A Common Sense Approach to Avoiding Malpractice Claims

The practice of law is a profession. As professionals, our stock-in-trade is making decisions and giving advice. For a variety of reasons, we may make decisions or give advice that is incomplete or incorrect, especially when viewed with hindsight.

Although no single factor will prevent mistakes, a number of guidelines can enhance your performance as a professional and also help you handle the consequences of most any mistake. Making mistakes goes with the territory of being a lawyer. Often, your handling of those mistakes determines the severity of the consequences.

The purpose of this article is to share a workable approach to avoid or minimize malpractice claims. This approach is the product of my 25 years’ experience representing plaintiffs in legal malpractice cases and advice conveyed to me by the Professional Liability Fund.

The client relationship can be divided into two stages - before you are hired and after you are hired. The guidelines for avoiding or minimizing malpractice are different for each stage.

Before you agree to represent a client, the focus is on whether you, the case, and the client are a good match for each other and if you are creating a clear relationship that will endure. At this stage, there are five guidelines:

1. Look before you leap. Carefully and thoroughly evaluate a matter before you agree to accept the representation. If in doubt, don’t take the case. Usually, the most important time you spend is the time you invest to evaluate the client and the matter. Case selection is a crucial key to a successful practice, and careful evaluation is an indispensable component. Your professional intuition and experience will be your best guide in case selection. Saying “no” is as important as saying “yes.” Check out both the client and the matter before you say “yes.”

2. Know your limits and resources. Handle matters within your experience and expertise, or get appropriate help. It can be dangerous to venture into a new area of law without help from someone who is knowledgeable in that particular area. Professional growth should not come at the expense of a client. The key to professional growth and success is often being willing to ask for help from a colleague who has more

IN MEMORIAM
We are saddened to announce that Doreen S. Margolin of Portland died on January 8, 2007. Doreen served on the PLF Board of Directors from 1989 to 1994, including service as Secretary-Treasurer, Vice-Chair, and Chair. We extend our deepest condolences to her family.
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experience than you in the relevant area of law. If you don’t know a lawyer who can help you, check with the Oregon State Bar Lawyer to Lawyer program at (503) 620-0222, ext. 408, or call an active member of the applicable OSB section.

3. Connect with your client. It is important to understand your potential client before you agree to representation. If you do not feel comfortable with the person, you should not represent him or her. Your gut reaction is usually a good indicator of how other people will react to the person and the case. It is difficult to convince someone to accept your client’s version of the facts if you don’t believe your client or if you don’t share your client’s perspective on the case. In turn, clients who feel their lawyer is connecting with them and is “on their side” will be far less likely to make a malpractice claim.

4. Manage client expectations. Managing expectations is essential but often difficult. In your efforts to get the business, be careful not to promise too much, too soon, with too little information. This creates unrealistic expectations that you will then be stuck with. Resist giving a quick opinion. Concentrate on the process of developing and evaluating the case, not on specific results. Provide a general overview of estimated costs and fees. Make sure the client understands that circumstances often change, and that changed circumstances require a case reevaluation.

5. Document your representation – or lack thereof. If you have gained confidential information from a potential client but you are not going to represent him or her, send a nonengagement letter documenting that you are not representing the person. If you are going to represent the person, document the scope of engagement with an engagement letter. Explain what your representation includes and, if important, what it excludes. If you represent the client, send the client a disengagement letter when your representation is finished – whether that is in the middle of a case because you withdrew or at the conclusion of the legal matter.

After you agree to representation, the focus shifts to communication during representation and managing the case you are handling. In this stage, there are six guidelines to help avoid or minimize malpractice:

1. Be clear and direct. Create an atmosphere in which you can speak frankly with your client. Anticipate and address problems so no one is surprised. If possible, give the client options along with your recommendation, but only after the due diligence of adequate factual investigation and legal research. If you and the client repeatedly disagree on significant issues, you should consider ending the representation, as long as you can do so without prejudice to the client. Don’t ignore problems either in your working relationship or with the matter you are handling. Deal with issues sooner rather than later.

