IN BRIEF

Oregon State Bar
PROFESSIONAL LIABILITY FUND
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Malpractice Prevention Education for Oregon Lawyers

What You Need to Know About PIP and UM/UIM Claims

If you handle motor vehicle cases, you need to be familiar with personal injury protection (PIP) benefits and uninsured motorist (UM) and underinsured motorist (UIM) coverage. This article addresses these issues from both a plaintiff and defense perspective and discusses minimum coverage, time limitations, order of benefits, application of coverage, and proof of loss.

Personal Injury Protection (PIP) Benefits

PIP benefits are available for a person's injury or death resulting from the "use, occupancy or maintenance of any motor vehicle." ORS 742.520(2)(a). PIP is a "no-fault" insurance, so coverage is available even if the injury was caused by the person seeking benefits.

PIP is required for every "motor vehicle liability policy issued for delivery in this state that covers any private passenger motor vehicle." Coverage is provided for the insured, members of the insured's family or children living in the same household, passengers occupying the insured vehicle, and pedestrians hit by the insured vehicle. ORS 742.520(2)(b). However, not all vehicles are included.

PIP Benefits Available

PIP must allow for "reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance and prosthetic services incurred within one year after the date of the person's injury." ORS 754.524(1)(a). The minimum amount of coverage in Oregon is $15,000 per person. *Id.* Medical expenses are presumed reasonable and necessary unless the medical provider is given a denial within 60 days after the insurer receives notice of a claim for services from the provider. ORS 742.524(1)(a). The insurer is required to

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PLF Claims Attorney Position

The Oregon State Bar Professional Liability Fund seeks a full-time claims attorney to join our claims department team. Responsibilities include managing caseload of lawyer professional liability claims and working with the covered attorneys on a broad range of matters involving lawyer professional liability. The position requires an advanced level of legal knowledge and experience, OSB membership, and five to seven years of Oregon private practice experience. Proficiency in Word® and basic computer skills are preferred. Starting salary is $75,000 per year, plus excellent retirement, health insurance, and other benefits.

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Application deadline: October 14, 2011. No telephone calls please.

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THIS ISSUE

September 2011
Issue 110

conduct a reasonable investigation "based on all available information" before denying a claim. ORS 746.230(1)(d). See *Ivanov v. Farmers Ins. Co.*, 344 Or 421 (2008) (reversing grant of summary judgment for Farmers on grounds that insurer is required to establish that denials were based on reasonable investigation).

The amount allowed for medical expenses under Oregon PIP policies is the lesser of the amount normally charged to members of the public or the amount in the workers' compensation fee schedule (available at http://tinyurl.com/pipinfo). Hospital charges are subject to adjusted cost-to-charge ratios specified in a fee schedule published pursuant to ORS 656.248. Hospitals are permitted to charge (1) the amount of the charges multiplied by the cost-to-charge ratio, or (2) 90% of the charges, whichever is greater. ORS 742.525(2).

In addition, PIP provides the following wage-loss benefits: "If the injured person is usually engaged in a remunerative occupation and if disability continues for at least 14 days," the benefits paid will be "70 percent of the loss of income from work during the period of the injured person's disability until the date the person is able to return to the person's usual occupation. This benefit is subject to a maximum payment of $3,000 per month and a maximum payment period in the aggregate of 52 weeks." ORS 742.524(b). PIP also provides coverage for essential services, funeral expenses, and child care if certain conditions are met. See ORS 742.524(c)-(e).

Which PIP Policy Applies?

PIP is primary for anyone in the insured vehicle. If the occupant of the vehicle has another motor vehicle policy, that policy is secondary. If another family member in the same household as the injured person has another motor vehicle policy, that policy is the next to cover the injured person. If the injured person has health insurance, it is available after all PIP policies are exhausted.

For individuals who are struck by a vehicle as a pedestrian or on a bicycle, the PIP medical benefits are available in the following order:

- Individual's motor vehicle policy;
- Motor vehicle policy of family members living in individual's household;
- Individual's health insurance, other governmental benefits, or gratuitous benefits;
- Motor vehicle policy of vehicle that struck individual.

Pedestrians (and bicyclists) are entitled to PIP wage-loss benefits as well.

If the injured person is entitled to receive workers' compensation or other medical or disability benefits, PIP can be eliminated by the policy. ORS 742.526(2). However, the insured may be entitled to medical and wage benefits through a PIP policy if not provided by workers' compensation.

