General rule - generally, expenses are not recoverable as taxable costs unless recovery for such items is expressly provided for by statute or is recoverable under equitable principles. *Phillips v. Wertz*, 579 S.W.2d 279, 280 (Tex. App. -- Dallas 1979, writ ref'd n.r.e.).

C. The following items are taxable:

1. **Court Reporter's Fees** - Deposition costs for the original deposition transcript are taxable. Please note that copies of deposition transcripts are not taxable. The original copies of depositions on written questions, a common vehicle for obtaining and proving up medical and employment records, are taxable. Civil Practice & Remedies Code §31.007 (b)(2); T.R.C.P. 206(1); *Wallace v. Briggs*, 348 S.W. 2d 523, 527 (Tex. 1961); *Shenandoah Assoc. v. J. & K. Properties*, 741 S.W.2d 470, 487 (Tex App. -- Dallas 1987, writ denied).
2. **Guardian ad litem's Fees** - Civil Practice and Remedies Code §31.007 (b)(3); T.R.C.P. 173.
3. **Master's Fees** - Civil Practice and Remedies Code §31.007 (b)(3).
4. **Interpreter's Fees** - Civil Practice and Remedies Code §31.007 (b)(3).
5. **Mediation Fees** - Fees of mediators, arbitrators and other third parties appointed by the Court to conduct ADR proceedings - Civil Practice and Remedies Code §154.054 (b)
6. **District Clerk's Fees** - Fees charged by the district clerk, such as filing fees and service fees - Civil Practice and Remedies Code §31.007 (b)(1). Government

Code §51.317 - 51.319 lists the items that the District Clerk shall tax as costs.

D. The following items are not taxable:

1. **Expert Witness Fees.** *Richards v. Mena*, 907 S. W .2d 566, 571 (Tex. App. -- Corpus Christi 1995, rehearing overruled); *King v. Acker*, 725 S.W.2d 750, 755 (Tex. App. -- Houston [1st Dist.] 1987, no writ); *Adams v. Stows*, 667 S.W.2d 798, 801 (Tex. App. -- Dallas 1983, no writ).
2. **Attorney's Fees.** *Equitable Trust Company v. Lyle*, 627 S.W.2d 824, 826 (Tex. App. -- San Antonio 1982, writ ref'd. n.r.e.); *New Amsterdam Casualty Company v. Texas Industries, Inc.*, 414 S.W.2d 914, 915 (Tex. 1967). It is well-settled law that attorney's fees are not recoverable unless provided by statute or by a contract between the parties.
3. **Traveling expenses.** *Brandtjen & Kluge v. Manney*, 238 S.W.2d 609, 612 (Tex. Civ. App. -- Fort Worth 1951, writ ref'd. n.r.e.).
4. **Loss of time by a litigant and his employees.** *Eberts v. Business People Personnel Services, Inc.*, 620 S.W.2d 861, 863 (Tex. Civ. App. -- Dallas 1981, no writ).
5. **Video Deposition Fees** - The cost of the videographer's services are not taxable. T.R.C.P. 202 (1)(d).
6. **Costs incurred by a Plaintiff prior to change of venue.** *Read v. Luttrell*, 217 S.W.2d 457, 459 (Tex. Civ. App. -- Fort Worth 1949, no writ).

7. **Other Items** - In *Shenandoah Associates v. J & K Properties*, 741 S.W.2d 470, 486-488 (Tex. App. -- Dallas 1987, writ denied), the following expenses of litigation were held to be not recoverable as costs of court:
- a. Delivery services, such as Federal Express;
 - b. Travel;
 - c. Long distance calls;
 - d. Bond premiums;
 - e. Postage;
 - f. Reproduction expense;
 - g. Binding of brief;
 - h. Transcripts of testimony elicited during trial;
 - i. Office air conditioning; and,
 - j. Secretarial overtime.

E. **Federal Court**

O'Connor's Federal Rules - Civil Trials has a good summary of the items that are taxable as court costs in Federal Court. The summary can be found in Chapter 9, under the portion dealing with the entry of judgment.