

**P.I. AND THE GENERAL PRACTITIONER BY KEITH A.
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(Motor Vehicle Accidents)**

I. Initial Contact

A. Initial phone call from potential client; Appointment later - tell client to preserve evidence:

1. Visible Injuries
2. Property Damage
3. Clothing, shoes, etc.
4. Don't talk with anyone about accident or injuries
5. Don't sign anything; e.g., medical authorizations, etc.
6. Use health insurance for payments of medical expenses and do not provide any auto insurance information to providers.
7. When appropriate, have accident reconstructed quickly

II. Initial Interview

Review all insurance information; have clients bring copies of all their own auto and health insurance policies or cards. Remember Uninsured Motorist Coverage UM, and Underinsured Motorist Coverage (UIM) and Medical Payments Coverage “med pay” are portable coverages that generally travel with family members of the household. With regard to all of those coverages, you may be able to choose the best coverage. Med pay, UM and UIM also flow from the vehicle that one is an occupant.

1. UM/UIM (A.R.S. §20-259.01 *et seq.*)
2. Cancellation (A.R.S. §20-1632.01)
3. Excess vs. primary. (A.R.S. §28-4010)
4. Mandatory Insurance. (A.R.S. §28-4009)

UM and UIM are optional, but option must be provided in writing (see #1 above) and per Giley v. Liberty Mutual, 168 Ariz. 306, 812 P.2d 1124 (App 1991), must be explained to or fully understood by insured. UM has subrogation rights, UIM does not. Release of tortfeasor okay with UIM as long as the release is for limits. Anything less creates offset argument; and has double impact on recovery. Release of tortfeasor will jeopardize UM coverage unless carrier consents. See also County Mutual Insurance Co., v. Fonk, 198 Ariz. 167, 7 P.3d 973 (2000) which allows injured insured to seek UIM benefits for her damages she claims exceed the full amount of the at-fault policy even when the she has settled the at-fault claim for less

than the total liability limits.

You need to obtain client's S.S.N, marital status and D.O.B and include that in your letter of representation along with a complete list of all injuries.

You need to have clients sign a written contingency fee agreement, employer release and medical releases. (Medicare and IHS have their own so have them handy)

If you don't take case, follow up; CYA letter; statute of limitations, etc.

III. Medical Expenses

A. Medical Payments

First choice will usually be Arizona Health Care Cost Containment System (AHCCCS) or Medicaid or private health insurance plan as will be explained in B. However, Med pay is an excellent help to any case. Reason: no subrogation rights, no repayment requirement up to \$5,000.00 per A.R.S. §20-259.01(J) and Allstate v. Druke, 118 Ariz. 301, 576 P.2d 489 (1978). If either party (or vehicle owner) is from another state, consider PIP/no-fault type coverage. Again, under Arizona law, there is no reimbursement even though the coverage itself may provide for it. (if PIP, med pay and liability from same carrier, possible offset if less than limits case)

B. Health insurance

Note: If the health insurance plan is a private plan, meaning that the individual pays premiums and the insurance company is not acting as a "third party administrator" (TPA) then there is probably no subrogation rights regardless of contract provisions. United Food, etc. v. Pacyga, 801 F.2d 1157 (9th Cir.1986); Piano v. Hunter, 173 Ariz. 172, 840 P.2d 1037 (Ct.App. 1992).

If the health insurance it is an employer-provided health plan, it may be protected by Employee Retirement Income Security Act (ERISA) 29 U.S.C. §§1001 to 1461 which provides for reimbursement based upon plan terms. This is federal legislation; therefore, it supersedes Arizona law with regard to no subrogation rights. Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). Ask for certification/verification of ERISA qualifications; consider self-funded versus insurance funded.
NOTE: Watch what you and client sign; can restore subrogation interest.

Others health insurance that has recovery rights:

1. AHCCCS or Medicaid (Sources: A.R.S. §12-961 to 12-964, A.R.S. §36-2915, *et seq.* and 42 U.S.C. 1396a(a)(25)(A) and (B).
2. Medicare parts A and B. (Source 42 U.S.C. §1395y(b)(2)(B)(ii)-(iv) and 42 C.F.R. §411.24.
3. Medicare Advantage Plans “MAP” parts C and D. (This is in flux as a result of ongoing tension in two Federal Circuit courts as to whether MAP is treated like Medicare or are treated like an ERISA plan.)
4. Workers Compensation. (Source A.R.S. §23-1023.)
5. Medical Provider liens per A.R.S. §33-931, *et seq.* (Does not attach to UM or UIM and arguably med-pay as they are 1st party claims and A.R.S. §33-931(A) only authorizes third-party personal injury claims)(No excess or “balance bill” A.R.S. §20-1072)(Applies only to “customary charges”)(Must be perfected see A.R.S. §33-932(A), (C) and (D) for timely perfecting different types of healthcare providers.)