PIP Proof of Loss

A proof of loss is important because it starts the clock ticking for attorney fees. In *Scott v. State Farm Mutual Ins. Co.*, 345 Or 146 (2008), the court reiterated that "[a]ny event or submission that would permit an insurer to estimate its obligations" is sufficient for proof of loss. *Id.* at 155. In *Scott*, the court determined that a PIP application for benefits that (1) provided information to enable the insurer to determine whether the policyholder was entitled to benefits under the insurance contract and (2) included an authorization to collect health insurance information, was sufficient. *Id.* at 156. In a more recent case involving homeowner's insurance, a phone call to the insurer's agent concerning the damage was sufficient. *Parks v. Farmers Ins. Co.*, 347 Or 374 (2009).

Uninsured Motorist (UM)/ Underinsured Motorist (UIM) Insurance

Together, these two types of coverage permit an insured to obtain all sums that he or she is "legally entitled to recover as damages for bodily injury or death caused by accident and arising out of the ownership, maintenance or use of an uninsured motor vehicle." ORS 742.500(1). UM coverage is required for every policy in the state in amounts equal to the amount of liability coverage, unless the insured elects a lesser amount in writing. ORS 742.502(2)(a). UIM coverage is in an amount equal to the UM coverage less the amount recovered from other motor vehicle liability policies or other sources. ORS 742.502(2)(a).

Each UM policy must provide coverage in the amount of liability coverage, which requires a minimum of $25,000 per person and $50,000 per accident. ORS 742.502(2)(a). If the insured elects lower limits, a statement to that effect must be signed within 60 days of making the election. ORS 742.502(2)(b).

Several circumstances will be excluded from UIM or UM motorist coverage. It is important to examine the policy to determine the specifics. You must comply with the terms of the policy to have coverage. ORS 742.504(8). In addition, if the injured party fails to get written consent from the UIM carrier before proceeding with settlement or prosecution to judgment of an action against a party legally liable, the injured party may be precluded from making a UIM claim. ORS 742.504(4)(a). However, this exclusion is considered a "condition of forfeiture" and applies only if the insurer can

show it was prejudiced by the failure to obtain written consent and that the failure to obtain written consent was unreasonable. *Federated Serv. Ins. Co. v. Granados*, 133 Or App 5, rev den, 321 Or 512 (1995); *Armintrout v. Transportation Ins. Co.*, 137 Or App 86, rev den, 322 Or 361 (1995). Failure to exhaust the available policy limits is prima facie evidence of prejudice. All this can be avoided by obtaining written consent in advance. UM and UIM protection also often excludes coverage for other vehicles owned by the insured or furnished for the regular use of the insured (or members of the insured's household). ORS 742.504(4)(b). You cannot extend your coverage to uninsured vehicles if you have opted not to insure them.

Reduction by Amounts Received from Other Sources

Amounts payable under UM or UIM coverage are reduced by (1) sums paid on account of the bodily injury by or on behalf of the owner or operator of the uninsured vehicle or any other person jointly or severally liable, including amounts paid under bodily injury liability coverage; and (2) the amount paid and present value of all amounts payable under any workers' compensation law or disability benefits law. ORS 742.504(7)(c). These offsets apply to the insured's damages, not to the policy limits. *Bergmann v. Hutton,* 337 Or 596, 101 P3d 353 (2004) (offsetting damages by workers' compensation payments, but not reducing policy limits of UIM); but see *Vogelin v. American Family Mut. Ins. Co.*, 346 Or 490, 213 P3d 1216 (2009) (holding that ORS 742.504(7)(c)(A) requires payments made on behalf of a tortfeasor to be deducted from insured's total damages, but that ORS 742.502(2)(a) requires tortfeasor's motor vehicle liability payments to reduce UM/UIM policy limits). PIP benefits paid to an insured are applied to reduce the amount of damages, but cannot reduce the UM/UIM policy limits. ORS 742.542.

In order to recover UIM benefits, you must comply with ORS 742.504(4)(d). This requires that one of the following occurs:

- The limits of liability have been exhausted by judgment or settlements to the injured person or other persons;
- The limits have been offered in settlement, and the insurer has refused consent and the insured protects the insurer's right of subrogation to the claim against the tortfeasor;
- The insured gives credit to the insurer for the unrealized portion of the limits as if the full limits had been received if less than the limits have been offered and the insurer has consented; or
- The insured credits the insurer for the unrealized portion of the liability limits as if the full limits had been offered in settlement and the insurer has refused consent and the insured agrees to protect the insurer's right of subrogation to the claim against the tortfeasor.

If none of these events occurs, a UIM claim does not yet exist.

