



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; and
- (3) Claims by medical providers for unpaid bills for services, including liens by hospitals and physicians.

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

2005 PLF ANNUAL REPORT

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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.

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 medical 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.

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DISCLAIMER

IN BRIEF INCLUDES CLAIM PREVENTION INFORMATION THAT HELPS YOU TO MINIMIZE THE LIKELIHOOD OF BEING SUED FOR LEGAL MALPRACTICE. THE MATERIAL PRESENTED DOES NOT ESTABLISH, REPORT, OR CREATE THE STANDARD OF CARE FOR ATTORNEYS. THE ARTICLES DO NOT REPRESENT A COMPLETE ANALYSIS OF THE TOPICS PRESENTED, AND READERS SHOULD CONDUCT THEIR OWN APPROPRIATE LEGAL RESEARCH.

OTHER RESOURCES

For additional articles relating to the topic of settlement proceeds, go to the PLF's Web site, www.osbplf.org, select *In Brief* under Loss Prevention, then select any of the following titles from the June 2006 issue:

- "PIP Basics"
- "PI Settlements and Welfare"
- "Medicare and Medicaid Liens in PI Cases"

For related practice aids, select Practice Aids under Loss Prevention, then select Litigation, then select any of the following documents:

- Personal Injury Case – Commencing or Settling
- Settlement or Judgment Disbursal Checklist
- Sample Settlement Accounting

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(g). See *Lawson v. Coos Co. Sch. Dist. No. 13*, 94 Or App 387, 765 P2d 829 (1988). Also, watch out for the minor's medical 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. ORS 30.810(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).

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.
- (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 at 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

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providers' participation. 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.

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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TAX-DEFERRED EXCHANGES

Tax-deferred exchanges, commonly called 1031 exchanges (referring to the Internal Revenue Code [IRC] section defining them), give property owners the opportunity to dispose of their existing investment property and acquire new replacement property through an exchange rather than a sale. If properly done, the property owner can defer (but not avoid) the capital gains tax that would otherwise be owed on any profit made from a straight sale transaction. This article addresses a typical delayed exchange of real property, not a simultaneous exchange in which the existing and new properties are transferred concurrently.

This article does not deal with exchanges of personal property held for investment or for productive use in a trade or business, nor with the more complicated exchanges, such as reverse exchanges (in which the new property is acquired before disposing of the existing property) or build-to-suit exchanges (in which exchange funds from the sale of the existing property are used for the construction of replacement property), nor does it deal with partnership, limited liability, or Real Estate Investment Trust (REIT) issues. Readers should be aware that special rules apply to exchanges between related parties as defined in the IRC. Also, the complexities of refinancing in connection with an exchange are not covered.

TERMINOLOGY

Understanding the terminology in a 1031 exchange is essential because the definitions include many of the rules to qualify an exchange for tax deferral. The relevant terms are defined as:

Exchanger (or exchanger): The property owner who elects to use a 1031 exchange. This is the seller in an earnest money agreement or purchase and sale agreement. The IRC uses the term "taxpayer" rather than exchanger.

Relinquished Property: The property that is transferred by the exchanger in an exchange. This is sometimes called the exchange property or downleg property.

Replacement Property: The property that is acquired by the exchanger. This is sometimes called the acquisition property or upleg property. The replacement property can be one or more properties.

Like-Kind Property: To qualify as a 1031 exchange, the relinquished property must be exchanged for "like-kind" replacement property. Generally, real property is like-kind as to all other real property, whether improved or unimproved and whether located in Oregon or another state. Bare land and farm land, residential and commercial rental properties, office buildings, industrial properties, and even a leasehold interest of not less than 30 years all qualify for exchange, and each type of property can be exchanged for any of the others. Personal property is not like-kind to real property for exchange purposes, such as that associated with hotels, restaurants, and assisted living facilities.