The client has the right and the responsibility to make the big decisions. The lawyer has the right and the responsibility to determine strategy and tactics. The client should set the goal for the representation; the lawyer should determine how to achieve it.

2. Document your advice. Document all advice and every decision, using letters to the client or notes in the file. Letters to the client are best for critical decisions, particularly those involving case evaluation and settlement. Notes are helpful for recording the circumstances of the advice or decisions. Documentation helps the client make a better, informed decision and signals to the client that what is going on in the case is important. It also helps with the defense of your representation.

3. Docket everything. Many malpractice claims are filed because of missed deadlines. This type of malpractice is entirely preventable, especially with use of an effective computer system. Calendar case dates, deadlines, and file reviews, using multiple, staggered follow-up reminders for each. If you have staff, arrange for someone in addition to you to check the docket. Using systems that bring deadlines to your attention in multiple ways decreases your chances of missing one. You cannot look at a file too often, only too little.
Utilize the free and confidential help of the PLF’s practice management advisors by calling 503-639-6911 or 800-452-1639.

4. Provide customer service. The client is a customer. The lawyer is a service provider. Follow the “golden rule”: treat a client as you would like to be treated. In general, the more time you spend with the client, the better your relationship will be. Certain key practices will enhance that relationship: return phone calls as soon as possible, keep clients informed about developments with copies of work, and don’t keep clients waiting. The cumulative effect of such treatment always pays dividends.

5. Don’t sue your clients for fees. Suing a client for unpaid fees causes that client to look for a reason not to pay. Use the OSB fee arbitration service or a similar alternative to suing for fees, or avoid the problem altogether by getting your money up front.

6. Disclose mistakes. The ethics rules require that you disclose material mistakes to the client. If you think you may have made a mistake or someone is accusing you of having made one, call the PLF for advice on how to proceed and how to inform your client. Ignoring a problem doesn’t make it get better or go away. Cover-up efforts exacerbate the problem, get you into ethics trouble, and anger the client. This conduct makes it more likely that the client will file a malpractice claim or an ethics complaint.

We all make mistakes. Often, it is the way we handle those mistakes that determines how the client will respond.

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The author thanks Barbara S. Fishleder, PLF Director of Personal and Practice Management Assistance, and Tanya Hanson, PLF Loss Prevention Attorney, for their assistance with this article.

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PLF Practice Aids

The Professional Liability Fund has many practice aids to help lawyers, including the following aids to help avoid or minimize malpractice:

Client Relations
• Client Relations Checklist
• Client Service Questionnaire

Disclosure of Potential Malpractice
• Sample Letter to Client with Potential Malpractice Claim Against Attorney
• Formal Opinion No. 2005-61
• Full Disclosure: What It Is and Isn’t
• After the Complaint

Docketing and Calendaring
• Calendaring and File-Tickling Systems
• Calendaring Note
• Diary/Tickler Systems
• Docket Control Checklist
• Docket Sheet
• Follow-up

Engagement, Disengagement, and Nonengagement Letters
• Attorney Fee and Prevailing Fee Client Disclosure Letters

• Contingent Fee Agreements
• Disengagement Letters
• Engagement Letters
• Nonengagement Letters
• Retainer Agreements

File Management
• Declined Prospect Information Sheet
• New Client Information Sheet

Office Systems Audit
• Office Systems Audit Checklist

To print or download PLF practice aids, log on to the PLF’s Web site at www.osbplf.org, select Practice Aids and Forms under Loss Prevention, select the relevant practice aid category, and then select the particular practice aid you wish to view.

If you do not have Internet access and would like a copy of a PLF practice aid, call the PLF at 503-639-6911 or 800-452-1639 and ask for Julie Weber.
Representing the Seller in the Sale of a Business

When selling or transferring a business, sellers have personal and financial goals they want to achieve through the transaction. Lawyers representing these sellers should give careful thought and planning to accomplish their clients’ goals, regardless of whether the buyer is a stranger or a family member or whether the transaction is a sale or a transfer by gift.