Must check county recorder's office for all PI cases. All liens are considered to be actual notice to both the insurance company and more importantly the lawyer. Disbursements in ignorance of a lien will result in liability. Watch for timeliness of liens. Generally, 30 days after “any services” for an ambulance or other healthcare provider and 30 days after “discharge” from a hospital but if “accessible” i.e. on the internet at least 30 days or more before the “settlement is agreed to or judgment is paid” still enforceable. Statutory requirements for releasing liens and damages if they are not properly released. If client is AHCCCS-eligible, then normal collection efforts are prohibited. A.R.S. §36-2948.

Remedy for health care provider is lien.

AHCCCS and other public agencies with liens must by law consider compromise when appropriate; i.e., \$100,000 injury, \$15,000 limits. Client is receiving 15% of value of case. Argue that AHCCCS should receive 15% of lien. Plan on extreme delays in negotiating with AHCCCS. Get limits money put into trust and get interest running.

Notice of settlement letter may stop further lien amendments. The statute requires that liens be filed in the county where the injury occurred which may not always be the county where the major medical care is provided.

6. Attorney liens to providers (for records or continued treatment)
 - a. Ethical considerations:
 - client consent
 - trust account monies and disbursements
 - b. Practical considerations:

- Compromise?
- Priority?
- Relationship with doctor in future

7. Be prepared for request re: compromise attorney's fee

IV. Preservation of Evidence

- Cannot have too many photos!!! (Unless you have a bad case)

A. Photographs

1. All visible signs of injuries, including:

Pictures of any injury attributable to the wearing of a restraint - have someone else look at plaintiff's body, specifically the back area to make sure no bruises are overlooked.

2. All visible signs of property damage

a. Photos of interior of car, be sure to check the stability of the seat back and its adjustment. Perhaps use a yardstick to measure how far seat is from various objects or parts of the interior of vehicle. Critical if seat belt use an issue; also head rest location.

b. Photos of undercarriage - suggest considering arrangements to have the vehicle put on a hoist or otherwise lifted up so you can actually walk underneath it.

3. Obvious and not so obvious damage

a. under the hood, undercarriage of vehicle, frame bumper, shocks, springs, support arms, bolts that are bent, metal that has moved;

b. Size references; coins, rulers, yardsticks pylons, cones, etc. at identifiable distances

B. Accident Scene:

Demonstrative photos of scene, use reference points consider different lighting approaches.

C. Interior of vehicle re: injuries and seatbelt defense

D. Newspaper Ad re: witnesses and video; newspaper photos; canvas accident area (video of aftermath)

V. Management of Case:

- A. Get interview early from all witnesses. If favorable, statementize. If unfavorable, may still want to statementize to limit scope of harm
- B. Appropriate and timely doctor involvement; referrals to specialists by doctors. What client says to medical personnel goes into records. Stay current with medical records.
- C. Diaries from clients - (weekly review - keeps you current and helps client later)
- D. Watch out for doctor-shopping. If done by doctor referrals, it's okay. If done by client, can look bad. If done by lawyer, is absolutely bad.*
*(Exception: bad doctor)
- E. Obtain medical releases from client and assemble all medical records for the 10-year period prior to the accident. If wage claim, all wage information and employer records for 10 years prior to the accident. Obtain income tax records for last 5 years. Defendant will, so you need to see them.
It is wise to look at these records before you submit a demand letter because there maybe things in there which can hurt you if you aren't aware of them when you put your demand letter together; i.e., previous back injuries; failure to file tax returns. Remember your option to abandon portion of claim.
- F. Demand letters - if you are a general practitioner and do not have an established reputation in the adjusting community, this is your opportunity to show the insurance company that you are ready to try your case. DO NOT just include medical records -- include good photographic workup, good analysis of the law, references to appropriate jury instructions that will help your case and perhaps are unique to it. Use Trial Reporter excerpts, Jury Verdict Research, and other forms of research where helpful to your case. Consider video presentations, particularly if your client makes a strong appearance as a witness and you have good emotional impacts in your case. If really great client, invite adjuster to meet with you both. **NOTE:** the above is only appropriate in the right case where you believe that there is an opportunity to settle your case. Remember that everything you've put in your brochure, including your video, can come back to haunt you. If you know the case will not settle for what you want, then it may be more prudent to do a very simple, to-the-point kind of brochure and move on with litigation. Always be realistic re: value of case and do not abuse "bad faith" threat!