To qualify as a like-kind exchange, both the relinquished property and the replacement property must be held by the exchanger for investment purposes or for "productive use in their trade or business." The exchanger's intention must be to hold the property as an investment or for business purposes. Property held primarily for sale, including real estate held by a developer or dealer, does not qualify. Interests in a partnership or limited liability company cannot qualify for exchange because they are considered personal property, even though the entities themselves may own and exchange real property in a qualified 1031 exchange. Stocks, bonds, promissory notes, other securities, and other evidences of indebtedness also do not qualify. A vacation home does not qualify for exchange because of personal use, but it could be converted to a legitimate rental property and thereby qualify, subject to applicable IRC and Revenue Ruling requirements.

Boot: Property received by the taxpayer in an exchange that is not like-kind. Boot is non-qualified property received in an exchange, such as cash, promissory notes, securities, personal property (e.g., office supplies, furniture), and/or debt reduction. The receipt of boot by an exchanger does not disqualify the exchange, but the market value of the boot is recognized as immediate gain rather than being deferred. Common traps resulting in the receipt of boot are relief from debt on the relinquished property; an assumption of (or taking subject to) a mortgage, trust deed, or contract by the buyer; or the agreement to pay other debt of the exchanger that is not replaced on the replacement property.

Practice Tip: To avoid boot, ensure that the exchanger: (1) Does not actually or constructively receive any of the exchange proceeds; (2) Acquires

replacement property of equal or greater net sales price than the relinquished property; (3) Uses all the proceeds from the relinquished property in acquiring the replacement property; (4) Receives only like-kind replacement property; and (5) Obtains debt on the replacement property equal or greater than that paid off, assumed, or taken subject to on the relinquished property.

Qualified Intermediary (sometimes called an accommodator): An independent party to the exchange (not an agent of the exchanger) who facilitates the exchange by receiving and holding the exchange proceeds and using the exchange proceeds to purchase the replacement property for the exchanger. Even if the exchanger does not have possession of the exchange proceeds but has control of the proceeds, this will constitute constructive receipt by the exchanger and the gain will be recognized. The exchanger's real estate agent or broker, banker, employee, attorney, accountant, and related parties are all disqualified to serve as the qualified intermediary. Many companies provide services as qualified intermediaries. Most title insurance companies have affiliated exchange companies, allowing easy coordination of closings and exchanges.

The qualified intermediary becomes the principal in the exchange transaction. The exchanger assigns to the qualified intermediary its interest as the seller of the relinquished property and as the buyer of the replacement property. Generally, the exchanger first enters into a purchase and sale agreement (PSA) for the relinquished property and then, before closing (preferably as soon as possible after entering into the PSA), enters into an exchange agreement with the qualified intermediary and uses an assignment agreement to assign all of the exchanger's interest in the PSA to the qualified intermediary. The qualified intermediary usually provides exchange closing instructions. The forms of exchange agreements, assignment agreements, and exchange closing instructions developed by reputable, experienced, qualified intermediaries are generally good, but the attorney for the exchanger cannot avoid the responsibility to his or her client by complete reliance on these forms.

Practice Tip: To qualify as a 1031 exchange, the exchanger must assign its interest in the PSA to the qualified intermediary. When representing a client in a purchase or sale of real property, unless you have confirmed that your client definitely does not want to engage in a 1031 exchange, include a provision in

REVISED PLF HANDBOOKS

The PLF has revised three of its handbooks:

- *A Guide to Setting Up and Running Your Law Office* (October 2005)
- *A Guide to Setting Up and Using Your Lawyer Trust Account* (December 2005)
- *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death* (April 2006)

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the PSA that requires the other party to cooperate in a 1031 exchange and execute all documents necessary to effect such exchange.

