

OSB Professional Liability Fund presents

Handling Personal Injury Cases: Malpractice Traps and Ethics Concerns for Lawyers

Friday, June 30, 2023
10:00 am – 12:00 pm

MCLE ID 101237
1.5 Practical Skills Credit, 0.5 Ethics Credit

Speakers: **Amber Bevacqua-Lynott**
Senior Counsel, Buchalter PC

Amy Hoven
Claims Attorney, OSB PLF

Brian Dretke
Owner, The Dretke Law Firm



Professional
Liability Fund

CLE Materials

- Speakers' Biographies
- Scenario
- PowerPoint Slides
- References and Resources

Speaker Biographies

Amy Hoven

Amy Hoven is a Claims Attorney with the Oregon State Bar Professional Liability Fund. She has been a claims attorney since 2017. Prior to joining the PLF, Ms. Hoven was an attorney with Kennedy Watts Arellano LLP where she handled cases involving professional liability defense and domestic relations. She joined Kennedy Watts from California, where she had been a litigation attorney. Ms. Hoven is a member of the Oregon State Bar (2007) and an inactive member of the State Bar of California (2002). She obtained her undergraduate degree from University of California, Santa Barbara and her J.D. from Loyola Law School in Los Angeles. Ms. Hoven currently serves on the Board of her local chapter of National Charity League, Inc., a non-profit organization that encourages community service, leadership development and cultural experiences for mothers and daughters.

Brian Dretke

Brian Dretke started The Dretke Law Firm in Bend in 2018. His practice focuses on medical malpractice and nursing home litigation. He has tried over 100 cases to Oregon juries in both State and Federal court. From 2012 to 2017 Brian was presiding judge in Oregon's Tenth Judicial District serving Union and Wallowa counties. Prior to his appointment to the bench, Brian practiced with W. Eugene Hallman in the firm of Hallman and Dretke, representing plaintiffs in a wide variety of cases. He is past president of the Oregon Chapter of the American Board of Trial Advocates, a board member of the Oregon Trial Lawyers Association, a member of the American Association of Justice, and is board certified as a Civil Trial Specialist by the National Board of Trial Advocacy. Brian has been selected by his peers for recognition in the Oregon Super Lawyers publication since 2006, and was selected to The National Trial Lawyers "Top 100" in 2020.

Amber Bevacqua-Lynott

Amber Bevacqua-Lynott is Senior Counsel in the Buchalter's Portland and San Diego offices, and a member of the Firm's Professional Responsibility and Litigation Practice Groups. Ms. Bevacqua-Lynott provides guidance and legal representation to attorneys, licensed professionals, and other business clients, including firms and in-house legal departments. Her practice centers on legal ethics, risk management, and discipline defense. She acts as outside counsel to clients in a variety of industries, providing advice and counsel on all manner of ethics issues, including conflicts, confidentiality, malpractice, risk management, and fee issues. In addition, Ms. Bevacqua-Lynott represents lawyers, students, and other professionals in front of regulatory authorities and bar associations on licensing, admissions, reinstatement, reciprocity, character and fitness, consumer protection, unauthorized practice of law, and disciplinary matters. Ms. Bevacqua-Lynott has more than 20 years of legal experience, including extensive civil trial experience. Prior to joining Buchalter, Ms. Bevacqua-Lynott worked in the Oregon State Bar's Disciplinary Counsel's Office (DCO) as an Assistant Disciplinary Counsel, where she enforced the Oregon Rules of Professional Conduct through the investigation and prosecution of alleged misconduct.

SCENARIO

At the time of the accident, Pat Plaintiff was driving with his spouse. The accident occurred at a controlled intersection. Pat approached the intersection and had a green light. Pat proceeded through the green light and was hit by a vehicle, which presumably ran a red light. Pat was speeding through the intersection. The driver of the vehicle who hit Pat's car was an individual driving a meal delivery van for a community senior center.

Pat Plaintiff suffered a hurt arm on the steering wheel and a broken wrist. His spouse, Peyton Plaintiff, was in the front seat and was not wearing a seatbelt. Peyton sustained broken ribs, a collapsed lung, and shoulder injuries that required surgical repair. Peyton initially lost consciousness. Peyton spent over a week recovering in the hospital.

As a result of the injuries Pat, a concert pianist, is unable to play the piano. On release from the hospital, Peyton required a significant period of physical therapy. Peyton also was also diagnosed with a mild traumatic brain injury from a concussion with brief loss of consciousness and is seeing a counselor.

The police were not called to the scene of the accident and no police report was filed. There were no other witnesses to the accident who came forward. Plaintiffs obtained the name and phone number of the individual who was driving the van, but did not note the exact name of the business the van driver worked for.

Plaintiffs come in to see Luca Lawyer several days before the statute of limitations runs. Plaintiffs are Luca Lawyer's new next door neighbors. Pat Plaintiff's brother is an insurance agent, so Plaintiffs have good insurance coverage. Luca Lawyer has just started a new job as an associate in a law firm which specializes in business litigation and tax. Luca is licensed in Oregon, but has only been in private practice for 1 day. Prior to a position at the firm, Luca worked as corporate counsel for a Washington utility company. Luca is paid a base salary by the firm and also receives a percentage of all new business brought into the firm.

Personal Injury Cases: Malpractice Traps and Ethical Concerns for Lawyers



Presented by:
Amber Bevacqua-Lynott,
Buchalter
Amy Hoven,
Professional Liability Fund
Brian Dretke,
The Dretke Law Firm

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MALPRACTICE: ERRORS – PERSONAL INJURY

- MISSED DEADLINE
- SETTLEMENT/NEGOTIATION/DOCUMENTATION OF SETTLEMENT ISSUE
- SERVICE
- DRAFTING ERROR
- LACK OF PROSECUTION
- FAILING TO FILE OR TIMELY FILE MOTION/DOCUMENT/RESPONSE/REPLY
- FILING OR E-FILING ERROR
- MISNOMER/FAILURE TO NAME CORRECT PARTY OR PARTIES
- DEAD DEFENDANT
- LIEN ISSUE



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MALPRACTICE: FACTORS – PERSONAL INJURY

- FAILURE TO CALENDAR/CALENDARING ERROR/INADEQUATE CALENDAR SYSTEM/DID NOT LOOK AT CALENDAR
- FAILURE TO KNOW OR UNDERSTAND LAW/PROCEDURAL RULES
- NEGLIGENCE/LACK OF ATTENTION/LACK OF FOCUS/PROCRASTINATION/UNDUE DELAY/FAILURE TO TAKE ACTION
- FAILURE TO PLAN/PREPARE/THINK THROUGH STRATEGY/ANTICIPATE CONSEQUENCES
- FAILURE TO SET AND MANAGE CLAIMANTS EXPECTATIONS
- COMMUNICATION ISSUE/FAILURE/ERROR BY ATTORNEY
- FAILURE TO INVESTIGATE/LOCATE INFORMATION



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Scenario:

- Pat Plaintiff was driving with spouse.
- Accident occurred at a controlled intersection.
- Pat had a green light.
- Pat was hit by a vehicle, which presumably ran a red light.
- Pat was speeding.
- The other vehicle was a senior center meal delivery van.

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- Pat suffered a hurt arm and a broken wrist.
- His spouse, Peyton, was in the front seat and not wearing a seatbelt.
- Peyton sustained broken ribs, a collapsed lung, and shoulder injuries that required surgical repair.
- Peyton initially lost consciousness.
- Peyton spent over a week recovering in the hospital.

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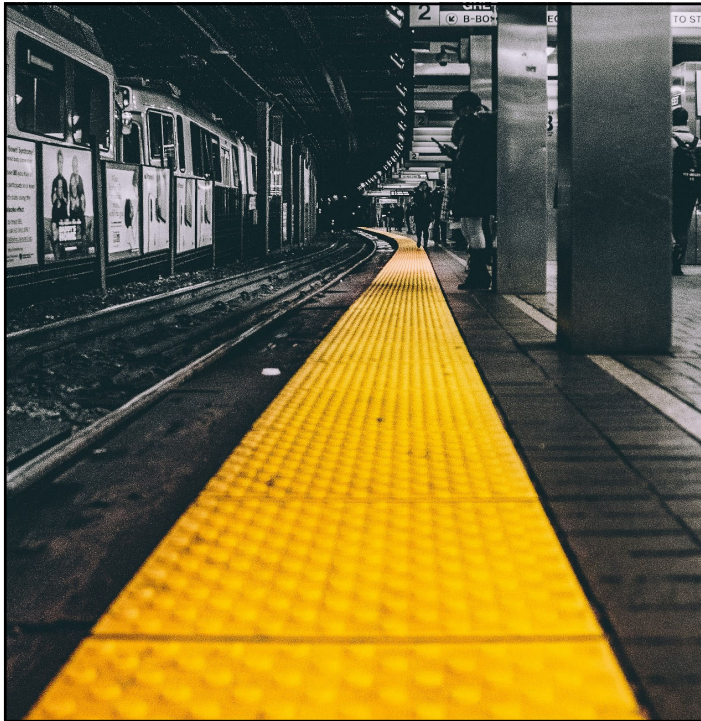
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- Pat is a concert pianist and is unable to play the piano.
- On release from the hospital, Peyton required a significant period of physical therapy.
- Peyton also was also diagnosed with a mild traumatic brain injury from a concussion with brief loss of consciousness. Peyton is seeing a counselor.



