LIENS, SETTLEMENTS, AND OTHER TRAPS

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

CLIENT INTAKE

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.

- Advise Clients That Bills Have to Be Paid Back: Many clients do not understand that money they have received for medical expenses or wages may have to be paid back to insurance carriers of PIP, health, disability, or workers' compensation. Informing the client early helps everyone have the same expectations going into a case.

- Find Out if Health Insurance Exists: If you know who the health insurance carrier is, call and find out if a lien exists. Also, ask what the reimbursement agreement is (including whether there are attorney fee discounts or future health care benefits). Inquire about medical providers so you can determine if there are any bills you were not aware of.

- Find Out Where Your Clients Received Medical Treatment: The sooner you learn what insurance exists, the sooner you can look for liens, bills, and providers that might be relevant to the case settlement. Examples are: PIP, UIM, workers' compensation, and disability carriers.

- Find Out What Other Insurance Exists: The sooner you learn what insurance exists, the sooner you can look for liens, bills, and providers that might be relevant to the case settlement. Examples are: PIP, UIM, workers' compensation, and disability carriers.

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DISCLAIMER

This newsletter includes claim prevention techniques that are designed 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.
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, they are often sent to collection much sooner than other bills and many providers won’t accept a lien or promise to pay on a case.

**Find Out About Ages:** The time limit for a minor’s claim against a public body (Tri-Met, a city, a school district, the police, etc.) is short – it must be filed within **two years**. ORS 30.275(8); Lawson v. Coos Co. Sch. Dist. No. 13, 94 Or App 387, 765 P2d 829 (1988). Also watch out for minor’s medical bills. A parent’s action to recover the medical expenses of a child is governed by the two-year statute of limitations contained in ORS 12.110(1).

**THINGS TO DO BEFORE SETTLING**

- **Check with the UIM Carrier:** Before you settle, evaluate whether your client has an underinsured motorist claim or potential claim. 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.

- **Check with the PIP Carrier:** Before a settlement conference:
  
  1. Write the PIP carrier and obtain an **updated lien** in writing. Lien totals can change and you can’t negotiate effectively if you don’t have the correct amount. If the lien is in writing, there can be no dispute later.
  
  2. Find out about the reimbursement plan. Is the PIP carrier recovering its own lien or are you supposed to obtain it? Do you get an attorney fee? Can you negotiate the lien?

  3. Confirm which bills have been paid by the PIP carrier and that the total of the payments equals the amount of the PIP lien. Make sure that the PIP carrier, if it paid a discounted amount, is not credited for paying the full bill (thus reducing your total limit of PIP available).

- **Invite Lien Holders to the Settlement Conference:** If a significant lien or future benefits are at issue, request that the lien holder be at the settlement conference or available by phone. The more important the lien issue, the more you need the lien holder’s attendance. The lien holder is more likely to reduce its lien if the defense lawyer is explaining the comparative fault facts or other reasons why your client should lose. Calling the lien holder after the case is settled is much less effective.

- **Get Updated Lien Totals in Writing:** Obtaining written confirmation of the lien totals **before** the settlement helps prevent problems later. If a bill or adjusted lien comes in after the settlement, you have a written confirmation of the lien from the provider. 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 comp 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 comp carrier.

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**FREE CLE**

On March 31, 2000 the Professional Liability Fund will present *Avoiding the Nightmare*, a FREE seminar to help sole practitioners and lawyers in small firms plan for vacations, retirement, disability, sudden illness, or death. The seminar, presented at the Embassy Suites in Portland, will include: ethical considerations, planning and organizing for closure of a practice, implementing the closure of a practice, and perspectives on closing a law practice. The program has been accredited for 4.5 MCLE credits (1.0 ethics, 3.5 practical skills or general). If you would like registration information, call Karen Neese at 800-452-1639 or 503-639-6911.
THINGS TO DO ONCE THE CASE SETTLES

- **Report the Case Settled To Court:** 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, and all outstanding bills you are aware of that need to be repaid. 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 PIP Lien:** Make sure you either pay the full lien (less any agreed-upon attorney fees or discount) or the other side pays it. If the other side is to pay, be sure to get proof of payment and a release.

