

## The Case for Outsourcing Lien Resolution

***Executive Summary:*** Managing a personal injury law firm involves lots of moving parts. Attorneys should spend as much time as possible on revenue generating activities (moving cases towards resolution). Administrative functions such as accounting, payroll, HR, and IT should be outsourced as they do not generate revenue for the firm. Neither does lien resolution.

Lien resolution is a necessary evil for a personal injury attorney. An issue in almost any case involving bodily injury, liens must be resolved before funds can be disbursed. Attorneys and staff spend too much time resolving liens; time better spent moving newer cases towards resolution. Instead of handling liens internally, personal injury law firms should work with an outside partner experienced in lien resolution to handle those issues on their behalf. Making the simple business decision to outsource lien resolution allows that attorney to: 1) build their reputation; 2) mitigate their risk; and 3) maximize their revenue. Like other administrative functions, law firms should outsource lien resolution to achieve optimal results.

### **Introduction.**

Congratulations! You have decided to open your own personal injury law firm representing injury victims. No matter if you are an experienced attorney leaving an established practice for a new challenge or a newly licensed attorney fresh off the bar exam, opening your own firm is an exciting time.

But there's so much to think about. Of course, you'll provide your clients with the best representation possible. You will wake up early and stay up late to ensure they receive the justice they deserve. But how will you handle the administrative functions that come with your title of "Founding Partner?" There's accounting, payroll, HR, and IT to start. All tasks critical for a new firm to get right in order to prosper. All tasks which do not generate any additional revenue for the firm.

There's another task that does not generate additional revenue for you: lien resolution. Lien resolution is a necessary evil for a personal injury attorney. You don't get paid more if you excel at lien resolution, but your reputation could suffer if you cannot procure quality results. Additionally, your time is much more valuable than to spend addressing lien resolution issues. Not to mention the potential exposure the firm and the attorney faces for failure to handle liens properly.

New personal injury firms should outsource lien resolution. Engaging others experienced in lien resolution to handle liens for your firm might be the best decision you make. By making this simple business decision, the new firm can focus squarely on revenue generating activities (*i.e.*, moving cases to settlement quicker). If more cases settle per year, the firm earns more in fees per year, accelerating firm growth.

This article discusses the following: 1) an overview of potential lien obligations facing a plaintiff personal injury lawyer; 2) how outsourcing lien resolution allows you to build your reputation; 3) how outsourcing lien resolution allows you to mitigate your risk; and 4) how outsourcing lien resolution allows you to maximize firm revenue. Savvy attorneys understand that outsourcing lien resolution helps ensure the financial success and longevity of the law firm.

### **What Possible Liens Exist?**

Personal injury attorneys encounter liens on almost every case involving bodily injury to the client. No two liens are exactly the same though. It all depends on what kind of health insurance coverage the client has or has had since the date of injury. Maybe it's health insurance through their (or their spouse's) employer. If so, then we may be contemplating a private or ERISA lien. If the client has served in the military, they may have coverage via the Veterans' Administration ("VA") or TriCare program. If the client is a member of an indigenous Indian nation, we could be talking about a lien with Indian Health Services. If the client is young or lacks financial means, then a Medicaid lien likely exists. If the client is elderly or disabled, then the "lien" is with Medicare.

The Medicare "lien" is in quotes for a reason. While commonly called a "lien", it really is not as no property rights attach with it. Instead, Medicare trumps all other liens and has a priority right of recovery against settlement proceeds under certain circumstances. That discussion is outside the scope of this article, and that's intentional.

Over the past ten (10) years, compliance with Medicare Secondary Payer ("MSP") provisions has grown exceedingly complex. *42 U.S.C. § 1395y(b)(2)*. Couple that in 2020 with enhanced enforcement by the federal government of the future medical provisions of the MSP Act. Today, it's a full-time job just to stay on top of how to address reimbursement obligations under the MSP Act. Standing alone, these developments justify established law firms to outsource lien resolution to a firm those practice focuses on those issues, let alone attorneys launching a brand-new law firm. They simply do not want the Medicare liability. They prefer passing the risk associated with Medicare compliance to a firm better equipped to address those issues.

