CHAPTER 5

CIVIL LITIGATION/CIVIL MOTION PRACTICE

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Civil Litigation and Motions Practice

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Avoiding Malpractice

In 2018, Hong Dao, PLF Practice Management Attorney reviewed PLF claims data for the prior five years and identified the major factors that lead to malpractice claims. That chart is reproduced below.

(See October 2018, *in* Brief, Malpractice Risk Factors and How to Avoid Them, by Hong Dao, PLF Practice Management Attorney). Most of these can be resolved through fixing the first problem—inadequate office systems.

Malpractice occurs for many reasons other than failure to know the law. Many lawyers are solo practitioners or in small firms with fewer people to bounce ideas off of. A lawyer must not only know the law but also set up office procedures to prevent malpractice.

To that end, make sure you have a calendaring system that works. That tracks deadlines, due dates, SOLs, reminders, and everything else to make sure you are keeping up with your cases. This can be paper or electronic. It can be through a generic program like Outlook or you can use case management software specifically designed for your type of practice.

Also, make sure you know what happens with a case as it moves through your office and have checklists for you and your staff to use to make sure things do not get missed. If surgeons and airline pilots can use checklists to dramatically reduce and prevent tragic errors, you can use them too.[1]

Intake

This is your client's first interactions with and your office. Now is the best time to ask for information and documents. The client has affirmatively taken one step already—contacting you—so a second action will feel natural and motivated. The request shows the client you care about their case. Also, this is a lovely test—will this client follow through? Are you going to be able to rely on them to get you what you need throughout the case? Are

[1] https://www.hsph.harvard.edu/news/magazine/fall08checklist/

they going to be difficult to work with? Difficult to communicate with? Will they treat your staff poorly?

Types of information that I want in my cases (I handle tort claims):

1. Does Health Insurance Exist?
    a. If so, I want copies of all cards, especially Medicare or Medicaid.
2. What Other Insurance Exists?
    a. Auto insurance? UM/UIM coverage?
    b. Umbrella insurance?
    c. Cancer or Long-Term Care insurance?
    d. Life Insurance?
    e. Disability insurance?
        i. Short term?
        ii. Long term?
3. Where Your Client Received Medical Treatment
4. Ages:
    a. The time limit for a minor's claim against a public body (Tri-Met, a city, a school district, etc.) is tolled just like for any other minor's or disabled person's claim (ORS 12.160). Smith v OHSU 272 OR App 473 (2015). Same for the minor's medical bills. ORS 12.160.
    b. BE CAREFUL THOUGH because minority or disability does NOT toll the notice statute – you still have to send notice within 270 days (180 + 90 days).
    c. A parent's action to recover the medical expenses of a minor child is the same as the minor's but the parents must include a consent to add their claim to the child's case. ORS 12.160(5). Many argue the medical bills of a child while the child is a minor are the claim of the parents – it is safest to file a consent of the parents with the child's claim. The medical bills once the child reaches 18 are clearly the child's.
    d. In addition, if you have a particularly elderly or sick client, be aware that they may not live to see the end of litigation if you tarry.
5. Names of All Defendants:
    a. Get the full legal name. This may be on a police report, a medical record,
    b. Watch out for a tort-claim notice that needs to be or needed to be sent. 180-day/1-year tort claim notice requirement (see below). Also, dram shop cases (bars, etc. serving intoxicated patrons) have short, 180-day time notice requirements!
6. Location of Injury:

a. Time limitations in other states may be applicable. The 2, 2, 3 rule for filing personal injury cases based on negligence is California – 2 years, Oregon – 2 years, Washington – 3 years.
b. Claims that arose on a Native American Reservation also have different and separate deadlines you need to be aware of.

7. Was Your Client Uninsured or Intoxicated?
    a. Recovery of non-economic damages is barred in a motor vehicle suit if the plaintiff was uninsured (ORS 806.010) or under the influence (ORS 813.010). The statute contains several exceptions, including if your client was a passenger.
8. Evidence
    a. In general, now is a great time to gather the important evidence in your case, such as:
    b. Photos.
    c. Property damage estimates.
    d. Electronic data such as from a Black Box (more properly called an event data recorder or EDR) or cell phones.
        i. If your client has been emailing or texting people about this issue, you want copies or screenshots.
    e. Copies of correspondence, admissions paperwork, and anything else the client or the client's family has that pertains to your case.
    f. If the client or family already has copies of the records, so much the better. That does not mean you will not need to order copies directly from the providers (the records the client receives and the records turned over in response to a legal request rarely match up), but it gives you a head start on understanding what you are dealing with.

Immediate Actions

Obtain the Proper Name and Address of All Parties

Don't wait until the last minute. Do this first for two important reasons:

First, you absolutely must confirm that the defendant is not entitled to either tort claim notice or dram shop notice, or any other kind of notice. Those notices are required and failure to serve them within the deadline (which is frequently as short as 180 days) will lose your client their claim and earn you a malpractice claim.

Second, naming the wrong corporate defendant causes many malpractice claims. In many instances, the lawyer was given a corporate name that was very close to the corporate name. Call the corporation commission or go online and search (http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.login). It is also helpful to check

OJIN for other cases where the same defendant was named. You need to name the proper defendant and obtain the proper addresses for service.

For example, in an elder facility case, you may need to name the company that owns the brand, a separate company that owns that facility, another corporation that administers that facility, another that manages staffing, and the list goes on. Depending on what your claims are, you may need to name corporations that provide contract workers, physical therapists, nutrition, etc. You want to know all of that *before* the SOL is upon you.

If you are suing an insurance company directly, you must check with the Department of Consumer and Business Services to verify the correct legal name, status and registered agent of the insurer. If you go to the Corporation Commissioner, you may end up with the name of an insurance agent and that can be fatal to your case. (See PLF CLE "Avoiding Malpractice While Filing and Serving a Complaint," May 2021, https://osbplf.org/cle-classes/avoiding-malpractice-claims-when-filing-and-serving-a-c/).

When it comes time to file the Complaint, you do not want to be scrambling to find this information. Do it at the beginning, and check your findings as documents come in.

- Does the insurance company for defendant name it the same as you have?
- Does the police report for both owner and operator of a vehicle match what you have?
- What about official government sources, like ODOT, Oregon Medical Board, DHS, or other regulatory agencies?

When it is time to file suit, run the corporation commission search again. Some defendants (such as elder care facilities) change hands with distressing frequency.

Keep Tabs on Your Defendant

Also, calendar a reminder 3-6 months before your statute runs to make sure your defendant did not die, move out of state, or out of the country! If the defendant died, a probate will need to be set up, and it is unlikely the defense will assist with this process. So make sure you give yourself enough time to do this or hire that work out so you have an estate to sue. If they moved far away, service will be harder, so file sooner! Much sooner if they moved to another country—now you have the joy of dealing with service under the Hague Convention (which is way outside the scope of this CLE).

Send Tort Claim Notice if Required

Claims against public bodies in Oregon are arguably subject to the Oregon Tort Claims Act. ORS 30.260, 30.271, 30.272, etc. Public bodies include school districts, police, fire, the State of Oregon, hospital districts, state boards, agencies, departments, transit districts, etc. ORS 30.260. There are caps on damages for claims against public bodies and the amount of the

cap depends on whether the entity is a "State" or "Local" public body. ORS 30.271 & 30.272. https://www.courts.oregon.gov/Pages/tort.aspx provides the caps updated each year (see below). The caps on damages have a cap per claimant and an aggregate cap for multiple claimants.

Effective July 1, 2021

The Office of the State Court Administrator (OSCA) has calculated the annual adjustment to the limitations on liability of state and local public bodies for personal injury, death, and property damage or destruction. Based on these calculations, the limitations are adjusted as shown in this table:

Public Body	Claimant(s)	Claim	Adjusted Limit
state	single	injury or death	$ 2,347,700
state	multiple	injury or death	$ 4,695,300
local	single	injury or death	$ 782,600
local	multiple	injury or death	$ 1,565,100
state or local	single	property damage or destruction	$ 128,400
state or local	multiple	property damage or destruction	$ 641,800

These new limitations became effective on July 1, 2021, and apply to all causes of action arising on or after July 1, 2021, and before July 1, 2022.

In Oregon, there is a wrongful death cap of $500,000 non-economic damages. ORS 31.710. However, in claims against public bodies, the wrongful death cap does not apply. ORS 30.262(2). The cap is just the state or local public body cap – per claimant. ORS 30.269-273.

In addition, if there are two surviving beneficiaries, each beneficiary has a separate cap. The combined cap on claims would be $1,498,000 for local public entities and $4,944,000 for state public entities (as of July 2019). *Miller v Tri-Cty. Metro Dist.,* 241 Or App 86, rev den, 350 Or 408 (2011).

The statute does not establish different caps for non-economic and economic damages. There is just one total cap for all wrongful death damages. Another caution is that there are currently 33 "hospital districts" in Oregon, which are public bodies subject to the OTCA – cap and notice requirements. A helpful list of the hospital districts can be found at https://secure.sos.state.or.us/muni/public.do.

Be careful because some federally funded hospitals and health clinics (VA Hospital, WIC, etc) and are subject to the Federal Tort Claims Act notice provisions and you have to sue the United States.

A good resource is **January 2019, *In Brief*, "Potential Malpractice Trap in the OTCA" by Marilyn Heiken.**

A plaintiff must give notice of the claim within 180 days of the injury or 1 year in a wrongful death action. ORS 30.275(2). Minors, incompetent persons, or persons unable to give notice because of the injury are allowed an extra 90 days (270 days total). Minors only get 270 days from discovery of the claim. *Catt v. Dept of Human Services* (August 1, 2012) Or App

Be careful – the notice period provided by ORS 30.275 is not tolled pending the appointment of a guardian ad litem for the minor. *Perez v. Bay Area Hospital*, 315 Or 474, 846 P2d 405 (1993). Obtain proper name and address for each entity that is to receive a Tort Claim notice. Also read the statute to ensure that you include everything the Tort Claim notice is required to have in it. My personal practice is to re-read this statute every time I draft up a notice.

Beware of Weekends & Holidays: The time for giving the Tort Claim notice is NOT EXTENDED by Saturdays, Sundays or legal holidays. *See Tyree v. Tyree*, 116 Or App 317, 840 P2d 1378 (1992), rev. denied, 315 Or 644, 849 P2d 524 (1993).

On top of the required tort claim notice, do not assume that statutes of limitations are extended for minors or others. A good general rule is to final any tort claim notice case within two years.

Make Sure Your Client's Bills are Getting Paid

Most tort claim cases will involve medical treatment—anything from a few visits with a chiropractor up to millions of dollars in state-of-the-art treatment. There are many ways

such bills can be paid as you go throughout the litigation. It can be part of your job to find those ways.

For example, in Oregon, every car insurance policy sold must have Personal Injury Protection, also called PIP. This no-fault coverage pays for things like medical bills, lost wages, and even funeral expenses that were related to the use of a car. In addition to occupants, PIP applies to pedestrians, bicycle riders, skate boarders and even in-line skaters involved in accidents involving motor vehicles. All of the above are considered pedestrians and entitled to PIP coverage under ORS 742.520(7). The pedestrian may be able to access their own PIP policy, a family member's PIP policy, their own health insurance, and the PIP policy of the car that hit them. For a seriously injured pedestrian, stacking those policies can make a world of difference.

Similarly, an occupant of a car involved in a crash may be able to access the policy covering the car, their own policy, a family member's policy, perhaps more. All of this requires investigation and research on the law and the facts.

Some PIP claims may carry the right to attorney fees, but that right may be reciprocal if you lose the claim. In order to avoid bar complaints or attorney malpractice claims it is imperative that counsel fully disclose and discuss with clients both the benefits and the risks associated with pursuing attorney fee claims. It is ultimately your client's decision but make sure you put the decision in writing.

Dealing with Reimbursement of Insurance Companies

If you are handling cases involving medical bills, chances are that you will dealing with various insurers. PIP, health insurance, Medicare, and Medicaid to name a few of the most common. Each on has different, sometimes highly technical rules for notice, reimbursement rights, and how to resolve claimed liens. A full review of those methods is outside the scope of this CLE (we could literally do an hour or more on each one of those alone), so if you're working on tort cases, do your research, read the statutes, articles, and CLEs. Find a mentor who can help you sort through these issues.

Service

Service is a common source of legal malpractice. It can feel mechanical, unnecessary, and unduly complex. I am not going to tell you that is inaccurate, but that does not excuse you from having to follow the rules. Many of service-based claims can be avoided with the help of an effective docket system and diligent follow through. **(See PLF CLE "Avoiding Malpractice While Filing and Serving a Complaint," May 2021,** https://osbplf.org/cle-classes/avoiding-malpractice-claims-when-filing-and-serving-a-c/ **).**

Some quick notes:

- I prefer to send service documents out within days of filing. I do not wait out the 60 day clock.
- To use the filing date as commencement date, serve within 60 days of filing. ORS 12.020(2). If you are within the quickly approaching statute of limitations but have not completed service consider dismissing and re-filing to get a new 60 days.
- Note that the Action is not deemed commenced until the complaint is filed and the summons is Served. ORS 12.020(1); ORCP 3.
- Make sure you calendar service verification. Get your papers, information and deadlines to the process servers and/or the sheriff as soon as possible. Be careful, service is not complete until the follow-up mailing has been accomplished. ORCP 7D.
- Many times defense attorneys will request an extension of time to respond. I grant this in almost every case. **However, never grant extensions without waiver of service challenge.**
- The PLF has many forms that will be of great help to you, including a FREE litigation packet, which contains 16 forms, including a Service of Process Checklist.

Motions

Over the course of your career you will either run into or file dozens of different kinds of civil motions. We will focus the four most common motions in state court: ORCP 21 Motions, Discovery Motions, and ORCP 47 Summary Judgment Motion.

Quick Tips to Avoid Mistakes

1. Read the rules, read the rules, read the rules. Those include Oregon Rules of Civil Procedure (ORCP), Uniform Trial Court Rules (UTCR), and Supplemental Local Rules (SLR) for the county of filing.
2. Know when you must confer before filing a motion.
    a. Conferral is required for motions under ORCP 21A(1)-(7), 23, and 36-46. UTCR 5.010. That is jurisdictional—if you did not confer or show good cause for not conferring (and futility is insufficient), the court must deny your motion.
    b. Many court require at least an attempt at conferring over the phone. A simple email or letter will not meet the requirement.
    c. If conferral is required, you must include a certificate of compliance in your Motion that you either conferred or show good cause why you did not do so.
3. ORCP 10 will help you with computing time periods. Learn it well, but don't be afraid to go back and check it.
4. Make sure you are using the most up to date filing fee schedule to figure out the required fee.
5. Do not confuse the certificate of service and certificate of readiness. Proposed Orders require both.