If you are representing the seller in the sale of a business, here are a few common traps and some tips for how to avoid them:

- **Choosing the buyer.** Consider the characteristics or attributes of the “right” buyer for the business. Your client may already have preferences for the type of buyer that would be a good fit for the transaction. Discuss these preferences with your client ahead of time to reduce the risk of spending unnecessary time and resources negotiating with a buyer who is not the right fit for your client. To avoid your client’s surprise or disappointment at what the buyer does with the business, advise your client to thoroughly investigate the buyer’s purpose for buying the business, determine the buyer’s creditworthiness, and investigate the buyer’s business acumen.

- **Purchase price.** Help your client to establish realistic expectations about the value of the business. Sellers want to realize a reasonable return on their investment, but no buyer wants to spend more than the business is worth. Advise your client to engage a professional appraiser to value the business and its assets and to defer to the appraiser’s judgment regarding the purchase price. An appraisal is essential if the business interest is being gifted.

- **Time.** Due diligence, document preparation, analysis of the tax considerations, and negotiations all take time. Be realistic about the amount of time the entire transaction might take and communicate that clearly to your client at the outset of your representation of the matter. If your client pressures you to close the deal quickly, explain to your client that premature closings can create problems later on if something is overlooked or left undone.

- **Expense.** When talking to your client at the beginning of your representation, provide a realistic assessment of the amount of attorney fees and costs involved in the deal. When in doubt, estimate high, and give your client a range of potential fees and costs to expect. Alert your client when events or facts unfold that may change the estimates. Have your client execute a written fee agreement and try to get a retainer from the client up front.

- **Confidentiality.** Before entering into any discussions with a potential buyer, have the buyer sign a confidentiality agreement restricting the disclosure and use of any information learned about the business during the discussions and negotiations. The process of selling a business should not offer a competitor an unrestricted look at the seller’s business methods, customer vendor lists, or other proprietary information.

- **Tax considerations.** Explore all the transaction’s tax implications and options as they relate to your client, consulting a tax attorney if necessary. As a part of your research and due diligence, know the tax consequences to the buyer. The seller and the buyer often have different and conflicting tax objectives, which may affect the negotiations and the outcome of the sale. One common mistake is to structure the deal as a taxable transaction if a nontaxable reorganization is possible. Another mistake to avoid is structuring a stock sale if an asset sale is the better approach.

- **Capital gains.** Most sellers want to minimize their tax obligations as a result of the sale of their business. To avoid triggering a capital gain on the transaction, consider whether to structure the sale as a charitable remainder trust buyout, in which your client transfers its stock in the business to a charitable remainder trust and the buyer purchases the stock.
from the trust. Your client receives income from the charitable remainder trust for life, and the charity receives the remainder interest. Keep in mind that this tax structure converts capital gains to ordinary income, so this option will not be appropriate for every transaction.

**Noncompetition.** Your client may want to preserve the right to work in the same or similar line of business after the sale. The buyer usually wants to limit the seller’s ability to compete against the buyer once the transaction is complete. The common solution is to negotiate a noncompetition agreement as part of the sale. As attorney for the seller, you should draft the narrowest possible limitation on engaging in the same or similar business. The agreement should also provide that the noncompete agreement will no longer apply if the new owner changes the business substantially.

**Plan B.** Negotiations can break down, and sales can fall through. Counsel your client to have a backup plan, and anticipate what series of events would trigger the implementation of the client’s Plan B.

**Communication.** Sellers are understandably anxious to get the deal closed. They want to know that their transaction is being timely moved forward. Discuss the frequency of communication in your initial meeting with the client, confirm in a letter how often the client can expect to hear from you, and then follow through. A good practice is to communicate with clients at least weekly, even if you just confirm that nothing is happening and explain why.

**Other professionals.** Selling a business often requires the services of other professionals such as accountants, appraisers, and lawyers with special knowledge or expertise in taxation, securities, or business valuation. Be cognizant of the difference between giving legal advice and business advice. To avoid mistakes or missed opportunities for the client, recognize when you might need assistance from other competent professionals. Discuss these issues with your client before retaining the services of an outside expert.

**Objectivity.** Sellers are seldom objective about the transaction, since they are financially and usually emotionally invested in their business. As the seller’s lawyer, you must be objective to render competent advice about when the client should close the deal, compromise, stand firm on a point of negotiation, or walk away. Maintaining objectivity is critical if you want to help your client realize the most beneficial outcome from the deal.