Identification Period: The period for identifying the replacement property. This period starts on the day the exchanger transfers the relinquished property (generally the closing date) and ends at midnight on the 45th day thereafter. Special rules dictate the number of potential replacement properties that may be identified, the percentage of value for certain identified multiple properties, the type of description required, and to whom the notice must be given. Generally, the identification notice is given to the qualified intermediary, but it may be given to any party obligated to transfer the replacement property to the exchanger. The exchanger should sign and deliver the identification notice by hand, mail, fax, or otherwise send it by midnight on the 45th day. After the 45th day, the exchanger may not change the list of identified properties. Unless one or more of the listed properties are acquired as replacement properties, the exchange fails.

Exchange Period: The period within which the exchanger must acquire the replacement property. This period starts on the day the exchanger transfers the relinquished property (i.e., the same day that the identification period starts) and ends on the earlier of the 180th day thereafter or the due date (including extensions) of the exchanger's tax return for the year of the transfer of the relinquished property.

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Practice Tip: The 45-day identification period and the 180-day (or earlier) exchange period cannot be extended. The customary manner of counting time periods by excluding the first day and including the last day does not apply; both the first day and the last day are included, and it makes no difference if the last day falls on a Saturday, Sunday, or legal holiday.

VESTING OF OWNERSHIP

Title to the replacement property must be held in the same manner as title to the relinquished property, for example, by one spouse or both spouses or by the same entity. (There are exceptions for revocable living trusts and single-member limited liability companies that are disregarded for federal tax purposes.) Generally, the exchanger should not make any changes in the vesting of title to the relinquished or replacement properties before or during the exchange.

The tenancy-in-common interest as replacement property is a relatively new product being offered by the real estate industry. An exchanger may acquire replacement property that is a tenancy-in-common ownership interest in real property, provided that: (a) the real property satisfies the like-kind requirement, and (b) the interest acquired meets the requirements of a legitimate tenancy-in-common and is not subject to being taxed as a partnership. The Internal Revenue Service has issued guidelines to assist exchangers in determining whether a particular tenancy-in-common ownership qualifies as replacement property in a 1031 exchange. The exchanger should satisfy itself, through its own legal and tax counsel, that the tenancy-in-common interest qualifies as exchange replacement property. Tenants in common may exchange or not exchange their interests in a property held in a tenancy in common

without affecting the eligibility of the other tenants in common for an exchange.

THE EXCHANGE PROCESS

The typical delayed exchange commences when the exchanger's relinquished property is sold and closed and is completed when the last replacement property is purchased and closed, all of which must occur within the 180-day (or earlier) exchange period. The exchanger assigns its rights in the PSA for the relinquished property to the qualified intermediary. When the exchanger decides on the replacement property, the exchanger also assigns its rights in the PSA for the replacement property to the qualified intermediary. Through these assignments, the qualified intermediary becomes the "seller" of the relinquished property and the "buyer" of the replacement property. When the relinquished property closes, the qualified intermediary holds the exchange funds pursuant to the exchange agreement until the funds are needed for the purchase of the replacement property.

Even though the qualified intermediary acts as the "seller" of the relinquished property, it need not convey the relinquished property, and even though the qualified intermediary acts as the "buyer" of the replacement property, the replacement property need not be conveyed to the qualified intermediary. The Internal Revenue Service allows for "direct deeding" of the relinquished property from the exchanger to the buyer and of the replacement property from the seller to the exchanger. Therefore, the qualified intermediary need not hold title to either the replacement property or the relinquished property, and may thereby avoid potential liabilities of holding title to either property. This direct deeding is generally covered in the exchange agreement and in the exchange closing instructions. The exchange closing instructions usually provide that the closing statement for the relinquished property should show the qualified intermediary as the seller and that the statement of consideration in the deed should state that the consideration is being paid to a qualified intermediary as part of a 1031 exchange.

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PRE- AND POSTNUPTIAL AGREEMENT TIPS AND TRAPS

Many couples wish to define their marital rights and responsibilities by entering into prenuptial or postnuptial agreements. The impetus for such an agreement is frequently a reaction to a bad dissolution of a prior marriage or a result of parental pressure. Some people simply wish to carefully define their financial relationship. Whatever the couple's motivation, approach these agreements with caution.