- **Pay the Workers’ Compensation Lien:** Repayment of the workers’ compensation lien is governed by statute (ORS 656.593) or as otherwise agreed 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 comp carrier’s portion 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, and (3) the remainder or its total lien to the workers’ compensation carrier. If there is any money remaining it 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:** When you pay all outstanding bills or liens, include them in your settlement summary for the client (see “Prepare a Settlement Summary”). Verify if 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 send this to the provider.

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

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Our thanks to Jana Toran, Jana Toran PC, for reviewing this article.

Editors Note: The Professional Liability Fund offers sample settlement and judgment disbursement forms, a checklist for commencing and settling personal injury cases, and other litigation practice aids. See the Practice Aid Order Form inserted in this issue.

RETIREMENT BENEFITS IN DIVORCE CASES

When handling a case involving a QDRO or a case requiring division of a federal employee’s pension, do not wait until after the divorce decree has been entered to prepare the order. Always have the QDRO pre-approved by the plan administrator and entered by the court when the dissolution judgment is entered. A judgment dividing a federal employee pension should also be pre-approved. Always include the terms governing division of a federal employee’s pension in the dissolution judgment. Following these tips can help you to avoid these risks:

- In the event of the participant’s death, the alternate payee may not receive the benefits awarded to him/her in the judgment because all rights of a “surviving spouse” are terminated by the divorce.
NEW ETHICS OPINIONS
The Oregon State Bar has issued two new ethics opinions:

- **2000-158 Multiple Client Conflicts of Interest – Current Clients:** Representing Driver and Passengers in Personal Injury/Property Damage Claims
- **2000-159 Zealous Representation – Requesting a Guardian ad Litem in a Juvenile Dependency Case**

These opinions will appear in the OSB Bar Bulletin. If you need them before they appear, check the Bar’s website www.osbar.org or call Penny Moller at 800-452-8260, ext. 334 or 503-620-0222, ext. 334.

The divorce terminates “spouse” status, and the rights of an alternate payee pursuant to a QDRO do not arise until a QDRO is entered. Rights to plan benefits are fixed at the moment of the plan participant’s death, and in the absence of a timely QDRO, the plan will not recognize the divorced spouse as a “surviving spouse” or as an alternate payee.

- The plan participant may decide to withdraw all of his/her retirement funds before the QDRO is entered and presented to the plan administrator. When the retirement funds are gone, there is nothing left to divide by QDRO.
- The plan may not be capable of division by QDRO or otherwise. Only certain kinds of retirement benefit plans are divisible by QDRO. An effort to solve the problem with an amendment to the judgment might be rejected as an impermissible attempt to modify a property division.
- In addition to tax qualified plans (governed by QDROs), plans for state, federal and non-tax qualified plans often have unique and unusual rules. For example, if a retirement plan of a retired federal employee is to be divided, the decree must include the terms of the division. See 5 CFR 838.806 and 5 CFR 838.1004. If the terms are not included in the decree, the spouse will be ineligible for benefits.

When working with retirement plans, advance planning can minimize these risks. Be sure to: (1) Have the form of the QDRO or judgment (when dealing with federal retirement plans) pre-approved by the retirement plan administrator, (2) submit the QDRO simultaneously with the decree and include the terms of the plan division in the decree when necessary such as when involving a retired federal employee, and (3) upon entry of the decree and order, immediately send a certified copy of the order to the plan administrator along with a formal request that the plan accept and administer the order according to its terms.

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DOMESTIC RELATIONS PRACTICE AND IMMIGRATION LAW

Domestic relations practitioners often confront issues in unfamiliar areas of law. This article presents some of the issues that may arise for immigrant clients and steps to take in dealing with them. When presented with these issues you may want to consult with an experienced immigration practitioner.