**Other issues.** The client often thinks of issues that are of special importance to him or her in the transaction at hand. Your job is to anticipate what the client might not think of. One issue that frequently comes up is the business premises lease. Because it takes time to negotiate the transfer of the premises lease to the new purchaser, you should immediately review the lease and determine the necessary steps to transfer it. Another recurring issue is how to deal with the seller’s employees and employee benefits. You should determine early in the engagement what the seller wants regarding the employees and what, if any, obstacles interfere with the implementation of the seller’s goals. If unions or executive employment contracts are involved, you may want to consult a labor or employment lawyer.

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The author thanks Jay Richardson, Buckley LeChevallier P.C., and John Heald, John H. Heald P.C., for their assistance with this article.
Tips for Working with Elder Clients

Effectively representing elder clients may require some additional planning and accommodation. For example, an elder client may have poor eyesight, making reading documents more difficult. Hearing and memory may also be issues. Your client may not have heard clearly what you said or may have forgotten important details, but may be too embarrassed to ask you for clarification.

First of all, review three especially relevant Oregon Rules of Professional Conduct (ORPCs):
- ORPC 1.4 Communication;
- ORPC 1.6 Confidentiality of Information; and
- ORPC 1.14 Client With Diminished Capacity.

The ORPCs can be found on the OSB Web site at www.osbar.org/docs/rulesregs/orpc.pdf.

Client and family relations
Here are some general tips for working with elder clients:
- Be clear about who is the client, especially if an adult child accompanies the elder client to the appointment.
- Give the elder client the opportunity to meet with you in private.
- Respect your elder client’s autonomy and realize that some adult children, in their zeal to protect their aged parent, may try to take over too much.
- Remind your client the day before each appointment.
- Follow up important telephone conversations and client meetings with a clear memorandum summarizing what was discussed and decided.
- Don’t automatically assume that a “senior moment” – characterized by fuzzy thinking, rambling, forgetting words or a train of thought – means that your client is impaired. Check the definition of capacity and impairment by reviewing pertinent elder law materials listed in the Oregon State Bar CLE publications and CD-ROM catalog. Assess the situation clearly and carefully. Don’t be pressurized by the client’s family members.

Preparing and handling documents
Here are some tips for preparing and handling documents when working with elder clients:
- Use a readable typeface for documents. Serif style is generally perceived to be more readable than sans serif.
- Increase the size of the typeface for clients with poor vision. By increasing the typeface to 14 point, you’ll make the document much more “reader friendly” for your elder clients.
- Provide your client with a “plain English” translation of legal documents to aid in comprehension.
- Ask whether your client understands your explanation and the documents. Don’t let your client “just sign” a document if the client shows any lack of understanding or unwillingness to listen to an explanation.
- Provide your clients with copies of all incoming and outgoing correspondence regarding their matters and all documents. Stamp them: “Client’s Copy. For your information only. No action needed.” You might want to provide a file folder in which your client can keep documents, but it’s a good idea to ask whether it’s needed. People often have their own filing systems. Some clients may prefer electronic copies in PDF format.
- Remember that your duty of confidentiality to your client requires you to get your client’s consent before providing anyone else with copies of documents.

Here are some specific tips for dealing with estate planning documents:
- Execute only one original will. If there is a second or even third original will, no one can be sure that the testator did not revoke the will.
- Give your client the original documents. Don’t store original wills for your clients. Original client documents are the property of the client and should be returned to the client for proper storage. Original wills are specifically protected by ORS 112.815, which requires that 40 years elapse before a will can be destroyed, among other requirements. To avoid burdening yourself – or your family or personal representative – with the responsibility of returning, storing, or protecting these client items, do not retain original client documents in your files. Return original documents to the client at the...
conclusion of your representation. (See “Why Did We EVER Want to Keep Original Wills?” on page 8.)