### **Outsourcing Lien Resolution to Build Your Reputation.**

New firms rely on positive word of mouth referrals to build the practice. They encourage clients to spread the word about the attorney they hired to beat the corporate goliath into submission. "Tell all your friends about how I got justice for you and how I can get justice for them," may be an actual quote from a personal injury attorney to a client at their final meeting together.

While positive experiences and referrals from satisfied clients are proven ways to build a law practice, it may only take one bad experience to tear that down. One client whose liens were handled in a sub-standard manner. One client who recoups nothing from a settlement because all net proceeds must go to satisfy lien obligations. One client who receives word from Medicare post-settlement that Medicare will not pay for certain future medical benefits related to their settlement.

In the social media age, it only takes one dissatisfied client to share their tale of woe with others. Be it through Facebook, Linked In, Twitter, Instagram, Tic Tok, or good old-fashioned face-to-face conversation, they call out their former attorney because the lien issues ate up the entirety of their settlement proceeds. Or (worse), Medicare now refuses to pay for medical care on a go-forward basis because the attorney failed to disclose the need to address Medicare Set-Aside ("MSA") issues when settling the case.

Making the decision to outsource lien resolution removes these scenarios from the realm of possibility. For firms that outsource lien resolution, attorneys can always point to the lien resolution company as at-



fault, even though ethical rules indicate that the attorney maintains ultimate control of the issue on behalf of the client. *See*, for example, The American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 08-451 (August 5, 2008) and The New York County Lawyers' Association, Ethics Opinion 739 (July 10, 2008). Attorneys can still take all the credit for those cases where lien obligations are addressed compliantly and successfully. Working with the best lien resolution firms allows the attorney to exceed client expectations constantly. That's a good position to be in. That position allows the attorney to always be strengthening the firm's reputation.

### **Outsourcing Lien Resolution to Mitigate Risk.**

While building a reputation is important, you cannot build a reputation if you do not have a practice to build. That's what happens to some attorneys who address lien obligations incorrectly. Improper lien handling could result in big trouble for the attorney and firm.

Depending on the lien obligation, the attorney/firm may face exposure to the lienholder separate and apart from the client themselves. For example, under the MSP Act, Medicare has a right of recovery against any entity that makes or receives payment. *42 U.S.C. § 1395y(b)(2)(B)(ii)*. Plaintiff attorneys fall squarely under this provision as they both receive payments into their client trust account and then make payments to the client in the form of net settlement proceeds.

Failure to address reimbursement obligations properly under the MSP Act has meant big consequences for some plaintiff attorneys. Medicare can refer matters such as this to the United States Department of the Treasury ("USDOT") for collection. Medicare could also refer the alleged debt to the United States Department of Justice ("USDOJ"). Once with USDOJ, that attorney could be sued by the federal government for failure to comply with the MSP Act. Multiple examples of this exist just since 2018 alone. USDOJ has pursued plaintiff personal injury attorneys on big debts ([\\$250,000](#)) and small debts ([\\$6,604.59](#)) alike. No attorney wants to be in that position. For more information about the USDOJ litigation against plaintiff personal injury attorneys, please see our law firm's blog at [www.cattielaw.com](http://www.cattielaw.com).

Even if Medicare does not involve the USDOT or USDOJ, attorneys face dangers from the client themselves if the client determines the attorney handled the matter improperly. Often, this takes shape in one (1) of two (2) ways. First, the former client may receive word from Medicare that Medicare will not pay certain bills. When this happens, it means Medicare rejected the medical provider's reimbursement request. Medicare then informs the provider to collect payment from the patient (aka the former client) at one hundred (100) cents on the dollar. Nothing prevents that provider from collecting only the Medicare reimbursement rate; however, why would the provider seek that when it can now seek to collect on the entire bill? The former client, upon receiving word from the provider about this, will likely circle back to the attorney to ask questions. Why won't Medicare pay my bills? Do I really owe the provider this much? Why didn't you tell me this could happen?