6. Follow the UTCR to make sure you get what you want in terms of logistics of the hearing. You must request oral argument and include an estimated time for oral argument, and whether official court reporting services are requested. If you are requesting telecommunication appearance, make sure you comply with UTCR 5.050(2).
7. Do not be afraid to call the JA and ask for guidance or the judge's preference. JAs are your friend.

ORCP 21 Motions Against Pleadings

Motions to Dismiss – ORCP 21 A

Motions to dismiss are used by defendants to eliminate claims for relief or an entire action, or, by plaintiffs to eliminate affirmative defenses. ORCP 21 A specifies the following grounds for dismissal:

1. Lack of jurisdiction over the subject matter;
2. Lack of jurisdiction over the person;
3. There is another action pending between the same parties for the same cause;
4. Plaintiff does not have legal capacity to sue;
5. Insufficiency of summons or process, or insufficiency of service;
6. The party asserting the claim is not the real party in interest;
7. Failure to join a party under ORCP 29;
8. Failure to state ultimate facts sufficient to constitute a claim; and
9. The pleading shows that the action has not been commenced within the applicable statute of limitation.

Unlike the other ORCP 21A motions, motions to dismiss brought under ORCP A(8)(Failure to state a claim) and A(9) (statute of limitations) are limited to the face of the complaint. In other words, these motions cannot be supported by matters outside the pleading, including affidavits, declarations, and other evidence. *See Deep Photonics Corp. v. LaChapelle,* 282 Or App 533, 548, 385 P2d 1126 (2016), *rev den* 361 Or 425 (2017); *Kastle v. Salem Hospital,* 284 Or App 342, 344, 392 P3d 374 (2017).

Certain defenses are waived if not raised by motion before pleading, or in the first responsive pleading.

1. ORCP 21 G(1) – Lack of jurisdiction over the person, insufficiency of summons or process, insufficiency of service, another action pending between the same parties on the same cause. These defenses are **waived** if not raised in the party's first appearance.
2. ORCP 21 G(2) – Plaintiff lacks capacity to sue, not real party in interest, and statute of limitations. These defenses are waived if it is neither made by motion nor included in a responsive pleading or, in limited circumstances, amendment thereof.

Practice Tip: Consider whether the ORCP 21 A motion to dismiss will result in dismissal with or without prejudice if granted. If you want the court to dismiss the claim or action

with prejudice, make sure you so state in your motion and order. If the order is silent as to whether the dismissal is with or without prejudice, then the dismissal shall be treated as without prejudice.

Other ORCP 21 Motions

ORCP 21 B provides for a motion for judgment on the pleadings after the pleadings are closed and in advance of trial. *See Simpkins v. Connor*, 210 Or App 224, 228, 150 P3d 417 (2006); *Beason v. Harcleroad*, 105 Or App 376, 379-80, 805 P2d 700 (1991). The court may enter judgment on the pleadings if the allegations show the nonmoving party cannot prevail as a matter of law. ORCP 21 B; *Rowlett v. Fagan*, 358 Or 639, 649, 369 P3d 1132 (2016); *Lehman v. Bielenberg*, 257 Or App 501, 508, 307 P3d 478 (2013); *Pendergrass v. Fagen*, 218 Or App 533, 537, 180 P3d 110 (2008), *rev den*, 344 Or 670 (2008) (court did not err in granting plaintiff's motion for judgment on the pleadings in FED action).

ORCP 21 D Motion to Make More definite and certain: Use ORCP 21 D to "require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense, or reply is not apparent." *See Stewart v. Kids Incorporated of Dallas, Or.,* 245 Or App 267, 272, 286, 261 P3d 1272 (2011), *rev dismissed*, 353 Or 104 (2012) (affirmed dismissal where complaint failed to allege facts to show why defendants were on reasonable notice of unreasonable risk of harm).

ORCP 21 E Motion to Strike: Use ORCP 21 E(1) to strike any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated. Use ORCP 21 E(2) to strike redundant matter from the complaint.

- A "sham" allegation appears false on the face of the pleading and may be stricken. *Rowlett v. Fagan*, 262 Or App 667, 682, 327 P3d 1 (2014), *aff'd in part, rev'd in part*, 358 Or 639 (2016); *Kashmir Corp. v. Nelson*, 37 Or App 887, 891, 588 P2d 133 (1978); *Warm Springs Forest Products Ind. v. EBI Co.*, 300 Or 617, 619 n 1, 716 P2d 740 (1986) ("Good in form but false in fact; * * * a pretense because it is not pleaded in good faith.").
- A "frivolous" pleading under ORCP 21 B "is one which, although true in its allegations, is totally insufficient in substance." *See Kashmir Corp. v. Nelson*, 37 Or App 887, 892, 588 P2d 133 (1978)
- An "irrelevant" pleading pertains to matters that "are not logically or legally germane to the substance of the parties' dispute." *Ross and Ross*, 240 Or App 435, 440-41, 246 P3d 1179 (2011). A pleading may be stricken as either frivolous or irrelevant if it is legally insufficient. *Id* at 440.

Practice Tip: If you are filing an ORCP 21 D motion to make more definite or certain or ORCP 21 E motion to strike, make sure you comply with UTCR 5.020(2).

Discovery Motions

Discovery motions are generally based under ORCP 36-46. Conferral is required. These motions are largely disfavored by the court. The moving party should make every attempt to resolve the issues and document in writing all of the efforts to resolve the dispute before filing the motion. You want to look like the reasonable one when this issue ends up in front of a judge, so make sure your communication is respectful, reasonable, and professional.

Motions to Compel – ORCP 46

If the opposing party or a nonparty fails to respond to discovery requests or if the response is inadequate, the requesting party may file a motion to compel discovery pursuant to ORCP 46 A. The moving party must establish that the material sought is discoverable, e.g., that the material is not privileged or subject to an exception to the privilege claimed. *Kahn v. Pony Express Courier Corp.,*173 Or App 127, 133 (2001). The court may award reasonable expenses, including attorney fees, to the party that prevailed on bringing or opposing the motion. ORCP 46 A(4).

Discovery Sanctions- ORCP 46 B

The trial court may impose a variety of sanctions for a party's failure to obey an order to permit or provide discovery. ORCP 46 B(1)-(3), C, D. Sanctions for the failure must be just, but may include striking pleadings, limiting proof at trial, and dismissal. ORCP 46 B(2), 46 D. *See Burdette v. Miller*, 243 Or App 423, 431-32, 259 P3d 976 (2011) (Court of Appeals held no abuse of discretion in striking defenses of defendant who failed repeatedly to appear for deposition or for sanction hearing). The party compelling compliance is also entitled to reasonable expenses, including attorney fees, unless the court finds that the opposing party's failure to obey the order was substantially justified "or that other circumstances make an award of expenses unjust." ORCP 46 D.

Be careful and judicious if you request sanctions. These are not a standard request and the other party's behavior should be exceptional before sanctions are requested. This goes back wanting to appear reasonable before the court. Be prepared to back up this request with evidence of the other party's extraordinary behavior.

Motion for Protective Order-ORCP 36 C

A party opposing a request for discovery has two options. The party may

(1) object to the discovery request or

(2) move for a protective order under ORCP 36 C—an order "that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

Summary Judgment Motions

A summary judgment motion is a dispositive motion designed to eliminate the opponent's case or portions of the case without a trial. The motion is not designed to resolve factual disputes, but to determine whether there is any genuine issue of material fact to justify a trial. ORCP 47 C; *Bonnett v. Division of State Lands,* 151 Or App 143, 145-46 n 1, 949 P2d 735 (1997).

A plaintiff seeking to recover on a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment, may obtain summary judgment if it is established that "there is no genuine issue as to any material fact" necessary to prove a claim, that none of the affirmative defenses asserted by defendant raise a genuine issue of material fact, and that judgment should be entered in plaintiff's favor under applicable law. ORCP 47 A; ORCP 47 C; *see William C. Cornitius, Inc. v. Wheeler*, 276 Or 747, 757, 556 P2d 666 (1976) (summary judgment was appropriate when, *inter alia*, "none of the affirmative defenses raised any triable issue").

A defendant may obtain summary judgment on a showing that "there is no genuine issue as to any material fact" necessary for the plaintiff's claim and that defendant is entitled to a judgment based on the applicable law, or when one or more affirmative defenses are established in the same manner. ORCP 47 B; ORCP 47 C; *King v. Warner Pac. Coll.*, 296 Or App 155, 172, 437 P3d 1172 (2019).[2]

Summary Judgment Standard

The court reviews the facts and draws all reasonable inferences in favor of the nonmoving party. ORCP 47 C; *Chapman v. Mayfield*, 263 Or App 528, 530, 329 P3d 12 (2014); see *Perry v. Rein*, 215 Or App 113, 168 P3d 1163 (2007) (record permitted competing inferences); *West v. Allied Signal*, Inc., 200 Or App 182, 113 P3d 983 (2005). "Summary judgment is proper if the 'pleadings, depositions, affidavits, declarations and admissions on file show that there is not genuine issue as to any material fact.' ORCP 47 C." *Greer v. Ace Hardware Corp.,* 256 Or App 132, 134, 300 P3d 202 (2013); *Hagler v. Coastal Farm Holdings, Inc.,* 354 Or 132, 140, 309 P3d 1073 (2013). The court cannot weigh the relative strength of the evidence or assess credibility. This standard exists because granting summary judgment takes the case or an issue away from the jury, which should be difficult given the jury's role in our legal system. This is not a tool for resolving cases that are merely "dumb" or "weak." It is a tool for resolving cases *where the law dictates a specific outcome*.

When the moving party does not have the burden of proof at trial, it may move for summary judgment without coming forward with evidence in support of its motion. Rather, the adverse party must produce admissible evidence on every issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. ORCP 47 C. Failure to do so entitles the moving party to summary judgment. Practically speaking though, the moving party almost always provides evidence in support of its motion.

Responding to Summary Judgment Motions

After the moving party has claimed the lack of any genuine issue of material fact and that it is entitled to judgment as a matter of law, the adverse party must produce admissible evidence sufficient to meet a burden of production on any issue on which that party would

[2] For more perspectives on Motions for Summary Judgment, check out this article: https://litigation.osbar.org/2019/04/01/summary-judgment-motions-to-file-or-not-to-file/

bear the ultimate burden of persuasion at trial. ORCP 47 C. This evidence can come in many forms, including affidavits, documents, and more as discussed below.

Type of Evidence Allowed in Summary Judgment

Both the moving party and adverse party may only rely on admissible materials for purposes of summary judgment. *See* ORCP 47 D; *Deberry v. Summers,* 255 OR App 152, 166 n6 (2013). Affidavits, declarations, depositions, responses to requests for admissions are typical materials used in summary judgment proceedings.

An affidavit or declaration must be based on personal knowledge and must "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein." ORCP 47 D; *Spectra Novae, Ltd. v. Waker Associates, Inc.,* 140 Or App 54, 58, 914 P2d 693 (1996). The declarant satisfies the requirement for personal knowledge when the affidavit is read as a whole, and an objectively reasonable person would understand that the statements are made from the affiant's personal knowledge and with competence. *West v. Allied Signal, Inc.,* 200 Or App 182, 113 P3d 983 (2005).

If evidence presented in support or oppose summary judgment is inadmissible, the other party should seek to strike the evidence. When evidentiary challenges are raised, the court will assess the admissibility of particular evidence. *See Perman v. CH. Murphy/Clark-Ullman, Inc.,* 220 Or App 132, 138, 185 P3d 519 (2008) (analyzing admissibility of lay opinion under OEC 701).

Expert Declarations

A particular type of evidence that may be appropriate in some cases are declarations from experts. When a party opposing summary judgment is required to provide the opinion of an expert to establish a genuine issue of material fact, ORCP 47 E permits the party's attorney to submit an affidavit or declaration "stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact[.]" ORCP 47 E is designed to protect the expert's identity and opinions from disclosure before trial. *Stotler v. MTD Products, Inc.,* 149 Or App 405, 408, 943 P2d 220 (1997); *Moore v. Kaiser Permanente*, 91 Or App 262, 265, 754 P2d 615, rev den, 306 Or 661 (1988).

An ORCP 47 E affidavit or declaration must be made in good faith and be based on admissible facts or opinions of a qualified expert. *Two Two v. Fujitec Am., Inc*., 355 Or 319, 328-29, 325 P3d 707 (2014) (if ORCP 47 E affidavit is filed in bad faith, offending party pays reasonable expenses incurred by other party as a result and may be subject to sanctions).

Be wary of including more information in the ORCP 47 E declaration than the statute calls for. Once you start specifying the issues on which the expert will testify, you may be trapped. *Moore v. Kaiser Permanente*, 91 Or App. 262, rev den 306 Or 661 (1988). An ORCP 47(E) affidavit can only be used when an issue of fact could conceivably ("may" or must) be

proven by use of expert testimony. *Hinchman v. UC Market, LLC*, 270 Or App 561 (2015) (involving an alleged hazardously installed floor mat) citing *Whalen v. AMR*, 256 Or App 278 (2013) (involving a battery).

An ORCP 47 E affidavit effectively precludes summary judgment on its own, except where the point at issue "could not conceivably be proven through expert testimony, but necessarily would require proof by testimony from witnesses with personal knowledge." Id. at 572.

Motion to Strike

A party must make evidentiary objections before the motion for summary judgment is decided. Otherwise, the evidence may be considered. *Aylett v. Universal Frozen Foods Co*., 124 Or App 146, 154, 861 P2d 375 (1993).

Examples of objections include:

- Hearsay – Hearsay statements not falling within any exception to the hearsay rule are inadmissible and should not be considered.
- Opinions – "Opinions as to liability are legal conclusions and are not the proper subject of a witness's testimony." Olson v. Coats, 78 Or App 368, 717 P2d 176 (1986).
- Legal conclusions – An affidavit that merely states legal conclusions is not sufficient to create a question of fact. *Spectra Novae Ltd*., 140 Or App 54, 59, 914 P2d 693 (1996).
- Irrelevant averments – Affidavit statements that are irrelevant should play no part in the court's consideration.