IMMIGRATION STATUS

Under 8 USC §1227(a)(1)(G), INA §237(a)(1)(G), if an alien gains legal residency through marriage and the marriage is terminated through divorce or annulment within two years after the alien gains legal residency, the marriage is presumed to be fraudulent. An alien who enters into a fraudulent marriage is deportable.

If your client is contemplating dissolution:

1. Determine if the client has “conditional residency” status (a two-year status based on marriage to a U.S. citizen). You will need to look at the client’s immigration documents to determine what status the client has and when it was acquired.
2. For the client who is converting to full permanent residency status after a divorce or annulment, help that individual prove that the marriage to a U.S. citizen was in “good faith” by obtaining documentation that debts and assets were commingled, bills were in both names, joint income tax returns were filed, etc. Your client will then have this documentation avail-
able when it is time to apply for permanent residency.

3. For an abused spouse, consider the provision of the Violence Against Women Act that allows certain spouses and children of U.S. citizens and lawful permanent residents to file an I-360 “self petition” for lawful permanent residency. This remedy is available if their non-alien spouse or parent does not wish to file the normally required I-130 immigrant visa petition. The self petition can be filed during dissolution of a marriage but not after dissolution is final. See 8 C.F.R. §204.2(c)(1)(ii).

DOMESTIC VIOLENCE

8 USC §1227(a)(2)(E)(i), INA §237(a)(2)(E)(i) states: “Any alien who at any time after entry is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.” This provision covers a crime of violence (as defined in section 16 of title 18, United States Code) committed by a victim’s current or former spouse, an individual with whom the victim shares a child, a live-in partner, or anyone against whom the victim is protected under the domestic or family violence laws of the United States or any state, Indian tribal government, or unit of local government.

8 USC §1227(a)(2)(E)(ii), INA §237(a)(2)(E)(ii) renders deportable any alien who is enjoined under a court-issued protection order after entering the U.S. and has then threatened violence, engaged in repeated harassment, or inflicted bodily injury on anyone named in the protection order. The term “protection order” means “any injunction issued to prevent violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions), whether obtained by filing an independent action or as a pendente lite order in another proceeding.”

8 USC §1227(a)(2)(E), INA §237(a)(2)(E) applies to convictions or violations occurring after September 30, 1996.

THE EFFECT OF MARITAL STATUS

Certain family-based immigrant visa categories are only available to those who are unmarried – a fact your clients must know if they are to qualify for permanent legal residency and avoid deportation. If the INS learns that it conferred a status on an alien under the mistaken belief that the alien was unmarried, the alien is subject to deportation. This can occur at any time, even after many years of residency in the United States.

Lawful permanent residents are eligible to file immigrant visa petitions for their spouses and unmarried children under INA §203(a)(2). A child can obtain lawful permanent resident status in this category and marry the next day without jeopardizing permanent resident status. However, the same child will be disqualified or lose such status by marrying one day before obtaining it.

Under 8 USC §1153(a)(1), INA §203(a)(1), a United States citizen is eligible to file an immigrant visa petition for an unmarried adult child, although currently there is a waiting period and a numerical limitation on the number of immigrant visas that can be issued each year in this category. Under INA §203(a)(3), U.S. citizens can petition for married children as well, but the waiting period is several years longer and a child who marries while on the waiting list is automatically shifted into the category with the longer wait.

In the case of step-children, it is better to marry as soon as possible. Immigration law confers certain benefits on step-parents and step-children, but to qualify, 8 USC §1101(b)(1)(B), INA §101(b)(1)(B) requires that the marriage creating the “step” relationship occur before the child’s eighteenth birthday.