In similar fashion, with respect to future medical bills, Medicare may pay the bills but later realize it paid in error. Someone else is responsible for the bills. Medicare then defines those payments to be "conditional payments" pursuant to the MSP Act. *42 U.S.C. § 1395y(b)(2)*. Medicare then has a right to seek repayment of those conditional payments from the party responsible for those bills. Often, that means the former client. Medicare will then send that former client a letter stating its right of recovery and its demand for repayment. At that point, the former client would likely revert back to the attorney.

Why did Medicare send me this letter? What does this mean? Do I have to pay this? Why didn't you tell me this could happen?

Depending on the conversation between the former client and the attorney at that point, several things could happen. The attorney could agree that they erred. They did not advise the former client that Medicare could potentially cut off benefits or pay bills and chase the former client for repayment. They may agree to accept responsibility and pay that difference in order to avoid more severe action. That more severe action may consist of: 1) a legal malpractice action filed by the former client against the attorney/firm; or 2) a phone call from the former client to the state bar to report the attorney/firm on potential ethical violations. Depending on the state, the former client could allege that the attorney/firm violated professional rules based on competence, diligence, client communication, and safekeeping client property. See [The American Bar Association's Model Rules of Professional Conduct](#).

Outsourcing lien resolution mitigates this risk. Having a firm whose practice focuses on lien resolution means a firm that is competent, knowledgeable, and compliant with all lien obligations. They know what issues to look out for and the way to avoid trouble before trouble appears. For new law firms, outsourcing lien resolution means maximizing your chances to avoid lien complications that could potentially derail the firm before the firm is established.

#### **Outsourcing Lien Resolution to Generate Revenue.**

While risk mitigation is a leading reason for law firms to outsource lien resolution, some savvy attorneys view outsourcing lien resolution as a means to maximize firm revenue. They know that each day only has twenty-four (24) hours. Time spent by attorneys and staff on lien resolution is time not being spent on revenue generating activities (like working active cases). Less time spent on lien resolution means more time to handle more cases, achieve more settlements, and make more in fees. Firms making the simple business decision to outsource lien resolution become more efficient and more profitable by focusing energy on maximizing revenue generating activities, leading to maximizing attorneys' fees earned.

Let's discuss this using the following assumptions:

- Law Firm ABC ("ABC") settles one hundred (100) cases per year with an average gross settlement value of \$50,000;
- ABC asks staff to handle all liens themselves and it does not outsource lien resolution;
- On average, liens take staff twenty (20) hours per case to complete (includes typical disputes for unrelatedness but does not include appeals/compromise/waiver requests); and
- Thus, staff spends 2000 hours per year handling lien resolution (100 cases per year \* 20 hours per case).

Imagine what staff could do with 2000 hours per year instead of lien resolution. More time to request medical records. More time reviewing medical records. More time building damage arguments. All of that means a demand for settlement can be pushed out the door faster. With that extra time, some firms will be able to build up and settle 1.5x more cases annually. Other firms will be able to build up and settle 2x more cases annually. The most efficient firms may be able to settle 3x or more cases annually with this newly created staff bandwidth.



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## A Higher Standard in MSP Compliance

Law Firm ABC does not outsource lien resolution. ABC represents Mrs. Jones for her car wreck. ABC has staff handling the leg work on liens associated with the case. Staff spends 20 hours handling lien issues in that case. At mediation, that case settles for \$50,000. Based on attorneys' fees of one-third (1/3), the firm is paid \$16,666.67 for services rendered. ABC does this for 100 clients in an average year.

Law Firm XYZ ("XYZ") outsources lien resolution. XYZ represents Mrs. Smith for her car wreck. Assume the exact same facts of the case. Since XYZ outsources lien resolution, the staff who would have been handling liens on that case now has 20 hours to spend on activities that generate revenue for XYZ. Over the course of a year, that amounts to 2000 additional hours as compared to ABC. Mrs. Smith's case settles for the same \$50,000 as Mrs. Jones' case. XYZ earns the same \$16,666.67 as ABC for its work.

