Treating Automobile Accident Victims

Information That All Health Care Providers Should Know About Personal

The Law Offices of Steven D. Weier, PS

WEIERLAW

Do the right thing, always

Overview

1. Automobile Accident Claims
- Dealing with an Adversarial System
- The Cold/Faceless/Brutal Truth
- Insurance Industry Trends

2. What to Know Before You Begin Treatment
- The Victim's Perspective vs. Reality
- Disputed Liability vs. Admitted Liability
- Police Reports and Property Damage
- First-Party Insurance (PIP vs. HI)
- Medicaid/Medicare/L&I
- Crime Victims Assistance

3. Preparing for Battle
- Battling First-Party Insurance
  - Reasonable and Necessary
  - Billing Rates
  - The Insurance-Medical-Exam or "IME"
- Battling Third-Party Insurance
  - Payment at Time of Resolution
  - Unpaid Medical Bills
- Battling Impoverished Patients
  - Promises of Payment: Liens and LOPs
  - The Patient's Right to Proceeds
  - Self-protection

4. Trial Preparation
- Know Your File
- Know Your Client's History
- Know Your Opponent's Position
- Learn to Be a Layman
- Always Provide Ammunition

5. The Economics of Litigation
- Sometimes It is Better to Settle
- Sometimes It is Better to Fight
- When to Cut Your Losses
- When to Count It As "Marketing Money"

Automobile Accident Claims

Dealing with an Adversarial System

Recognize that virtually **nobody** involved in the case has **your** interests in mind.

The patient is primarily interested in getting treatment and receiving compensation for his/her pain/suffering/inconvenience. Patients frequently feel that the "at-fault" party should deal with the bills. Patients frequently feel that it is not their "responsibility" to make sure the health care provider (**you**) gets paid.

The Patient's insurance company is primarily interested in avoiding payment on the claim. PIP adjusters will look for reasons to deny payment – they have policies dictating that minimal damage to a vehicle equates to "no mechanism for injury." Cost-saving measures are constantly being introduced to cut down on the amounts paid to providers. IMEs are requested for that reason.

The Third-Party (at fault) insurance company always looks for any excuse to deny liability in order to avoid payment. They also look for any justification to allocate a portion of the fault to the patient. Some insurance companies actually provide bonuses to adjusters for paying less than the true value of the claim.

The Cold/Faceless/Brutal Truth

You (the health care provider) have no advocate in the process. Insurance companies are armed with adjusters and attorneys. Patients (if they are smart) have attorney representation. But the health care provider stands alone. **You** must advocate for yourself by:

1. Evaluating the claim;
2. Educating the patient;
3. Planning for and justifying your patient's care; and
4. Protecting yourself.

How? You can get help from an attorney who works with you to help his client/your patient. You – the health care provider – have the opportunity to be proactive in the patient's care **and** their case.

Insurance Industry Trends

You should be aware of trends in claim management within the insurance industry. Some of these have been around for years, and some are emerging:

Insurance Companies believe:

Low impact = no mechanism for injury

No "objective findings" = no proof of injury requiring care

80% of the population has "bulging disks" without symptoms

You need to "objectify" your patient's injuries with understandable technology and documented research. Take Continuing Education courses on Biomechanical Engineering. Learn to address and document the "lighting-up" of symptomatic and asymptomatic pre-existing conditions.

You should also know that First-Party requests for IMEs are more-often-than-not simply an attempt to avoid paying you. IME is an "**insurance**" Medical Examination – not an "Independent" Medical Examination. **Always** consult a lawyer before allowing a patient to undergo an IME.

And you should also know that gaps in treatment kill the case! The longer the gap in treatment, the less likely a physician is able to relate the subsequent treatment to the initial traumatic event. According to the insurance industry, too many different possible incidents could have occurred during the gap in treatment to necessitate the need for service. Calling a patient and noting the phone consultation in the notes is a good way to "bridge the gap" for patients.

What To Know Before You Begin

The Victim's Perspective vs. Reality

Clients **never** believe they are at fault. They frequently tell a health care provider that the other party caused the accident and admitted their fault at the scene. Over 50% of the time, the other driver changes their mind and denies liability after they talk to their insurance company. That is why it is **very** important to understand the dynamics of the accident. If the patient has an attorney – follow up on the status of the liability investigation. Has the opposing side acquiesced? If not, beware! Your ability to get paid often hinges on the liability determination. Get a copy of the police report if you can, and ask an attorney how to interpret it.