- Encourage your client to keep legal papers, including executed wills and estate planning documents, in a safe deposit box. There is a misperception that a will stored in a safe deposit box is inaccessible upon the death of the box lessee. ORS 708A.655 provides for the opening of the safe deposit box for the purpose of conducting a search for the will or the trust instrument. The statute requires that the Oregon operating institution be furnished with a certified copy of the decedent’s death certificate or other evidence of death satisfactory to the institution along with an affidavit stating the individual believes the box contains the decedent’s will or trust instrument, documents pertaining to the disposition of the decedent’s remains, or documents pertaining to the decedent’s property, and that the individual is an interested person as defined in ORS 708A.655(3)(a)-(g).

- Provide your client with a complete set of copies of all estate planning documents that are stamped: “Copy. Original document stored: [insert site of storage].” (Your client needs to decide where to store the original documents, but make sure you know where to locate them.)

- Give your client an index or log of important estate planning documents and make sure to list:
  - the health care representatives for the advance directive for health care decision-making and for HIPAA
  - agents with power-of-attorney
  - trustees of trust
  - nominated personal representatives
  - nominated conservators

Resources
Take advantage of available resources:

- If you need help with changing your office practices to accommodate your clients’ special needs or need information about how to return original wills or other documents to clients, contact the PLF practice management advisors at 503-639-6911 or 800-452-1639.

- OSB general counsel can help you navigate the applicable ethics rules. Contact Sylvia Stevens, General Counsel, at 503-620-0222 or 800-452-8260, ext. 359, or Helen Hierschbiel, Assistant General Counsel, ext. 361.

- If you think that you may have made a mistake or that your client may want to file a claim, call a Professional Liability Fund (PLF) claims attorney at 503-639-6911 or 800-452-1639.

-SHEILA M. BLACKFORD
PLF Practice Management Advisor

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Why Did We EVER Want to Keep Original Wills?

Well, it seemed like a good idea at the time. Other people were doing it. Our medium-sized firm had plenty of room in the office, and it spared clients from renting a safe deposit box of their own. The firm already had a fireproof filing cabinet, so I didn’t think too much about the practice of retaining the original estate planning documents for clients. It seemed to make sense. The firm hoped that the service would be appealing to clients and that it would help us compete with similar services offered by other firms. The senior members of the firm believed that this office practice would pay off in the form of probate work.

That was the logic behind the decision to keep original wills. I did not take the time to glance into the future to examine the space that would be needed (this wasn’t my job at the firm), nor did I ever consider the unthinkable—that the firm might split up. That was then. I never really gave it much thought...at the time.

You see, I left the medium-sized firm and started a new firm. In the spirit of tradition and mindlessness, I, too, offered the service of storing clients’ original estate planning documents. I swallowed hard and purchased a fireproof filing cabinet (price approx. $1,500 in today’s dollars) and arranged to have all 800 pounds of it moved into my new office.

In the beginning, it was not a problem. Time moved on, and my practice grew. I ended up moving to a nicer and larger space. This required moving my 800-pound fireproof filing cabinet. I often wondered whether using a regular filing cabinet would have been good enough, but the idea just did not seem wise, even in my weakest moments (moving day). As my practice grew, so did the problem. I had to purchase another cabinet (another $1,500, another 800 pounds). Soon I had no room in the second fireproof filing cabinet. Soon after that, I realized I had no room in my office. Reality had set in.

I could not stomach the thought of moving again, just so I could make space for more 800-pound monsters. Move avoidance propelled me into two radical decisions.

First, I would no longer keep client documents. (No surprise, this was the easy decision.) Second, I would steadfastly and determinedly return the original documents that I had previously held. The reasons I made this second, more difficult decision are described at the end of the article. It was a good decision, but, as the saying goes, “I had no idea.”

The fun was just about to begin.

This project took about six months, and at least $1,500. The cost of returning the documents came in the form of copying the documents (I wanted to keep a file copy), staff (I had to hire temporary personnel), and postage (certified mail).

In addition, my legal assistant spent many hours writing letters to clients announcing our new procedure, talking to clients on the phone about our new procedure, arranging for file pickup, obtaining the signature of the client (and the client’s spouse when both spouses were clients), writing receipts for files, and other record keeping.

Although this task was overwhelming for a while, I am happy we did it. It completely released me from the bondage of my 800-pound Darth Vodars and freed up space for a wonderful client meeting area.