Settling a Case

It would be simple and easy if settlement was as easy as agreeing on a number between the two parties, signing a Release, and receiving a check. Before you settle a case, there are many steps you need to take. **(See June 2006, *In Brief*, Revised October 2011, "Settlement Proceeds and Other Traps" By Jane Paulson).**

Check With Any Potential UIM Carrier

If your client has a potential UIM claim, you *must* obtain the insurance company's *written* consent to the underlying settlement *before* you settle the case. Failing to obtain written consent to the settlement can defeat any potential claim. Also, your client's insurance coverage now "stacks" the liability insurance (defendant driver) with your client's UIM coverage if the MVC happened on or after 1/1/16 and the insurance policy was new or renewed after 1/1/16 ("UIM Stacking" ORS 742.502 & 742.504). Make sure you know which policies are BI and which are UIM before you let your client sign any Release.

Check With PIP Carrier

Obtain updated lien *in writing*. Find out if you can negotiate the lien. Also, make sure lien is owed back. A new law ensures that injured motorists are able to recover their total damages first, before their insurer gets paid back for any PIP benefits it has provided (PIP "Made Whole" Law – ORS 742.544 (2015)).

Make sure the PIP carrier paid bills in full (not a reduced amount, like an HMO, yet charged client or took credit for paying full bill). Also, figure out how much of PIP, if any, you need to reimburse (see ORS 742.544 above). Follow the formula to determine the amount of PIP you must reimburse: total benefits received (liability proceeds plus UIM benefits plus PIP) minus economic damages = $ available to reimburse PIP).

Invite Lien Holders to Settlement Conference or Mediation

Many times being able to get the liens reduced can make settlement numbers offered by the defense work. However, if you are calling the health insurance adjuster out of the blue in the middle of a mediation or when you need an answer today (!!), you are unlikely to get the results you want. Let the lien holders know about settlement conferences in advance, discuss the defense positions with them ahead of time, and confirm they are available to talk with you and the mediator or judge during the mediation or settlement conference.

Get Updated Liens in Writing

While this applies to all lienholders, Medicare is very difficult to get a conditional lien out of and it can take months – so start early! You will also need a final Medicare lien from the Medicare office once the case is over.

Send Your Client a List of Bills

To make sure your client agrees and there are not more bills out there. We have our clients sign a settlement agreement acknowledging the bills we are aware of and paying back and that any outstanding bills are the client's responsibility.

Find Out if Settlement Could Affect Client's Future Benefits

Some benefits can be cut or limited due to a personal injury settlement. You do not want to be the cause of your client losing their health insurance, housing, food assistance, etc. If your client is receiving benefits the state will attach a lien to the settlement to the extent of all assistance provided (cash and medical) since the date of injury. Check effect on public assistance/benefits (including social security) and health insurance among others.

Consider Whether a Medicare Set Aside is Necessary

Medicare is very complicated and until you know this area of the law, you should consult an expert. It is beyond the scope of these materials. In its simplest form in addition to finding out if there is a current Medicare lien that has to be paid back, you must also find if there will be future Medicare payments for medical bills related to the claimed injuries after the case is over which may require a future Medicare set-aside.

Not only do you risk malpractice and your client making a claim against you, but you also can be personally liable for mistakes in this area.

Obtain Workers' Compensation Carrier Approval

If there is a comp lien, the carrier must approve of the settlement. ORS 656.593. Also make sure the comp lien is all related, all properly paid, and the claimed reimbursement tracks with the statutory formula.

Put All Settlement Offers to Your Client in Writing and Consent to Settle (Preferably In Writing)

Protect yourself and put settlement discussions in writing. Even if you discussed the offer on the phone, send your client a note confirming the offer and discussion. It is especially important to put settlement offers your client has rejected in writing to prevent any problems in the future.

Advise Client If Any Portion of Settlement is Taxable

Since the Small Business Job Protection Act of 1996 passed, most emotional distress and punitive damage payments (also check if laws if client is receiving money from an employment based claim) will be taxable if they are for damages not attributable to physical injury or sickness or are paid as punitive damages. https://www.irs.gov/pub/irs-pdf/p4345.pdf is a helpful article to share with clients. If there is any question whether a settlement is taxable, it is always safest to advise your client to see the advice of an accountant.

Assess Where Money Is Going if Minor or Protected Client

If you client is a minor or protected person, there are even more considerations and court approval to be obtained. You may see conservatorships, annuities, trusts, and considerations of how money will impact the minor's benefits in the future. **See August 2003, *In Brief* "Protecting Minor's Money" and November 2010, *In Brief*, "Settlements for Minors – 2009 Legislative Changes" by Brooks F. Cooper.**

Wrongful Death Settlements

Wrongful death settlements generally need to be approved by the probate court before they can be finalized. Note also that you must have a probate set up for someone to have authority to retain you and then settle the case on behalf of the estate.

Wrongful death proceeds belong to the beneficiaries, not the estate, and are not subject to claims against the estate. ORS 30.030. Personal injury proceeds—i.e. damages paid for the harm done while the decedent was alive that did not lead to the decedent's death—belong to the estate, and are subject to debts and claims against the estate. ORS 30.075. Such survival claims carry a statutory claim to attorney fees, however, such attorney fees are reciprocal, so client notice and consent are imperative.

Wrongful death proceeds are distributed one of two ways:

1. By agreement of all the potential beneficiaries (this includes the estate of any heirs/beneficiaries who survived the decedent and then later passed away).
2. If the beneficiaries cannot agree, by judicial decision in the probate court after a hearing.

ORS 30.040

Wrongful Death Caps

While Oregon currently has a statutory cap on damages (ORS 31.710), it does not apply in some cases, and is subject to several arguments about its constitutionality that are weaving their way up to the Oregon Supreme Court. You need to be aware of these arguments and where the law currently stands so as not to short-change your clients.

In addition, there are several types of claims where the statutory cap does not apply. For example, to claims under the Oregon Tort Claims Act or under the Employer Liability Law (ELL) (ORS 654.325).

Post Settlement

Congratulations! You have settled your case! Hopefully your client is pleased or at least relieved with the outcome. You, however, still have much work to do. **See June 2006, *In Brief*, Revised October 2011, "Settlement Proceeds and Other Traps" By Jane Paulson; Also See PLF Sample Settlement & Judgment Disbursal Forms, Checklist for Commencing and Settling Personal Injury Cases.**

Report Case Settled to Court

The courts like to know this for the court docket. JAs greatly appreciate the courtesy of prompt notice of a case settlement. In addition, docket how long you have to wrap up the case before the case is dismissed by the court after reporting it settled (often only 30 days). If the case is going to take longer to wrap up (maybe you need probate court approval, approval of a minor's settlement, or Medicare is moving slowly), request additional time from the court and docket the new deadline so your case does not get dismissed.

Prepare a Settlement Statement

Have your client sign-off on the statement acknowledging the amounts paid and the amount your client will receive. List all bills you are aware of that have to be reimbursed and give notice to your client that s/he will have to pay any outstanding bills that come in.

Pay Liens

Check back on your list of liens. PIP, outstanding doctor's bills, health insurance, Medicare, Medicaid, Workers' Compensation **(**use the statutory distribution ORS 656.593). If you haven't already, find out if any of these can be reduced, either through negotiations or by attorney fees and proportionate costs.

Medicare Set Asides

If there is a question about whether or not a set-aside is appropriate, write a letter to your client outlining what you considered and why you believe there is or is not a need for a set aside. Assume this letter will end up as an exhibit someday and write it as such.

If you decide a set aside is appropriate, you will need to explain and justify how you calculated the appropriate amount and explain to the client the risks and benefits of handling that account themselves and having it professionally managed, including anticipated costs and bookkeeping.

Medicare set asides are complicated. Consult an expert on this.

Be Careful Submitting Money Judgments

Make sure your judgment complies with ORCP 70A. Judgments must include identification information for each debtor, the names of others that are entitled to any portion of a judgment, addresses of creditors and their attorneys, debtors and their attorneys. The judgment may be rejected by the court and cost you a priority lien position if it doesn't comply with ORCP 70A.

Do Everything to Make Sure Client is Happy

While it is not always possible, if your client walks away happy your odds of future problems from the client are decreased. If the settlement is not great for your client but your client should take it, consider reducing your fee – especially if your client perceives you are trying to talk her/him into it. Even a small fee reduction can improve your relationship with your client or your client's decision whether to accept an offer. Don't forget -- happy clients also send you referrals and help keep your practice going!

There are some common client relationship errors that make clients mad at their attorney. **See October 2018 & January 2019, *in Brief*, Malpractice Risk Factors and How to Avoid Them Part I and II, by Hong Dao, PLF Practice Management Advisor:**

1. Not returning client's phone calls or emails.
2. Not responding to client's request for information.
3. Not actively listening to client's concerns.
4. Allowing phone calls or staff to interrupt client meetings.
5. Being late for appointments.
6. Rescheduling too many times.

Avoid these, and your clients are much more likely to be happy with you and what you have accomplished for them.

Ask for Help

Simply asking someone for help can avoid many malpractice traps. Don't be afraid of looking stupid or admitting you aren't sure what to do – many lawyers like to help other

lawyers and it's a whole lot easier than calling the PLF after the fact. Ask more experienced lawyers for sample pleadings, motions, depositions or advice. It is a simple, inexpensive way to cut down on malpractice.

Worried that you don't know any more experienced lawyers? They are easy to meet. Join the Oregon Trial Lawyers Association (civil plaintiff attorneys, www.oregontriallawyers.org, 503-223-5587), Oregon Association of Defense Counsel (civil defense attorneys, www.oadc.com, 503- 253-0527) or Oregon Criminal Defense Lawyers Association (criminal defense attorneys, www.ocdla.org, 541-686-8716). These groups have list serves to help learn issues and ask questions and have continuing education and social gatherings to meet and interact with other lawyers.

Personally, I am a member of OTLA and I have cold-called many members with questions for years. I have never once been rebuffed, and now have several amazing mentors. I have asked many questions on the listserv and get helpful responses quickly almost every time. Experienced attorneys generally speaking want to see you succeed. Most are delighted to share their expertise and knowledge with you. You just need to reach out and ask.

Another resource is the Professional Liability Fund ("PLF"). The PLF is there to help us and is a great resource for answering questions before you commit malpractice.

Finally, if you feel a case is beyond your knowledge or ability, associate a more experienced attorney – not only is it the ethical thing to do, it is the smart thing to do. You do not have to commit malpractice (or an ethics violation) and you do not have to give up the case. Better yet, you can learn how to do the case for the next time. If you do not want to associate on the case, refer it to a more experienced lawyer and ask for a referral fee. Some lawyers give referral fees (generally 10-25%) to referring lawyers.

The Professional Liability Fund would like to thank the previous presenters and authors Jane Paulson and Lindsey Hughes for their permission to adapt their materials for this segment of the 2021 Learning The Ropes program.

§ 2.1A(2) Commencement of an Action for Purposes of a Statute of Limitations

For the purpose of determining whether an action has been commenced within the applicable statute of limitations, an action is deemed commenced as follows:

(1) If the summons is served on the defendant within 60 days after the date on which the complaint was filed, the action is deemed to have been commenced on the date that the complaint was filed. ORS 12.020(2).

(2) If the summons is not served within that 60-day period, the action is deemed to have been commenced on the date that the summons was served on the defendant. ORS 12.020(1). In such a case, the summons must be served within the applicable statute of limitations for the action to commence timely. *See Baker v. Kennedy*, 115 Or App 360, 362, 838 P2d 634 (1992), *aff'd*, 317 Or 372 (1993); *Johnson v. MacGregor*, 55 Or App 374, 376–77, 637 P2d 1362 (1981), *rev den*, 292 Or 589 (1982).

NOTE: ORS 12.020 does not toll the statute of limitations. It merely provides that when a complaint is filed against a defendant within the limitations period, the summons may be served on the defendant within 60 days thereafter, even though service is beyond the limitations period. *Johnson*, 55 Or App at 376 n 2.

NOTE: ORS 12.020 is both a procedural rule and a substantive rule. The 60-day limitation of ORS 12.020 does not apply to causes of action based on federal law brought in state court (e.g., admiralty claims under the Jones Act). *Hurley v. Shinmei Kisen K.K.*, 98 Or App 180, 184–85, 779 P2d 1041 (1989), *rev den*, 309 Or 291 (1990).

See § 2.6 to § 2.6B(3) (statutes of limitations; tolling).

§ 2.1A(3) Oregon Tort Claims Act (Minor Children)

Subsection (1) of ORS 12.160, which extends the time limit for a minor to commence an action, tolls the two-year statute of limitations found in ORS 30.275(9) for a minor to commence a cause of action under the Oregon Tort Claims Act (OTCA) (ORS 30.260 to 30.300). *See Robbins v. State ex rel. Dep't of Human Servs.*, 276 Or App 17, 20, 366 P3d 752 (2016) ("ORS 12.160(1) does not serve to eliminate a minor's ability to extend the statute of limitation in claims under the OTCA."); *Smith v. OHSU & Clinic*, 272 Or App 473, 486, 356 P3d 142 (2015). See § 7.3B for further discussion.

NOTE: If a minor has a claim against a public body, the 270-day notice period prescribed in ORS 30.275(2) is not tolled pending the appointment of a guardian ad litem. *Perez By & Through Yon v. Bay Area Hosp.*, 315 Or

474, 482–83, 846 P2d 405 (1993). See, however, ORS 30.275(8), pertaining to a claim brought by a minor against the Department of Human Services or the Oregon Youth Authority.

For further discussion of the OTCA, see § 2.18A(4)(b).

§ 2.6B Tolling the Statute of Limitations

§ 2.6B(1) Minors; Personal Disabilities

§ 2.6B(1)(a) General Rule

If a person is entitled to bring an action that is subject to a statute of limitations under ORS 12.010 to 12.050, ORS 12.070 to 12.250, or ORS 12.276, and, at the time that the cause of action accrues, the person (1) is younger than 18 years of age or (2) has a disabling mental condition that bars the person from comprehending his or her rights, the statute is suspended for the period of minority or insanity, except that the time for bringing the action cannot be extended for more than five years or for more than one year after the minority or disability ceases, whichever occurs first. ORS 12.160.