Time Limitation

There is a statutory limitation on UM and UIM claims of two years from the date of the accident. ORS 742.504(12)(a). The two-year period applies to minors and there is no tolling of the two years. *Wright v. State Farm Mutual Auto. Ins. Co.*, 223 Or App 357 (2008) (holding that the two-year period was not tolled by child's minority). Within two years of the date of the accident, the insured must either settle the case, formally institute arbitration, or file against the insurer. If the case is against the uninsured/underinsured motorist, the insured must either file against the insurer or formally institute arbitration within two years of settlement or judgment of the underlying case. "Formally" instituting arbitration requires that "an insured or an insurer must expressly communicate to the other party that the initiating party is beginning the process of arbitrating a dispute." *Bonds v. Farmers Ins. Co.*, 349 Or 152, 154 (2010). A letter from the insurer consenting to arbitration is no longer sufficient. *Id.*

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Are You New to Private Practice?

On November 2–4, 2011, the Professional Liability Fund is sponsoring a practical skills and ethics seminar in Portland for new admittees and lawyers entering private practice. The full seminar qualifies for 15.75 MCLE credits, which will satisfy the MCLE requirements for new admittees' first reporting period.

The fee for the seminar is $65 and includes lunch on November 2 and 3. The registration form is available on the PLF's Web site. To print a registration form, go to www.osbplf.org and click on Upcoming Seminars.

For more information, call DeAnna Z. Shields at 503-639-6911 or 1-800-452-1639. The registration deadline is October 26, 2011. Space is limited – register early!

Reimbursement of PIP or Health Insurance Payments

There are three methods for an insurance company to recover PIP payments or health insurance payments made on behalf of an injured person: (1) interinsurer arbitration (ORS 742.534); (2) lien (ORS 742.536); or (3) subrogation (ORS 742.538).

Interinsurer arbitration allows "every authorized motor vehicle liability insurer whose insured is or would be held legally liable for damages for injuries sustained in a motor vehicle accident by a person for whom personal injury protection benefits have been furnished by another such insurer, or for whom benefits have been furnished by an authorized health insurer," to be reimbursed by the insurer of the at-fault party. ORS 742.534. This is what insurers usually elect because the insurer does not have to pay attorney fees. Interinsurer arbitration is only permitted if (1) the PIP insurer is entitled to reimbursement by its policy; (2) the PIP insurer has not elected recovery by lien under ORS 742.536; and (3) the PIP insurer has requested reimbursement under ORS 742.534. ORS 742.534. The statute also specifies that the amount being paid back be reduced for any percentage of fault of the insured. Disputes between insurers are sent to arbitration.

An ORS 742.536 lien is available only when (1) the insurer is entitled by the terms of its policy; (2) the insurer has not elected to recover through interinsurer arbitration; and (3) a lien is elected in writing within 30 days of the receipt of notice or knowledge of the claim through personal service or registered or certified mail. ORS 742.536. The lien is against the cause of action up to the amount of the lien, but is reduced for the proportion of expenses, costs, and attorney fees incurred in connection with recovery of the lien. ORS 742.536. If the insurance company fails to elect recovery by lien within the 30-day timeline, it is not available.

Subrogation is available only when (1) the insurer is entitled by the terms of its policy; (2) the insurer has not elected to recover by lien; and (3) interinsurer reimbursement is not available. ORS 742.538; see *State Farm Mut. Auto Ins. Co. v. Hale*, 215 Or App 19 (2007) (discussing requirements). Under subrogation, the insurer is entitled to proceeds from a settlement or judgment from the person legally responsible for the accident, but the proceeds are reduced for the insurer's share of expenses, costs, and attorney fees. ORS 742.538(1).

Limitations of Reimbursement

ORS 742.544 limits reimbursement so that it is permitted "only to the extent that the total amount of benefits paid exceeds the economic damages as defined in ORS 31.710." ORS 742.544. Total amount of benefits includes UIM benefits, liability insurance, PIP payments, and any other payments by or on behalf of the party whose fault caused the damages. ORS 742.544(1).

ORS 742.542 specifies that any PIP benefits paid for its own insured will reduce the amount of damages recoverable through UIM or UM benefits, but that it cannot be applied to reduce the policy limits. See *Farmers Ins. Co. v. Connor*, 219 Or App 337 (2008). In *Connor*, the total damages exceeded the UIM and PIP benefits. Farmers sought reimbursement of its PIP benefits based on the amount of economic damages as determined by the trial court. Based on the legislative history, the court determined that Farmers was not permitted to recover its PIP benefits because it would serve to reduce the policy limits.

Attorney Fees

ORS 742.061 allows a plaintiff to collect attorney fees in a PIP or UM/UIM claim in specific circumstances. "If settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state on any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender," the plaintiff is entitled to recover attorney fees unless the insurer satisfies specific conditions within six months of the date the proof of loss is filed with the insurer.

For PIP claims, the insurer must (1) accept coverage in writing and state that the only issue is the amount of benefits due the insured; and (2) consent to binding arbitration. ORS 742.061(2).