Since I was forced to carefully think this problem through, I want to spare others the pain and expense of keeping original documents. Here is what I learned, and why I (and the PLF) vehemently recommend that you do not keep original documents:

First, since my clients never had to get a safe deposit box, they never really knew that I was saving them money by keeping the documents. In that way, my goal of being appreciated for saving my clients the bother never materialized.

Stress to your clients the importance of safeguarding the original will. One attorney I know discovered his client’s original will in the decedent’s dresser drawer. Another decedent apparently had a will, but it could not be found. The decedent’s brother thought that the will had been kept in the rolled-up window shade in the decedent’s apartment! Since I had been told by the decedent that he had a will, I believe it was removed by a relative. Other clients have used a home safe to store their wills, which can easily be carted off by a thief. I fear that those safes are not terribly fireproof or waterproof. A safe deposit box is the best place for an original will.

If you do have an original will of a client, photocopy the entire, fully executed will and place that copy in the client’s file before releasing the original will to the client. While it is possible to admit a copy of a will into probate in certain cases, it should not be relied upon. See ORS 113.035(10).
Second, I realized that times have changed. Many clients are uncomfortable about having the lawyer keep their original documents – they feel (correctly) as if the lawyer is trying to retain control of something that is theirs. This feeds the fuel of suspicion that prompted the chant: DON'T LET LAWYERS AND PROBATE EAT UP YOUR HARD-EARNED MONEY!

Third, it is important to maintain the integrity of the original will. I have had several clients mark up original wills. Often these original wills were admitted to probate court and became public documents. In one case, the client intended to revise her will, but died before doing so. She had written rather slanderous remarks about her "uncaring and selfish" children on the margins of her will. I was loath to provide those children with a copy of her will.

It is fairly common for clients to cross out specific bequests or add new provisions on the original will. If a new will is never made, the insertions are likely to bring into question the validity of the marked-up will. The moral: When entrusting original documents – especially wills – to the client, clearly mark the original and the copy, and stress the importance of maintaining the integrity of the original. The copy should state the location of the original. Example: "Original kept in safekeeping at US Bank, Main Branch, Portland, Oregon, Box No. . . . " I generally type "Original" on the backer, but am considering stamping the first page as well.

Fourth, more than thirteen years have passed since I started my mission, and I still have some original wills that I have been unable to return to clients for various reasons. It has been a huge time drain and a very expensive process. In addition to the expenses and difficulties already mentioned in this article, I also encountered untold nightmares with storage facilities. These nightmares included flooded storage areas, molding files, dangerous characters lurking around the storage facility, and inconvenient hours. I also had to list the storage locker location on my business insurance and provide proof of insurance to the storage facility.

Fifth, I realized that the practice of keeping original wills is an absolute nightmare for the person who ends up trying to close your practice when you die or become disabled. The person closing your practice will have to return all of the documents, and that is likely to be a difficult and expensive task.

Most people move every seven years; many of those people do not think to let their lawyer/holder-of-their-original-will know their new address. As a result, your personal representa-

tive, or the person assisting with the closure of your practice, may have difficulty finding the testators. ORS 112.815 requires that 40 years elapse before a will can be destroyed. This problem may end up being a burden for the person helping you close your practice, your personal representative, and maybe even for his or her personal representative!

If you are a member of a firm and breathing a sigh of relief – thinking this doesn’t apply to you – think again. My former law firm eventually completely split up. Someone ended up with the albatross of dealing with all of those original wills.

Lastly, and perhaps most importantly, I discovered that even with the best intentions, keeping the original estate planning documents may actually make it difficult for your client, or the family of your client. The client may have left the area, yet the estate documents will be with you. You will have to be found, and the documents will have to be mailed. You may decide to change firms, leave the area, or stop practicing law. Any of these choices could make it difficult for your client, or your client’s family members, to find you.

In short, if I had to do it over again, I would never have incurred the expense and liability of retaining original documents. I hope that this testimonial helps new lawyers get on the right track, and inspires some of you more seasoned folks to get on the bandwagon and stop keeping those documents. For those of you who decide to go for it and return the originals you have in your possession, I can assure you that it is worth it in the long run!