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- Police were not called and no police report was filed.
- No other witnesses to the accident came forward.
- Plaintiffs obtained the name and phone number of the individual who was driving the van.
- They did not note the exact name of the business the van driver worked for.

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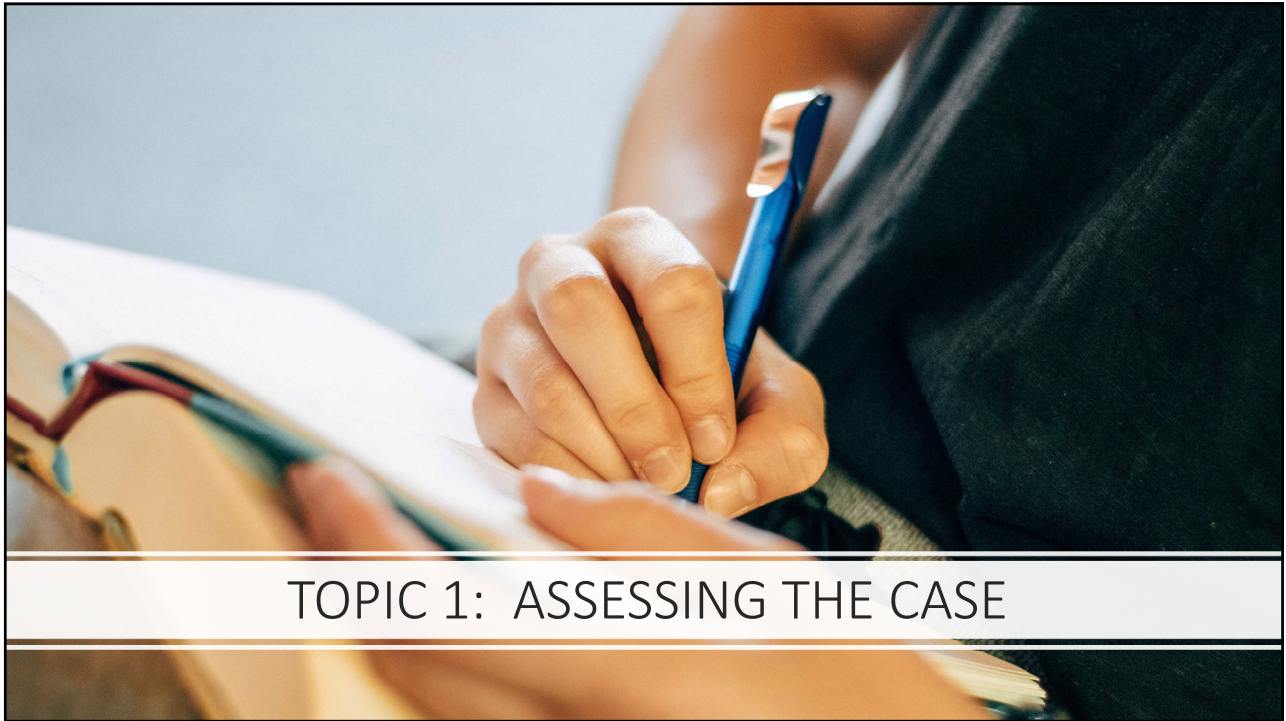
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- Plaintiffs met Luca Lawyer several days before the statute of limitations runs.
- Plaintiffs are Luca Lawyer's new next-door neighbors.
- Pat Plaintiff's brother is an insurance agent.
- Luca Lawyer is an associate in a business litigation and tax law firm.
- Luca is licensed in Oregon and has only been in private practice for 1 day.
- Luca is paid a base salary and receives a percentage of all new business brought into the firm.



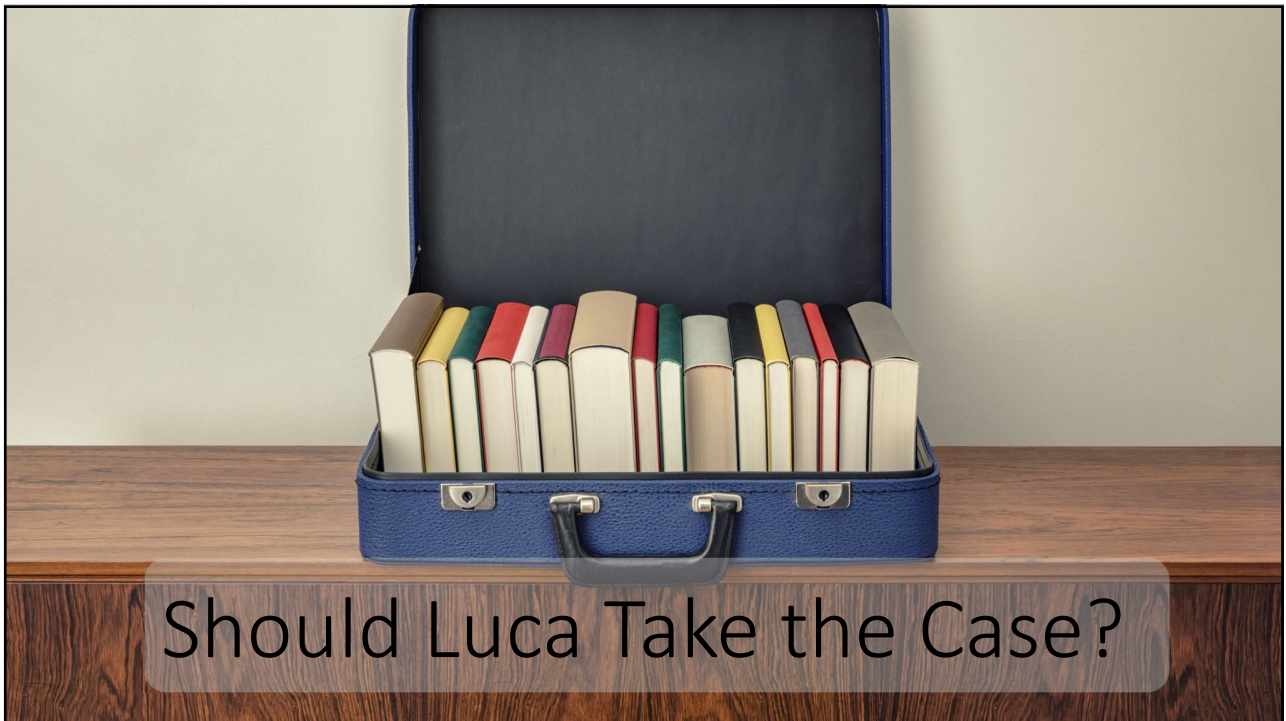
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TOPIC 1: ASSESSING THE CASE

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Should Luca Take the Case?


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Discussion Questions

1. What is Luca's duty of competence to Pat and Peyton Plaintiffs?
2. Does Luca have adequate time and experience to handle the case?
3. What about time to file within SOL?
4. Should Luca associate counsel?

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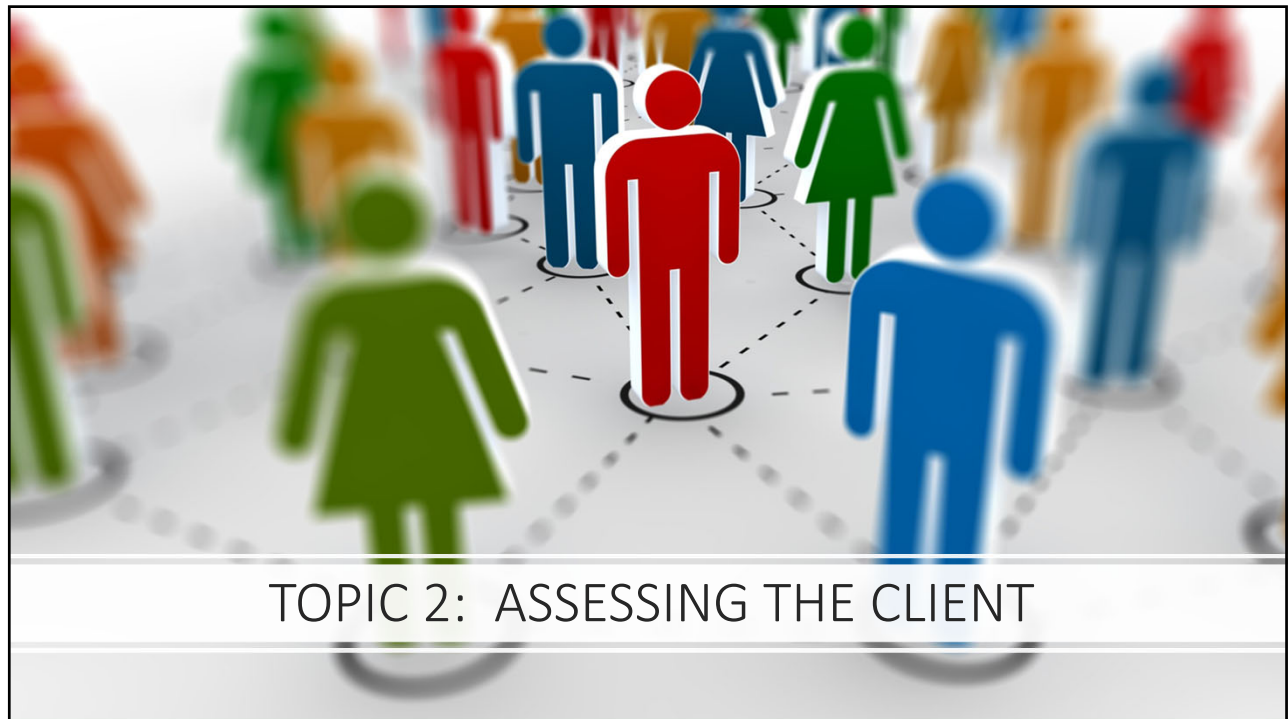
5. If Luca refers the case out, can they collect a referral fee?
 - What if Luca doesn't do any work on the case?
 - If Luca does receive a referral fee, does Luca have to disclose how the fee will be split between the lawyers?
6. If Luca does refer the case out, what should Luca tell Pat and Peyton Plaintiffs?