In Oregon, prenuptial agreements are authorized by ORS 108.700 to 108.740. Postnuptial agreements are not authorized by statute, and their status is considerably less certain than that of prenuptial agreements. Because of the high incidence of divorce, it is quite possible that a prenuptial agreement you draft will be "put to the test."

PRENUPTIAL AGREEMENTS

Understand the Law. Prenuptial agreements can be very comprehensive in scope. Typically, they address both what happens in the event of a divorce and what happens in the event of death. They can also examine any day-to-day financial arrangements the parties may wish to include. The competent drafter must have a good grasp of both estate planning and domestic relations law. If you are inexperienced in one of these areas, consult with another lawyer who can provide the needed expertise.

Represent Only One Party. Represent only one party to a prenuptial agreement, and insist that the other party have independent counsel. Even if the parties say that they agree about every term of the agreement, their interests are adverse, and it is not permissible for one attorney to represent both parties. Independent representation for each party will increase the likelihood that the agreement will be upheld and will provide an often-helpful second set of eyes during the drafting process. It is good practice, although not required, to have both attorneys sign a certificate stating that they have fully explained the agreement to their clients and that they believe that the clients understand the terms and how their rights are being altered. There is no required format for such a certificate. You can find an example in the OSB CLE *Family Law*, Volume II (Dissolution Practice), Chapter 14: Formal Agreements.

Time Carefully. Although a prenuptial agreement in Oregon could be signed just before the organ starts to play the wedding march, this timing makes the parties vulnerable to the contention that the agreement was signed under duress. It is better to have both parties execute the agreement a reasonable period of time before the ceremony. Although Oregon law does not define a "reasonable period of time," California law requires that prenuptials be signed at least a week before the wedding ceremony.

Draft Carefully. During the drafting process, advise clients that they are opting out of the complex bundle of marital rights that has developed over centuries and are trying to create a customized bundle that applies only to their situation. Take the time to describe exactly what will happen to complex assets, such as retirement plans, stock options, intellectual property, and business assets.

Consider Reasonableness of the Agreement. Although a reasonable agreement that provides for the needs of both spouses may produce a more satisfying marital relationship than a one-sided agreement, Oregon does not require that prenuptials be reasonable. A prenuptial agreement is very difficult to set aside and is likely to be upheld under the Oregon statute.

ORS 108.725 sets forth the two grounds under which a premarital agreement is not enforceable. The first ground is that the party did not execute the agreement voluntarily. The second ground is that the agreement was unconscionable when it was executed **and**, before execution, one party (1) was not provided fair and reasonable disclosure of the other party's property or financial obligations, (2) did not waive the right to disclosure, and (3) did not have or reasonably could not have had adequate knowledge of the other party's property or financial obligations. Clients challenging a prenuptial agreement will find this an extraordinarily difficult standard to meet. Absent unusual circumstances, courts are quite likely to enforce prenuptial agreements. This message is particularly important for the "have not" spouse who is frequently less sophisticated than the "have" spouse, uncomfortable with the prenuptial negotiation, and anxious to get married and put it all behind.

Although full disclosure of each party's property and financial obligation is not required by the statute, it eliminates any attack based on unconscionability, leaving only lack of voluntary execution as

a ground for setting aside the agreement. If the parties choose the full disclosure approach, lawyers customarily attach exhibits to the prenuptial agreement, showing each client's separate property and any property they hold jointly or intend to make joint following the marriage.

Keep File Notes and Letters to Clients. Take reasonably detailed notes about your conversations with clients and keep those notes in your files. This is particularly wise when a client insists on doing something that you think may not work out well or that the client may later regret. Advise clients in writing when they are acting contrary to your advice. If the situation is crucial, consider having the client sign off on the letter acknowledging your advice.