-- WILL I EVER BE FREE OF THE ALBATROSS?
**CIVIL FILING FEE CHANGES:** Effective January 1, 2007, the filing fee amounts changed for appellate courts and many circuit courts. The temporary surcharge that began September 1, 2003, ended on December 31, 2006. Before filing papers in a state court, check the court’s Web site or contact the court for correct fee amounts. You can find a circuit court directory and links to all the circuit courts’ Web sites at [www.ojd.state.or.us/courts/circuit/index.htm](http://www.ojd.state.or.us/courts/circuit/index.htm).

**CLACKAMAS COUNTY COURTS – STANDARDS FOR DOCUMENTS; LAWYER’S SURVIVAL GUIDE:** Clackamas County Circuit Court Supplementary Local Rule (SLR) 2.011 (effective February 1, 2006) requires documents submitted for filing to be two-hole punched at the top. Documents that are not two-hole punched are returned to the parties by the court clerk and may not be considered timely filed. To download the current SLRs for Clackamas County, go to [www.ojd.state.or.us](http://www.ojd.state.or.us), select Rules in the toolbar, select Supplementary Local Rules in the pull-down menu, select the View button, and then select Clackamas County.

Clackamas County Circuit Court has recently issued a survival guide to the Clackamas County courts. Dated November 29, 2006, the 113-page guide addresses issues relating to court administration, calendaring, trial procedural tips, and court-mandated arbitration. It also includes forms and checklists in the areas of domestic relations, adoptions, probate, and juvenile court. To download the guide, go to [www.ojd.state.or.us/courts/circuit/clackamas.htm](http://www.ojd.state.or.us/courts/circuit/clackamas.htm) and select “CLE Handout – Lawyer’s Survival Guide to the Clackamas County Courts.”

**DOCUMENTS FILED WITH CORPORATION DIVISION:** Domestic and foreign corporations, limited liability companies, and limited partnerships authorized to transact business in Oregon must file annual reports with the Secretary of State. These reports are due by the entity’s anniversary date. Although the Secretary of State mails the annual report form to the entity’s registered agent, the entity is not relieved of its obligation to file – even if the form is not received due to a data entry error by the Secretary of State.

To be certain this obligation is fulfilled, the entity’s registered agent should calendar the anniversary date and watch for the Secretary of State form. This enables the agent to follow up and request another form – in case the form was lost in the mail or never sent. Shortly after filing the initial organizational documents, the agent may also want to verify that the information was entered correctly by the Secretary of State. The entity may have to file an amendment to correct a mistake in the documents, even if it is due to a data entry error by the Secretary of State. The agent should also advise the entity in writing at the time of its formation to file annual reports and not to depend on the Secretary of State for notice. The status of the entity’s filings can be checked on the Secretary of State Corporation Division’s Web site at [www.filinginoregon.com](http://www.filinginoregon.com).

**DOMESTIC RELATIONS:** For an article discussing Oregon’s automatic beneficiary revocation statute, see “Beware! Automatic Beneficiary Revocation Law Not Effective for ERISA and Federal Life Insurance and Retirement Benefits,” by Clark B. Williams, originally published in the April 2006 issue of the *Family Law Newsletter* by the Family Law Section of the Oregon State Bar. To print or download the article, log on to the PLF’s Web site at [www.osbplf.org](http://www.osbplf.org), select In Brief under Loss Prevention, then select the article title under March 2007.

**NEW CLE RESOURCE:** You can now get American Bar Association CLE programs on preloaded iPods, as audio or video downloads in MP3 or MP4 format, or as part of the monthly ABA CLE Podcast series. The Business Law Edition and Labor & Employment Law Edition are available on a Video iPod ($319 for ABA members); the Litigation Edition, Antitrust Law Edition, Estate Planning Edition, Health Law Edition, and Real Property Edition are available on an iPod nano ($259 for ABA members). For a limited time, each preloaded iPod will also include the 66-minute audio program, “So Many Meetings, So Little Time: Making Meetings Shorter, Better Organized, and More Productive,” a $99 value. The current monthly podcast is “New World for Bankruptcy Law,” a complimentary 60-minute audio download.