Using the disability to suspend the running of the statute of limitations requires that the disability existed when the right of action accrued. ORS 12.170.

When two or more disabilities coexist at the time that the right of action accrues, the time limitation does not attach until all disabilities are removed. ORS 12.180.

ORS 12.160 applies only at the time that the cause of action accrues or comes into existence as an enforceable claim. If the cause of action never accrues, the tolling provision cannot apply. *Wright v. State Farm Mut. Auto. Ins. Co.*, 223 Or App 357, 363, 196 P3d 1000 (2008) (ORS 12.160 did not apply to an underinsured motorist claim when none of the requisite events set forth in ORS 742.504(12)(a) occurred within two years of the accident).

An infant suffering a personal injury has five years (ORS 12.160(1)–(2)) plus the two years provided in ORS 12.110(1), for a total of seven years, to commence an action, *Shaw v. Zabel*, 267 Or 557, 559, 517 P2d 1187 (1974), unless a shorter period of repose applies, *see* ORS 12.110(4); *Christiansen v. Providence Health Sys. of Oregon Corp.*, 344 Or 445, 452, 184 P3d 1121 (2008) (a claim based on medical negligence must be brought within five years after the date of treatment, omission, or operation).

> NOTE: A statute of ultimate repose may limit the time for tolling based on minority or a disabling mental condition to less than the period of minority or disability without violating the remedies clause, Article I, section 10, of the Oregon Constitution. *Christiansen*, 344 Or at 454 (the court rejected a remedies-clause challenge to a statute of repose for a medical malpractice claim on behalf of a minor child); *see Fields v. Legacy Health Sys.*, 413 F3d 943, 959 (9th Cir 2005) (the repose period for a wrongful-death action in ORS 30.020(1) barred the claim). See § 2.7A to § 2.7G(2) for further discussion of statutes of ultimate repose.

The five-year suspension of the limitations period for minors and persons with a disabling mental condition is not lost by the commencement and subsequent

dismissal of a claim by a conservator or by the appointment of a conservator. *Luchini By & Through Luchini v. Harsany*, 98 Or App 217, 221, 223, 779 P2d 1053, *rev den*, 308 Or 608 (1989) (as long as the right to sue remains in the person, the appointment of a conservator does not remove the statutory extension of the statute of limitations for minors).

See § 2.6B(1)(b) (applicability of ORS 12.160 to the OTCA).

§ 2.6B(1)(b) Applicability of the Minority-Tolling Statute to the Oregon Tort Claims Act

The minority-tolling statute, ORS 12.160 (*see* § 2.6B(1)(a)), tolls the two-year limitations period under the OTCA for a minor's cause of action. *Robbins v. State ex rel. Dep't of Human Servs.*, 276 Or App 17, 19–20, 336 P3d 752 (2016); *Smith v. OHSU & Clinic*, 272 Or App 473, 486, 356 P3d 142 (2015). See § 2.18A(4)(b) for further discussion.

NOTE: If a minor has a claim against a public body, the 270-day notice period prescribed in ORS 30.275(2)(b) is not tolled pending the appointment of a guardian ad litem. *Perez By & Through Yon v. Bay Area Hosp.*, 315 Or 474, 482–83, 846 P2d 405 (1993). However, see ORS 30.275(8) regarding a claim against the Department of Human Services, the Oregon Youth Authority, or certain private nonprofits that provide public transportation.

See also § 2.1A(1) to § 2.1B (actions in general), § 2.18A to § 2.18C (actions involving governmental and public bodies), § 7.3A (actions for wrongful death against a governmental body), § 7.4A to § 7.4D(1) (actions for personal injury), § 7.16C (actions for wrongful death based on products liability), § 7.14A(5) (actions for wrongful death against a governmental body based on medical malpractice).

§ 2.6B(2) Death of a Party

§ 2.6B(2)(a) Death of Plaintiff

If a person who is entitled to bring an action dies during the time allowed for bringing the action, an action may be commenced by the person's personal representative after the statute of limitations has run, as long as the action is commenced within one year after the person's death. ORS 12.190(1).

See § 2.18A to § 2.18C (governmental and public bodies), § 2.2G to § 2.2G(4) (survival of actions), § 2.7A to § 2.7G(2) (statutes of ultimate repose), § 6.5A to § 6.5C(2) (actions for wrongful death in general).

§ 2.6B(2)(b) Death of Defendant

If a person who would be a defendant in an action dies before the statute of limitations has run, an action may be commenced against the person's personal representative after the statute has run, as long as the action is commenced within one year after the person's death. ORS 12.190(2).

See § 6.4B(2) (defendant's death), § 6.5D (death of wrongdoer).

§ 2.6B(3) Absence or Concealment of Defendant

If a cause of action accrues against a person when the person is out of state and service cannot be made on the person in Oregon, or if the person is concealed in Oregon, the action may be commenced within the applicable statute of limitations after the person returns to Oregon or is no longer concealed. ORS 12.150.

If a person leaves Oregon or hides in Oregon after the cause of action accrues, the statute of limitations is suspended during the time that the person is absent from, or concealed in, Oregon. The time of concealment or absence will not be counted as any part of the time within which the action must be commenced. ORS 12.150.

NOTE: A question exists regarding whether a student in Oregon who maintains a permanent residence outside the state and returns to his or her home in another state during breaks and vacations is "absent from Oregon" for those periods for purposes of tolling the statute of limitations.

NOTE: A question also exists regarding whether the statute of limitations is tolled in motor vehicle cases against drivers who are absent from the state after the cause of action accrues. A plaintiff's alternative form of service for an action against a nonresident motorist, or against an Oregon motorist who moves out of state, is service by mail in compliance with ORCP 7 D(4)(a)(i) to the addresses specified in that provision. Service in this manner is deemed complete on the latest date on which any of the required mailings is made. ORCP 7 D(4)(a)(i); *see Whittington v. Davis*, 221 Or 209, 212, 350 P2d 913 (1960); *Wright v. Osborne*, 151 Or App 466, 470, 949 P2d 321 (1997), *rev den*, 327 Or 448 (1998).

In *Herzberg v. Moseley Aviation, Inc.*, 156 Or App 1, 6, 964 P2d 1137 (1998), *rev den*, 328 Or 275 (1999), the court held the two-year statute of limitations on a products-liability claim was tolled when personal service could not be effected in state and the defendant's partnership ultimately was served by mail to an address outside of Oregon.

When the maker of a promissory note defaults and moves out of state after the claim has accrued, the statute of limitations is tolled during the maker's absence from Oregon. *Gary M. Buford & Assocs., Inc. v. Guillory*, 98 Or App 691, 694, 780 P2d 783, *rev den*, 308 Or 660 (1989), *modified by Wright*, 151 Or App at 469 n 1 (citing ORS 12.080(1) and ORS 12.150).

§ 2.6C Advance Payments for Death, Injury, or Property Damage

§ 2.6C(1) Notice of Expiration of Limitations Period

ORS 31.560 and ORS 31.565 allow a person to make an advance payment for damages arising from the death or injury of a person or the injury or destruction of property without admitting liability for the death or injury.

If, within 30 days after making the first advance payment referred to in ORS 31.560 or ORS 31.565, the payor gives to each person entitled to recover damages

for the death or injury written notice of the date that the limitations period expires, then the making of any such advance payment does not suspend the running of the limitations period. ORS 12.155(1).

If such notice is not given within 30 days after the first advance payment is made, the limitations period is suspended from the date of the first advance payment until the date that the payor gives the person entitled to recover damages written notice of the expiration date of the limitations period. ORS 12.155(2); *Pipkin v. Zimmer*, 113 Or App 737, 740–41, 833 P2d 1350, *rev den*, 314 Or 727 (1992) (when the defendant's insurance company paid for property damage to the plaintiff's car but failed to give the notice, the statute of limitations was tolled).

NOTE: The term *advance payment* means "compensation for the injury or death of a person or the injury or destruction of property prior to the determination of legal liability therefor." ORS 31.550. However, a party's provision of free or discounted medical services can also qualify as compensation for an injury, and can constitute compensation "prior to the determination of legal liability" for purposes of tolling the statute of limitations. *Humphrey v. OHSU*, 286 Or App 344, 356, 398 P3d 360 (2017).

See § 2.6C(2) for the meaning of the word *person* for purposes of ORS 12.155. See also § 2.6C(3) regarding an advance payment to a minor.

§ 2.6C(2) *Person* Defined

A "person" making an advance payment within the meaning of ORS 12.155 is not limited to insurers. *See* § 2.6C(1). An advance payment by any person, as defined in ORS 174.100(6), made without providing written notice of the statute of limitations as set forth in ORS 12.155(1), will toll the limitations period. *Hamilton v. Paynter*, 342 Or 48, 53–54, 58, 149 P3d 131 (2006).

§ 2.6C(3) Advance Payment to Minor

The Oregon Court of Appeals has held that an advance payment to a minor does not toll the two-year statute of limitations provided for under the OTCA (ORS 30.275(9)). It reasoned that because of the "notwithstanding" clause in that statute, the tolling provision of ORS 12.155(2) did not apply to the OTCA limitations period. *Lawson v. Coos Cnty. Sch. Dist. No. 13*, 94 Or App 387, 391, 765 P2d 829 (1988), *abrogated by Baker v. City of Lakeside*, 343 Or 70, 164 P3d 259 (2007). However, in *Baker v. City of Lakeside*, the Oregon Supreme Court interpreted the "notwithstanding" clause differently. It held that the clause "applies only to those provisions of ORS chapter 12 and other statutes that provide a limitation on the commencement of an action." *Baker*, 343 Or at 83. Given that interpretation, it appears that ORS 12.155, which does not provide a limitation on the commencement of an action, would apply to the OTCA limitations period. It follows that, although no appellate court has so ruled yet, an advance payment made without the notice specified in ORS 12.155(1) would, in accordance with ORS 12.155(2), toll the OTCA's two-year limitations period in ORS 30.275(9).

§ 2.6D Court Actions

§ 2.6D(1) Limitations Period When Action Is Stayed by Injunction or Statutory Prohibition

If the commencement of an action is stayed by an injunction or a statutory prohibition, the statute of limitations does not run during the continuance of the injunction or prohibition. ORS 12.210.

§ 2.6D(2) Extension of Limitations Period for Trustee on Debtor's Bankruptcy or Debtor's Action

Under 11 USC section 108(a) to (b), a trustee, stepping into the debtor's shoes, receives an extension of time for filing an action or doing some other act required to preserve the debtor's right.

"If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action," and if that period has not expired before the date of the filing of the bankruptcy petition, the trustee may commence the action before the later of "(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) two years after the order for relief." 11 USC § 108(a).

Thus, the statute of limitations or the time period fixed by a nonbankruptcy order or agreement is extended for the commencement or continuation of an action by the debtor (trustee) for two years after the date of the order for relief, unless the fixed period would expire after two years from the order of relief. 11 USC § 108(a).

Under 11 USC section 108(b), the trustee receives an extension of 60 days from the date of the order for relief within which the trustee may file any pleading, demand, notice, or proof of claim or loss; cure a default; or perform any other similar act, such as filing an insurance claim, or any action not covered by 11 USC section 108(a). If the period for doing the act expires after 60 days from the date of the order for relief, the date of expiration of the time otherwise allowed for performing the action applies. 11 USC § 108(b).

§ 2.6D(3) Bankruptcy Creditor's Action

Section 108(c) of the Bankruptcy Code extends the statute of limitations for creditors.

If a statute of limitations, a nonbankruptcy order, or an agreement "fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor," and if that period has not expired before the date of the filing of the bankruptcy petition, then that period does not expire until the later of:

> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of [the Bankruptcy Code], as the case may be, with respect to such claim.

11 USC § 108(c).

Thus, the creditor is given an additional 30 days after notice of the termination or expiration of the automatic stay if the statute of limitations runs while the stay is in effect. An event that could result in the termination or expiration of the stay could include relief from the automatic stay under 11 USC section 362, 11 USC section 922, 11 USC section 1201, or 11 USC section 1301; dismissal of the petition; or the debt on which the creditor bases its claim being excepted from discharge. *See* 11 USC § 108(c).

The creditor must bring its action against the debtor within the later of the 30-day extension or the expiration of the statute-of-limitations period on the creditor's claim. 11 USC § 108(c).

Section 108(c) applies to chapters 7, 11, 12, and 13 bankruptcies. 11 USC § 103(a).

The period for giving notice of a claim for a statutory lien against the debtor is not suspended or extended by the debtor's filing of a bankruptcy petition. *See* 11 USC § 546(b).

See § 11.20 to § 11.20E(18) for further discussion of creditors' rights when a debtor declares bankruptcy.

§ 2.6E Effect of Involuntary Dismissal on Statute of Limitations

If a case is involuntarily dismissed, ORS 12.220 allows a plaintiff to refile that same action within 180 days, even if the statute of limitations has then run on the action. But the defendant must have had actual notice of the filing of the original action within 60 days after the original action's filing. ORS 12.220(1)–(2); *see* § 2.8 to § 2.8C (commencing a new action after involuntary dismissal); *see also* 2 *Torts* § 32.7 (OSB Legal Pubs 2012).

§ 2.18A(4) When Action Must Be Commenced

§ 2.18A(4)(a) General Rule: Action Must Be Commenced within Two Years

Except as provided in ORS 12.120, ORS 12.135, and ORS 659A.875, "but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action," an action arising from any act or omission of a public body or an officer, employee, or agent of a public body must be commenced within two years after the alleged loss or injury. ORS 30.275(9); *see Bell v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 353 Or 535, 548, 301 P3d 901 (2013) (holding that ORS 30.075(1) constitutes a "statute providing a limitation on the commencement of an action," and thus the two-year limitation in ORS 30.275(9) applied to the plaintiff's survival action against the transportation district). But see § 2.18A(4)(b) regarding the commencement of an action by a minor or person with a disabling mental condition.

NOTE: Construction-defect actions must be commenced within two years, but ORS 12.135 can affect the period of ultimate repose. ORS 12.135(2); ORS 30.275(9).

§ 2.18A(4)(b) Commencement of Action by Minor or Person with Disabling Mental Condition

ORS 12.160, as amended in 2015 (Or Laws 2015, ch 510), the tolling statute for minors and for persons with disabling mental conditions that prevent them from comprehending their rights at the time the cause of action accrues, tolls the two-year statute of limitations found in ORS 30.275(9) for commencing a cause of action against a public body under the OTCA. *Robbins v. State ex rel. Dep't of Human Servs.*, 276 Or App 17, 19–20, 336 P3d 752 (2016).