Patients always describe an automobile accident as a "big impact." It always feels like a severe accident to a patient – never as a little "bump." But beware! Low vehicle damage is considered indicative of the severity of the impact. Investigate into the **evidence** of the impact. Ask for photos and damage repair estimates.

Disputed Liability vs. Admitted Liability

Whenever there is **any** dispute over the liability for the accident – **beware**! If there is PIP coverage, you may be safe because PIP pays regardless of liability. But if your patient is without insurance, you may get hung out to dry on your bills. Patients rarely pay health care bills if they truly (even if erroneously) feel that someone else is responsible.

Keep in mind that, even if liability is clear, many automobile insurance policies are capped at $25,000. That means your patient may only be entitled to $25,000 in insurance proceeds... after 1/3 attorney fees, + costs ($8,333.33), and any hospital or ambulance bills, there may be very little left to pay you or your patient. **Be aware of the policy limits** before engaging in lengthy and expensive treatment of the patient.Police Reports and Property Damage

Get copies of the police report, vehicle photos and property damage estimates. The opposing side's expert medical providers review them, why shouldn't you? **You** should have everything the defense expert is going to have – otherwise you are at a disadvantage. A jury is more likely to believe the expert who has looked at everything available, than one who has only seen the patient.

First-Party Insurance (PIP vs. HI)

Find out what insurance your patient has **before** continuing with frequent or expensive treatment. If the patient went to the ER in an ambulance, a large portion of the PIP policy limit may have already been spent! A simple ER visit with x-rays and orthopedic evaluation can easily cost $3,000. A MRI can cost $2,000 and a CAT scan $4,000!

If the patient indicates he/she does **not** have PIP coverage, an attorney should be sought. In Washington State – all insured drivers automatically have PIP coverage **unless** the insured signs a waiver rejecting PIP coverage. But when pressed, if an insurance carrier cannot produce a copy of the signed PIP coverage waiver, then the insurance carrier **must** provide PIP coverage.

Health insurance companies frequently will not pay medical bills related to an accident if they believe there is auto insurance coverage. **However**, if there is no PIP coverage or PIP benefits are exhausted, then the health insurance carrier should cover contractual health care expenses.

If your patient has health insurance, be aware that you only have twelve months from the date of treatment to submit bills to the insurance company for treatment. If insurance is available, it is always wiser to bill the insurance than to wait for the case to settle in order to avoid contractual write-offs.

Medicaid/Medicare/L&I

Medicaid is State assisted health insurance. **Medicare** is Federally assisted health insurance. L&I is the State Agency that administers Workers' Compensation benefits and ***Crime Victims Assistance*** payments.

These are very complicated programs. The following are a few **very important** provisions that you need to be aware of:

If a patient is eligible and you accept Medicaid or Medicare insurance, if you refuse to bill the insurance, you may be barred from billing the patient. That means waiting until the case settles to get paid in Medicaid and Medicare cases may not work. You may be limited collecting only the amount available through the settlement, but you may not pursue the patient for additional unpaid balances.

Medicare will require a **Medicare Set Aside (MSA)** of funds if the *provider's records* indicate or imply that the patient's condition may require future care. That means, if your records indicate that the patient "may experience future residual symptoms" or that the patient "would benefit from future care or adjustments", then Medicare can require that the **entirety** of the patient's personal injury settlement be set aside for that *possible* future care. If your client is 64 or older - or on Medicare - **consult a lawyer** regarding these issues!

If the at-fault driver was convicted of a DUI, your patient may be entitled to Crime Victims Assistance payments. Be aware that if you are eligible as a provider to accept payments from L&I, you may be **obligated** to bill Crime Victims for the treatment of your patient – and if you fail or refuse to do so – you will be **precluded** from billing the patient (or lawyer) directly for any unpaid balances. **You cannot bill a victim** (or his injury case) for treatment as a result of the crime. You may only bill and collect from the 1st party insurance company and Crime Victims Assistance. You may not collect co-pays or patient responsibility payments from a crime victim.

Preparing For Battle

BATTLING FIRST-PARTY INSURANCE

Reasonable and Necessary: Under the insurance contract, the insurance company reserves the right to determine if the treatment you are providing is Reasonable, Necessary and Related to the accident. You should be prepared to support your position that your services are reasonable under the circumstances (modalities frequently prescribed for the injuries suffered), necessary (benefitting the patient by reducing their symptoms or improving their condition), and that the injuries you are treating were actually *caused* by the accident (carefully written analysis of the mechanism of the traumatic event as having caused the injury).

