

## ISSUES FOR CONSIDERATION IN COMMENCING AND SETTLING A PERSONAL INJURY CASE

### COMPETENCY

1. Do you have adequate experience to handle the case?
2. Do you have adequate time and resources to handle the case?
3. Should you associate counsel to assist you?
4. Is the client a client that you would have accepted if he or she had come to you off the street (as opposed to by a referral, a friend, a relative, or some other source)?
5. Have you screened this case and client before you accepted the case and client?
6. Do you have adequate PLF coverage to handle the case?
7. Does any potential claim require admission to a jurisdiction in which you are not admitted?
8. Does your client or do you prefer that communications occur through an interpreter to avoid any possible confusion due to a language barrier?

### ESTABLISHING THE ATTORNEY / CLIENT RELATIONSHIP

1. Have you identified who your client is and is not?
2. If the case involves multiple clients, are there any conflicts between them? For example: Husband/wife; child/parent; passenger/driver; or employer/employee.
3. Should the clients be given a conflict disclosure and consent letter to sign?
4. Did you present your client(s) with the OSB approved Model Explanation of Contingent Fee Agreement and obtain their signatures prior to entering into a contingent fee agreement?
5. Have you sent engagement letters and fee agreements to each client whom you are representing?
6. Have you checked to ensure that you have no conflict of interest by representing these clients or litigating against any potential defendant in this matter?

### INTAKE INFORMATION

1. Have you had the client fill out a client intake form?
2. Have you obtained the pertinent HIPAA-compliant medical authorizations?
3. Have you obtained an employment and tax records authorization?
4. Have you discussed your fee and advancement of litigation costs with the client and how they may increase at different stages of litigation?
5. Has the client signed a retainer agreement and explanation of the fee agreement?
6. Have you provided the client with a letter confirming the scope of your representation (an engagement agreement)?
7. Have you ascertained the client's bankruptcy status? The Bankruptcy Code requires debtors to disclose claims that exist prior to the filing of the petition, regardless of whether a claim is pending in a court proceeding or has yet to be pursued in any way, and regardless of whether the debtor is even aware of the claim. 11 U.S.C. Section 521. Failure to list actual or potential claims may preclude the debtor from pursuing the claim later in a non-bankruptcy action. Use PACER (Public Access to Court Electronic Records) to check for bankruptcy filings. Contact the US Bankruptcy Court at 503-326-2231 for more information if needed. See *Personal Injury Claims and Bankruptcy*, PLF *In Brief*, February 2008. Available online at [www.osbplf.org](http://www.osbplf.org).
8. Have you discussed the scope of the attorney-client privilege with your client and explained what they should or should not discuss with family members, on social media, or anyone else to protect it from discovery by the adverse party?
9. Have you determined whether the client is Medicare eligible and whether the issue of "set asides" needs to be addressed?
10. Have you asked the client if they have an on-line social networking account and whether they have discussed their case or aspects of their injury in a public forum? Have you warned your client that information put into such a forum can be obtained by lawyers representing the adverse party?

11. Have you determined whether the client is Medicare or Medicaid eligible and have you put the agencies on notice so that you can be aware of any potential lien or set-aside requirement?
12. Does your client have a workers' compensation claim related to the injury at issue?
13. Does your client receive food stamps, social security disability, or other public benefits that need to be taken into consideration before receipt of any recovery?
14. If your client was a victim of a crime have you asked whether they received any benefits from the Crime Victims Compensation Fund and, if so, have you contacted the fund to see if they have a lien against a recovery?
15. If your client was a victim of a crime have you notified the prosecutor of your involvement and need to be included in any discussions about a civil compromise that the criminal defendant may propose?
16. Have you warned your client about the potential adverse consequences of the loss or destruction of potentially relevant evidence?
17. Was your client possibly injured by a "phantom vehicle" that requires that immediate notice be provided to their Uninsured Motorist insurer?