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Key Points:

- Don't dabble.
- Maintain professional distance from family and friends.
- Associate experienced counsel, when needed.
- Taking a case on the eve of the SOL is risky. It's too easy to miss a defendant.
- Document division of fees and get client's informed consent. Overall fee cannot be excessive.

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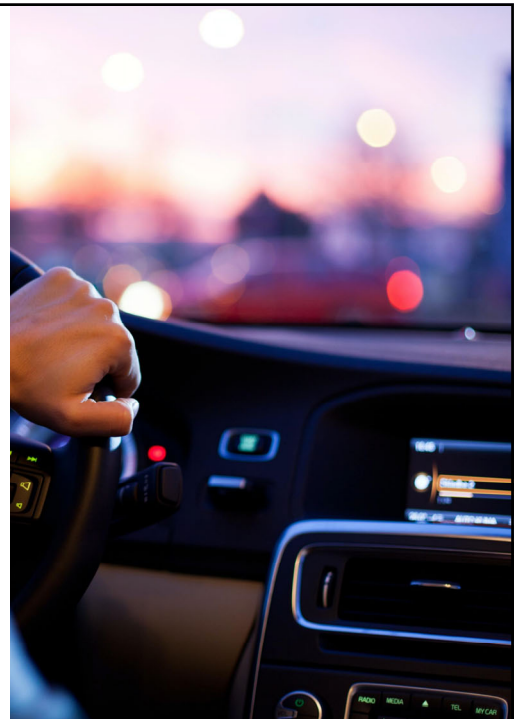
Luca Lawyer needs to figure out:

- 1) Who the clients are; and
- 2) Whether Luca can represent them against defendants.

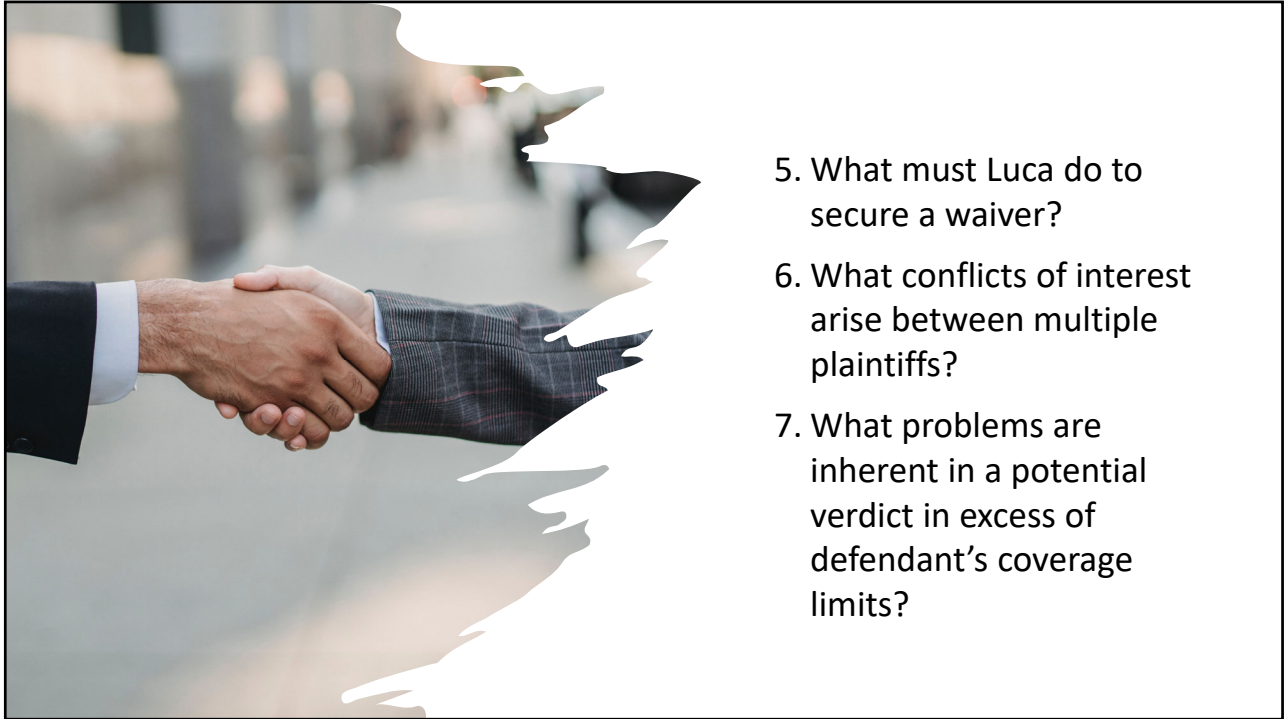
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Discussion Questions

1. Who are Luca's clients?
2. Does Luca need to do a conflict check on the potential defendant(s)? How?
3. What conflicts of interest arise when an attorney represents multiple clients such as passenger and driver?
4. When can these conflicts of interest be waived?

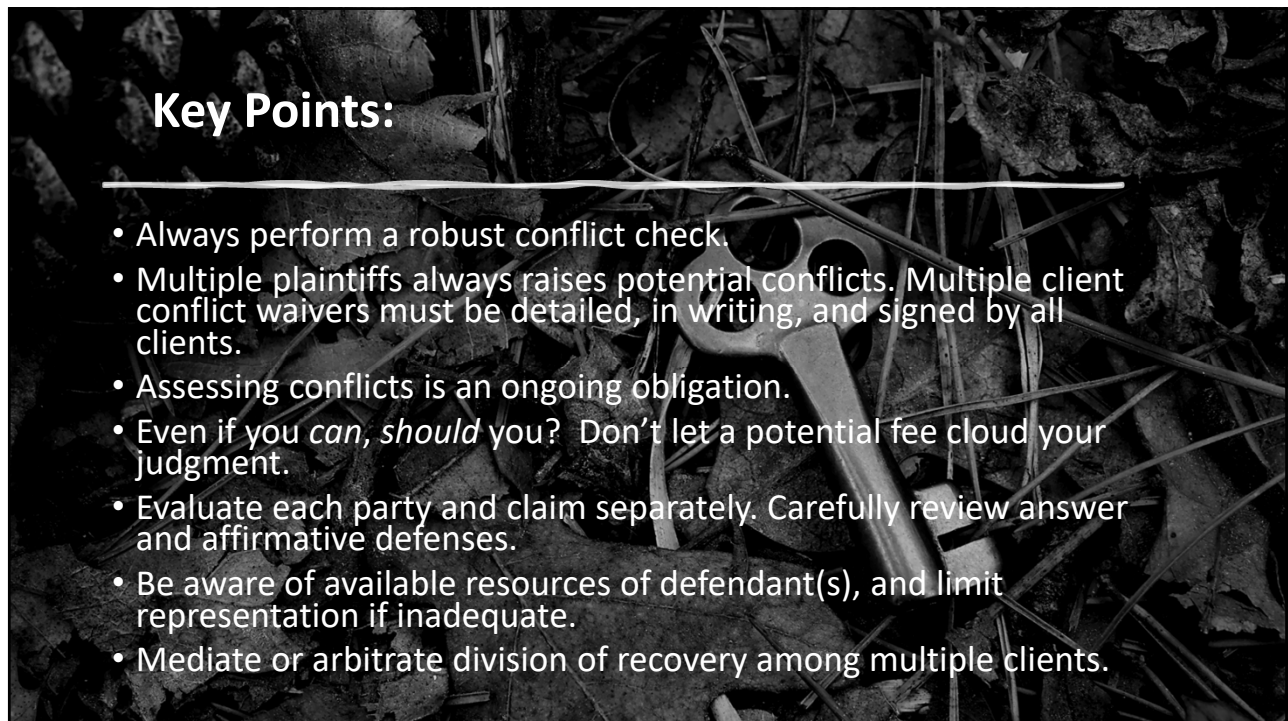


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5. What must Luca do to secure a waiver?
6. What conflicts of interest arise between multiple plaintiffs?
7. What problems are inherent in a potential verdict in excess of defendant's coverage limits?