ADOPTION AND IMMIGRATION RIGHTS

An adoption, however bona fide, does not by itself create immigration rights for the adopted child or the child’s adoptive parents. 8 USC §1101(b)(1)(E), INA §101(b)(1)(E) requires that the adoption be completed prior to the child’s sixteenth birthday and that the child be in the legal custody of and reside with the adoptive parents for at least two years before an immigrant visa petition (the first step towards obtaining lawful permanent residency status) based on the adoptive relationship can be filed. This statute also provides that “no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status” under the INA.

WEDLOCK AND IMMIGRATION

Immigration law treats children born out of wedlock less favorably than children born in wedlock. The mother of a child born out of wedlock may petition for
her child without difficulty. However, INA §101(b)(1), 8 USC §1101(b)(1) requires that the father of a child born out of wedlock either:

- legitimate the child “under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in or outside the United States ...before the child reaches the age of eighteen years and [that] the child [be] in the legal custody of the legitimating parent...at the time of such legitimation” or

- establish that a “bona fide parent-child relationship” existed between the father and the child prior to the child’s twenty-first birthday.

A little knowledge can be a dangerous thing. But in the field of immigration law, absence of knowledge can be extremely dangerous.

Philip Hornik
Our thanks to Portland immigration attorney Teresa Statler for her assistance and her review of this article.

WHERE TO GO FOR ANSWERS

Need legal advice? Have an ethics question? Looking for forms or checklists? The help you are seeking may just be a phone call or web link away. The list below highlights both tried and true resources and others that may be new to you.

LEGAL ADVICE

The Oregon State Bar operates a program called Lawyer-to-Lawyer which connects Oregon attorneys working in unfamiliar practice areas with experienced attorneys willing to offer informal advice at no charge. Resource lawyers with experience to share are listed according to areas of expertise and geographic location. These lawyers are available to help in 19 practice areas encompassing more than 250 sub-specialties, ranging from civil procedure/litigation issues to prenuptial agreements, wrongful discharge, aviation law and pro bono housing development questions. Call the Oregon State Bar at 800-452-8260 or 503-620-0222, extension 408 for more information.

Don’t forget about colleagues and your own peer network as resources, too – not just for questions, but also to associate as co-counsel. Calling a lawyer friend can give you valuable insight into case strategy and valuation. If you are new to the practice of law, or new to Oregon, consider joining sections of the state bar pertinent to your practice areas. Get involved in your local bar association. Join Oregon Women Lawyers or other groups to begin building your network. A list of organizations available to Oregon attorneys is published in the Oregon State Bar 2000 Membership Directory beginning on page 287.

If you haven’t visited the Oregon State Bar web site lately, do so. Not only can you get the latest information on CLE materials, but there are links to free sites for case law, administrative rules, and the Oregon Revised Statutes. Go to www.osbar.org, click on OSB Reference Desk, then Internet Resources for Oregon Lawyers.

ETHICS ADVICE

Oregon attorneys can contact the Oregon State Bar General Counsel’s ethics hotline by telephone, letter, or e-mail to obtain free, confidential ethics advice. The General Counsel’s office can help identify applicable disciplinary rules, point out relevant ethics opinions, and answer questions. Contact George Riemer,
General Counsel, at griemer@osbar.org 800-452-8260 or 503-431-6405 or Sylvia Stevens, Assistant General Counsel, at sstevens@osbar.org or 800-452-8260 or 503-431-6359.

The bar has also posted all current and past formal ethics opinions online at its web site www.osbar.org. Click on OSB Reference Desk, follow the link to Ethics Advice for Lawyers, then click on the OSB Formal Ethics Opinion Library.

TAX OR ACCOUNTING QUESTIONS

If you have a tax or accounting question, you can speak with a CPA by calling the Oregon State Bar/Oregon Society of Certified Public Accountants referral service at 800-255-1470 or 503-641-7200. Identify yourself as a member of the Oregon State Bar and specify the area your question involves. The service is free. Taxation questions can also be directed to the OSB Lawyer-to-Lawyer program described earlier in this article.