For UM/UIM claims, the insurer must (1) accept coverage in writing and state that the only issues are the liability of the uninsured or underinsured motorist and the damages due the insured; and (2) consent to binding arbitration. ORS 742.061(3).

However, an insurer must be careful when denying specific claims. In *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, modified and adhered to on reconsideration, 343 Or 394 (2007), the PIP carrier denied payments for chiropractic treatment, claiming it was not related to the collision. This was interpreted as a dispute of coverage, not just benefits, so the plaintiff was entitled to attorney fees. Once a denial of benefits occurs, it is not necessary to wait the six-month period from the proof of loss required pursuant to ORS 742.061.

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Thanks to John. R. Bachofner, Jordan Ramis PC, for his assistance with this article.

File Support Modifications Before Expiration of Spousal Support Obligation

A failure to file a motion to continue or extend an existing spousal support order before termination of support will preclude modification of spousal support. ORS 107.135(1)(a) provides that the court has the power at any time to set aside, alter, and modify any spousal support portion of a judgment. Oregon cases have construed the statute to require that any motion to modify a spousal support award for the extension of support must be filed before the final payment date under the original judgment. *Wrench and Wrench*, 98 Or App 352 (1989), rev den, 308 Or 608 (1989).

In *Wrench*, husband was required to make his final payment of spousal support on October 1, 1988. Husband made that payment on October 3, 1988. On October 11, 1988, wife filed a motion to modify the decree to extend the term of support. The trial court dismissed wife's motion on the ground that the motion was untimely. The court of appeals affirmed, holding that the decree created an obligation to pay the support on the first day of the month. As with a promissory note, when the final payment is made, the obligation is discharged. Therefore, after October 3, 1988, husband had no obligation that would support a modification. The *Wrench* case stands for the proposition that a modification must be filed before the date the last payment is due, not any time during the final month of the support obligation.

In *Harkins and Harkins*, 200 Or App 468 (2005), rev den, 340 Or 672 (2006), the court of appeals applied the same principle to prepayment. The court held that a prepayment of spousal support terminates a support obligation and that a motion for modification made after prepayment but before the official final payment due date is untimely. In *Harkins*, the judgment provided that husband's spousal support obligation ended on November 30, 2002. Husband paid the final support installment on October 15, 2002. Wife moved to modify the judgment on October 30, 2002 (after the last installment was paid but before the official end of the support obligation). The trial court granted the motion and modified the support. The court of appeals reversed, holding that once final payment is made, the support obligation ceases to exist; because a support obligation must exist at the time the court exercises its authority to modify, the court could not modify the obligation. The court of appeals was not persuaded by wife's argument that a support obligor with sufficient means could pay off the entire spousal support obligation on entry of the judgment and thereby deprive the court of jurisdiction to modify its spousal support provisions.

When a client wants a spousal support obligation continued beyond the term set in the original judgment, the attorney must file a motion before the last support payment due date and before the support obligation is paid in full. An attorney should file as soon as the substantial change in circumstances is known.

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Thanks to Katie A. Carson of Zimmer Family Law, LLC, for her assistance with this article.

Help New Admittees

Are you interested in helping new lawyers by answering questions about your practice area? If so, share your experience practicing law by leading a roundtable discussion with new admittees at the PLF's *Learning the Ropes* luncheon on Thursday, November 3, 2011. Call Tanya Hanson at 503-639-7203 or e-mail tanyah@osbplf.org if you are interested.

CORRECTION to "P.I. Settlements and Welfare," *In Brief*, June 2011

This article stated: "This provision grants the Department of Human Services (DHS) and the Oregon Health Authority (OHA) a lien against any judgment on or settlement of a claim for damages for personal injuries. ORS 416.510(5), 416.540(1). This does not include SAIF (State Accident Insurance Fund) or workers' compensation claims."

Correction: The Department of Human Services (DHS) and the Oregon Health Authority's (OHA) lien against a judgment on or settlement of a claim for damages for personal injuries does not include SAIF or the Workers' Compensation Board, *but it does include workers' compensation claims against other insurers.*

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Recognizing Difficult Client Types

Dealing with a difficult client can result in an ethics complaint or a malpractice claim. So confirm that your client understands the important information and document it! To reduce your risks further, learn to recognize these types of difficult clients and how to handle them.

- **The angry or hostile client.** The angry or hostile client came into your office that way. Anger that the client cannot appropriately express, mixed with aggression, creates hostility just below the surface, expressed in snappish, rude, or contrary behavior. Once legal representation has commenced, the anger or hostility may be dialed up several notches. You or your staff may become the target of misdirected anger. When a deposition or court date is imminent, this client can create more than a tension headache. Consider discussing your observations of the client's anger with him or her, and consider suggesting that the client seek assistance.