Retitle the Property. A prenuptial agreement may be used to define the legal status of untitled property. For instance, a prenuptial (or postnuptial) agreement could state that all the parties' household furniture and furnishings are joint property, regardless of who brought such property to the marriage or paid for it. This statement would effectively make such property joint. A prenuptial agreement, however, cannot actually change the title to property. Although it is possible to state in a prenuptial agreement that the parties' principal residence is joint property, this may create an ambiguous situation unless the title to the residence is also transferred at the same time. Creating joint assets can be tricky, particularly when one person is buying an interest in an asset, such as a residence already owned by one of the clients. Use available resources, such as the OSB CLE on Family Law, as a starting point.

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To order from Softmart, call 800-545-1294 or go to www.softmart.com/bar.

Advise Clients to Keep Records. A well-drafted prenuptial agreement is only half the battle. The other half consists of the client's keeping careful records, reviewing the agreement from time to time, and doing his or her best to live within its terms. Even the best-drafted prenuptial agreement will not be helpful if the parties have kept poor records or acted inconsistently with the document, such as placing assets in joint names without intending to make the assets joint for purposes of the agreement.

Modify in Writing. Prenuptial agreements can be modified or terminated, but only in writing. Tearing them up, throwing them in the fireplace, or otherwise destroying them will not alter the agreement.

POSTNUPTIAL AGREEMENTS

Although many of the comments above about prenuptial agreements also apply to postnuptial agreements, the following additional considerations come into play.

Include Consideration. A prenuptial agreement requires no consideration to be enforceable, including any modification or revocation of the agreement. Postnuptial agreements are governed by contract law, which requires consideration to enter into and modify an agreement. The mutual alteration of marital rights may provide adequate consideration, but it is safer to require additional monetary consideration, no matter how minimal.

Clarify Application. Postnuptial agreements do not enjoy the statutory authority of prenuptial agreements. Although carefully drafted and reasonable postnuptial agreements may be enforceable, they are considerably less certain than prenuptial agreements. The recent case of *In re Marriage of Grossman*, 338 Or 99, 106 P3d 618 (2005), had a chilling effect on postnuptial agreements, although the facts of that case are unusual and may not have broad application. In *Grossman*, the parties executed a postnuptial agreement while contemplating a divorce. After executing the agreement, the parties reconciled and continued to live together for some years. They later divorced, and the validity of the agreement came into question. The Oregon Supreme Court ruled that the agreement was no longer effective, possibly because it would have resulted in an extremely uneven division of property and it was not clear whether the parties intended the agreement to apply to anything other than the divorce impending at the time they executed the agreement.

TURBOCHARGE YOUR WORKFLOW

If every file on your desk is on fire and it feels like your practice is approaching meltdown, how do you know where to start to put the fires out? Here are some ways to help:

1. Start by making a single TO DO list containing everything you can think of that needs to be done. Don't try to organize tasks or prioritize them. Just list them.
2. Once you have made your comprehensive list, divide it into two lists – one for yourself and one for your secretary or legal assistant. Your list should contain only things that you (a lawyer) can do. Everything else should be on the other list for your secretary or legal assistant. If either list looks humanly impossible, you probably need more help.
3. Go over these two lists again and divide each into two more lists: one **high priority list** for the things that must be done today and a second one for **everything else**. Revise the lists each afternoon before you leave or each morning as soon as you arrive at the office. Let the priority list guide your work during the day, but use the second list to add less pressing tasks as they come up. This approach will keep you focused on what's most important, because you won't have to worry about forgetting something else. It's all on the list.
4. Once you've prioritized your TO DO lists, let your calendar help you manage your time. In addition to noting the final due date of important events such as statutes of limitations, filing deadlines, and hearing and trial dates, calendar at least three advance reminders of the event. Calendar a follow-up reminder for monitoring each event.
5. Schedule appointments with your files on a specific day, at a specific time, and for a specific length of time to ensure that you make time to do the work. If you take these appointments with your client files as seriously as you take an appointment with the client, you are much less likely to allow yourself to be interrupted while you are doing the work. If you set up two of these work appointments, with sufficient blocks of time to actually do the work, you're much more likely to complete it on time and without stress, even if it turns out to be more complicated than you originally anticipated. Scheduling appropriate blocks of time on the calendar to do work gives you a much better idea of how busy you really are, and scheduling two sessions for doing the work also helps you to avoid those seemingly inevitable time crunches caused by unexpected emergencies for other clients.