FORMS AND CHECKLISTS

The Professional Liability Fund has a collection of over 100 forms, checklists, and sample letters in 10 practice areas. Forms are available via e-mail, computer disk, or hard copy at no charge to Oregon lawyers. The PLF collection also includes resource materials and forms relating to client relations, entity formation, financial management, office systems, partnership and office sharing arrangements, and staffing issues. Order forms are regularly inserted into the PLF newsletter, In Brief. For more information, or to obtain a current order form, call the PLF at 800-452-1639 or 503-639-6911.

The Oregon State Bar also has an extensive collection of CLE materials, many of which include forms. For more information, visit the Bar’s web site at www.osbar.org or call the OSB Order Desk at 800-452-8260 ext. 413 or 503-684-7413.

PRACTICE MANAGEMENT ISSUES

Administrative errors account for the majority of legal malpractice claims. Improving the administrative areas of a law practice reduces the risk of a claim and enhances the enjoyment of practicing law. The Professional Liability Fund practice management advisors are available to assist any law office in Oregon by phone or in person. Call Carol Wilson, Dee Crocker or Beverly Michaelis at 800-452-1639 or 503-639-6911. The practice management program is a free, confidential service of the Professional Liability Fund.

PERSONAL ASSISTANCE

The Oregon Attorney Assistance Program is a completely confidential resource for Oregon lawyers who need assistance with personal issues that may be interfering with the practice of law. The OAAP offers help for alcoholism, drug addiction, gambling addiction, stress management, career change, relationship issues, depression, anxiety, and procrastination. If you or someone you know is struggling, the Oregon Attorney Assistance Program can help. To reach Meloney Crawford Chadwick, Mike Long, Shari Pearlman, or Michael Sweeney, call 503-226-1057. To page, call 800-321-OAAP.

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TAX ALERT: ACCRUAL METHOD

Recently President Clinton signed HR 1180, which disallows installment sale reporting on the sale of assets by accrual method taxpayers. This change will affect many corporations, especially small companies that typically report their income and expenses under the accrual method.

Under the revised rules an accrual method taxpayer must report the entire amount of the gain in the year of sale. Prior to the amendment, a seller using the accrual method could report a portion of the gain during each year that sale proceeds were received.

When structuring an installment sale of a business or business assets for a client using the accrual method of accounting, you should advise your client that the income taxes will be due in the year of sale. In some cases, you may want to recommend that the sale terms include a down payment that takes this tax liability into account. It may also be possible to structure the transaction as a sale of stock by the individual shareholders. The shareholders can then utilize the installment reporting provisions as to their gain.

These rule changes do not apply to taxpayers using the cash method of accounting. Most individuals use the cash method.

Our thanks to Steven A. Nicholes, Duffy Kekel LLP, for this tip.

The Professional Liability Fund sincerely thanks the following people for their assistance with updating the practice aids we make available to Oregon lawyers:

- C. Lane Borg
  Criminal Case Checklist
- Thomas W. Brown
  Litigation packet
- Don G. Carter
  Trust Deed Foreclosure Checklist
- Ann K. Chapman
  Bankruptcy (Consumer) Checklist
- William A. Davis
  Defense Case – Information Sheet for File
- Randy M. Elmer
  Workers’ Compensation packet
- Michael A. Greene
  Plaintiff’s Case – Information Sheet for File
- David William Hadley
  Real Property Checklist
- Frank H. Hilton
  Sale of Small Business
- Lee J. Judy
  Conservatorships Checklist
- Matthew J. Mullaney, Jr. / Lee J. Judy
  Guardianships Checklist
- Shawn Michael O’Neil
  Domestic Relations packet
- Michael J. Scott
  Construction Law packet
- Penny H. Serrurier
  Probate and Estate Planning packet
- John H. Van Landingham, IV
  Landlord-Tenant Residential Checklist

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