- **The vengeful or zealous client.** For the vengeful client, cost is not a consideration; it is the principle of the matter. In this client's mind, there has been a great wrong, and you have been selected as the instrument to correct it. This client sees you in a role you'd be wise to refuse. If you have a high sense of idealism, you may find it difficult to resist the siren song that could lure you onto the rocks of unethical conduct. If you feel enmeshed in this client's crusade, withdraw.

- **The overinvolved or obsessed client.** This client thinks about the case 24/7. If you ask for notes or documentation, the client produces a filled notebook and expects you to read it – ASAP. The key word is "expect." Establish reasonable expectations at the outset. Provide the client with a legal file and hole-punched copies of everything to put into it. If you don't meet or exceed this client's expectations, you may not get paid, and the client may report you to the bar for neglecting the case.

- **The emotionally needy or dependent client.** This client may seem emotionally fragile, insecure, lacking confidence, dependent on others, and now reliant upon you. Do not settle into the role of decision maker. Your role is to be an advisor about choices available to the client. You may find it personally painful to watch your dependent, emotionally needy client struggle with making a decision, but you need to tolerate your own discomfort as well as that of your client. Warmly encourage this client to go home, think through the matter, and talk it over with another trusted personal advisor, therapist, or religious officiant. Advise the client to get a good night's sleep and call you the next day after spending some time in reflection.

- **The secretive, dishonest, or deceitful client.** If your client is secretive, then information that you need to formulate the correct advice is being hidden from you. If your client is dishonest or deceitful, you will be told incorrect facts. How can you represent this client adequately? You can't. Lawyers have run into difficulty when they have been taken advantage of by unscrupulous clients. If you discover that your client has lied to you, terminate the representation as soon as you can under applicable ethics rules. Your professional reputation is too important to risk on one client.

- **The depressed or mentally ill client.** The depressed client may not be able to sufficiently engage with the legal process. The mentally ill client may not have the capacity to understand and make informed decisions, and it may require the appointment of a representative. Avail yourself of help for dealing with these types of clients, including those who practice guardianship law and the Oregon Attorney Assistance Program.

- **The unwilling client.** This client will not believe your advice because it does not match the advice the client wants to hear. Clients often come to lawyers to determine the consequences of actions they have already taken or have decided to take. Also, many clients are just unwilling to follow or accept the advice their lawyers give. Put your advice in writing, including the likely outcomes of following as well as rejecting this advice. If they choose not to follow it, at least they do so knowing the consequences.

Sheila Blackford
PLF Practice Management Advisor

This article was adapted from Law Practice*, July/August 2010, volume 36, number 4, published by the American Bar Association. Reprinted with permission.*

The Of Counsel Relationship

Lawyers have been using the "of counsel" designation in a variety of ways for many years. Originally, the term was used to identify firm partners or judges transitioning from full-time legal practice into retirement. The definition has broadened over time to cover other relationships between lawyer and law firm, from testing out a lateral hire before extending a partnership offer to an attorney with special expertise joining the firm as a resource. Because of the variety of arrangements and inherent potential for ambiguity, attorneys and law firms should keep in mind a few considerations as they enter into of counsel relationships.

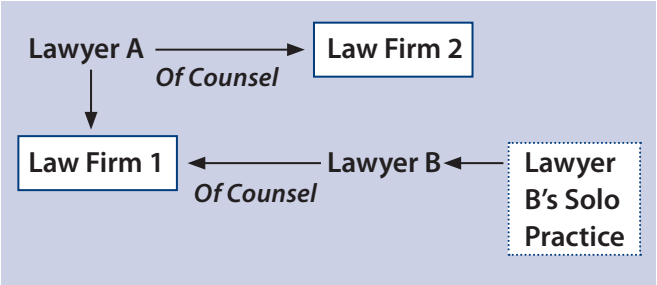
Conflicts of Interest

Oregon Rule of Professional Conduct (ORPC) 7.5(b) states that "[a] lawyer may be designated 'Of Counsel' on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as a partner or associate." ORPC 1.0(d) provides that a firm "denotes a lawyer or lawyers, including 'Of Counsel' lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law…." Together, these two rules inform us that an of counsel attorney is considered a part of a law firm for conflict purposes.

The Oregon State Bar addresses the particularities of the conflict-of-interest issues created by of counsel relationships in Oregon Formal Ethics Opinion 2005-155. The opinion proposes the following scenario:

Lawyer A operates Law Firm 1 as a sole practitioner. Lawyer A is also of counsel to Law Firm 2 and is listed as such on Law Firm 2's letterhead. Lawyer B is a sole practitioner who wishes to be of counsel to Law Firm 1.