G. Time for claims - initially treat all claims as if they must be filed within 5 months of date of accident.

1. REASON: several liability, municipal and/or county/state liability (A.R.S. §12-821.01) and workman's compensation (A.R.S. §23-1023).
2. Workman's compensation issues - if in doubt, submit. REMEMBER: Automatic assignment of claim to carrier after one year per A.R.S. §23-1023.
3. If no governmental liability, no workman's comp liability and no specific statutory cause of action; i.e., dog bites (1 year as liability based upon statute etc. A.R.S. §12-541), then normally two-year statute A.R.S. §12-542. When in doubt, file within 5 months. Let defendants, pursuant to the rule designate non-parties at fault and still have sufficient time to serve notices and/or to amend pleadings.

H. Additional Concerns

1. Conflicts
 - a. Passenger/driver
 - b. Parent/children
 - c. Seatbelt - availability of
 - d. Potential defendants slightly at fault
2. Lawyer/Client Integrity
 - a. If your first impression of client is unfavorable, this may be a case you don't want to be involved in. Remember, you are much like the juror with regard to your first impression. Maintain your integrity; your reputation develops quickly with adjusters and the defense bar.
 - b. In no other area of the law is client honesty with the lawyer so critical. Virtually every aspect of your client's background can be discovered. Majority of your damage case is based on subjective complaints from client -- therefore, their integrity/credibility is constantly tested by defense.

Much background information, though discoverable, is not admissible, **EXCEPT** for impeachment!!! If the client is totally honest with the lawyer, he will be protected from abuses.
 - c. In typical soft tissue case, the plaintiff places in issue (See ARAJI (Civil) Personal Injury #1:

1. Physical injury
2. Emotional distress
3. Quality of life
4. Loss of consortium
5. Loss of earnings

THEREFORE, defense can inquire about:

1. Previous medical treatment
2. Previous psychological counseling
3. Things from past that relate to quality of life
4. Marital problems - past and current
5. Previous employment history, problems, job applications, etc.

3. Lawyer Involvement and Investigation

- a. Always go to scene --
 - with client if possible
 - with investigator preferably
 - Get police report and the body cam!
- b. Photos, measurements, etc. --
 - potential witnesses on foundation
 - keep out of photo itself
- c. Witness interviews (critical since limit on depositions)
 - if lawyer involved, how do you prove?
 - Watch out for that innocent phone call from witness --
 - what good is your memo to file or your letter to witness summarizing phone call?
- d. Discussions by Lawyer --
 - with non-clients (no privilege)
 - Non-employees (no work product)
 - with client in presence of:
 - boyfriend
 - relative
 - witnesses

I. Litigation

1. Discovery

A.R.Civ.P. 26.1 the disclosure requirements; sanctions are serious.
(Exclusion mandatory for failure to disclose without good cause).
Probably still want comprehensive discovery package available and almost

always want deposition of defendant. My experience is more investigation and costs incurred prior to filing suit; cases are almost ready for trial when suit is filed.

2. Arbitration - good recovery; faster; inexpensive; net-net.

If the case is within arbitration limits (A.R.S. §12-133, \$65,000.00, Coconino \$65,000, Maricopa \$50,000, Yavapai \$65,000, Mohave \$50,000, Navajo \$65,000, Cochise \$50,000.00 and Apache \$10,000), then get the matter set for arbitration quickly. Remember that under the rules, arbitration requires that a party appear and participate, or they waive their right to appeal. Arbitration awards - generally higher; always faster and less expensive; keep net-net to client in mind.

3. Rule 16.

Parties are now required to meet and confer regarding a list of items set forth in the Rule including setting a Tier level between 1 and 3 for the case. This is usually initiated by Plaintiff.

BE PREPARED -- DON'T UNDER RATE IMPORTANCE OF THIS.

4. Plaintiff's and Defendant's offers of judgment - Rule 68.

- a. Sanctions are considerable
- b. Double taxable costs incurred after offer
- c. Reasonable expert witness fees incurred after offer
- d. Prejudgment interest on unliquidated claims from date of offer

5. July Instructions

Before you file your lawsuit, or even submit a demand letter, review the jury instructions which relate to your case, ARAJI, standard PI's and formulate a general closing statement in your mind and perhaps on paper. From that final point, back up and see if you are ready to prove this case.