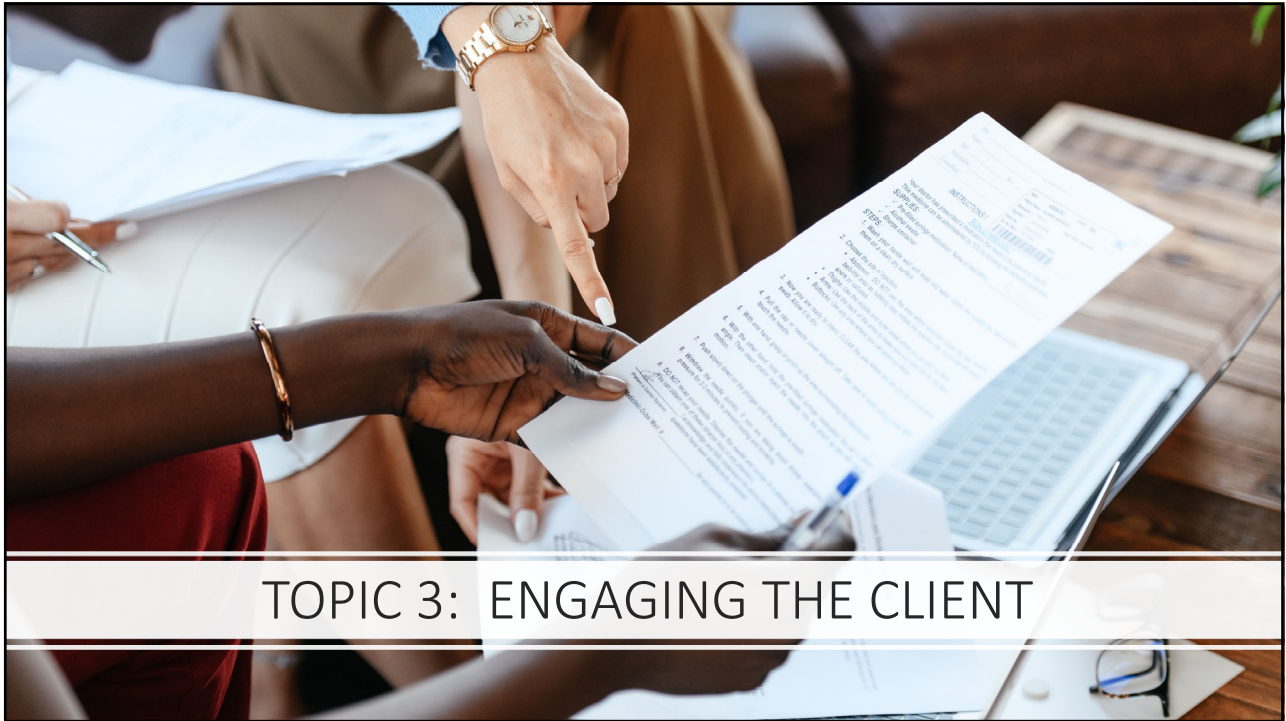
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Key Points:

- Always perform a robust conflict check.
- Multiple plaintiffs always raises potential conflicts. Multiple client conflict waivers must be detailed, in writing, and signed by all clients.
- Assessing conflicts is an ongoing obligation.
- Even if *you can, should you?* Don't let a potential fee cloud your judgment.
- Evaluate each party and claim separately. Carefully review answer and affirmative defenses.
- Be aware of available resources of defendant(s), and limit representation if inadequate.
- Mediate or arbitrate division of recovery among multiple clients.

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TOPIC 3: ENGAGING THE CLIENT

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Luca Lawyer is meeting plaintiffs at the firm office.

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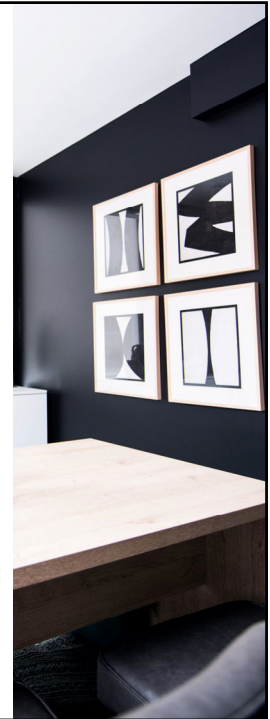


Discussion Questions

1. What should be contained in the initial retainer agreement?
2. What statute governs contingent fee agreements?
3. What terms should be in a fee agreement?
4. What is the benefit of using a client intake form?
5. What is an engagement letter and why is it important?
6. What should Luca do if Plaintiffs want to sign the papers later?

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7. What costs can Luca's firm advance in litigation? Should Luca discuss those costs with Plaintiffs?
8. What do you do if you feel something needs to be done, but your client doesn't want to pay for it (e.g., an investigator, asset check)?
9. What should Luca tell Plaintiffs about medical bills and medical liens?
10. Should the fee agreement address payment of medical bills and medical liens?
11. Should Luca tell the clients what Luca thinks the case is worth during that first meeting?



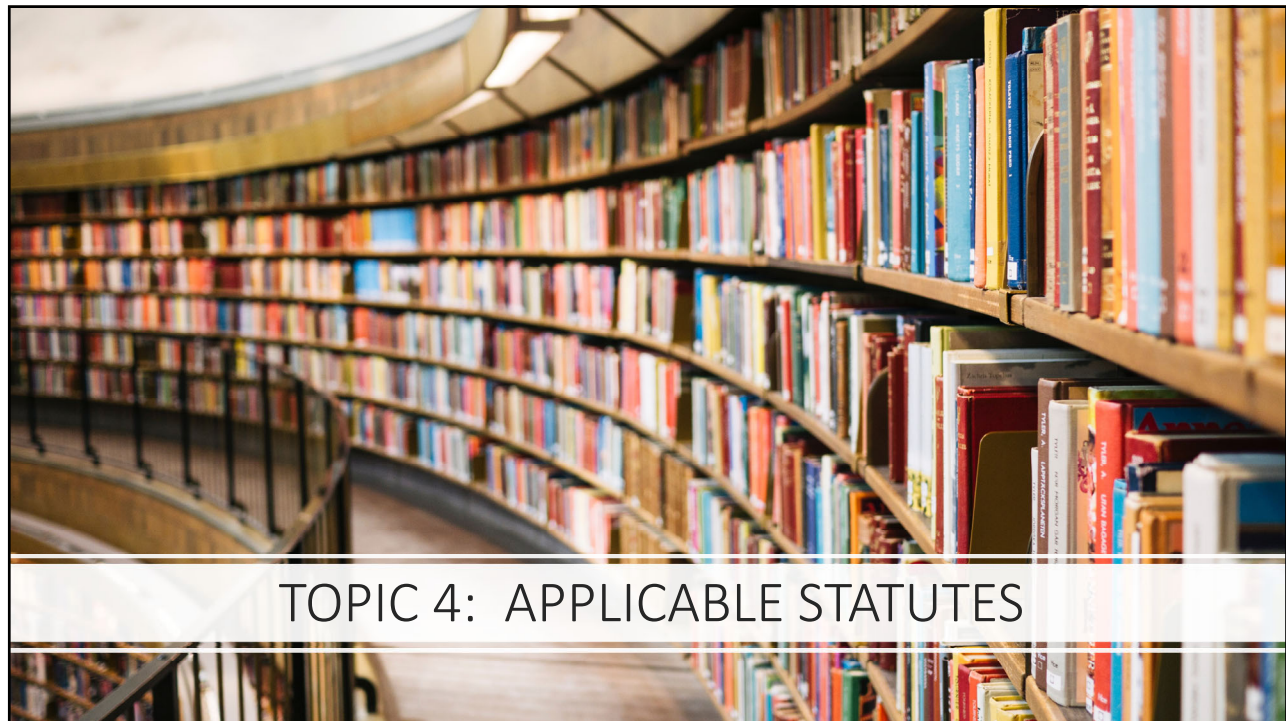
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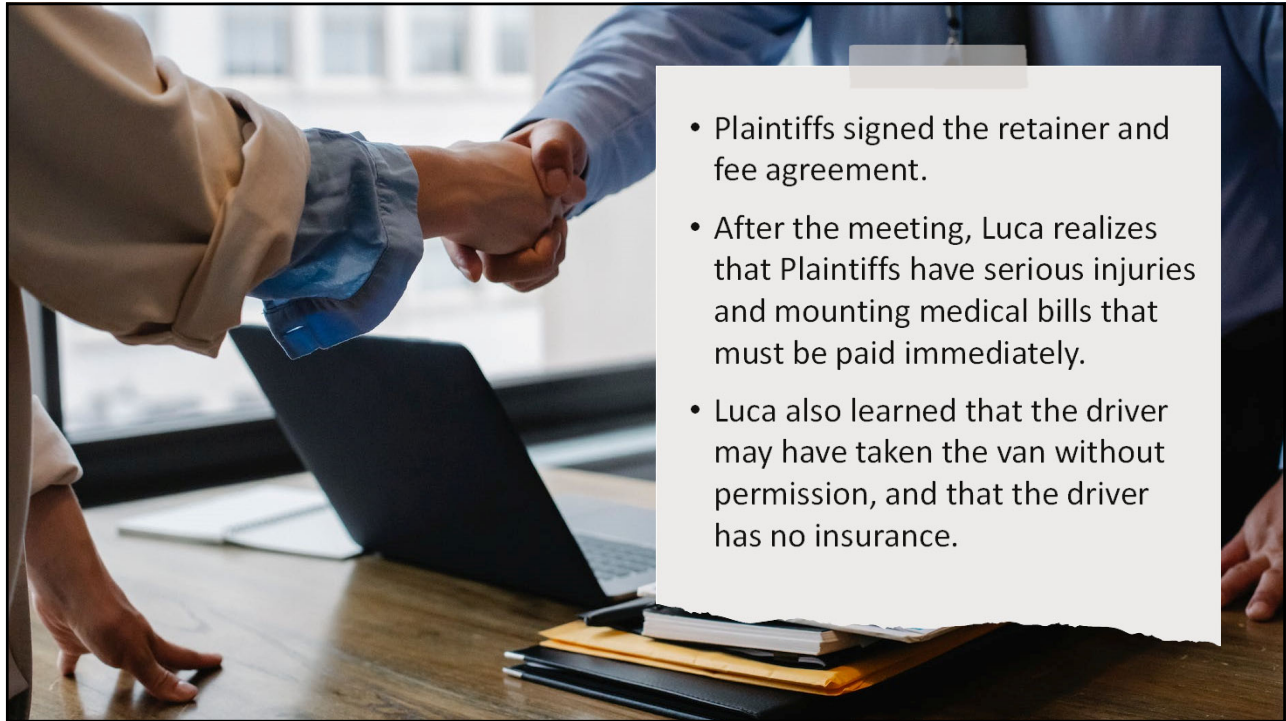
Key Tips:

- Always use a fee agreement. Describe precisely the scope of representation. Use a nonengagement letter if not hired.
- Reasonably set client expectations -- under promise and overdeliver.
- A good intake form will save hours of follow-up.
- Check client's bankruptcy status.
- Clearly explain fees and costs. Clients must understand how the attorney fee is calculated, that medical liens are paid before disbursement, and that all costs advanced will be deducted from settlement/verdict. If the case is lost the attorney may waive cost reimbursement.
- Document case decisions in writing to client.