On a single case, ABC and XYZ both make \$16,666.67. The big difference is that XYZ outsourced lien resolution while ABC did not. Instead of handling liens on Mrs. Smith's case, XYZ's staff has the time to work up newer cases, preparing those for settlement, while Mrs. Smith's case is reaching settlement. ABC has staff tied up on the Jones case that just settled for the same amount as the Smith case. Handling lien resolution internally does not result in higher settlements for the client and fees for the firm.

Think about an assembly line. The assembly line can only move as fast as the workers performing the work. When staff is being asked to request medical records and handle document review on top of addressing all liens, ABC's assembly line of cases moves at a certain speed. XYZ's assembly line moves faster since XYZ brings more workers to the line (by virtue of outsourcing lien resolution). XYZ's faster assembly line means more settlements for XYZ, which means more fees annually for XYZ.

Outsourcing lien resolution is not free though. There's a cost tied to that. Let's assume that cost is \$2,500 per case. Let's also assume that XYZ can settle 150 cases annually instead of 100 as a result of outsourcing lien resolution. While XYZ will incur an annual cost of \$375,000 to outsource lien resolution, its annual fees will total \$2,500,000 compared to ABC's annual fees of \$1,666,667. Subtracting the cost of lien resolution results in XYZ earning \$2,125,000 in net revenue compared to ABC's net revenue of \$1,666,667, a difference of \$458,333.

Now, imagine if XYZ could settle more than 150 cases annually. What if XYZ could settle 200 cases annually? What if XYZ is an established firm with hundreds of auto cases and could settle 300 cases annually? Attorneys that view law firms like a business can increase internal efficiencies to reach these figures. Done right, here's what could await those making the simple business decision to outsource lien resolution:

	ABC	XYZ (1.5x)	XYZ (2x)	XYZ (3x)
<b>Gross Settlement Value Per Case</b>	\$50,000	\$50,000	\$50,000	\$50,000
<b>Attorneys' Fees (1 Case)</b>	\$16,666.67	\$16,666.67	\$16,666.67	\$16,666.67
<b>Settled Cases/Year</b>	100	150	200	300
<b>Attorneys' Fees/Year</b>	\$1,666,667	\$2,500,000	\$3,333,333	\$5,000,000
<b>Less Lien Resolution Fees (\$2,500/Case)</b>	\$0	(\$375,000)	(\$500,000)	(\$750,000)
<b>Net Revenue</b>	\$1,666,667	\$2,125,000	\$2,833,333	\$4,250,000

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## **A Higher Standard in MSP Compliance**

For the firm that settles 150 cases (or more) as a result of outsourcing lien resolution, potential seven figure net revenue increases await. XYZ can use that newly found cash to reinvest in firm operations, plug into increased advertising, or the attorney can simply take it as a distribution to be used as a down payment for the new house they've been wanting. From the revenue generating perspective, the dollars and cents of outsourcing lien resolution just makes sense.

One last thing on the cost to outsource lien resolution. It's not necessarily the firm that incurs the cost. Under most circumstances, if the law firm has built into its retainer agreement provisions allowing the firm to hire experts on behalf of the client, the firm receives consent from the client via that retainer agreement to outsource lien resolution and pass the costs of outsourcing lien resolution to the client as a case expense. Thus, the law firm can recoup the cost of outsourcing lien resolution from the client out of the settlement proceeds. The client gets the benefit of a faster settlement; you get the benefit of more fees annually based on an internal process change to focus staff on revenue generating activities. In a way, perhaps outsourcing lien resolution can be "free" for the law firm.

### **Conclusion.**

Opening a new law firm can be overwhelming. Take it from me; I opened mine about four (4) years ago. While your focus is the practice of law and getting the best possible results for your clients, the business of law can interrupt that pursuit. You will minimize those disruptions by outsourcing your accounting, outsourcing your payroll, and outsourcing your IT needs. Add outsourcing lien resolution to that list.

The benefits of outsourcing lien resolution far outweigh the detriments. The ability to build a strong reputation, to mitigate your professional risk, and to maximum firm revenue far exceed the downside of paying a fee for lien resolution services (which could be passed along to the client in most circumstances anyway). Savvy attorneys understand that outsourcing lien resolution helps ensure the financial success and longevity of the law firm.