

Be Mindful of Overly Broad Waivers in General Releases

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In nearly all of our recently-settled medical malpractice cases, counsel for the defense has proposed exceedingly broad release language following the conclusion of otherwise successful mediations. Those excessively broad release provisions typically assume one (or both) of two forms: first, by executing the release, the plaintiff waives any and all potential claims against the defendant(s) through the date of the release, including claims entirely unrelated to the lawsuit; and second, by executing the release, the plaintiff waives any and all claims that could ever be brought against the defendant(s) in perpetuity, again including claims entirely unrelated to the lawsuit.

While it can certainly be appealing to close a case and obtain the settlement funds which may alter the course and quality of your clients' lives, it is our view that acquiescing to such broad release language, and recommending that clients sign such releases, is unjust to the client and exposes the consenting attorney to potential claims of legal malpractice. Consider, as an example, that a client agrees to a settlement with a defendant-hospital in Case A, and signs a release waiving any and all current and future claims against that hospital; then the client suffers a subsequent and distinct injury as a result of unrelated but negligent care rendered by that same hospital. The client's execution of the release in Case A would arguably preclude the assertion of any claim against the defendant-hospital in Case B, even though the claims in case B were unrelated.

More subtly, but no less problematically, is the scenario in which the client agrees to a settlement with a defendant-hospital in Case A, and signs a release waiving any and all potential claims against the hospital through the date of the release's execution; then, the client later learns that, before the date of the release's execution, the defendant-hospital had actually failed to timely diagnose a completely unrelated condition, causing significant injury. The client's execution of the release in Case A would, again, arguably preclude her from pursuing any claim against the hospital in Case B, even though the claims in case B were unrelated.

In order to protect the client's interests, and also to avoid any potential claim of legal malpractice, we refuse to permit our clients to sign these general releases, and insist that the waiver language be limited to claims arising out of the medical malpractice incident at issue. We have been able to successfully resolve these release disputes by conveying that: (1) the terms of settlement, and primarily the amount of settlement, were dictated by the claims alleged in the complaint and at issue in the case; invariably, a desire to settle "any and all unrelated claims" is never raised at mediation by the defense, and is therefore

never a consideration during the course of material settlement discussions; and (2) allowing our clients to waive their rights to unrelated claims leaves us exposed to a malpractice action, no matter how unlikely.

To avoid these kinds of release disputes from becoming an insurmountable hurdle after the conclusion of an otherwise effective mediation, we recommend the following:

- (1) Submit a copy of your desired release language to the mediator before the mediation, and address the terms of the release during mediation with direct assistance from the mediator;
- (2) If the client insists on signing the release in order to avoid an extended continuation of the release negotiations, explain to the client in detail, both verbally and in writing, the breadth of the release's intended scope, and provide a concrete example of what the client could be giving up by executing the release; and/or
- (3) Demand that the insurance carrier pay a premium for a broader release, as it was not part of the anticipated consideration for the settlement terms agreed to at mediation. It is critical to consider, though, that pursuing this type of additional payment could trigger otherwise avoidable tax obligations: at least one court has found that, if a settlement is awarded for anything other than compensation for personal injuries, then it constitutes taxable income by the IRS.ⁱ Thus, should you take this route, be sure to advise your client about the potential tax consequences of the supplementary compensation.

Obtaining a settlement for your client is a gratifying and rewarding experience, and no attorney wants a drawn-out negotiation over release terms to unnecessarily delay that recovery. But it is important to scrutinize the release language. It is never safe to “assume” that your client possesses no unknown, unrelated, yet otherwise actionable claims – so protect the long-term interests of your clients, shield yourself from a future claim for legal malpractice, and decline those overly broad release terms.

ⁱSee Amos v. Commissioner of Internal Revenue, T.C. Memo 2003-329 (U.S. Tax Ct. 2003).