



TIPS FOR PROTECTING YOURSELF FROM MALPRACTICE CLAIMS

Reduce your risk of a legal malpractice claim and protect the funds of the minor or incapacitated person by doing the following:

1. **UNDERSTAND WHOM YOU REPRESENT.** When filing a conservatorship or a guardian *ad litem* petition, you represent the fiduciary. You also may have responsibilities to the protected person. See *Hale v. Groce*, 304 Or 281, 744 P2d 1289 (1987). OSB Formal Ethics Ops 1991-119, 1991-62.
2. **EDUCATE THE FIDUCIARY.** Unfortunately, the people most likely to take money belonging to your client are the client's own family members. In times of financial crisis, family members may try to gain access to the injured family member's funds. If you are bringing a claim on behalf of a minor or other incapacitated person, you must educate the person acting on his or her behalf. (This will be a guardian, guardian *ad litem*, or conservator.) At the beginning of your representation, make sure that the fiduciary understands his or her fiduciary responsibilities and that if he or she receives the incapacitated person's money, you will work with him or her to make special arrangements to protect it.
3. **REFER THE CASE TO A CONSERVATORSHIP ATTORNEY.** Conservatorships require frequent review of the assets and annual accountings. Generally lawyers who handle personal injury cases are unfamiliar with the rules and procedures of conservatorships. If you generally practice in the area of personal injury, you and your client may be best served by referring the case to a separate attorney for the conservatorship.
4. **BE SURE TO DOCUMENT YOUR EXPLANATION OF FIDUCIARY DUTY TO YOUR CLIENT.** If the conservator is successful in finding a way to run off with the conservatorship funds, you may find yourself as a target defendant. Thorough file documentation of your efforts to restrict the accounts, as well as documentation of your advice to the fiduciary on the fiduciary responsibilities, are critical to a successful defense.
5. **BOND THE FIDUCIARY WHENEVER POSSIBLE.** See *To Bond or Not to Bond* on page 5 of this issue.
6. **MAKE SURE THE RESTRICTED ACCOUNT IS RESTRICTED.** If you want to restrict access to the conservatorship assets, be sure that you make the special arrangements. This means *much more* than sending

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the conservators to the bank and getting a bank teller to sign an acknowledgment that the account is restricted. It means making special arrangements with a person in a position of authority at the bank, depositing the money yourself, making sure that the bank acknowledges the order restricting conservatorship assets, *and* making sure that the bank understands what it is supposed to do. This requires a lot of additional involvement by the attorney. It is the only way to make sure that the conservatorship assets are restricted.

- 7. USE STRUCTURED SETTLEMENTS.** Structured settlements are an excellent vehicle when dealing with funds of a minor and can be utilized in combination with other mechanisms when dealing with an incapacitated person. See *Structured Settlements* on page 7 of this issue.