NOTE: Case law predating the 2015 amendments provides helpful context but is based on former versions of ORS 12.160, so earlier cases should be relied on only with caution. *See Baker v. City of Lakeside*, 343 Or 70, 82, 164 P3d 259 (2007) ("Nothing in the legislative history suggests . . . that the legislature intended to deny children and persons with mental disabilities bringing OTCA claims the advantage of a tolling provision that is

available to them in every other action."). The legislature expressly made the 2015 amendments retroactive to "all causes of actions arising on or after January 1, 2008." Or Laws 2015, ch 510, § 2(1).

See also § 2.1A(1) to § 2.1A(3) (discussing when an action is commenced), § 2.6 to § 2.6E (statutes of limitations and tolling the limitations period), § 2.18A(2) (wrongful-death actions), § 7.3A to § 7.3B (actions against governmental bodies).

§ 6.1E Guardian Ad Litem; Civil Litigation

(1) *Appearance in court action.* A minor or incapacitated person who has a conservator or guardian must appear in court through the conservator or guardian or, if no conservator or guardian has been appointed, through a guardian ad litem. ORCP 27 A–B.

(2) *Tolling during minority or insanity.* The statutes of limitations for most causes of action (except for those relating to land sale contracts) held by a person who is under the age of 18 are tolled for up to five years before the person reaches age 18. ORS 12.160(1)–(2). Causes of action that accrue while a person has a disabling mental condition are also tolled. ORS 12.160(3)–(4). The time for commencing an action cannot be extended under the statute for more than five years, or for more than one year after the person reaches age 18 or no longer has a disabling mental condition, whichever occurs first. ORS 12.160(2), (4). See § 6.3B(2), § 6.5C(1), and § 2.6B(1)(a) to § 2.6B(3) for further discussion on the tolling statute, including applicability of the statute to the Oregon Tort Claims Act (OTCA).

CAVEAT: It is not clear whether the minority-tolling statute (ORS 12.160) tolls the two-year limitation period under the OTCA to commence an action. See § 2.18A(4)(b) for further discussion.

NOTE: A claim brought by a parent, guardian, or conservator of a minor child for medical expenses resulting from the same wrongful conduct that is the basis of the minor's cause of action is also tolled. ORS 12.160(5). *See* § 7.4D to § 7.4D(1).

NOTE: The appointment of a guardian ad litem, conservator, or guardian does not affect the tolling period. *Luchini By & Through Luchini v. Harsany*, 98 Or App 217, 221–23, 779 P2d 1053, *rev den*, 308 Or 608 (1989).

NOTE: The Oregon Constitution does not prevent the legislature from imposing statutes of limitation on claims accruing during the minority of a claimant. *Christiansen v. Providence Health Sys. of Oregon Corp.*, 344 Or 445, 454–56, 184 P3d 1121 (2008).

§ 6.1F References

See generally Guardianships, Conservatorships, and Transfers to Minors (OSB Legal Pubs 2018).

§ 6.3A Death of a Party

§ 6.3A(1) Action Continued by Personal Representative

Upon the death of a party, the court, on motion, must allow the action to be continued by the party's personal representative or successors in interest if the motion is made any time within one year after the party's death. ORCP 34 B(1); *see* § 6.5A to § 6.5E (wrongful death).

§ 6.3A(2) Action Continued against Personal Representative

"An action against a decedent commenced before and pending on the date of death of the decedent may be continued as provided in ORCP 34 B(2) without presentation of a claim against the estate of the decedent." ORS 115.315.

Under ORCP 34 B(2), if a defendant dies, the court, on motion, must allow the action to be continued against the defendant's personal representative or successors in interest, unless (1) the defendant's personal representative or successors in interest mail or deliver notice that includes the information required by ORS 115.003(3) to the claimant (or the claimant's attorney, if represented) and (2) the claimant or the claimant's attorney fails to move the court to substitute the personal representative or successors in interest within 30 days of mailing or delivery of the notice. In the case of such failure, the claim may be barred.

§ 6.3A(3) Abatement

If a plaintiff or defendant dies in an action in which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate. ORCP 34 D. The proper procedure is to move the court for an order substituting parties as described in § 2.2G(1) to § 2.2G(2).

§ 6.3B Disability of a Party

§ 6.3B(1) Action Continued

If a party to an action becomes disabled, the court, within one year of the disability, on motion, may allow the action to be continued by or against the disabled party's guardian, conservator, or successors in interest. ORCP 34 C.

§ 6.3B(2) Tolling for Minority or Insanity

If a person is younger than 18 years of age or has "a disabling mental condition that bars the person from comprehending rights that the person is otherwise bound to know" at the time of the accrual of a cause of action mentioned in ORS 12.010 to 12.050, ORS 12.070 to 12.250, or ORS 12.276, the statute of limitations for the action is tolled for as long as the person is younger than 18 or for

as long as the person has such a disabling mental condition. ORS 12.160(1), (3); *see* § 6.1E. However, the statute of limitations will not be extended for more than five years by reason of age or disabling mental condition, or for more than one year after the person reaches 18 years of age or no longer has such a disabling mental condition, whichever occurs first. ORS 12.160(2), (4). See § 6.5C(1) and § 2.6B(1)(a) to § 2.6B(1)(b) for discussion of how the OTCA affects the tolling statute.

NOTE: If a child's cause of action is tolled under ORS 12.160(1), an action seeking damages for medical expenses incurred by a parent, guardian, or conservator of the child is tolled for the same amount of time if the medical expenses resulted from the same wrongful conduct that is the basis of the child's cause of action. ORS 12.160(5). *See* § 7.4D(1).

To be sufficient to toll the statute of limitations for a disabling mental condition as defined in ORS 12.160(3), the person must suffer from "such a condition of mental derangement as actually to bar the sufferer from comprehending rights which he is otherwise bound to know." *Roberts By & Through Drew v. Drew*, 105 Or App 251, 254, 804 P2d 503 (1991) (quoting *Hoffman v. Keller*, 193 F Supp 733, 735 (D Or 1961)). Whether that condition existed when the cause of action accrued is usually a question of fact. *Roberts By & Through Drew*, 105 Or App at 255.

§ 6.3C Effect of Death on Unfiled Action

§ 6.3C(1) Commencement of Action by Personal Representative

If a person who is entitled to bring an action dies before the applicable statute of limitations expires, the personal representative may commence the action after the expiration of that time, but the action must be commenced within one year after the death of the person. ORS 12.190(1).

However, the limitations period set forth in ORS 30.075(1), rather than ORS 12.190(1), applies to personal-injury actions in which the injured person dies before the action is commenced. Under ORS 30.075(1), the personal representative must commence the action within three years (extending the otherwise applicable two-year statute of limitations under ORS 12.110 for one year). *See Giulietti v. Oncology Associates of Oregon, P.C.*, 178 Or App 260, 266, 36 P3d 510 (2001). "ORS 30.075 is specific to personal injury claims," whereas ORS 12.190(1) applies to all other actions in which the decedent died before the action was brought. *Giulietti*, 178 Or App at 265–66.

NOTE: An action for wrongful death is subject to the limitations period set forth in ORS 30.020(1) (generally, three years).

CAVEAT: A cause of action may be subject to a specific statute of limitations. *See* chapter 7 (discussing statutes of limitations applicable to various torts, including actions based on a products-liability civil action).

§ 6.3C(2) Commencement of Action against Personal Representative

If a person who would be a defendant in a case dies before the statute of limitations expires, the plaintiff may commence an action against the defendant's personal representative after the statute of limitations expires, but the action must be brought within one year after the defendant's death. ORS 12.190(2).

However, with certain exceptions, "no action against a personal representative on account of a claim shall be commenced until the claim of the plaintiff has been presented to and disallowed by the personal representative." ORS 115.325; *see Meissner v. Murphy*, 58 Or App 174, 177–78, 647 P2d 972 (1982).

§ 6.3D Death of an Attorney

If an attorney for a person dies, the person must commence the action within 180 days after the attorney's death, or within the statute of limitations, whichever is later, if

(1) "[t]he attorney has agreed to represent the person in the action";

(2) "[t]he attorney-client relationship between the person and the attorney is confirmed in a writing prepared by the attorney or at the direction of the attorney"; and

(3) the attorney dies before the statute of limitations expires.

ORS 12.195.

§ 6.3E References

See 1 *Oregon Civil Pleading and Practice* ch 7 (OSB Legal Pubs 2012) (substitution of parties); *see also* 2 *Torts* ch 30 (OSB Legal Pubs 2012) (wrongful death and survival of personal injury actions).

§ 7.4 PERSONAL INJURY

§ 7.4A Statutes of Limitation—In General

An action for personal injury may be governed by one of several different statutory limitations periods, including medical, surgical, and dental malpractice (ORS 12.110(4)); product liability (ORS 30.905); wrongful death (ORS 30.020); and claims against public bodies (ORS 30.275). These actions are covered separately in this chapter.

§ 7.4B Assault, Battery, False Imprisonment, or Injury to Person or Rights

"An action for assault, battery, false imprisonment, or for any [other] injury to the person or rights of another, not arising on contract and not especially enumerated in this chapter, shall be commenced within two years" after accrual of the cause of action. ORS 12.110(1); *see* ORS 147.065 (extending the statute of limitations to five years after the commission of a compensable crime); § 7.18 to § 7.18F (compensable crimes).

PRACTICE TIP: ORS 30.765 establishes parental liability for the intentional or reckless acts of a minor in that parent's legal custody. No Oregon case comments on the time limit for such claims, but ORS 12.110(1) should by its terms apply.

§ 7.4C Tort Actions Do Not Abate on Death of Injured Person

Causes of action arising out of injuries to a person, caused by the wrongful act or omission of another, do not abate on the death of the injured person and may be maintained by the personal representative for the deceased person if the decedent might have maintained an action had the decedent lived. ORS 30.075(1).

The decedent's personal representative may commence an action against the wrongdoer on behalf of the decedent if the action is commenced within three years after the injury causing the decedent's death. ORS 30.075(1).

The personal representative also may continue an action already commenced by the injured person before his or her death, assuming that the cause of action was commenced within the time limits allowed by ORS 12.110. ORS 30.075(1).

§ 7.4D Medical Bills of Injured Child

Medical expenses incurred due to the negligent injury of an unemancipated minor are damages suffered by the parent, not the child. *Palmore v. Kirkman Laboratories, Inc.*, 270 Or 294, 305–06, 527 P2d 391 (1974). A parent's action to recover the medical expenses of the child is governed by the two-year statute of limitations set forth in ORS 12.110(1) or, if the action is one for medical, surgical, or dental negligence, ORS 12.110(4). If a child's guardian ad litem files an action on behalf of the child against the wrongdoer, the parents or conservator may file a consent along with the complaint in order to include the claims for medical expenses in the guardian's action. ORS 31.700(1). If a consent is filed, the parents may not thereafter maintain a separate action to recover the medical expenses paid to treat the child's injuries. ORS 31.700(2); *see* § 7.3B (tolling of child's action).

§ 7.4D(1) Tolling (Claims Arising on or after January 1, 2008)

For actions arising on or after January 1, 2008, if a child's cause of action is tolled by ORS 12.160(1), the cause of action brought by the child's parent, guardian, or conservator "is tolled for the same period of time as the child's cause of action if the medical expenses resulted from the same wrongful conduct that is the basis of the child's cause of action." ORS 12.160(5).

However, if the action is one for medical, surgical, or dental negligence, the time to file pursuant to ORS 12.160(1) may not exceed the five-year statute of ultimate repose found in ORS 12.110(4), absent fraud, deceit, or misleading representation. ORS 12.110(4).

CAVEAT: It is not clear whether the two-year statute of limitations found in ORS 30.275(9) for commencing a cause of action under the OTCA is tolled during the plaintiff's minority by ORS 12.160. See § 7.3B for further discussion of this issue.

See also § 2.1A(1) to § 2.1B (actions); § 2.6B(1)(a) to § 2.6B(1)(b) (tolling the statute of limitations); § 7.14A(1) to § 7.14C(3), § 7.26A(2)(b) (medical and dental malpractice); § 7.22A(1) (wrongful death).

§ 7.4D(2) References

See generally 2 *Torts* chs 28, 32 (OSB Legal Pubs 2012).

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Malpractice Prevention Education for Oregon Lawyers

Potential Malpractice Trap in the OTCA

By Marilyn Heiken

For claims subject to the Oregon Tort Claims Act (OTCA), the $500,000 cap on noneconomic damages in ORS 31.710 does not apply. ORS 30.262(2). That means that in a wrongful death case against a public body, the caps in the OTCA apply rather than those in ORS 31.710. The caps in the OTCA are set forth in ORS 30.269-273.

Another thing to be aware of is that there are currently 33 "hospital districts" in Oregon, which are public bodies subject to the OTCA. For a current list of hospital districts, go to https://secure.sos.state.or.us/muni/public.do. Other public bodies include state boards, agencies, departments, cities, counties, school districts, transit districts, and hospital districts. ORS 30.260.

The limitations on liability for claims against public entities are adjusted every year. ORS 30.271. In a wrongful death case arising in August of 2018 against a local hospital district, the applicable cap on damages is $727,200 per claimant, with an aggregate limit of $1,454,300. ORS 30.272. If there are two surviving beneficiaries, each beneficiary has a separate cap. The combined cap on the claims would be $1,454,300. *Miller v. Tri-Cty. Metro. Dist.*, 241 Or App 86, rev den, 350 Or 408 (2011). The statute does not establish different caps for noneconomic and economic damages. There is just one total cap for all the wrongful death damages.

In some cases where the beneficiaries have sustained no economic damages because the decedent was not generating income at the time of his or her death, the beneficiaries could potentially recover the full $1,454,300 in noneconomic damages.

