CHAPTER 1

FIRST STEPS IN HANDLING A PERSONAL INJURY CASE

1.1 INITIAL CLIENT INTERVIEW

1.1.1 INTRODUCTION – GOALS AND IMPORTANCE OF FIRST INTERVIEW

Paralegals need to know how to conduct an initial interview with a potential client. While attorneys must make the final decision whether to take a case and while some lawyers conduct the initial interview themselves, you may be called upon to conduct an "initial screening." This is especially true in firms that handle a high-volume personal injury practice, because in such offices, where the majority of injury cases are modest and the clients come because of advertising, the lawyers probably won't have the time to meet every person who calls. This is where you come in, for the lawyers may ask you to conduct an initial evaluation and recommend whom they should meet and which cases they should accept.

Even if you work for a firm representing defendants, you may be asked to conduct an initial screening. The defendant may have sustained his or her own injuries and property damage from an accident. In addition, it is essential to hear the defendant explain "what happened." For these reasons, regardless of what side your office is on, you need to know what to do during an initial client consultation, including the information to elicit in order to make a preliminary evaluation of the case and, for plaintiffs' attorneys, a preliminary decision whether to accept the case. While you obviously do not have the ability or authority to form an attorney–client relationship, you ought to know what is entailed in the process and what not to say to a potential client in this regard. Finally, once the attorney–client relationship is formalized, you need to know what to do next, because many attorneys will delegate the initial tasks to you.

The goal of the initial meeting is simple: You want to obtain enough information to help your attorney make an intelligent decision: take the case or turn it down? Is this a case the lawyer may legally and ethically accept? Equally important, is this a case your lawyer *wants* to accept? Will it make money for the firm?

➢ ***PARALEGAL POINTER:*** A sound procedure for determining what cases to take is absolutely crucial to the survival of a plaintiff's law firm. As you probably know already, plaintiffs' lawyers handle almost all their cases on a contingency fee basis: no recovery, no fee. There's a saying in the real estate

industry: you make your money when you buy the property, not when you sell. It's the same in personal injury practice. Your lawyers take the cases they believe they can win or settle favorably. Conversely, your office will lose a lot of money by taking cases in which the defendant did nothing wrong (i.e., there is no liability) or where the defendant has no money with which to pay a judgment. For this reason, you must gather from potential clients enough information to enable your office to launch a competent investigation and determine if the case is worth their time.

A second goal of the first meeting is to develop an attitude of trust and confidence between the client and your office. This is indispensable to effective representation. You and the attorney you work for want to impress on the client that, if you accept the case, the client's interests will become *your* interests for purposes of the litigation. Therefore, this first consultation should leave the client feeling confident that he or she can communicate with you in a candid, unrestrained manner.

At the same time, the consultation should enable counsel (and, we hope, you) to make a preliminary assessment of the prospective client's credibility. The impression the client will make as a witness is crucial to the decision to accept or reject the case. So also is counsel's ability (or inability) to trust the person.

1.1.2 RESPONSE TO INITIAL CLIENT CONTACT

Typically, the prospective client's first contact with counsel is by telephone. It is better practice for the attorney to take the call personally. Prospective clients appreciate a show of personal concern from the outset. If they have had a chance to "break the ice" over the phone with their potential lawyer, they probably will feel more at ease during the initial office meeting. That said, many personal injury attorneys are simply too busy to talk with every potential client who calls. This is especially true with respect to firms handling a high volume of personal injury claims. That's where you come in.

➢ ***PARALEGAL POINTER:*** If you are the first person the potential client talks to, you are being entrusted with a huge responsibility. You will need to be able to decide, in a few short minutes, whether this new case is worth your lawyer's time. If an attorney gets swamped with meritless claims, she has less time to devote to the good cases in the office. Conversely, you don't want to reject a case that could be worth a substantial amount of money.

1.1.3 DETERMINE THE CLIENT'S GENERAL PURPOSE

Use the initial phone contact to learn a few basic facts about the proposed client's purpose in consulting you. Find out the type of accident the person was involved in, when it happened, who was involved, and what injuries were involved. You also must ask whether the prospective client has previously

consulted any other attorney about the claim and, indeed, whether he or she has retained another attorney. If the answer is yes, ask whether the potential client is seeking independent advice or contemplating a substitution of counsel.