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- Plaintiffs signed the retainer and fee agreement.
- After the meeting, Luca realizes that Plaintiffs have serious injuries and mounting medical bills that must be paid immediately.
- Luca also learned that the driver may have taken the van without permission, and that the driver has no insurance.


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Discussion Questions

1. What are PIP benefits and how do they apply?
2. Can Luca get information about defendant(s)' limits if suit has not yet been filed?
3. What are underinsured motorist coverage and uninsured motorist coverage, and when do they apply?

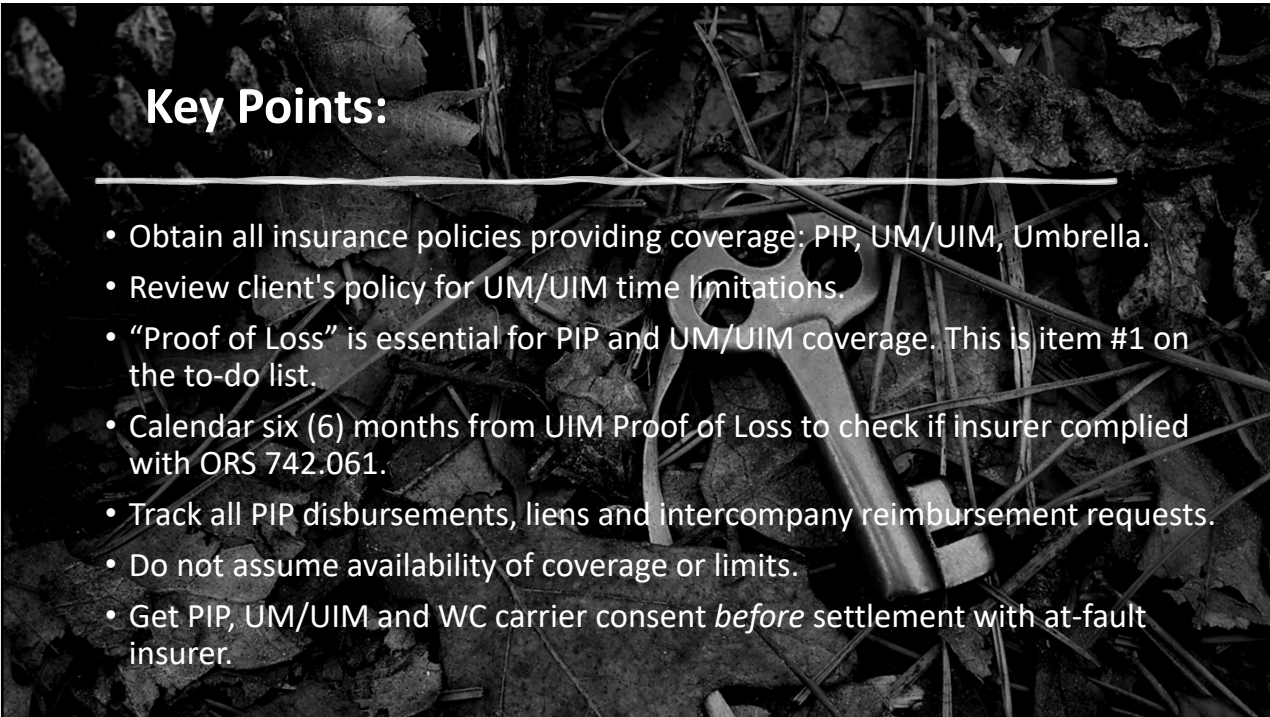
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INSURANCE

4. What time limits apply to UM and UIM cases?
5. Do the tortfeasors liability limits have to be exhausted to obtain UIM coverage?
6. Do you need authorization from the UIM carrier in order to settle?
7. What is an umbrella policy and why is it important?

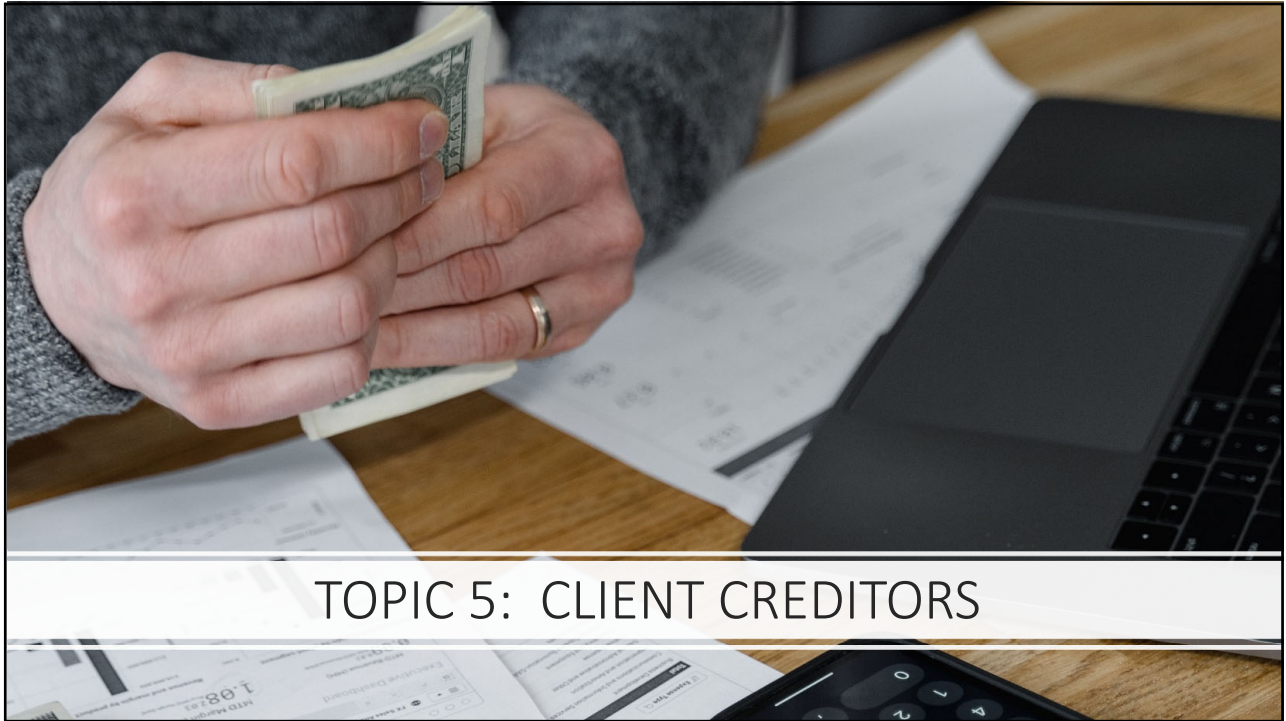
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Key Points:

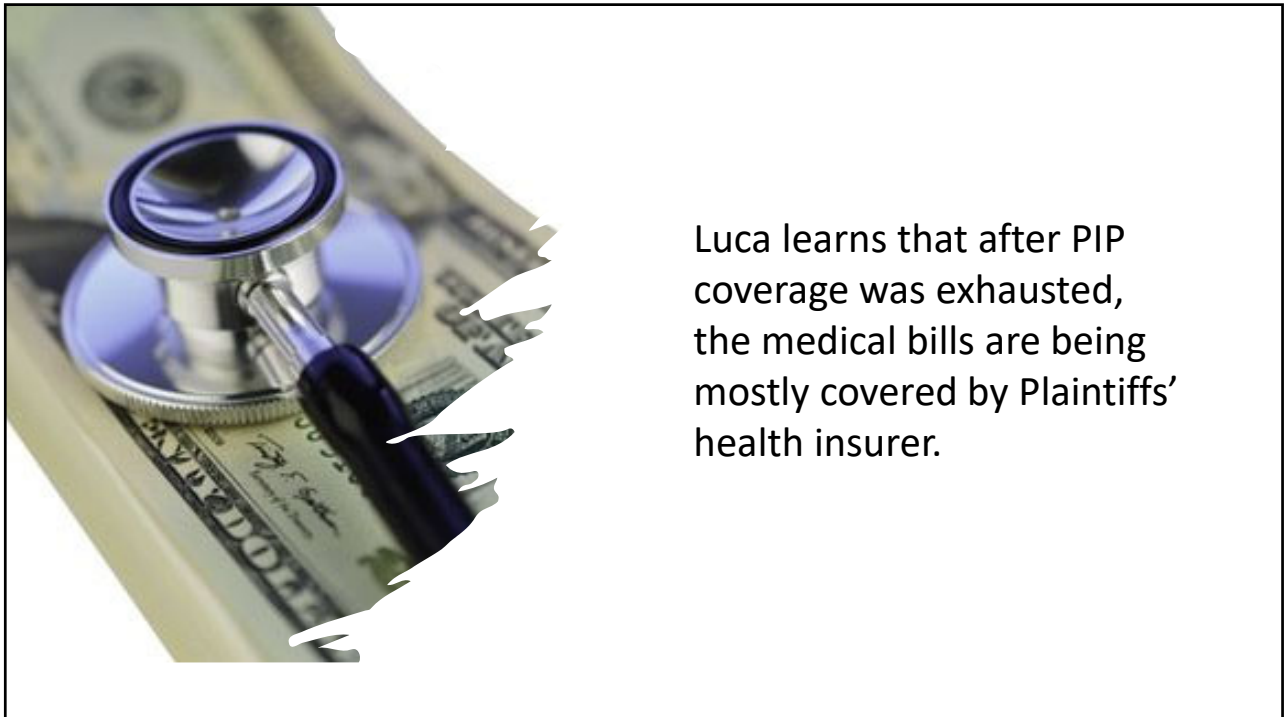
- Obtain all insurance policies providing coverage: PIP, UM/UIM, Umbrella.
- Review client's policy for UM/UIM time limitations.
- "Proof of Loss" is essential for PIP and UM/UIM coverage. This is item #1 on the to-do list.
- Calendar six (6) months from UIM Proof of Loss to check if insurer complied with ORS 742.061.
- Track all PIP disbursements, liens and intercompany reimbursement requests.
- Do not assume availability of coverage or limits.
- Get PIP, UM/UIM and WC carrier consent *before* settlement with at-fault insurer.

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TOPIC 5: CLIENT CREDITORS

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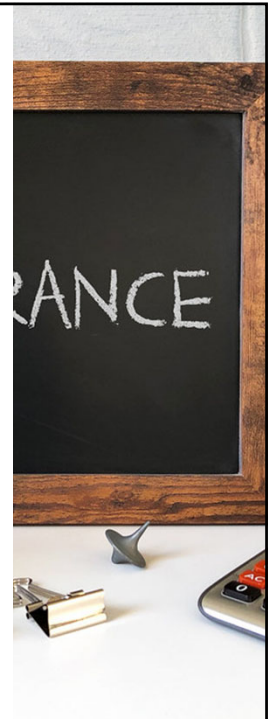


Luca learns that after PIP coverage was exhausted, the medical bills are being mostly covered by Plaintiffs' health insurer.

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Discussion Questions

1. What is Luca's obligation to the insurers regarding notice of a potential lawsuit against defendant(s) responsible for the collision that caused Plaintiffs' injuries?
2. How does Luca notify the various insurers of the potential claim against defendant(s)?
3. If Medicare is involved in payment of any of Plaintiffs' medical bills, what is Luca's responsibility for notifying CMS?



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Key Points:

- Determine when client became Medicare or OHP eligible. Don't forget about minors or protected persons.
- Notify CMS (open a portal) A.S.A.P. to determine Medicare lien.
- Obtain all Explanations of Benefits (EOB) and examine for insurance issues.
- Review health and other insurance policies for reimbursement requirements, including notice or consent before settlement.
- Consider impact of settlement on other benefits or income client may be receiving.

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TOPIC 6: FILING AND SERVICE

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A photograph of a document titled "Court Hearing" in large, bold, black letters. Below the title, the text "COURT HEARING" is printed in a smaller font. Further down, there are lines for "to the Sheriff of" and "County". A wooden gavel is visible in the foreground, partially overlapping the document. The document is placed on a wooden surface.

Luca filed the Complaint in circuit court electronically on behalf of Plaintiffs before the statute of limitations expired. Now Luca must serve defendants.

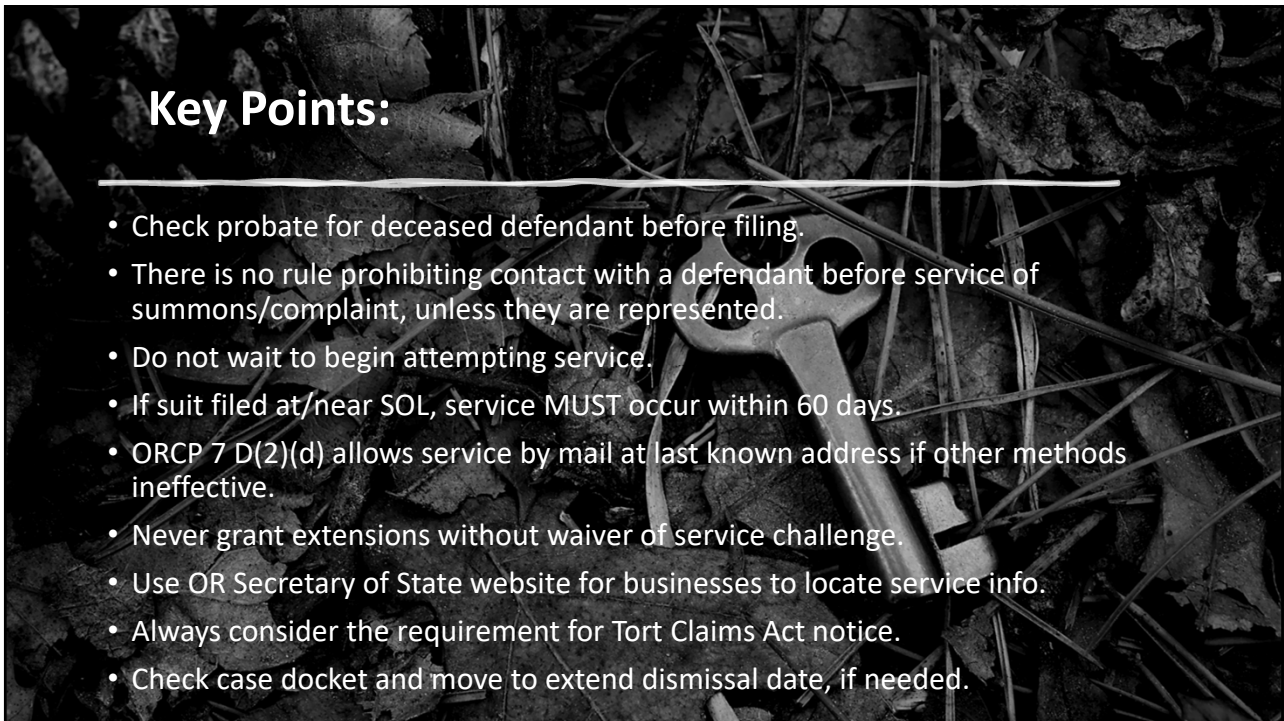
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Discussion Questions

1. How does Luca figure out who to serve?
2. If Luca can't locate the driver of the van to serve personally, how does Luca perfect service?
3. Is there a situation where a plaintiff has more than 60 days to serve a summons?

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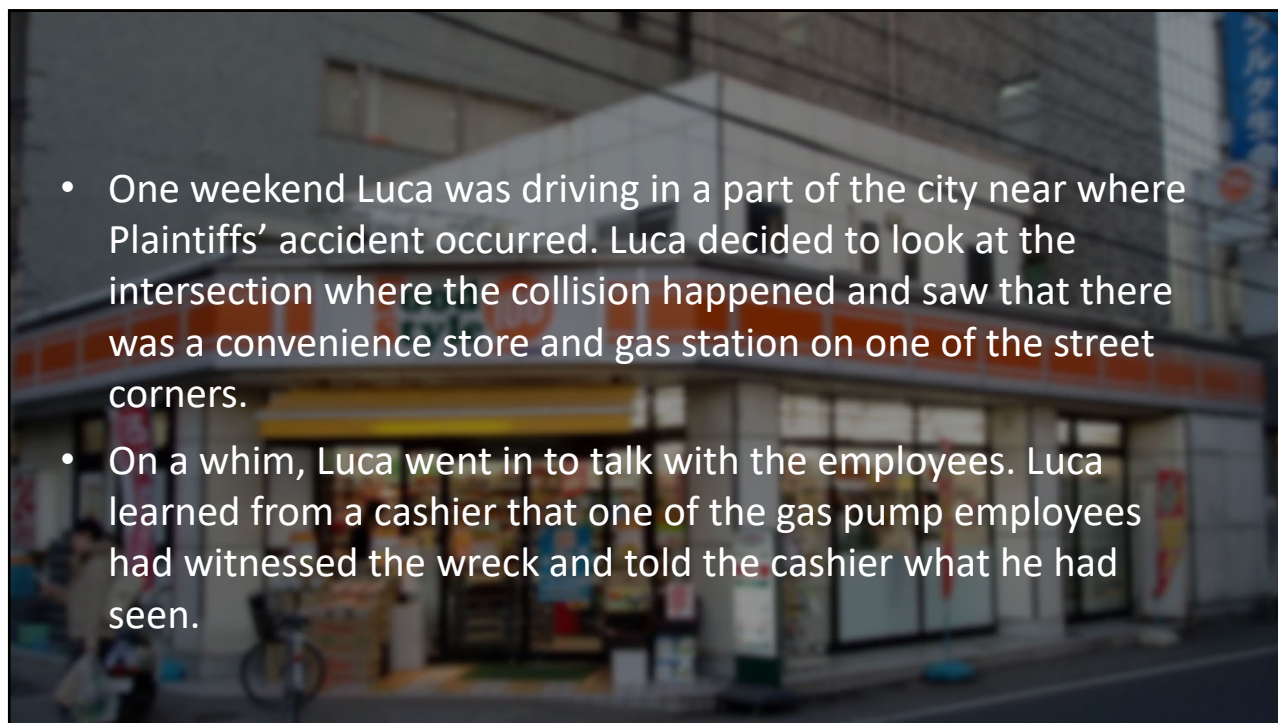
Key Points:

- Check probate for deceased defendant before filing.
- There is no rule prohibiting contact with a defendant before service of summons/complaint, unless they are represented.
- Do not wait to begin attempting service.
- If suit filed at/near SOL, service MUST occur within 60 days.
- ORCP 7 D(2)(d) allows service by mail at last known address if other methods ineffective.
- Never grant extensions without waiver of service challenge.
- Use OR Secretary of State website for businesses to locate service info.
- Always consider the requirement for Tort Claims Act notice.
- Check case docket and move to extend dismissal date, if needed.

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Discussion Questions

1. Should Luca speak to the employee witness directly or have someone else do it?
2. What are the pros and cons of each approach?
3. Should Luca confirm the witness account with a letter?
4. Should Luca ask for corrections?

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A photograph of a metal key lying on a bed of dry leaves and twigs. The key is a simple, old-fashioned key with two circular holes at the top. The background is a dark, textured surface of fallen leaves and sticks.

Key Points:

- Best practice is to go to accident site. It will help you tell your client's story.
- Know evidence rules and anticipate objections.
- Don't make yourself a witness; hire out eyewitness interviews. Have a third party present if you talk to a witness.
- If you write a confirming letter, treat it like it will be trial exhibit.
- Subpoena documents before depositions. Begin depositions early in case.

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TOPIC 8: DISENGAGEMENT

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Luca Lawyer gets fired by Plaintiffs. They demand “their” file from Luca to take to a new lawyer.

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Discussion Questions

- What does Luca need to do now?
- Who does the file belong to?
- Should Luca just turn the file over to Plaintiffs?
- Are Plaintiffs entitled to a copy of the file? Is Luca?
- How long should Luca keep the file?
- Does Luca have an obligation to bring the new lawyer up to speed on the case?
- Can Luca sue the former clients for fees or costs?

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Key Points:

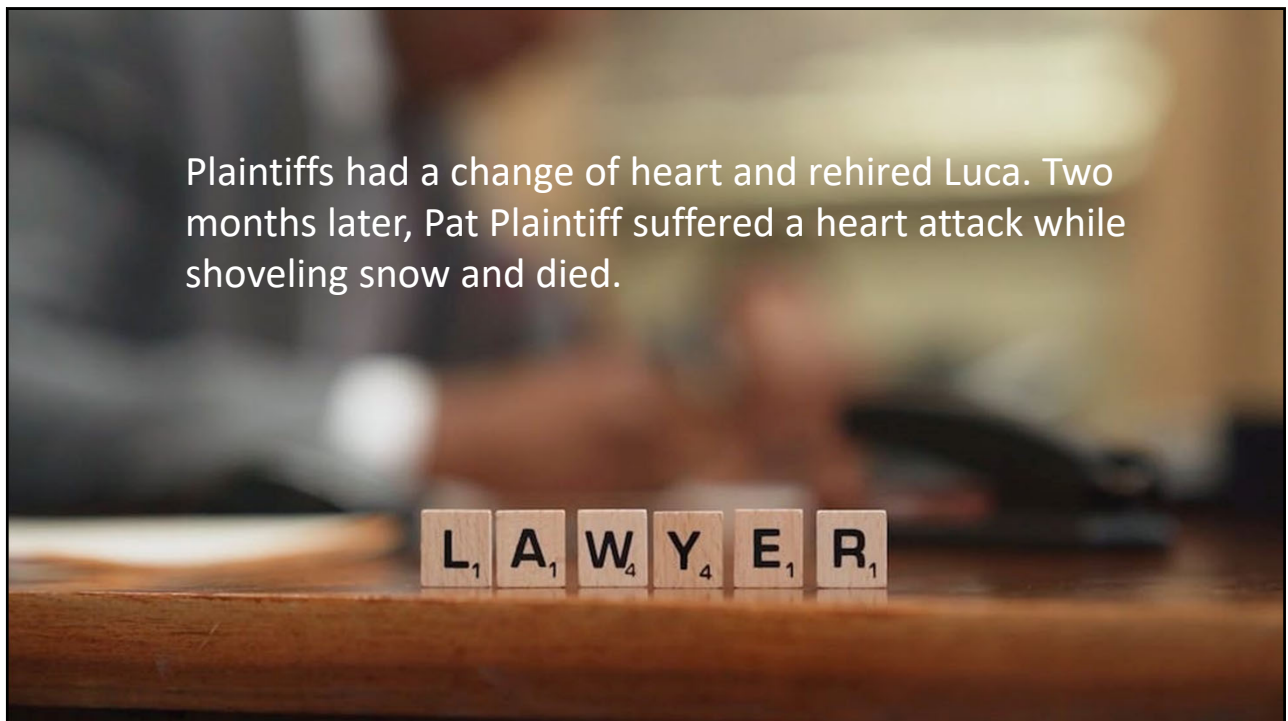
- Confirm termination in closing letter and file motion to withdraw where necessary. Account for funds in trust.
- The file belongs to the client, not the attorney. Attorney work-product is not exempt; personal notes re attorney-client relationship may be.
- Obtain written authorization from client before providing a copy of file. Confirm receipt of file. Always keep a complete copy.
- Sue a client and everybody loses.
- Statute of limitations on malpractice claim is two years.
- Understand OSB fee arbitration program.

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TOPIC 9: WRONGFUL DEATH


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Plaintiffs had a change of heart and rehired Luca. Two months later, Pat Plaintiff suffered a heart attack while shoveling snow and died.

L₁ A₁ W₄ Y₄ E₁ R₁


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Discussion Questions

1. How does this change the scope of damages for Pat Plaintiff's case against defendant(s)?
2. If Luca Lawyer intends to continue the lawsuit on behalf of Pat Plaintiff, now deceased, what does Luca have to do in order to do so?
3. Who can be appointed as the Personal Representative of Pat Plaintiff's estate for the purpose of continuing the claim against defendant(s) for the wreck?

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4. What factors should be considered in identifying who should serve as PR?
5. Assume that instead of dying from a heart attack, Pat Plaintiff died from injuries sustained in the accident. What if Pat Plaintiff had a will that contradicted the statutory distribution?

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Key Points:

- Tort actions survive death of injured person.
- On death of plaintiff, \$500k cap applies. ORS 31.710(1).
- A PR must be appointed to continue decedent's case. Move to substitute personal representative. Try to find PR who is not a beneficiary.
- Amend pleadings to reflect new party.
- Wrongful death is a statutory claim found at ORS 30.010 et seq.
- Always assert right to attorney fees in a survival action. ORS 30.075(2).
- Death caused by wreck = recovery distributed by statute.
- Death not caused by wreck = recovery distributed per Will. *Roe v. Pierce*, 102 Or App 152 (1990)
- Death impacts time limitations!

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TOPIC 10: STRATEGY AND PLANNING

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- Luca Lawyer received a document entitled “Defendant’s First Requests for Admissions” from a lawyer representing the van driver. Luca has never dealt with these before.
- The requests ask Plaintiffs to “admit” or “deny” some of the of the facts at issue, like Pat Plaintiff’s speed at the time of the collision and Peyton Plaintiff’s use of a seat belt. At the same time, a lawyer representing the van owner filed a “Motion for Summary Judgment” which argues that the owner is not responsible for the actions of the driver.
- Luca has never dealt with one of these either. Luca has a two-week vacation scheduled to begin 3 weeks from now and will be out of the country. Luca wants to take care of these legal documents after returning.

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Discussion Questions

1. Is there a time limit for when Luca has to respond to the Requests for Admissions?
2. What could happen if Luca does not file a timely response?
3. Is there a time limit for when Luca has to respond to the Motion for Summary Judgment?
4. What could happen if Luca does not file a timely response?
5. What should Luca do so that the time to file responses does not interfere with the long-planned vacation?