What conflict-of-interest issues are implicated by the proposed arrangement?



In the relationships depicted above, Lawyer A is considered a member of his or her own solo practice, Law Firm 1. Lawyer A is also considered a member of Law Firm 2 because of Lawyer A's of counsel relationship. Similarly, Lawyer B would be a member of both Lawyer B's solo practice and Law Firm 1. Though more attenuated, Law Firm 2 would also be considered a member of Lawyer B's solo practice. The clients of Law Firm 1 are deemed to be clients of Law Firm 2, just as the clients of Lawyer B's solo practice are deemed clients of both Law Firm 1 and Law Firm 2. Put simply, Lawyer A/Law Firm 1, Lawyer B, and Law Firm 2 will be treated as a single unit for conflict-of-interest purposes.

This brief example makes it very clear that of counsel relationships can create a tangled web of conflict-of-interest concerns very quickly. Before entering into an of counsel agreement, be sure to closely examine each person or entity you will be joining. Does the law firm have more than one of counsel attorney? How many lawyers and law firms will be entering into your conflict-of-interest evaluation? Questions like these are important to keep in mind as you contemplate an of counsel arrangement. For advice on the ethics rules applicable to of counsel relationships, call OSB General Counsel Helen Hierschbiel at 503-620-0222.

Liability for Lawyer and Law Firm

Liability is another concern for lawyers and law firms in of counsel relationships. Though the law on liability for of counsel attorneys is still developing, a few hallmark legal principles apply. Liability in contract will depend on the contractual agreement. In tort, the law firm will probably be responsible for the conduct of the of counsel attorney based on theories of respondeat superior or negligence (either negligent supervision or negligent selection). Though the law firm may seek to lessen its liability exposure for of counsel attorneys by using an independent contractor designation, the firm could still be held vicariously liable if actual or apparent authority existed. An Ohio appellate court found liability for an of counsel attorney based on an agency by estoppel theory.[1]

Law firms should also be aware that of counsel attorneys are often considered part of a single practice unit along with the law firm on malpractice insurance plans and policies in excess of the $300,000 mandatory PLF Plan. (The PLF Primary Plan differs because it provides coverage on an individual attorney basis, although multiple attorneys named on the same claim – including of counsel – could still share indemnity and expense limits.) For example, the PLF's Excess Program considers of counsel attorneys to be part of the firm unit due to

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[1] *Trimble-Weber v. Weber*, 119 Ohio App 3d 402, 695 NE 2d 344, 347 (11th Dist 1997).

potential vicarious liability risk and requires them to be included on the firm's application. Further, the Excess Program coverage assessment is charged on a per attorney basis – including of counsel members of the firm. Just as the ethics example pointed out, in terms of liability and cost, an of counsel attorney may well be considered a part of the firm.

Clarity in the Nature of the Relationship

Another consideration for law firms and attorneys is whether the use of the "of counsel" designation is false or misleading. Specifically, does its use accurately capture the relationship between the law firm and the of counsel attorney? ORPC 7.5(c)(1) states that a lawyer in private practice "shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of the lawyers in the firm." Oregon Formal Ethics Opinion No. 2005-12 addresses this issue in the following scenario. "Lawyers A, B, and C share office space. Beyond this, however, A, B, and C all maintain separate practices." The question is whether A, B, and C may "hold themselves out, whether through the use of a common letterhead or otherwise," as associates or of counsel with each other. The answer is no. To use an "of counsel" designation where none exists would be false or misleading and in violation of ORPC 7.5. In that situation, avoid representing the group as having an ongoing relationship if none exists. Instead, refer and associate on a case-by-case basis. The best practice would be to disclose any relationships you have with other attorneys and law firms.

What do the above considerations mean for Oregon lawyers and law firms? First, consider whether the of counsel relationship is the best option for your situation. If it is, choose carefully those lawyers and law firms with whom you associate in an of counsel relationship. Before entering into the relationship, consider the general history and reputation of the attorney or law firm, as well as any claims history and outside business relationships.

Second, identify whether the lawyer or law firm has any additional of counsel relationships. This is an extremely important step that will help you discover any conflict-of-interest issues early.

Finally, consider the professional liability implications of the of counsel relationship. This is particularly important for relationships with lawyers or law firms outside of Oregon. Your PLF coverage will not protect you from vicarious liability for your of counsel relationship with out-of-state lawyers or law firms.

Balance the purposes and benefits of the particular of counsel relationship you contemplate forming against the additional ethical and liability risks that you and your firm may assume.