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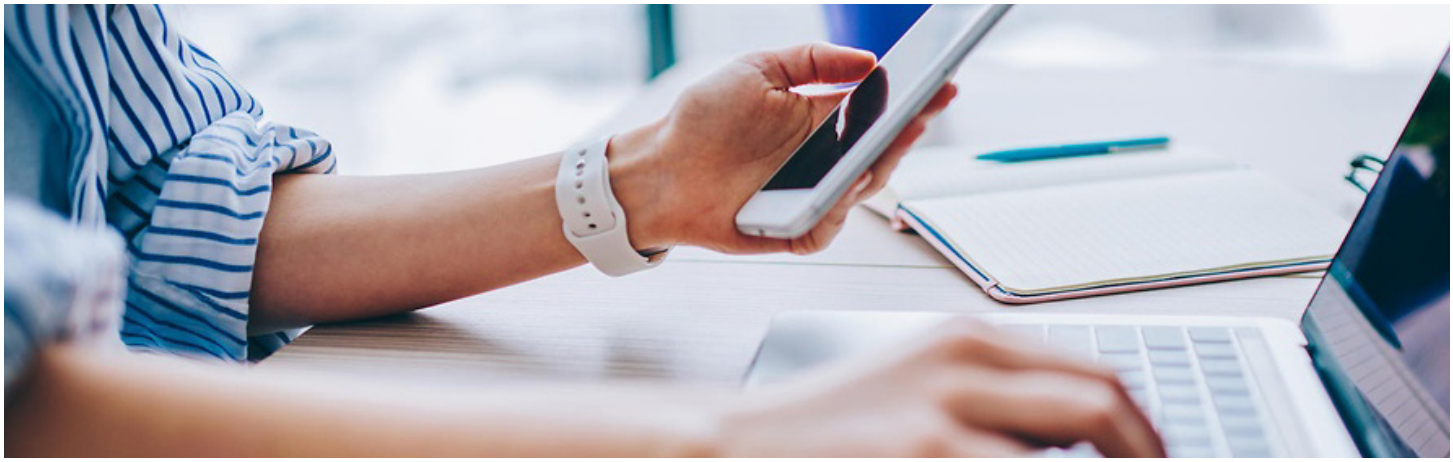
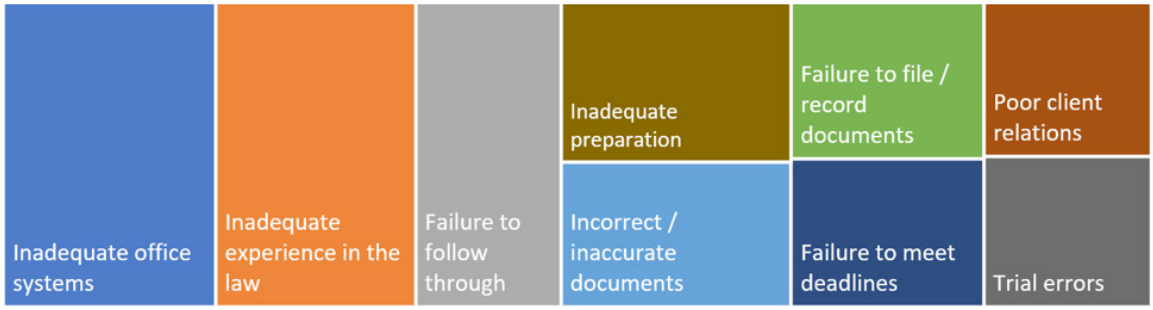


Malpractice Risk Factors and How to Avoid Them

By Hong Dao, PLF Practice Management Advisor

After reviewing PLF claims data for the past five years, I want to highlight some of the major factors that lead to malpractice claims filed against our covered parties. Those factors are represented in the chart below.



The malpractice risks resulting from many of these factors (e.g., failure to follow through, inadequate preparation, failure to meet deadlines, and poor client relations) can be avoided by focusing on one major risk factor: inadequate office systems.

This and a later article will explore ways to improve your office systems as a risk management tool.

Reduce Malpractice Risks by Improving Your Office Systems

Having the necessary law office systems helps ensure that your law practice runs smoothly. The systems set out procedures and processes to handle daily firm operations such as screening and engaging clients, checking for conflicts, entering deadlines, managing

the file, and disengaging clients. With these in place, lawyers will not have to scramble to come up with a way to do things or reinvent the wheel for each new client or matter. Most importantly, lawyers can reduce their malpractice risk by having reliable systems in which to practice law. Necessary office systems consist of the following components:

- Client screening and case assessment
- Calendaring
- File management
- Client management
- Conflict checking
- Time tracking and billing

These systems need not be thoroughly planned out or perfected before you open your law practice. But consider how you will set up and manage each component. As you practice, you figure out what works and what does not, and continue to refine and improve your systems.

This article will discuss the first three components on this list: client screening and case assessment; calendaring; and file management. The last three components will be discussed in a later article.

CLIENT SCREENING AND CASE ASSESSMENT

Proper client screening is one of the most effective ways to reduce the risk of malpractice claims. The purpose of screening is to filter out high-risk clients, who are more likely to bring an unmerited malpractice claim against lawyers or otherwise make your practice unenjoyable. Client screening will help you identify unwanted clients from desirable ones.

You can screen clients with the help of a checklist. (Read my blog post about why lawyers should use a checklist at *https://www.osbplf.org/inpractice*.) The checklist should consist of questions to evaluate the client's attitude toward the case, the client's experience and relationship with previous lawyers, the client's ability to pay, and other areas that may raise a red flag. Below are some red flags and what they could mean:

- **Client had multiple prior lawyers for the same matter –** This may indicate a problem client, a non-paying client, or a case with serious flaws (lacks merit, no evidence, no witness, etc.).
- **Client is motivated by revenge, a feeling of victimization, or other extreme emotions –** This may indicate the client has her or his own agenda and may be difficult to work with.
- **Client waited until the last minute to look for a lawyer –** This may be a signal that the client is unprepared, not proactive, and may not cooperate or respond to your requests for information, thus preventing you from performing competently.
- **Client has unrealistic expectations that cannot be changed –** This may indicate the client will be difficult or impossible to please, second-guess your legal advice, impose unreasonable demands on you, and will not be satisfied with the result, no matter how good.
- **Client expresses difficulty or inability to pay fees –** This may be a sign that the client will not pay on time or at all, will likely dispute the bills, will expect you to advance costs, and will blame you if anything goes badly.

Screen every prospective client. If a red flag is raised during the consultation or interview, put extra effort into evaluating the client by asking follow-up questions. If many alarm bells are going off, you will be better off declining the client. Send that person a nonengagement letter. Sample nonengagement letters are available at our website at *www.osbplf.org > Practice Management > Forms*.

Besides screening clients, it's also important to assess the case to ensure you can provide competent representation. Decline cases that fall outside your practice area. Dabbling is dangerous. Reject cases if you do not have and cannot acquire the requisite skill or knowledge to take them on. Consider rejecting cases if you don't have the needed time and resources to be thorough and prepared. Properly assessing your cases will help you reduce your exposure to other malpractice risk factors, including inadequate experience in the law and inadequate preparation.

CALENDARING SYSTEM

A calendaring system is an important risk management tool to manage deadlines. Claims resulting from

a missed deadline may be due to a clerical error, miscalculating deadlines, filing at the last minute, not knowing the statute of limitations, or general neglect due to procrastination or personal difficulties. Here are some calendaring errors the PLF has seen:

- Waiting until the last minute to electronically file a complaint that got rejected and missing a statute of limitations;
- Failing to appear at a final resolution conference in a case because the date was not calendared, resulting in judgment by default against the client;
- Missing a statute of limitations by untimely serving the registered agent of the corporate defendant;
- Miscalendering an administrative hearing in a case, resulting in the lawyer not appearing at the hearing.

A missed deadline is an avoidable mistake if lawyers have a reliable calendaring system to keep track of deadlines and dates. Some lawyers use rule-based calendaring software to generate a list of deadlines for a case based on applicable statutes and court rules in their local jurisdiction. When a statute or rule changes, affecting a deadline, the software automatically recalculates all the dates in the system. Other lawyers calculate manually to determine the deadlines. Whatever method you use, make sure the deadlines are promptly entered into your calendaring program.

Have one calendaring system as the main point of entry. Don't use multiple calendars (one for the office, one for home, one on your phone, and one using sticky notes). It's hard to keep track of dates and deadlines when you enter them in different places.

Enter all dates related to a case, including court dates, statutes of limitation, litigation deadlines, discovery deadlines, and client appointments. Also enter reminder dates so you have advance warning before the deadlines. Tickle dates to review your files on a recurring basis.

Adding reminders to follow up or confirm that work is complete and blocking out time to do work prior to a deadline will help you avoid at least four other risk factors — failure to follow through, inadequate preparation, failure to file/record documents, and failure to meet deadlines.

The firm should have a master calendar that pulls important deadlines and dates in cases from all the lawyers' individual calendars. This practice makes it easier for one lawyer to cover for another if an emergency occurs. A calendaring error made by one person could also be noticed and caught by another.

Make sure you back up your calendar by making a duplicate copy of the calendar. Synchronize your calendar across all your devices so you can have easy access to it. If calendaring is delegated to staff, make sure they are properly trained on how to calculate deadlines and how to use the calendaring program.

The PLF has CLEs and practice aids on calendaring available at *www.osbplf.org > CLE > Past* and at *www.osbplf.org > Practice Management > Forms*.

FILE MANAGEMENT

How you manage your files can present a malpractice risk. Proper file management can help you reduce the risk because it allows you to find the documents you need and encourages documentation. One aspect of file management is implementing a system to organize, store, and retrieve files. When you cannot find documents because they are misplaced, lost, or not properly labeled, it might jeopardize the success of your client's matter or affect your ability to represent the client. It also may lead to missed deadlines and other malpractice risks.

The second important aspect of file management is documentation. It is essential that lawyers keep a record of their communications with clients and other parties, as well as major events and milestones related to the client matters.

Documentation serves many useful purposes. It conveys information in writing to clients and gives them time to process the information. It helps prevent misunderstanding by giving the client a chance to dispute the content of the conversation. It also helps the lawyer articulate the thought process behind an action or a decision. Finally, it may help ward off a claim for legal malpractice and provide the lawyer with evidence to defend against one. If a conversation is

not documented, the client can later argue that it never occurred. But if the conversation is followed up with a letter to the client, it is harder to dispute it later.

Lawyers can document the files in different ways. One effective method is to contemporaneously memorialize the conversation or event in writing and then promptly send it to the person with whom you had the conversation by mail or email or any manner you know he or she will receive it. A second method is to write a contemporaneous and detailed memorandum to the file. A third method is to take handwritten notes during the interaction or conversation. The least effective method is doing any of these things after the fact — instead of contemporaneously.

Lawyers need to use judgment in deciding which method to use while keeping client relations in mind. Some clients may get annoyed when you send them too many "CYA" letters. You might want to explain the purpose for sending the letters (e.g., convey information, give them time to process, prevent misunderstanding, etc.).

Below are some areas you should document:

- **Commencement, scope, and termination of representation –** Use an engagement letter to document when your representation of a client begins and the scope of your legal services to avoid misunderstanding on what you will do for the client and when. Use a disengagement letter to document the termination of the attorney-client relationship when the matter is concluded or for other reasons. Use a nonengagement letter when declining a prospective client. This type of letter documents that an attorney-client relationship does not exist and that the lawyer is not responsible for any deadlines or statute of limitations in the matter. Both nonengagement and disengagement letters will help protect lawyers against allegations they failed to take an action before the statute of limitations expired. Sample engagement, nonengagement, and disengagement letters are available at *www.osbplf.org > Practice Management > Forms*.
- **Client's instructions and lawyer's advice –** Follow up with a letter to a client to document any advice given to the client and the client's instruction. Decisions about settlement, authority to settle, dismissal, or appeal should all be documented. This will help avoid finger-pointing if the matter goes south and the client does not get the desired result.
- **Important conversations with clients, opposing parties, and other parties involved –** By documenting these conversations, you will have evidence to help defend any claims for malpractice.
- **Major events and milestones in the matter –** Any significant event that happens in the client's matter should be documented, such as filing of pleadings or the court's ruling on a motion. Even when the matter is not currently active, it's still a good idea to inform clients in writing of major milestones in the case and its status. This might help stave off a claim that you didn't take action on the matter.

Proper file management, particularly documentation, can help improve client relations and allow you to prove what went on in the case, which can go a long way in avoiding malpractice.

I will discuss the last three components of an effective office system in the next issue of *in*Brief. ■

Special thanks to Bruce Schafer, recently retired Director of Claims at the PLF, for his input on documentation.

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Malpractice Prevention Education for Oregon Lawyers

Malpractice Risk Factors and How to Avoid Them Part II

By Hong Dao, PLF Practice Management Advisor

In my previous article in the October 2018 issue of *in*Brief, I discussed the importance of implementing law office systems to help reduce your risk of legal malpractice. I specifically focused on calendaring systems, client and case screening, and file management. This article will focus on client relations, conflict checking systems, and billing as risk management tools.

CLIENT RELATIONS

Risk management does not end when you screen and select the "right" client or case. It's an ongoing process requiring continuous evaluation of your client relationship and a diligent effort to remain on good terms with clients. Clients hire lawyers because of their skills, experience, and reputation, but those qualities alone do not result in a good attorney-client relationship. It's easy to think that as long as you're able to get the result clients want, they will have nothing to complain about.

Providing quality legal services is simply not enough to protect against malpractice risk. Of course, getting the desired outcome is important to clients. Just as important, however, is how they are treated during the course of representation. If your communication and interaction with clients leave them feeling dissatisfied, unhappy, or disrespected, the good outcome you obtained may still not be satisfactory to them. These feelings will affect how forgiving they are toward you. Clients who feel they are treated poorly are less likely to refer prospective clients to you and may be more likely to bad mouth you, file a malpractice claim against you, or complain about you to the Bar.

Let's look at some relationship errors that make clients unhappy or dissatisfied:

- Not returning clients' phone calls or emails;
- Not responding to their requests for information;

- Not actively listening to their concerns;
- Allowing phone calls or staff to interrupt client meetings;
- Being late for appointments;
- Rescheduling their appointments too many times.

You can avoid these errors by setting expectations and treating clients with common business courtesies.

Set expectations and boundaries for communicating with you

In addition to explaining the scope of your legal services and your fees at the beginning of your attorney-client relationship, it's also important to discuss with clients what they can expect of you in terms of communication. In order to do this, you have to determine what works best for you. This includes intentionally deciding whether you want to take client calls during business hours only, what period of time is workable for you to return calls, and whether you want to regularly block time for calls. Once you have made a plan, discuss it with your clients. A conversation about the best method and date/time for them to reach you and vice versa will save a lot of potential frustration and anger. For example, if you set aside one or two hours during the day for phone calls, communicate that schedule to clients. Absent an emergency, make yourself available at those times. Include your regular schedule in your engagement letter or fee agreement and make sure you stick with it. If the schedule needs to change, communicate that with the client and follow up with a letter or email.