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To avoid the result in *Grossman*, practitioners should distinguish marital settlement agreements from postnuptial agreements. The former are generally executed in contemplation of a divorce; the latter are not. A postnuptial agreement should clearly provide that it applies to any future divorce, if that is what the parties intend. If it is not their intention, the parties should enter into a marital settlement agreement, which should provide that it applies only to their impending divorce.

Advise Clients About Lack of Certainty. If the parties want to be certain of enforceability, they may

need to get divorced, sign a prenuptial agreement, and then remarry. Obviously, this extreme solution will not appeal to most clients. However, to protect yourself, advise clients in writing that a postnuptial agreement may not hold up.

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WHEN TO FILE SEPARATE RETURNS

Most married couples file joint income tax returns without giving their decision a second thought. However, some circumstances – such as finances, potential liabilities, and marital instability – can create a situation in which one or both spouses are better off filing a separate return.

Joint filing is commonly financially advantageous for two reasons. First, federal joint rates are lower than separate rates and often reduce the tax due from both spouses by more than 15%. Second, joint returns sometimes allow income earned by one spouse to be reduced by losses and deductions generated by the other spouse.

Joint filing, however, makes both spouses jointly and severally liable for any tax due – both the tax shown due on the joint return and any tax due that might later be discovered through an audit. Accordingly, joint filing makes sense when the tax has been or can be promptly paid, and the couple is confident that an audit would not result in additional tax. Some couples, on the other hand, should consider filing separate income tax returns.

This article discusses three situations in which separate filing might make sense: (1) The couple can't pay the tax due; (2) One spouse is taking aggressive positions on the couple's return; or (3) The couple is contemplating divorce or separation.

CAN'T PAY THE TAX

In most instances, a household's tax problems arise from the earnings of just one spouse. If one spouse has incurred more tax liability than the couple can quickly and conveniently pay, the couple should seriously consider filing separate returns. The hefty penalties and interest charged on unpaid taxes make it difficult to retire large tax debts. Low-income households and households experiencing financial problems may have too little discretionary income to keep up with interest and penalty accruals. Couples at all income levels are routinely surprised at how quickly tax liabilities grow to an unmanageable size; a self-employed businessperson, for example, who fails to file three or four years of returns and make the required estimated payments usually has a liability so large that it will be difficult or impossible to pay.

The couple's instinctive reaction when one spouse has incurred a significant tax is to file a joint return to take advantage of the lower rates. If, however, so much tax has been incurred that the tax will be difficult or impossible to pay, the couple will probably have to file bankruptcy or pursue a federal or state offer in compromise. (Most income tax liabilities can eventually be discharged in bankruptcy.) If bankruptcy or an offer in compromise seems the likely or only solution, the household may weather the tax collection process ahead more easily if only one spouse is liable for the tax. Separate return filing will keep one of the spouses immune from the tax problem.

The Bankruptcy Code prevents individuals from discharging most tax liabilities during the three-year period following the date the tax return was due. Weathering the collection efforts of taxing agencies during this three-year period can be very difficult. Separate return filing means that the non-liable spouse's bank accounts, wages, and equity in assets will not be drawn into the tax and bankruptcy processes – a significant benefit to both spouses. It is true that the higher separate tax rates will result in more tax owed for the spouse who earned the income. However, this larger amount of tax will not matter if relief is eventually obtained through the subsequent bankruptcy proceeding or offer in compromise.