Emilee S. Preble
PLF Staff Attorney/Excess Program Coordinator

Thanks to Jeff Crawford, PLF Director of Administration and Excess Program, and Helen M. Hierschbiel, OSB General Counsel, for their assistance with this article.

Tips, Traps, and Resources

CHANGES TO STATE COURT FILING FEES AND CAPTIONS: Effective October 1, 2011, HB 2710 (2011 Or Laws Ch 595) substantially changes circuit court filing fees. The revised fee schedule eliminates the current multiparty fees enacted in 2009. Fees in civil actions will be graduated based on the size of the claim. Captions must now reference the statute that establishes the filing fee. Pleadings in certain actions must contain the amount in controversy in the caption. For the new statewide fee schedule, visit http://tinyurl.com/feeschedule. If you have questions, check the particular court's Web site (http://courts.oregon.gov/OJD/courts/circuit/index.page?) or contact the court for correct fee amounts.

AMENDED UTCR: The new Uniform Trial Court Rules (UTCR) became effective August 1, 2011. Some of the changes include new UTCR 6.190 (evidence submitted in an electronic format); new UTCR 9.410 (protective proceeding – sealed information order); new Form 9.410.1 (Order Regarding Confidential Information Disclosed by Department of Human Services); amended UTCR 21.080 (electronic filing deadlines). To see the new rules, go to http://tinyurl.com/utcr2011.

TECHNOLOGY: For a thorough discussion of computer backup options, see "Backing Up: Your Most Important Office System," by Dee Crocker, PLF Practice Management Advisor, *Oregon State Bar Bulletin*, April 2011 at www.osbar.org/publications/bulletin/11apr/practice.html.

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Tips, Traps, and Resources

CHECK SCAMS: A new twist has surfaced in the ever-evolving world of check scams targeting lawyers. Here is the latest scenario: Because some attorneys are getting wise to the scams, a scammer poses as a property buyer and contacts a mortgage broker instead of contacting the attorney directly. The mortgage broker then contacts an attorney and says that he or she has someone who is interested in purchasing property in Oregon and would the attorney be interested in facilitating the deal. The attorney believes the proposed transaction is legitimate because the attorney knows and trusts the broker. Don't fall prey to this scam! Trust your instincts. If in doubt about the legitimacy of the deal, talk it over with a colleague or call a PLF claims attorney at 503-639-6911.

E-MAIL ETHICS: The ABA has released two formal ethics opinions regarding e-mail communications. Formal Opinion 11-459 provides that a lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. Formal Opinion 11-460 provides that when an employer's lawyer receives copies of an employee's private communications with counsel, which an employer located in the employee's business e-mail file or on the employee's workplace computer or other device, neither Rule 4.4(b) nor any other rule requires the employer's lawyer to notify opposing counsel of the receipt of the communications. However, court decisions, civil procedure rules, or other laws may impose such a notification duty, which a lawyer may then be subject to discipline for violating. More information is available at www.americanbar.org/groups/professional_responsibility.html.

EMPLOYMENT LAW: The National Labor Relations Board (NLRB) issued a final rule that requires most private employers (both union and non-union) to post a notice advising employees of their NLRB rights by November 14, 2011. The posting requirement applies to all private-sector employers subject to the National Labor Relations Act, except for very small businesses with a de minimis impact on interstate commerce. Failure to post this notice will be an unfair labor practice. More information is available at http://tinyurl.com/nlrbrule

TAX LAW: The Internal Revenue Service (IRS) issued final regulations regarding delivery of documents that have a filing deadline under the internal revenue laws. Treasury Decision (T.D.) 9543 provides that the proper use of registered or certified mail, or a service of a private delivery service (PDS) designated under criteria established by the IRS, will constitute prima facie evidence of delivery. The regulations became effective August 23, 2011.

LAW PRACTICE MANAGEMENT BLOG: Check out the best of the blog posts from the first half of 2011 by PLF Practice Management Advisor Beverly Michaelis at http://oregonlawpracticemanagement.com. A wide range of topics includes LinkedIn, Quicken, conflict systems, stolen laptops, the NALS Green Guide, unbundling, credit card processing, the new OSB mentoring program, best of the ABA Techshow 2011, trust accounting, paperless office, practicing in the cloud, and much, much more!

CLOSING YOUR OFFICE: For an article and checklist on closing your solo practice, see "Closing a Solo Practice: An Exit To-Do List," by Sheila Blackford, PLF Practice Management Advisor, *Law Practice Magazine*, May/June 2011, published by the American Bar Association, at http://tinyurl.com/exittodolist.