### **PREPARING THE CLIENT**

1. Have you prepared the client for the amount of time and money it will take to proceed with the case?
2. Have you prepared the client for the costs that will need to be paid as you proceed with the case?
3. Have you prepared the client for the costs and expenses (including liens and reimbursements) which will need to be paid out of the settlement or verdict?
4. Is your client receiving Medicaid, Social Security Disability benefits or Supplemental Security Income? If so, have you discussed the impact that a recovery may have on those benefits and the potential need to establish a Special Needs Trust (or, a Pooled Trust if your client is 65 or older) to avoid impacting those benefits? Have you discussed the limitations on spending that a Special Needs Trust creates?
5. Have you explained that any social networking that your client participates in may be subject to discovery and admissible as evidence at trial, including Facebook and Twitter?
6. Have you explained to client that any punitive damages based on an Oregon common law action (whether in state or federal court) or other Oregon state court claim will be split with the State and is subject to income tax?
7. If an injured party is a minor have you explained to their parent or guardian the potential need for a conservator and court approval of any settlement?

### **DOCUMENTATION OF THE CASE**

1. Do you have a system for documenting your conversations with your client?
2. Do you send your client confirming letters that review important advice given to them by phone or in person?
3. Do you have a back-up file system such as on-line encrypted data back up to ensure the integrity of your file system should you suffer a computer failure or theft?
4. Do you have a system to calendar important dates and provide reminders for upcoming events?

### **COMMENCEMENT OF THE ACTION**

1. Does the case involve an entity entitled to a "tort claim" notice? (Dram shop, ski facility, public body, etc.)
2. Have you correctly recorded and calendared the time within which a tort claim notice must be sent?
3. Have you correctly recorded and calendared the applicable time limitations?
4. Have you calendared the time within which the complaint must be served?
5. Have you calendared not only the applicable time lines, but also a reminder well in advance of the time line?
6. Is the defendant easy to locate?
7. Have you served all of the necessary defendants?

8. Is the defendant dead? If so, if the claim is not covered by insurance, have you presented the claim to the estate's personal representative for disallowance prior to commencement of the action (ORS 115.325)?
9. Before filing the suit have you considered alternate venues for the action and the costs/benefits of each?
10. After filing have you provided the required notice to all third parties having a potential claim to any recovery your client achieves such Medicare, Medicaid, Health Insurers, Auto Insurers, etc.?
11. Have you provided notice of claim for any potential Uninsured or Underinsured Motorist coverage?
12. Have you sent "spoliation" letters to any party or non-party that may possess relevant evidence that needs to be preserved?

### **CASE SETTLEMENT**

1. Does the case involve injuries that are in excess of the insurance coverage of the defendant?
2. If the defendant's insurance coverage is inadequate, have you investigated other applicable insurance coverage, including Underinsured Motorist Coverage, an "umbrella" policy, credit card travel insurance, or AAA travel insurance that may provide benefits to the plaintiff?
3. Have you read the Underinsured Motorist policy or policies before settling the case to determine if the underinsured motorist carrier requires consent before the case can be settled? If insurer denies consent, have you protected the insurer's subrogation rights by not releasing the tortfeasor?
4. Have the medical providers been paid prior to disbursing the settlement proceeds?
5. If your client has health insurance coverage through a private carrier, have you examined the health insurance policy for provisions requiring repayment of funds or denial of coverage for injuries which have been the subject of a personal injury settlement?
6. Did your client receive benefits through the Oregon Health Plan (OHP)? Medicaid? Medicare? Crime Victims Compensation Fund? If so, there may be a lien against the client's settlement proceeds. If your client has received such benefits have you obtained the required approval for settlement?
7. Is your client currently receiving welfare, social security disability, Supplemental Security Income, or workers compensation benefits? If so, have you considered how the settlement will affect the client's eligibility for benefits? If lien rights may be involved?
8. Have you discussed the advantages and disadvantages of using a structured settlement with your client?
9. Is a minor involved in the settlement? If so, are the minor's rights being protected? Should the settlement be approved by the court? See ORS 126.025.
10. Did your client file bankruptcy? If so, it may be necessary to obtain relief from the bankruptcy stay before moving to dismiss in a state court action. See *In re Enyedi*, 371 BR 327 (Bankr. N.D. Ill. 2007). Also see item number 7 under *Intake Information* above. You must also execute a new fee agreement listing the bankruptcy trustee as a co-plaintiff and seek the trustee's approval of any settlement.
11. Have you confirmed your client's (or clients') consent to the settlement in writing?
12. Have you prepared a settlement accounting and reviewed it with the client?
13. Have you sent your client a closing letter?
14. Have you returned the client's original documents?
15. Have you advised your client to speak with an accountant about any potential tax liability?

### **IMPORTANT NOTICES**

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