➢ ***PARALEGAL POINTER:*** If the potential client has retained another attorney and is considering a substitution of counsel, dig deeper. Find out how many attorneys have represented the client in this matter. If your office takes the case, will you be the client's second lawyer or, God forbid, the sixth? The more lawyers the person has churned through, the more suspicious you should be. A client with lots of former lawyers is someone to view with deep suspicion. Equally worrisome is a client who has been representing himself. People with this kind of history may have misrepresented facts to their earlier lawyers, and those lawyers may have withdrawn once they learned the truth. The individual may be quite difficult to work with. There are many prospective clients who want to monopolize an attorney's time. They believe their case is worth millions when the best they can hope for is a few thousand dollars. They may refuse to cooperate with their attorneys, failing to appear for depositions and refusing to answer interrogatories. People with this sort of attitude are not worth your office's time, even if their cases have merit.

1.1.4 DETERMINE POTENTIAL "URGENCY" MATTERS

Injury claims often present some type of urgency, in varying degrees, that requires prompt legal advice. Your immediate concern should be with three subjects: potential time bars, the need for quick medical treatment, and the preservation of evidence. These potential time bars constitute perhaps the most important "urgency" concern, particularly if the prospective client has delayed for some time pursuing his or her legal rights. The client may have to take immediate steps to toll applicable limitations periods. You must be aware of the following four potential time bars:

1) The applicable statute of limitations (most routine cases are subject to the two-year statute; one year for defamation or false imprisonment actions), which runs from "accrual" of the cause of action (CCP §§335.1, 340(c));

2) If there is potential government entity or government employee liability, the California Government Claims Act requires a formal claim to be filed with the entity within six months of accrual of the cause of action (Gov.C. §911.2) (this rule operates independently of the statute of limitations and will bar suit against the entity if the claim is not timely filed);

3) Clients with an uninsured motorist claim are bound by a two-year limitations period, and they must give the insurer written notice that suit has been filed within a "reasonable time" after actual or constructive knowledge of the defendant motorist's uninsured status (Ins.C. §§11580.2(i)(1), 11580.23(a)); and

4) If a prospective defendant has died, a timely claim ordinarily must be filed in the deceased defendant's probate administration (Prob.C. §9000 et seq.). Like the government entity claim filing period, the Probate Code limitations period operates independently of the statute of limitations.

➢ ***PARALEGAL POINTER:*** *Do not rely on the client's statement of the date* the accident occurred – he or she might be off one or two days, and that seemingly "minor" error could end up barring the right to sue. Always verify the date by checking police reports and questioning witnesses. (This is especially important if the end of the statutory period appears near.)

➢ ***PARALEGAL POINTER:*** If you are the person who handles the initial contacts from potential clients, you should assume that the person has procrastinated before calling. Therefore, never say that you will "consider the case" and get back to the client "in a few days." Even asking the client to call back "tomorrow" can be risky. The statute of limitations may have run out by then. If that happens, your office may be open to a claim for legal malpractice. Get the crucial dates immediately, and determine if you need to do anything right away.

1.1.5 AFTER THE FIRST CONTACT

To preserve the value of the potential claim, most injury cases require some type of immediate medical attention, if for no other purpose than to create a complete record of the injuries the person has suffered. There may also be some urgency in preserving evidence of the injury producing events and instrumentalities. If too much time passes between the incident and the beginning of your investigation, a potentially valuable claim can be compromised, perhaps lost. The danger here is that crucial physical evidence might be lost or destroyed. Even if the situation is not "urgent," you should schedule an immediate in person consultation as quickly as possible, regardless of what preliminary advice is given over the phone. Most prospective clients will want to see the attorney "right away." If your office delays, the client may call another lawyer and you may lose what could have been an excellent case. In addition, time will normally be of the essence in injury cases because of the various statutory deadlines and the need to locate and save the physical evidence.

The preferred setting is normally counsel's office. However, a potential client's inability to come to the office – e.g., because of severe injuries – should not delay the meeting. If the circumstances make an office consultation impossible, make arrangements to visit the prospective client at another suitable location – even in a hospital if the situation so dictates.