AGGRESSIVE RETURN POSITIONS

As noted above, joint filing makes both spouses liable for the tax shown due in a return, in addition to any tax that is later discovered through an audit. An individual who believes his or her spouse is taking overly aggressive positions on the return may want to consider filing a separate return to avoid joint liability for taxes due. He or she might be able to invoke state and federal laws that protect innocent spouses, but there is no guarantee of such relief. The best way for an innocent spouse to avoid liability for the aggressive return positions of his or her spouse is not to execute a joint return at all.

Federal and state "innocent spouse relief" is sometimes available for spouses who become liable through an audit for taxes not shown as due on joint returns. 26 USC §6015; ORS 316.368, 316.369. If available, innocent spouse relief extinguishes one spouse's liability for all or part of the taxes that were previously jointly owed. In most instances, the

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applying spouse must show that he or she did not know there was additional tax due when the joint return was executed and that relief from the tax liability is equitable in light of the facts and circumstances. Innocent spouse relief has become easier to obtain in the last few years, but the process is by no means convenient or certain. Successfully obtaining innocent spouse relief can be a lengthy and expensive process, as the IRS and the courts apply the requirements stringently.

Obtaining innocent spouse relief for a tax liability that was *shown on the joint return* is even more difficult. Only "equitable relief" is generally available for a spouse who signed the joint return knowing that the couple owed unpaid taxes. 26 USC § 6015(f). Equitable relief is generally available only in cases of significant hardship or when the "innocent spouse" signed the return under duress.

DIVORCE

Marital instability is another reason to consider filing separate returns. If a couple experiencing marital difficulties believes that they have paid the tax owed and that there is little chance of additional tax due, joint filing probably still makes sense. If, however, the couple cannot pay the tax owed or if one spouse insists on taking aggressive return positions, they should consider separate filing. Divorce does not undo the joint and several liability created by a jointly filed return.

Divorce and separation agreements often make one spouse responsible for paying taxes that were incurred during the marriage, but these types of agreements between the parties are not binding on taxing agencies. If the spouse who was contractually assigned the joint liabilities incurred during the marriage does not or cannot pay what is owed, the taxing agencies are free to pursue either or both

spouses for the full amount of the tax, regardless of the divorce or separation agreement. In that event, the only remedy available to a spouse who is required to pay more tax than required by the divorce or separation agreement is a claim for contribution or indemnification against the other (non-paying) spouse.

If the couple is divorced or legally separated, innocent spouse relief may also be available under 26 USC §6015(c) and ORS 316.368. When relief is allowed under these statutes, the joint tax liability is allocated between the parties. The federal and state statutes allocate the liability differently. Death of a spouse may also qualify the surviving spouse for innocent spouse relief under these same statutes.

HEDGING THE BET

Internal Revenue Code (IRC) Section 6015(b) sometimes allows a couple to hedge their bet on joint versus separate filing by allowing the couple to elect joint rates after initially filing separate returns. The joint election (1) must be made within three years from the due date of the separate returns (not counting extensions) and (2) can only be made after the couple has paid sufficient tax to satisfy the liability due under joint filing. Treas. Reg. 1.6013-2(b). To elect joint rates under IRC Section 6015(b), the IRS only requires that a joint return be filed. A cover letter, however, should accompany the return to clarify that the return is being filed to elect joint rates after separate returns have been filed. This right to later elect joint rates allows a couple undergoing financial difficulties to initially keep one spouse immune from an unpaid tax while still benefiting from the lower joint rates when the couple's financial difficulties have passed.

Couples who owe significant tax need to weigh the benefits of lower joint rates against the burden of joint liability, particularly if they are struggling with finances or their marriage. If you represent both spouses, be careful with advice on return filing strategies because of potential conflicts. If the spouses become divided on the return filing issue, encourage them to seek independent advice through separate counsel.

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