Billing rates: Insurance companies are relying more and more on outside billing consultants to evaluate the billing rates in the region. They **always** say you are billing higher than everyone else. Be familiar with the rates of others in your area – share that information between clinics and stay competitive.

The Insurance-Medical-Exam or "IME": It is not an "independent" medical exam – the IME doctor is paid to evaluate a patient for the insurance company. PIP IME doctors routinely opine that treatment is not reasonable, necessary or related in order to support the insurance company's desire to minimize medical payments. Think of it this way – if the IME doctors routinely opine that treatment is required (costing the insurance company more money), how long will it take for the insurance company to stop utilizing that particular IME doctor? Insurance companies utilize doctors and panels that share the insurance company's bias.

Moreover, if the IME doctor's report undermines your treatment protocol, or damages the causal link between the traumatic event and the injury being treated, the at-fault insurance company will try to get that report and use it against you and your patient!

BATTLING THIRD-PARTY INSURANCE

Payment at time of resolution: If there is no First-party insurance, be aware that Third-Party insurers only make 1 payment for bodily injury claims at the **end** of the process. That means you will be waiting until the patient is released from care before they even begin to consider your bills.

Unpaid medical bills: Sending patients to collections when the insurance company refuses to pay alienates your patients, damages their credit, and reduces the chance of referrals. Consider putting your patients on a payment plan. It keeps them aware of the cost of care, and puts you in a better position if the case does not settle. Charging interest on the account is legal, but beware that interest charges are not a recoverable cost if the case proceeds to trial. Strategically, accruing interest on an account and then **writing it off** at the end of the claim makes a great impression on the patient. You then look like the compassionate physician that you are – interested in them, not just the financing.

BATTLING IMPOVERISHED PATIENTS

Promises of payment: Liens and LOPs: Liens properly filed with the County and timely provided to the insurance companies and attorneys increase the likelihood of payment upon settlement. Beware that filing a lien on a patient effects the patient's credit rating and ability to refinance homes, etc. LOPs (Letter Of Protection) are a good alternative.

The patient's right to demand proceeds: A properly filed Lien assures payment out of settlement proceeds. However, if a patient instructs his/her attorney to pay all the settlement proceeds directly to the patient, the attorney **must** comply.

Self-protection: The best way to protect yourself from a client taking the money and refusing to pay your bill is by working with the attorney and the patient, using LOPs signed by the patient, and – if necessary – filing a Lien. Liens are valid for 12 months, and must be refiled to continue in effect.

Trial Preparation

If negotiations have broken down, the Statute of Limitations is looming or the liability issue simply cannot be resolved, the case may proceed to litigation. Here are some suggestions that will help you and your patient to progress to the best possible outcome.

Know your file: Review your client's chart and bills. Be familiar with the facts of the accident, the time-frame for treatment, and the reason for the continuation of care. If there are holes in your chart, be prepared to face them head on. Talk to the attorney about the case to get a sense of what the strengths and weaknesses are of your patient's file.

Know your client's history: Be aware of pre-existing conditions – symptomatic and asymptomatic. Understand that simple things like smoking, asthma, diabetes, or other chronic conditions affect a person's healing rate and prognosis. It is well known medically that depression adversely affects the speed at which a body recovers. Use the client's history to explain and justify treatment protocols and treatment length beyond the "textbook" treatment plans.

Know your opponent's position: You should be aware of the other side's position – are they claiming that a low impact could not produce an injury? If so, brush up on the latest research regarding that issue. What does your patient's attorney expect of the opposing side? Is their expert a chiropractor, or an orthopedic? Find ways to agree with portions of the insurance expert's opinions, and disagree with others. For example, if the opposing expert has prepared a report, get a copy from the attorney. You can usually commend the insurance expert for preparing a complete medical history, but strongly disagree that your records fail to show any objective findings of injuries.

Ask for a copy of your patient's deposition transcript. The defense expert reads the deposition transcripts for descriptions of the accident and symptoms – why shouldn't you?