**PROPOSED CHANGES TO THE UTCR – REQUEST FOR PUBLIC COMMENT:** The Uniform Trial Court Rules (UTCR) Committee met on October 13, 2006, to review 22 proposals to amend the UTCR. A description of the proposals can
**Tips, Traps, and Resources**

be found in Oregon Appellate Court Advance Sheets No. 1, January 2, 2007, and at [www.ojd.state.or.us/programs/ucer/utcrules.htm](http://www.ojd.state.or.us/programs/ucer/utcrules.htm).

Proposals of special note include juror contact (3.120); summary judgment requirements (new 5.130); alternative to the Uniform Support Affidavit (8.010 and 8.050); and mandatory filing of motion for permanent modification of custody (8.050). Those proposals approved by the Chief Justice will become effective August 1, 2007.

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Our thanks to Robin E. Pope, Portland-area sole practitioner; Linda L. Kruschke, OSB CLE Publications Manager; Thomas C. Tankersley, Drabkin, Tankersley & Wright, LLC; Clark B. Williams, Heltzel Upjohn Law Firm; Steve Carpenter, PLF Claims Attorney; and Sheila M. Blackford, PLF Practice Management Advisor, for their assistance with these tips.

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**New Case Affects Tolling by Advance Payments**

Oregon’s advance payment statute provides that if a person making an advance payment under ORS 31.560 or 31.565 for “death, injury or destruction” gives written notice within 30 days after the first advance payment was made of the date of the applicable statute of limitations, that statute continues to run. ORS 12.155(1). If the required notice is not given, however, the statute of limitations is tolled as of the time the advance payment is made and until the notice “is actually given.” ORS 12.155(2).

Since 1997, Oregon courts have limited the use of the tolling provisions of the advance payment statute to payments made by *insurers* based on Minisce v. Thompson, 149 Or. App. 746, 756, 945 P.2d 582 (1997). In Minisce, the Oregon Court of Appeals held that “the advance payment statutes do not toll the statute of limitations outside the setting of third-party claims against insurers.”

However, on December 7, 2006, in an *en banc* decision, the Oregon Supreme Court overruled Minisce to the extent it held that ORS 12.155 was limited to insurers. In *Hamilton v. Paynter*, 342 Or. 48, 149 P.3d 131 (December 7, 2006), the Court held that the term “person” in ORS 12.155 did not apply exclusively to insurance companies. Instead, ORS 12.155 could be applied to any “person” as defined by ORS 174.100(5), which broadly defines “person” to include “individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies.” As a result, the *Hamilton* decision greatly expands the reach of ORS 12.155.

Practitioners who are representing a client in a case that alleges damages for “death, injury or destruction” and in which the statute of limitations may be an issue should carefully consider whether the tolling provisions of ORS 12.155 now apply. If you represent the defendant in such a claim, you should determine whether your client has made an advance payment as defined by ORS 31.560 or 31.565 and, if so, whether the defendant has provided the notice required by ORS 12.155(1) to avoid the statute’s tolling provision under ORS 12.155(2).

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**Note:** Please make a note of the *Hamilton* case in your copy of the Oregon Statutory Time Limitations Handbook, at §45.1(C). If you do not have a copy of the handbook and would like one, call the PLF at 503-639-6911 or 800-452-1639 and ask for Julie Weber.

Our thanks to James L. Hiller, of Hitt Hiller Monsfi Williams, LLP, and Richard Wyman, PLF Claims Attorney, for their assistance with this article.

**IN BRIEF**

March 2007

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EXTENDED DAYLIGHT SAVING TIME: This year Daylight Saving Time (DST) will start three weeks earlier than in the past, starting 2:00 a.m., Sunday, March 11, 2007, as a result of the U.S. Energy Policy Act of 2005. BlackBerry devices will not update their clocks if no patches or third-party software are applied. Computer operating systems also must have DST updates or patches installed to correct for DST. If you use Microsoft products, you can find information about DST updates at http://www.microsoft.com/windows/timezone/dst2007.mspx.