TECH TIP – MICROSOFT OUTLOOK 2007: If you want to find a specific e-mail in one of your inbox folders or subfolders but you can't remember where it is, click on the folder or subfolder you want to search. Click on the Search Inbox window in the upper right corner. Type in your search term (recipient, sender, subject, etc.) and hit enter. This will bring up all the e-mails that match your search term. If you want to sort all those e-mails by sender, for instance, click on the "from" column. If you want to search all folders, click on the drop-down button next to the Search Inbox window; select Search Options; under Instant Search Pane, select All Folders and click OK.

Thanks to Jay Richardson, Buckley Law P.C., Lisa A. Amato, Wyse Kadish LLP, Emilee S. Preble, PLF Staff Attorney/Excess Program Coordinator, Matthew A. Borrillo, PLF Claims Attorney, and Beverly Michaelis, Dee Crocker, and Sheila Blackford, PLF Practice Management Advisors, for their assistance with these tips.

IN BRIEF

Published by the Professional Liability Fund

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Cases of Note

TORTS/CONSTRUCTION DEFECT: In *Abraham v. T. Henry Construction, Inc.* (Mar. 10, 2011), the Oregon Supreme Court held that common law negligence principles apply to a construction defect claim – notwithstanding a contractual relationship – as long as the property damage for which the plaintiff seeks recovery was a reasonably foreseeable result of defendant's conduct. A negligence claim for personal injury or property damage that would exist in the absence of a contract will continue to exist unless the parties define their respective obligations and remedies in the contract to limit or foreclose such a claim (by supplanting the common law standard of care). (www.publications.ojd.state.or.us/S058073.htm)

ATTORNEY FEES: In *Menasha Forest Prod. Corp. v. Curry County Title, Inc.* (Mar. 25, 2011), the Oregon Supreme Court held that a third-party's payment of attorney fees had no effect on the prevailing party's entitlement to attorney fees "expended or incurred" in connection with an action on a contract. The act or condition that causes a party to incur or become liable for or subject to an attorney fee is legally distinguishable from the act of paying for or otherwise satisfying a liability for that fee. (www.publications.ojd.state.or.us/S058450.htm)

CRIMINAL PROCEDURE/APPEALS: In *State v. Fowler* (Apr. 7, 2011), the Oregon Supreme Court held that an amended notice of appeal served and filed more than 30 days after the supplemental judgment it intended to appeal was not timely. Because the initial notice of appeal only specified the general judgment, neither the notice of appeal nor the amended notice of appeal gave the court of appeals jurisdiction over the supplemental judgment. (www.publications.ojd.state.or.us/S058769.htm)

STATUTE OF LIMITATIONS/TOLLING: In *Snyder v. Espino-Brown* (Apr. 7, 2011), the Oregon Supreme Court held that, to prevent the tolling of the statute of limitations, a person who makes an advance payment must give the notice described in ORS 12.155 to each person who has a legal right to bring an action to recover damages for the injury to or destruction of the property for which the advance payment was made – not just to injured persons who file claims for payment before an advance payment is made. (www.publications.ojd.state.or.us/S058520.htm)

INHERITANCE TAX: In *Force v. Dept. of Revenue* (Apr. 7, 2011), the Oregon Supreme Court held that an estate's state inheritance tax liability under ORS 118.010(2) is determined under pre-2001 federal estate tax law, pursuant to ORS 118.007 (2003 Or Laws ch 806). An IRS determination of federal tax liability (and state death tax credit) under the post-2001 federal tax law is therefore irrelevant. (www.publications.ojd.state.or.us/S058252.htm)

PREMISES LIABILITY/JURY INSTRUCTIONS: In *Hammer v. Fred Meyer Stores, Inc.* (Apr. 20, 2011), the Oregon Court of Appeals affirmed the trial court's application of the res ipsa loquitur doctrine, finding that there was sufficient evidence to create a reasonable inference that the negligence that caused the store's display shelf to flip up and injure plaintiff was more probably than not attributable to defendant. The appeals court also found that defendant's generalized objection to any instruction regarding res ipsa loquitur did not particularly assert that the uniform jury instruction inaccurately stated the law. (www.publications.ojd.state.or.us/A142677.htm)

BANKRUPTCY/FORECLOSURE: In the case of *In re Names* (May 13, 2011), the U.S. Bankruptcy Court for the District of Oregon found that the debtor's failure to object to the defect in the notice of sale required by ORS 86.745(9) (regarding the rights of residential tenants) – which did not impact the debtor's substantive rights – before the trustee conducted the sale and recorded the trustee's deed precluded the debtor from arguing that the defect in the form of notice made the sale void. (www.orb.uscourts.gov/Judges/file_attachment/400402130511152804.pdf)

Thanks to Maureen DeFrank, PLF Claims Attorney, for her assistance with these cases.