

COMMENTARY

When Personal Injury and Family Law Collide

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Personal injury and family law are complicated areas and become even more so when they overlap, as when during a divorce settlement one or both spouses is victim of a personal injury accident. Following are some practical tips from both perspectives to help attorneys avoid potential hazards and pitfalls during representation.

Representation

Your first opportunity to identify potential conflicts as early as possible in

the attorney-client relationship is during the initial consultation. This is foundational.

Family law attorneys regularly screen their clients for marital relationships, separating (or separated) couples, divorcing spouses and child custody issues, but many personal injury attorneys fail to ask these questions. This can put your attorney-client relationships and your fees at risk. By identifying these relationships early in the representation, attorneys can see and explore conflicts. Simply learning the full names of your potential client's partner, children, stepchildren and other individuals residing in their home, enables you to identify current or prior conflicts and either obtain informed consent and waivers or refer the party to another lawyer.

Initial intake is critical, but so is following your client throughout the representation. Personal injury cases may involve severe physical or emotional injuries that can strain a marital or custodial relationship. Sometimes these injuries, whether to the client(s) or their children in common, lead to a breakup after representation begins. Separation can impact a loss-of-consortium claim, a child settlement, and how and which claims may be pursued if a case proceeds to litigation. Personal injury attorneys must communicate regularly throughout this journey as life changes can happen quickly in family relationships.

Timing

Timing is everything.

For the family lawyer, when the injury occurred, when the personal injury award was received and when the family was impacted all affect whether the award is marital or community property divisible in a divorce or separate property that's off limits. Likewise, timing—as well as preservation of rights and claims—must be considered when a breakup is imminent and an injury during the marriage has gone unpursued.

For the personal injury attorney, timing is critical as settlements can be structured strategically to your client depending upon their family situation... How a personal injury settlement will be divided in a divorce may depend on several details in the settlement, including when the injury happened or compensation was received, what the compensation was for and where the compensation money was put.

For example, whether a couple is newly separated, was separated for a period of time or will be separated at some date in the future may all affect how personal injury awards may be structured and which claims your client may or may not want to make. If a couple separated prior to the date of the accident, the other spouse may not be entitled to all monies from lost wages or past medicals bills, whereas if a couple separates after the accident and before litigation, the other spouse may be entitled to past medical bills but not all lost wages. Personal injury attorneys can specify categories for settlements, which may or may not be marital property.

Jurisdiction

When multiple jurisdictions are involved during simultaneous personal injury and divorce litigation, beware of differences in spousal and mental health privilege laws and how both can impact your client's cases.

Coordination of counsel—especially pleadings, discovery, client testimony and other sworn client statements—informs you of what and where your client is communicating about their claims.

For the personal injury attorney, jurisdiction is a factor, but not as often. Personal injury automobile accidents where one spouse was driving and the other was a passenger can present a familial dilemma. Nearly every state has comparative negligence laws regarding liability and fault, which does not present a problem as both spouses can make claims against any of the other drivers, depending upon presumed liability.

However, in Maryland, Virginia and Washington, D.C., the law of contributory negligence holds, barring recovery if the spouse who was driving was even partially at fault. The passenger spouse, who has no liability or fault, would only receive a recovery from suing their own spouse, probably detrimental to the family estate if all parties are currently residing together happily. Similarly if they are separated or divorced, with current ties to the family estate. But, if they are already divorced, property is separated, have different insurance or child custody is not a factor, the passenger may choose to file a claim against the driver, especially if injuries are serious.

Damages

For the family lawyer, step one is knowing how your jurisdiction treats personal injury awards and their individual parts, which directly impacts whether any part of the award can be divided in divorce or considered income for child support or alimony purposes. More importantly, documentation of the award and its component parts is critical to prove what is marital/community or separate. Family attorneys can bring particular value here to protect client's interests.

Step two is preserving the marital/community or separate property character of the award after payment. The family lawyer should advise on where the award is deposited and whether it's comingled or separated and ensure the client's follow-through.

For the personal injury lawyer, both economic and noneconomic damages within settlement awards are critical to completing a claim. Regardless of where your client is in the divorce process, categorizing damages can become tricky.

In marital property states, all debts and assets acquired during the marriage are divided equally (or about equally). This may also include portions of a personal injury settlement, depending on how it is categorized.

Those equitable distribution states inventory all assets acquired by either spouse and then categorize each as separate property or marital property. Personal injury awards can be a mix of both, and generally a court will resort to equitable distribution.

Personal injury attorneys, take particular note of your client's damages. Awards for medical expenses and lost wages during the marriage are generally treated as marital property, especially if the client uses marital assets to pay for expenses such as medical bills incurred while married. Awards for noneconomic damages, such as pain and suffering, reduced income or earning ability, emotional distress and loss of consortium, are generally separate property as the victim of the injury incurs them individually. Many states also consider awards for future lost wages, future medical expenses, and pain and suffering to be separate property as the client will receive the award when the couple is already separated.

To maximize the benefit of a personal injury award to your client's individual needs, the personal injury attorney must speak candidly with the client to fully understand their wants and needs and categorize settlements accordingly. Personal injury settlements are ultimately just a sum of money, but when your client is being forced to separate his or her money, how it is categorized and subject to distribution may become an extremely important factor.

Minor Children

Pursuit of injured minor children's rights depends on local procedural rules and laws. Frequently, the first in line is the guardian or custodial parent. For separated or divorced parents, it's important the personal injury attorney have a copy of the custody order or legal document stating which parent has legal custody or makes decisions. Likewise, court rules or local laws may impose requirements for a minor child's settlement, such as court or other parent approval.

Personal injury attorneys must understand who they represent when minor children are involved. Who is the legal guardian, who has custody, who can sue on the child's behalf and who can accept distribution of funds? Many jurisdictions require that at least a portion of minor settlements be put into a trust, annuity or estate to protect the child.

Releases and Waivers

Beware of boilerplates! Divorce settlements often include general, mutual releases and waivers of all claims. If your client's spouse has injured them or a spouse has been injured but not pursued their personal injury claim, who preserves what rights needs to be negotiated and documented so everyone is clear about expectations going forward.

Similarly, when reviewing a release for a personal injury settlement, be aware of which parties and claims are bound by the terms of the release. Be very careful with delicate family law situations revolving around wrongful death settlements and be sure you have done your due diligence to contact all necessary parties in the event an award is given.

Conclusion and Collaboration

Many of us who have worked in tort law for decades may have long forgotten our law school family law classes, which means that personal injury attorneys will not have all the answers for settlement discussions with client(s) in the midst of separations, divorces, custody or splitting property. Personal injury attorneys should contact a reputable and respected family law attorney who can provide the guidance necessary.

As those of us who live and breathe family law can attest, personal relationships can be difficult and emotional. A family law attorney-client relationship may last for several years as the couple works through separation and custody. During that time, it is entirely possible that one or both parties may encounter a personal injury situation that can

seriously impact the ongoing negotiations for alimony, custody or property separation. Similarly, family law attorneys should collaborate with a trusted personal injury attorney to advocate for the client's best interests.

Lindsay Parvis, *principal at Joseph, Greenwald & Laake, simplifies complex life changes for her clients. From marriage to breakups to caring for loved ones who cannot care for themselves, she works as a team with her clients in pursuit of prenuptial agreements, divorce and guardianship.*

Renee Blocker, *senior counsel at the firm, oversees and manages the personal injury practice area, bringing substantial experience and leadership with a focus on client-centered engagement to provide individualized advocacy and guidance supporting client interests and outcomes.*

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