Once you establish and communicate your policies, stick with them. For example, if you tell clients you don't take after-hours calls, but you answer and talk with them, you're undermining the expectations you've set.

Treat clients with common business courtesies

Clients are also customers. They want good customer service and respect. Treating them with common business courtesies helps foster a respectful relationship that will have a lasting impact.

- **Promptly return clients' telephone calls** – You can also ask staff to call clients to explain your delay in returning their calls. If their calls or emails are not urgent or important, then respond on the days you've set aside to communicate with clients.
- **Be on time for their appointments** – Don't make clients wait more than 5 minutes to meet with you. Give them the courtesy of meeting them on time. Reschedule their appointment only if it is absolutely necessary. A client whose appointment is frequently rescheduled may feel like you don't respect their time.
- **Give clients your undivided attention** – When you meet with them, tell staff not to interrupt you. Put your office phone on "Do Not Disturb" and silence your cell phone. Refrain from constantly looking at the clock.
- **Be responsive** – If clients ask you for something related to their matter, provide the requested information to them in a reasonable amount of time. Your failure to fulfill your commitment may affect your relationship with the client and lead to more serious issues.
- **Be a good listener** – Actively listen to what the client has to say, and communicate back to the client what you hear the client say. This verbal assurance lets the client know that you understand what the client is saying and makes him or her feel heard. Delay asking questions or offering advice or comments until the client has had the opportunity to talk about her or his problem without interruption.
- **Be available** – Staff play an important role as a conduit between the lawyer and client. But don't let staff be a barrier between you and the client. Be personally available to communicate important issues or developments in the matter to the client.

Other aspects of managing client relations include documention, using a written fee agreement, and more. Those practices are discussed in my previous article available at *www.osbplf.org > Practice Management > Publications > InBrief > October 2018*. Additional tips on how to improve your client relations are available at *https://www.osbplf.org/assets/forms/pdfs//Client%20Relations%20Best%20Practices.pdf*.

CONFLICT CHECKING SYSTEMS

Another malpractice risk factor for lawyers is not using a conflict checking system. The failure to

properly screen can result in representing clients with conflicting interests. This creates legal malpractice problems as well as ethical issues with serious consequences.

Many situations may give rise to a conflict of interest. These include representing opposing parties in the same matter, or not providing full disclosure and obtaining a waiver in a matter with multiple clients. Whatever it may be, lawyers need a system to identify and resolve the situation that may give rise to an actual or potential conflict.

It's important to establish a reliable system that allows you to do a thorough and complete search of the entire database to find and match the queried name. Input all parties in your conflict database, including the clients, adverse parties, related parties, declined prospective clients, pro bono clients, etc. Set up procedures for conflict checking to properly search, analyze, and document potential conflicts as well as to obtain informed consent or decline representation due to a conflict. The PLF has a helpful practice aid called "Conflict of Interest Systems and Procedures" that discusses setting up a conflict database and how to systemize procedures. It is available at *www.osbplf.org > Practice Management > Forms > Conflicts of Interest*. It's also available at this link: *https://www.osbplf.org/assets/forms/pdfs//Conflict%20of%20Interest%20Systems%20-%20Procedures.pdf*.

BILLING ISSUES

The final legal malpractice risk factor to be mindful of is your billing and fee collection practices. Your efforts to get paid may result in a response you least expect: the client disputes your fees, accuses you of providing negligent service, and threatens to file a malpractice claim against you. The response may be triggered by an underlying issue that finally surfaces on receipt of the final bill. You can prevent this by taking a few precautionary measures.

- **Only take clients who can afford your legal services** – This advice harkens back to my previous article on client screening. Clients who express an inability or unwillingness to pay for your services may find fault in your work and avoid paying their bills.
- **Use a written fee agreement** – Clearly explain how your legal fees are determined and your billing procedures, such as when clients will be billed and the procedures for withdrawing funds. Document the billing process and withdrawal procedures in a written fee agreement. Follow the terms of the fee agreement. If you and the client agree that you will bill monthly, make sure you send the monthly statement out on time.
- **Review statements before sending** – Make sure you review all billing statements before sending them to clients. In addition to looking for errors, also review billing practices that may cause confusion to the client, such as block billing or vague entries (e.g., "legal research"). It's also an opportunity to reassess whether the charges reflect the value that clients receive from your work. If not, consider writing off some time. If you're discounting your hourly rate as a promotion or a favor to the client, include your normal rate so the client can see the actual value of your service.
- **Enter time contemporaneously or at least daily** – To avoid under- or over-billing clients, it's best to track and enter time contemporaneously with the task. If that is not possible, then enter your time at the end of every day. You can do this with a notepad or using time-tracking software. Recording time daily prevents the frantic search for emails you sent or documents you drafted to recreate a list of billable tasks. Lawyers who do not record time on a daily basis end up losing many billable hours, resulting in undercharging for their legal services or padding their bills.

You can find more information on good billing practices at our website, *www.osbplf.org > Practice Management > Forms > Financial Management*.

Of particular relevance are two practice aids titled, "Daily Time Sheet," available at *https://www.osbplf.org/assets/forms/pdfs//Daily%20Time%20Sheets.pdf*, and "Billing and Time Slips," available at *https://www.osbplf.org/assets/forms/pdfs//Billing%20and%20Time%20slips.pdf*.

If you have any questions on how to improve your office systems. please call a PLF practice management advisor at 503.639.6911.

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Malpractice Prevention Education for Oregon Lawyers

SETTLEMENT PROCEEDS AND OTHER TRAPS

Here are a few simple, but critical, tips for avoiding malpractice while handling and settling personal injury claims.

CASE INFORMATION AND CLIENT EXPECTATION

Resolving claims to everyone's satisfaction begins when clients first walk into your office. You can prevent many problems by reviewing issues with your clients at an early stage in your representation.

Provide a Case Settlement/Cost Overview. Many clients do not understand that settlement money they have received for medical expenses or lost wages must be paid to their medical providers or insurance carriers of PIP (Personal Injury Protection), health, disability, or workers' compensation coverage. Informing the client early helps everyone have the same expectations going into a case.

There are three basic categories of claims for reimbursement from personal injury settlement proceeds: (1) Claims by the client's insurer for PIP payments made; (2) Claims by health plan insurers for payments to the client's medical providers; (3) Claims by medical providers for unpaid bills for services, including liens by hospitals and physicians; and 4) claims made by Medicare or state welfare agencies for payments made to medical providers.

This article will refer to these categories of potential claimants collectively as "insurers and providers."

Ask About Health Insurance. If you know who the health insurance carrier is, call and find out whether a right of subrogation exists under the policy. Inquire about medical providers so you can determine whether there are any bills you were not aware of or whether a provider has filed a lien.

Medicare and Medicaid. Medicare and Medicaid liens are very tricky. Start early and hire help if needed.

Department of Human Services (DHS) Welfare Liens. Start early and hire help if needed.

Determine Whether Other Insurance Payments Are Involved. The sooner you learn what insurance exists, the sooner you can determine what portion of the settlement proceeds would be owed to the client's insurers for benefits paid. Examples are PIP, workers' compensation, and disability benefits.

Make Sure You Have All the Medical Bills.

The sooner you identify all of your client's providers, the sooner you can begin locating bills, liens, and records. This is especially important for the invoices that slip through the cracks because they are billed separately (e.g., ambulance, radiology, surgery, and anesthesiology). Quite often these bills do not show up on a hospital summary and can be missed. Also, these types of bills are often sent to collection much sooner than others.

Determine Whether a Minor Is Involved.

The time limit for a minor's claim against a public body (e.g., Tri-Met, a city, a school district, the police) is short – it must be filed within two years. ORS 30.275(9). See Lawson v. Coos Co. Sch. Dist. No. 13, 94 Or App 387, 765 P2d 829 (1988). Also, watch out for the minor's medi-

cal bills. When a minor child is injured by a wrongdoer, a parent may file an action against the wrongdoer to recover the reasonable medical expenses paid to treat the child's injuries. See RESTATEMENT (SECOND) OF TORTS §703(e) (1977). A parent's action to recover the medical expenses of the child is governed by a two-year statute of limitations set forth in ORS 12.110(1). If a child's guardian ad litem files an action on behalf of the child against the wrongdoer, the parents may file a consent along with the complaint to include the claims for medical expenses in the guardian's action. ORS 30.810(1). If the court allows that consent, the parents may not thereafter maintain a separate action to recover the medical expenses paid to treat the child's injuries. ORS30.810(2).

Although the statute and case law are not specific on this issue, when possible, a prudent guardian ad litem will bring an action to recover the medical expenses of the child within two years. See Palmore v. Kirkman Laboratories, 270 Or 294, 527 P2d 391 (1974).

For actions arising on or after January 1, 2008, if a child's cause of action is tolled by ORS 12.160(1), the cause of action brought by the parent, guardian, or conservator of the child is tolled for the same period of time as the child's cause of action if the medical expenses resulted from the same wrongful conduct that is the basis of the child's cause of action. ORS 12.160(5). If, however, the action is one for medical, surgical or dental negligence, the time to file pursuant to ORS 12.160(1) may not exceed the 5-year statute of ultimate repose found at ORS 12.110(4), absent fraud, deceit, or misleading representation. ORS 12.110(4).

THINGS TO DO BEFORE SETTLING

Check with the UIM Insurer. Before you settle, evaluate whether your client has an underinsured motorist (UIM) claim or potential claim. If your client has a potential UIM claim, you must obtain the UIM insurer's written consent to the underlying settlement before you settle the case. Failing to obtain written consent to the settlement can defeat any potential UIM claim.

Check with the PIP Insurer. Before a settlement conference: (1) Write the PIP insurer and obtain an updated total of PIP payments in writing. PIP totals can change, and you cannot negotiate effectively if you do not have the correct amount. If you obtain a current statement of PIP payments, in writing, there can be no dispute later. (2) If the PIP insurer has not authorized you to collect its PIP reimbursement, clarify in writing to the insurer that you will take no responsibility for collecting its PIP reimbursement from the liability insurer. If the PIP insurer authorizes you to collect its PIP reimbursement, clarify in writing your right to deduct your contingent fee and pro rata costs from the amount collected. However, be aware that you have a potential conflict of interest if you deduct your contingent fee for collecting reimbursement for the PIP carrier. (3) Confirm the total of the bills that have been paid by the PIP insurer. Make sure that the PIP insurer, if it paid a discounted amount, is not credited for paying the full bill (thus reducing your client's total limit of PIP available).

Determine the extent of PIP reimbursement allowable pursuant to ORS 742.544.

Invite Insurers and Providers to the Settlement Conference. If significant PIP or medical bills are an issue, request that the interested insurers or medical providers attend the settlement conference or be available by phone. The more significant the payments or bills, the more you need the insurers' or providers' participation. Be aware that some insurers are also claiming a lien for projected (future) medical expenses. The insurers and providers are more likely to reduce their reimbursement demands if the defense lawyers explain the comparative fault facts or other reasons why your client should lose. Calling the insurers or providers after the case is settled is much less effective.

Get Updated Totals in Writing. Obtaining written confirmation of insurance payments and medical bills before the settlement helps prevent problems later. If a bill or adjusted total comes in after the settlement, you have a written confirmation of the totals provided by the insurers or providers. This is much more effective than your telephone notes.

Send Your Client a List of Bills. Create a list of medical providers and the amounts they tell you they are owed. Send this list to your client and request confirmation that it is accurate and complete. You may even want to have the client sign off on the list. If you are missing a bill, your client may spot it. If your client comes back to you later with a new bill, you have written confirmation of the bills you were given.

Obtain Workers' Compensation Carrier Approval. If there is a workers' compensation lien, the carrier must approve of the settlement. ORS 656.593. Make sure you get this approval in writing, including the amount of any future disability, medical, or other payments estimated by the workers' compensation carrier. For Medicare issues, it can take up to 60 days to get a payoff figure.

THINGS TO DO ONCE THE CASE SETTLES

Inform the Court That the Case Is Settled. Advising the court when a case has settled helps keep the courthouse staff happy.

Prepare a Settlement Summary. Prepare a settlement

accounting for your client showing the breakdown of attorney fees, costs, liens, PIP, and all outstanding bills you are aware of that need to be paid. Include a statement that the client is responsible for paying any additional bills. Have your client sign the statement. This protects you in the event another bill surfaces.

Pay the Workers' Compensation Lien. Repayment of a workers' compensation lien is governed by statute (ORS 656.593), or as otherwise agreed to in writing. If there is a future disability rating or if medical bills are outstanding, consider (1) waiving future rights or payments so that the case can be resolved; or (2) holding the portion of the workers' compensation carrier in your trust account until there is closure of the claim. The general distribution is as follows: (1) attorney fees and costs; (2) one-third of the balance of the recovery to the client; (3) the remainder of its total lien to the workers' compensation carrier; and (4) all remaining money goes to the client. ORS 656.593. Always check the statute to make sure your case falls within the general guidelines.

Pay Outstanding Bills or Liens. Verify whether any providers will give an attorney fee discount on their bill, and try to negotiate the extent any settlement affects your client's future medical coverage with a provider. If there is no future medical coverage for this injury and the carrier is unwilling to negotiate, be sure to list the exact amount of money going to your client for future medical care and inform the provider. Consider whether PIP should be collected and reimbursed. When you pay outstanding bills, PIP, and/or other necessary payments, include them in your settlement summary for the client (see section above, Prepare a Settlement Summary).

Make Accurate Representations. In negotiating discounts with insurers and providers, it is a crime to misrepresent the amount of the settlement proceeds received by the client. See State v. Pierce,153 Or App 569 (1998), rev. den. 372 Or 448 (1998).

By following all of these tips, you are protecting your clients and yourself.

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Continued on page 4

IN BRIEF

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PROFESSIONAL LIABILITY FUND
www.osbplf.org

MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

PROTECTING MINORS' MONEY

Your friend, Trial Lawyer, has asked you to assist his clients John and Jane Smith. Their 14-year-old minor child was injured in a motor vehicle collision, and Trial Lawyer has settled the claim and obtained court approval of the settlement. Trial Lawyer has deposited the net funds payable to the child in his IOLTA account. John and Jane both work outside the home. They live a comfortable middle-class lifestyle but are certainly not wealthy.