➢ ***PARALEGAL POINTER:*** Do your best to schedule the appointment in a block of uninterrupted time (at least 30 minutes, sometimes an hour), with some leeway before your (or your attorney's) next scheduled commitment in the event the meeting runs over. Instruct your office to hold all your calls (or calls to the attorney) during the consultation. The prospective client will expect undivided attention and is not likely to feel that you can devote your best efforts to the case if you start off the relationship with anything less. Some people will understand that a lawyer is busy with other cases. They may not be as accepting with respect to a paralegal. Consider how you would feel during a first visit to a doctor if the physician kept getting interrupted with phone calls. You might understand if one of her other patients had just been rushed the hospital. But would you be as tolerant if, during a preliminary meeting with the doctor's nurse, that person kept stopping to take phone calls?

1.1.6 PRELIMINARY PHONE ADVICE

Although some preliminary phone advice will ordinarily be warranted, you must be careful. You are not licensed to practice law and thus cannot dispense legal advice. That means, for example, that you cannot and must not tell the person that he has a good claim or a bad claim. The most cautious approach is simply to schedule the meeting, tell the potential client to make notes of everything he remembers about the accident, and instruct him to bring to the meeting whatever documents and other items are available. Apart from scheduling the meeting, much of what you say should be concerned with preserving evidence and urging the person to seek immediate medical attention. You can also tell the potential client not to discuss the incident with anyone, especially any representative from the other side. That includes insurance investigators and adjustors. To recap:

1) ***Don't discuss the incident with the other party or that party's representative:***

A defendant may hear from an investigator from a plaintiff's law firm, and a potential plaintiff may be contacted by an investigator from an insurance company. Statements made at the time of or following the incident could be used against the person who made them as the case unfolds.

2) ***Seek immediate medical attention:***

Documentation of injuries is essential to recovery of damages, and procrastination in seeking necessary medical treatment can reduce the value of the claim. Tell the person to see a doctor even if the apparent magnitude of the injuries is not great. It is the possibility of injury that should trigger a visit to the doctor.

3) ***Memorialize the sequence of events:***

A person's memory of the incident (what happened and how it occurred) tends to fade with the passage of time. Therefore, potential clients should be advised to make written notes as quickly as possible, even before the first office interview. It does not matter if the caller is a potential plaintiff or the potential defendant. A good account of the incident, prepared before memory fades, is vital.

4) ***Take precautionary steps to preserve proof:***

Affirmative steps must be taken from the very outset to assure that essential proof is neither lost, altered, nor destroyed. Regardless of whether the potential client is going to be the plaintiff or the defendant, the person must be warned not to tamper with any potential evidence of the accident. The potential client must understand clearly the need to preserve the proof. Instructions in this regard must be specific. For example, in an automobile case, repair work should not occur until detailed photographs have been taken of the vehicle. Additionally, data should be extracted from any vehicle data recorder (e.g., "black box," "GPS," or video camera, if available). Indeed, a professional photographer, who knows what pictures to take, ultimately should do the job. Photographs of vehicles damaged in a collision may be admitted for the purpose of supporting or contesting a claim that the collision caused plaintiff's alleged injury. Foundational testimony of a biomechanical expert is not necessarily required to correlate the damage to the vehicles with injury to the vehicles' occupants; rather, the need for expert testimony is within the trial court's discretion. [*Christ v. Schwartz* (2016) 2 CA5th 440, 447-449, 205 CR3d 858, 865-866 (defense admitted photographs to show minor damage to plaintiff's vehicle was inconsistent with her allegations of serious physical injury)]

Similarly, in any product liability case, one must retain and safeguard the product, or its vestiges. If a person is the victim of a dog bite, all torn clothing should be preserved intact. In a slip or trip-and-fall case, the shoes a person was wearing become important proof and should be preserved (i.e., not worn, repaired or discarded until the claim is resolved). Finally, in cases involving foreign objects in food (e.g., nail in a submarine sandwich, a stone in the chili), both the food and the foreign object must be preserved. Tell the person not to discard the half-eaten portion, but to freeze the food. If the foreign object is still in the food, leave it there and freeze the meal. Save purchase receipts, credit card statements, and containers or wrappers in which the food came.

If the claim is for wrongful death and the decedent is or was in the coroner's custody, ask claimant to obtain any photographs (or video recordings) that the coroner's office may have taken of decedent.