Learn to be a layman: "Subluxations" or "segmental dysfunction" sounds good to a group of doctors – but those terms will be lost on a jury. Learn to reduce your explanations of conditions to simple terms and analogies. Explain that "subluxations" are a technical term that means the bones are mildly displaced, or out of their proper alignment. Use the big words to show the jury you know what you are talking about – then use simple explanations to show them the underlying concepts for those big words. If you assume the role of an "educator" for the jury, the jurors become more receptive of your testimony.

Always provide ammunition: You can help your patient and his/her attorney by standing back and looking at the big picture of your patient's injuries and care. If the opposing side attacks the results of your orthopedic testing as "not objective" show the jury that one test alone may be questionable, but when you have performed the same test numerous times with consistent results, they become more and more objective. You can also demonstrate that any singular test may have a subjective component, but complimenting tests, when taken as a whole, tend to "objectify" the findings. For example, while the positive finding from a palpation alone may be evidence of an injury, when it is accompanied by a reduction in range of motion corresponding to the same area, it increases the objectivity of the findings. Two related findings improve the believability of the tests.

A good example is sEMG testing which has been attacked by insurance defense firms as unreliable – too prone to environmental factors and user bias. However, when sEMG results are consistently showing tension at certain levels of the spine, it becomes more reliable and credible to the jury because it is improbable to believe that either the patient or the provider could manipulate the results of a sEMG so precisely over a period of time.

THE ECONOMICS OF LITIGATION

Sometimes it's better to settle: Lawsuits are expensive and risky. Patients and providers often do not realize that, if the patient loses in trial, he/she may be responsible for the **opposing side's legal costs** to defend the case. The patient may also owe his/her own attorney for case costs advanced (trial costs typically range from $3,000-$6,000 for small cases). Finally, if there are unpaid medical bills, the patient may still owe his/her providers for services.

In addition, the cost of bringing a health care provider to trial to testify is very high. The provider is losing business by having to testify, and if the provider charges a high rate to offset the loss in business, he/she alienates the jury and looks like a hired gun.

The decision to settle must be an economic choice, as opposed to a choice based upon principal or emotion. A settlement with a guaranteed payment can be distributed in a predetermined allocation between the attorney, the patient and if necessary, the medical provider. The certainty involved with a settlement often outweighs the risk and uncertainty of the outcome of a trial.

As the economy gets tougher, jury verdicts are going down. Juries frequently are unsympathetic to a patient who was rear-ended and suffered a sore neck and back, but was able to continue working. More and more, juries are awarding the cost of medical treatment – <u>but no pain and suffering</u>. This outcome is intended by juries to send the message that people should not be benefitted by pursuing accident claims. Times are tough... according to some jurors, "we need to get tough and quit expecting others to pay our way."

Finally, Washington State jurors are becoming more and more DC resistant. Recent polls of jurors after the verdict has demonstrated that the general public believes chiropractic care alone is unwarranted treatment. However, chiropractic care supported by the opinion of an MD is an acceptable treatment regimen. That means that providers should seek cross disciplinary care plans.

Sometimes it's better to fight: If we don't fight and go to trial, the big insurance companies win. They force people to accept bad settlements to avoid the cost and inconvenience of a lawsuit. Insurance companies will make the process so distasteful, so difficult and uncomfortable that people will avoid making an insurance claim next time. Sometimes we need to fight to show the insurance companies that we will continue to fight for our clients and patients; that we are willing to help our clients/patients at a reduced fee... both the attorneys and the providers. Sharing some of the cost and risk with our clients/patients creates good relationships with our community. When we help others at a cost to us, the result is usually positive. What goes around comes around.

When to cut your losses: Sometimes the economics of a case are such that we all need to walk away before it costs everyone too much. Sometimes it is better to let the insurance company win a small battle in order that we can continue to fight the war. Have a heart to heart with your patient and his/her attorney. Get the emotional aspect of the case out of the picture and run the numbers. Sometimes it is just better to do something as opposed to doing nothing.

When to count it as "marketing money": Occasionally, treating a patient pro bono (without being paid) is the smart way to go. Pick your pro bono cases and make an emotional and psychological commitment to take care of them purposefully – as opposed to providing care for free inadvertently. Let them know that you are doing it out of the goodness of your heart in hopes that they will appreciate it and return the favor someday in the form of a referral.

Still have questions? Please feel free to give us a call. (253) 931-0332

NOTES:

NOTES:

TUKWILA
Weier Building
331 Andover Park East
Tukwila, WA 98188

PHONE (253)-931-0332
FAX (253)-735-2845

www.weierlaw.com