At your initial meeting, John and Jane impress you as honest, conscientious parents who have their child's best interests at heart. They indicate their desire to invest the funds in part in a growth account to provide a down payment or nest egg for their child. They would like this account restricted so that their child cannot access it until he is at least age 28. They would like the rest of the funds placed into an accessible, liquid account that they can access to provide for their child's needs, such as school clothes and summer camp fees, with any remainder available to pay college tuition and expenses after their son graduates from high school.

How should the money be held? Who should be the account holder? Is court oversight required? Is court oversight advisable if not required? Can the parents restrict their child's access to the money after he becomes an adult?

PAYMENTS TO MINORS

At first blush it might appear that the UTMA (as adopted in Oregon, ORS 126.805 - 126.886) would provide a simplified process in which funds of $10,000 or less may be transferred to a "custodian" for the minor without the necessity of a conservatorship. However, a review of the statute reveals that it is directed at gifts, bequests, and other voluntary transfers to minors, not to settlements of litigation or payments of judgments.

Oregon Revised Statute 126.700 (formerly ORS 126.025) controls in circumstances such as the hypothetical in this article. *NOTE* - This act protects only the *transferor* of the funds. *See*, ORS 126.700(4). It does not shield John and Jane from liability for mismanaging the settlement funds, nor does it protect counsel. This raises the related question – whom do you represent?

WHO IS THE CLIENT?

A fundamental question to answer before determining what advice to give John and Jane is – who is your client? The money belongs to the child. It will be applied for the child's benefit. Ultimately, the child will suffer if the money is not administered wisely. It might seem obvious that the child – the final recipient of your services – is the client whose needs must be foremost in your mind. Although this is the obvious answer, it also is almost certainly wrong. In *Roberts v. Feary*, 162 Or App 546 (1999), the court held that the lawyer retained by the personal representative represents only the personal representative and does not have a lawyer-client relationship with the beneficiaries, creditors, or other interested persons of the estate. OSB Legal Ethics Opinion No 1991-119 opines that, with respect to a trust, the trustee's attorney represents only the trustee, not the beneficiaries. Also, Opinion No 1991-62 opines that, although the

personal representative of an estate owes fiduciary duties to the estate and the beneficiaries, the attorney for the personal representative is only the personal representative's attorney. This leads to the conclusion that you represent John and Jane and have duties only to them, while they, in turn, have duties to their child. However, *Hale v. Groce*, 304 Or 281, 744 P2d 1289 (1987) complicates this inquiry by holding that counsel for a deceased testator may be liable to the beneficiaries for her negligence in drafting the will. *Hale* seems to support the argument that counsel has at least some direct duties to the child and that counsel certainly could be liable to the child for negligence that results in depletion of the settlement funds.

CONSERVATORSHIP

At first glance it appears that the complexities of a conservatorship would be an unnecessary burden in this instance. However, this is the *only* mechanism by which counsel, parents, tortfeasor, and insurer all receive assurances that the funds are properly applied. Further, conscientious adherence to the statutes and rules governing conservatorships can limit or even eliminate the risk of malpractice.

For basic forms and procedures to establish a conservatorship, see *Guardianships, Conservatorships and Transfers to Minors* (OSB CLE 2000). Note that in this hypothetical the minor is 14 years of age. The minor is therefore entitled to notice of the petition and an opportunity to object.

A conservatorship usually entails a bond posted by the conservator and paid for with the protected person's funds. The conservator also usually has direct access to the protected person's funds, often in a checking account. Further, the conservator is required to file detailed annual accountings, which often necessitates the assistance of an attorney or CPA. All in all, this is not an ideal solution, especially if the child does not need the funds to live but instead the funds can be left to grow over time for the minor's use as an adult.

A modified form of conservatorship is a better choice. First, in the petition to establish the conservatorship, counsel should request that the conservator hold all funds in restricted accounts and ask that no bond be required of the conservator. A "restricted account" is one that the financial institution has agreed will be frozen and inaccessible to the conservator except as ordered by the court. A sample Acknowledgment of Restricted Assets can be found in *Guardianships, Conservatorships and Transfers to Minors* (OSB CLE 2000) and at www.osbplf.org, loss prevention, practice aids, guardianships and conservatorships.

Further, given that the funds will be restricted and no withdrawals will occur without court order, the petition also should request permission to use a simplified form of accounting. Ideally, this would be a short form accounting with copies of the account statements attached so that the court could verify that no withdrawals were made during the accounting period.

STRUCTURED SETTLEMENTS

It is entirely understandable that John and Jane would not want their child to suddenly receive a large sum of money the instant he turns 18. Although there is specific authority for such a restriction on a gift or transfer to a minor of $10,000 or less (ORS 126.872), a conservator of a minor child does not have any such authority. The conservatorship, and therefore the conservator's powers, necessarily terminate when the disability ceases. In this instance the minor's disability is simply his minority.

Many courts refuse to approve investments in annuities, structured settlements, and the like that have the effect of restricting the minor's access to the settlement funds after the age of majority. In addition, the foregoing analysis might differ greatly if the injury resulted in brain damage, permanent cognitive impairment, or similar condition.

SPENDING FOR NECESSITIES

Under the hypothetical presented, John and Jane wish to use some of the settlement funds to provide for the child's clothing, recreation, and so on. May they do so? As a conservator, John or Jane stands in a fiduciary relationship to the child. As a fiduciary, John or Jane has an obligation to place the child's interests and welfare above all else when dealing with the settlement funds. As parents, John and Jane have duties under ORS 109.010 to provide for the support of their children, so the conflicting roles create a conflict of interest. Generally it is improper for parents to use the child's settlement funds to defray the costs of raising the child. Certainly, one can envision circumstances in which a

family is so poor that use of the funds to improve the child's standard of living would be appropriate. However, use of the funds in this manner is likely to draw the ire of the probate court unless persuasively explained. Great care must be exercised to ensure that the child's interests remain paramount. Generally, the court will not permit a parent to retain funds without a bond and strict oversight. If a conservatorship has been established with a restricted account, the problem is lessened because funds cannot be withdrawn without court order.

PUBLIC BENEFITS AND SPECIAL NEEDS

If the family is receiving public benefits such as food stamps or the Oregon Health Plan, counsel should consider the impact of the settlement on the child's benefits. A discussion of these impacts is beyond the scope of this article. For an overview of the law, see *PI Settlements and Welfare*, *In Brief*, July 2002. (Available at www.osbplf.org, click on loss prevention, *In Brief*.)

CONCLUSION

It is vital to have open, detailed discussions with John and Jane about the limits of their ability to use the child's funds during his minority, their responsibilities as conservators, and the nature of their fiduciary duties. Use of the court's conservatorship mechanisms, modified by restriction of the funds, is the best way to ensure that the child's interests are protected along with those of the conservator and counsel.

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IN BRIEF

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Oregon State Bar
PROFESSIONAL LIABILITY FUND
www.osbplf.org
Malpractice Prevention Education for Oregon Lawyers

Settlements for Minors – 2009 Legislative Changes

The problem: A minor has a tort claim for personal injuries. Luckily, the minor's injuries are not severe, so the claim's value as determined by a jury is probably modest. A settlement can be reached with the defendant's insurer. However, minors are unable to contract.

Prior to the passage of ORS 126.725, the only certain way for an insurer to guarantee that the claim against its insured was discharged was the appointment of a conservator and the court approval of the settlement. This is time-consuming (entailing yearly reports to the court until the minor reaches majority) and expensive (including costs such as filing fees and attorney fees). It is an unpalatable solution when the minor's net recovery is only a few thousand dollars.

ORS 126.725 [passed in 2007 and amended in 2009] now solves this problem when the minor's **net recovery** is $25,000 or less. This statute allows the parties to enter into a settlement agreement without court oversight and without the establishment of a conservatorship if the following conditions are met:

- There is not already a conservator for the minor;
- The total amount to be received by the minor (after payment of medical liens, attorney fees, and the like) is $25,000 or less; and
- The person authorized by the statute to sign a settlement agreement and extinguish the minor's claim is "a person having legal custody of" the minor with the claim. The statute speaks in the singular. From a plain reading, it appears that when parents have joint legal custody but only one has physical custody of the minor, either parent can settle a claim of the minor under this statute. However, practitioners should note that if the minor is in the physical custody of a relative such as a grandparent due to an informal arrangement with the parent or parents of the minor, mere physical custody does not, pursuant to the statute, confer the ability to settle a claim.

Practice Tip: When prosecuting a claim for a minor's injuries, determine the legal authority of the person with custody of the minor as soon as possible. It may be that one or both parents may need to be located to finalize a settlement and avoid the expense of a conservatorship proceeding. Conversely, defense counsel should consider demanding proof of legal custody as part of a settlement to ensure that the release obtained for the defendant is, in fact, binding on the minor and the minor's claim.

Once you are satisfied that the person seeking to settle the minor's claim has authority to do so and that the settlement is reasonable, the following steps are required to comply with the statute:

1. **Affidavit of Custodian.** First, the person having legal custody of the minor must sign an affidavit swearing:

- To the best of that person's knowledge, the minor will be fully compensated by the settlement; **or**
- Though the minor will not be fully compensated, there is no practical way to obtain more from the party with whom the settlement is being made.

The attorney for the minor's legal custodian must keep the affidavit ***for two years after the minor reaches the age of 21***. **Caution:** This represents a departure from the usual practice of dis-

posing of closed files after 10 years. Attorneys settling claims for minors pursuant to this statute may have to keep the original affidavit signed by the person having legal custody for as long as 23 years.

2. Receipt and Disbursal of Funds. The funds (whether by check or by cash) must first be deposited into the plaintiff's attorney's IOLTA account. After attorney fees, costs, and medical liens are paid, *the lawyer* must deposit the minor's net recovery into "a federally insured savings account that earns interest ***in the sole name of the minor***." (Emphasis added.)

If defense counsel is dealing with a person having legal custody of the minor who is also *pro se*, the statute indicates that defense counsel must deposit the funds directly into a "federally insured savings account that earns interest ***in the sole name of the minor***." (Emphasis added.)

If the funds are to be used to purchase an annuity, they must be paid directly to the annuity issuer, with the minor designated ***as the sole beneficiary of the annuity***.

Caution: Note that the statute requires the account to be set up in the minor's name *only*. The parent(s) may not also be named on the account.

ORS 125.735, enacted in 2009, provides that minors may contract with banks or other financial institutions to establish a bank account, and that such contract is binding on the minor and may not be voided or disaffirmed by the minor based on the minor's age or minority.

3. Notice. Counsel must then provide notice of the deposit to the minor and the person who entered into the settlement on the minor's behalf, by personal service or first-class mail.

4. Funds Remain Untouched. The funds cannot be withdrawn or spent for any reason by any person, including the minor, unless under court order, the minor attains majority, or the minor dies.

The overriding theme is to avoid situations in which the person having legal custody of the minor has an opportunity to mis-deposit the funds, err in the creation of the account, or take the funds from the minor's account.

Practice Tip: Attorneys who represent the injured minor *and* the person having legal custody should document providing this important caution to the minor and the person having legal custody. It is not hard to envision claims against counsel and the person having legal custody if the minor's funds are misappropriated during the period of minority.

The statute also provides that the signature on a settlement agreement of a person in compliance with this statute is binding on the minor. Defendant's attorney can assure the client that the claim is fully and completely extinguished. A person acting in good faith on behalf of the minor is not liable to the minor for any claim arising out of the settlement.

All in all, ORS 126.725 should assist attorneys in settling modest claims of minors without the expense and effort involved in the establishment of conservatorships.

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Thanks to Neil W. Jackson, Neil Jackson Attorney LLC, for his assistance with this article.

9.055 SETTLEMENT OF PERSONAL INJURY OR WRONGFUL DEATH CLAIMS: REQUIREMENTS WHEN MINOR CHILD OR INCAPACITATED PERSON APPEARS BY GUARDIAN AD LITEM

(1) Except as permitted by ORS 126.725 for a minor child, a petition for approval of a settlement of a personal injury or wrongful death claim on behalf of a minor child, incapacitated person or decedent shall be accompanied by an affidavit which sets forth the following:

(a) A description of the incident causing the injury or death;

(b) A description of the injuries;

(c) The amount of the prayer and settlement. (If a structured settlement is requested, the present value of the future payments should be indicated);

(d) The amount of the attorney fees and costs;

(e) The proposed disposition of the settlement proceeds;

(f) A concise statement explaining the reasons for the settlement and the efforts to maximize recovery;

(g) A statement explaining that the attorney has independently evaluated the interests of the injured party;

(h) A statement explaining that the attorney has examined every medical record; and

(i) A statement explaining why it is necessary and proper to settle the case at the present time.

(2) The Chief [*Probate*] **{Family Law}** Judge[,] or designee, shall approve any settlement in a civil action which has been filed in this circuit court on behalf of a minor child.

(a) For personal injury, the original petition and affidavit must be filed in the civil action. The order shall be directed to the Probate Department by the Civil Department.

(b) For wrongful death, the petition and affidavit shall be filed in the Probate case.

(3) A conservatorship on behalf of the minor child or incapacitated person generally will be required for any case where personal injury or wrongful death settlement proceeds are at issue in excess of the amount allowed in ORS 126.725.

(a) Bond and standard annual accounting requirements may be waived if the funds are restricted until the minor attains the age of majority. In lieu of such accountings the court will require copies of the first and last bank statements for each standard accounting period to be filed with the court.

(b) Restricted accounts on behalf of a minor child or incapacitated person must be confirmed by a signed acknowledgment from the bank or brokerage firm which discloses the account number, type and account balance as required by UTCR 9.050 and 9.080. Exceptions for diminutive amounts may be requested.

(c) Approval of damage settlement amounts for the benefit of a minor child or incapacitated person appearing by a guardian ad litem in a lawsuit, except those

cases assigned for trial to a trial department, are a basic responsibility of the Probate Court. The allocation of funds and the structuring of such funds is likewise the Court's responsibility. Minors and incapacitated persons should be provided with independent counsel for such issues and most commonly when a minor's funds are proposed to be withheld from them after age 18.

(4) A fiduciary appointed by the Probate Court is required to comply with paragraph (1) of this rule and must file a motion for an order approving a settlement of a personal injury or wrongful death claim on behalf of a protected person. The motion must be supported by an affidavit setting out the required information.