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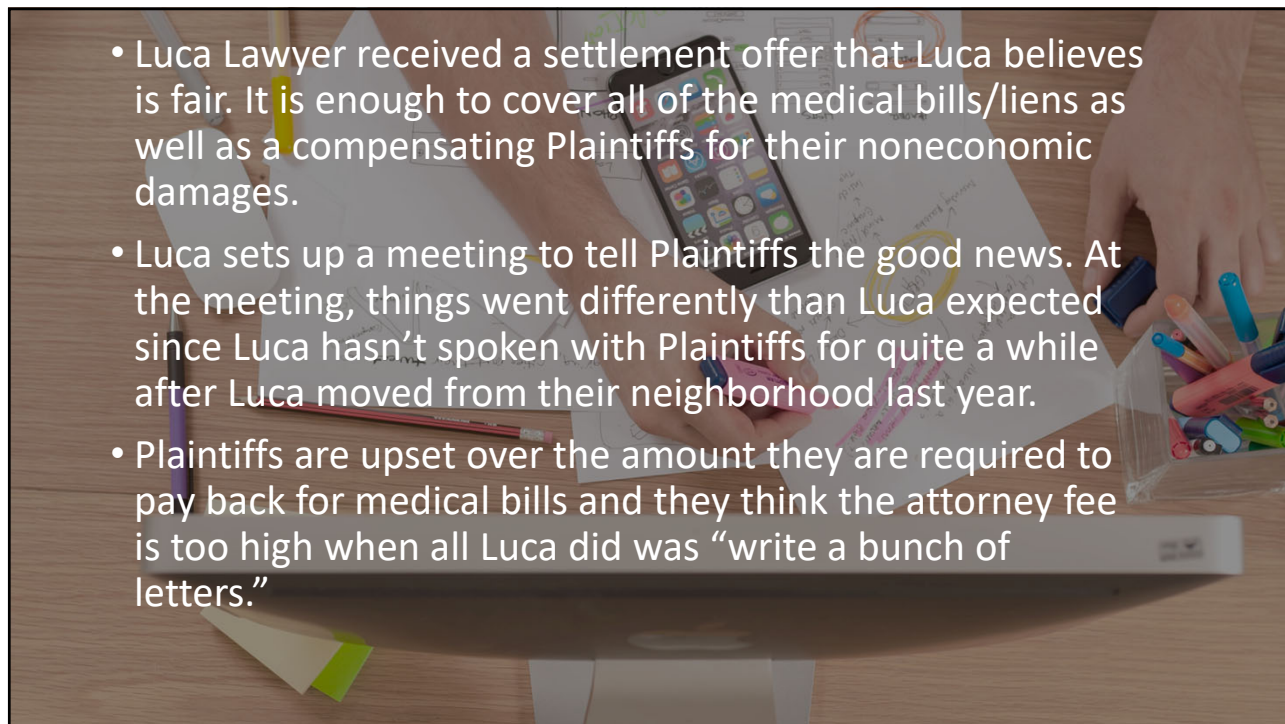
Key Points:

- Do not procrastinate with discovery requests or motions.
- 30 days to serve and file response to requests for admission unless extended by court or serving party. RFAs are deemed admitted if no response in 30 days. ORCP 45 B.
- Advise client about consequence of admitting or denying, including exposure to attorney fees.
- 20 days to file and serve response to MSJ with supporting evidence. MSJ must be served/filed at least 60 days before trial date. ORCP 47 C.
- A request for an extension should be in writing and confirmed in writing. Don't be stingy granting extensions.
- Anticipate evidentiary objections to evidence. Consider cross motion(s), if appropriate.
- Advise client about consequence of motion if granted and any fee exposure.

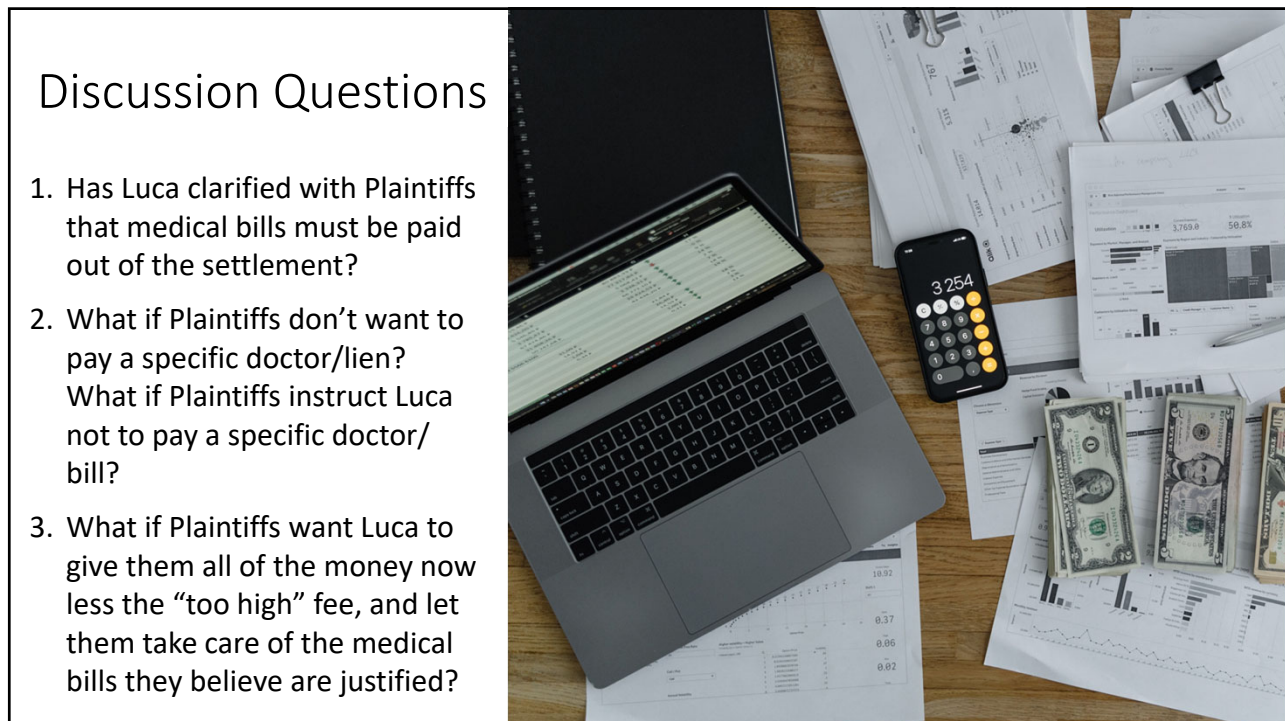
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4. What if Luca has an arrangement for referrals from the doctor/chiropractor? Must this be disclosed to Plaintiffs?
5. Can Luca settle some of the case and leave the bill disputes for later? Should Luca do that?
6. Will Plaintiffs be covered for future medical bills through their private insurance carrier even though they recovered money from defendants(s)?
7. What, if anything, should Luca do about the attorney fee that Plaintiffs think is too high?

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Key Points:

- Keep client informed of all liens throughout case. Have client confirm all bills and liens accounted for. Provide client with detailed written accounting.
- Obtain client consent in writing before satisfying liens or medical bills.
- Obtain written confirmation of satisfaction from providers or lienholders.
- Safeguard funds claimed by client or third parties. Promptly satisfy undisputed bills or liens.
- Disputed funds should remain in attorney's trust account. Plaintiff's attorney is not the arbiter of disputes between client and third-party claimants.
- An appropriate fee reduction can engender good will. Don't be stuck on the percentage in the fee agreement.
- Settlements do not cover future medical bills.

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THANK YOU



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Free and confidential



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References and Resources

Topic 1: Assessing the Case

- [*Issues for Consideration in Commencing and Settling a Personal Injury Case*](#), OSB Professional Liability Fund, rev. December 2021.
- [*Sharing Fees Outside Your Law Firm*](#), by Jennifer Meisberger, March 2017, InPractice
- [*Lawyer-Owned Lawyer-Referral Service*](#), Oregon Formal Ethics Opinion No. 2005-168
- [*Information about Legal Services: Lawyer Membership in Business-Referral Clubs*](#), Oregon Formal Ethics Opinion No. 2005-175
- [*Drawing the Line for Nonengagement*](#), by Monica Logan, July 2022, InPractice

Topic 2: Assessing the Client

- [*Conflict Of Interest Systems and Procedures*](#), PLF Practice Aid
- [*Checklist for Personal Injury Disclosure and Consent Letters*](#), PLF Practice Aid
- [*Request For Conflict Search and System Entry*](#), PLF Form
- [*Conflicts of Interest, Former Clients: Matter-Specific Conflicts*](#), Oregon Formal Ethics Opinion No. 2005-11
- [*Conflicts of Interest, Current Clients: Representing Driver and Passengers in Personal-Injury/Property-Damage Claims*](#), Oregon Formal Ethics Opinion No. 2005-158
- [*Tort Claims Table of Liability Limits*](#)
- [*ORS 30.260*](#)

Topic 3: Engaging the Client

- [*Tort General Information Sheet*](#), PLF Form
- [*Engagement Letters and Fee Agreements*](#), PLF Form
- [*Oregon State Bar Model Explanation of Contingent Fee Agreement*](#)
- [*Conflicts of Interest, Current Clients: Advancement of Living Expenses, Bail, and Travel Expenses to Client*](#), Oregon Formal Ethics Opinion 2005-4
- [*Fee Agreements: Contingent Fees Paid in Installments*](#), Oregon Formal Ethics Opinion 2005-15
- [*Fee Agreements: Contingent to Hourly Fee When Client Rejects Settlement Offer*](#), Oregon Formal Ethics Opinion 2005-54
- [*Fee Agreements: Dividing Court-Awarded Fees with Nonlawyer*](#), Oregon Formal Ethics Opinion 2005-69
- [*Fee Agreements: Excessive Fees, Contingent Fees, PIP Benefits*](#), Oregon Formal Ethics Opinion 2005-124
- [*Managing Client Expectations*](#), by Rachel Edwards, June 2018, InPractice

Topic 4: Applicable Statutes

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