To obtain such photographs, claimant must make a written request accompanied by:

- A declaration under penalty of perjury that claimant is a *legal heir* or *representative* (e.g., guardian or conservator) of decedent;

- A valid form of identification; and

- A certified death certificate. [CCP §129(a)(3)(A) (subd. added Stats. 2016, Ch. 467)]

Once suit is filed, the photographs can also be subpoenaed. [CCP §129(a)(3)(B) (subd. added Stats. 2016, Ch. 467)]

5) ***Document evidence of the injury:***

The injury itself constitutes crucial evidence. It is advisable to photograph all parts of the anatomy that reflect signs of injury before the healing process commences (and to date the photos accordingly). Valuable demonstrative evidence may be lost forever once a person's injury starts to heal. If cosmetic surgery is necessary (e.g., for burns, cuts or scars), instruct the person to have photographs taken before and after the surgical procedure.

➢ ***PARALEGAL POINTER:*** Hire a professional photographer for this purpose. Do not rely on lay photos; they could prove to be inadequate, and it may be too late at that time to capture the magnitude of the original harm. A trained medical photographer may be desirable. (If you have trouble locating such a person, contact local hospitals. Many hospitals have medical photography departments, and appointments can be arranged on an outpatient basis.)

1.1.7 WHAT TO ADVISE THE POTENTIAL CLIENT TO BRING TO THE FIRST MEETING

If you are handling the initial telephone call, tell the potential client to bring a number of items to the first meeting. Explain that the person will have to produce these items at some point during a lawsuit, and it is better for the attorney to be able to study them now. The following list includes most of the papers, materials, and other things the potential client should bring to the meeting:

1) ***Items with respect to the occurrence:***

- Names and addresses of adverse parties, and their insurance carriers.

- Names and addresses of witnesses.

- Written statements the person has already given to, e.g., police, witnesses, or the other party; or by witnesses or the other party to the potential client.

- Police or other official accident reports.

- Photographs of the accident scene and vehicles or objects involved, if any.

- All physical evidence of the accident capable of being transported (e.g., torn clothing, instruments or equipment or pictures thereof).

2) ***Items bearing on damages:***

- Medical and hospital reports.

- Medical bills.

- Repair estimates or bills.

- Documentation of lost earnings to date (e.g., statement from employer).

- Also, if claimant is an alien, you'll need to know whether he or she is documented or undocumented as this will bear on recoverable damages for loss of future earnings. This issue is decided on a motion in limine outside the presence of the jury. Defendant has the burden of proving plaintiff is an alien subject to removal. If defendant meets its burden, the burden shifts to plaintiff to demonstrate "to the court's satisfaction" that he or she has taken steps to correct removable status and lawfully remain in the U.S. [*Rodriguez v. Kline* (1986) 186 CA3d 1145, 1149, 232 CR 157, 158] If the court decides for plaintiff on the alienage issue, all evidence relating to alienage must be excluded; and plaintiff's projected earnings loss must be computed on the basis of his or her future income in the United States. [*Rodriguez v. Kline,* supra, 186 CA3d at 1149, 232 CR at 158] If defendant prevails at the hearing, evidence of plaintiff's future earnings must be limited to anticipated income in the country of his or her lawful citizenship. [*Rodriguez v. Kline,* supra, 186 CA3d at 1149, 232 CR at 158]

- Documentation of all other “out-of-pocket” expenses incurred (e.g., car rental costs, towing charges, photographer’s costs, etc.).

3) ***Automobile, homeowner’s, medical and/or disability insurance policies relevant to the accident:***

If the injury is job related, the names and addresses of the employer, workers’ compensation carrier, general contractor, etc. (In many cases, there may be a workers’ compensation claim to be made as well as a third-party claim.)

4) ***All texts and photographs stored on the client’s cell phone, as well as those of the client’s famiy, which pertain to the incident.***

Cell phone evidence is relevant and discoverable, and it may contain information crucial to the client's case.

1.1.8 DISCUSSING FEES

Simply put, this is not your concern. If your office represents plaintiffs, they probably will handle the case on a contingency fee basis. If your office represents insurance companies, the carrier will defend the person free of charge and will pay any settlement or judgment provided that 1) the amount is within policy limits and 2) the plaintiff does not prove that the potential client intentionally injured the claimant. If the caller starts asking you about fees and costs, say that you are not authorized to discuss the matter and that the attorney will discuss it fully during the first meeting. Regardless of whether the caller is a potential plaintiff or defendant, you are not authorized to make financial arrangements with a client. Moreover, even if you could do so, neither you nor your attorney has enough facts to determine exactly what is involved. Fees and costs discussions should be deferred until your attorney has had a chance to meet in person and explore the matter more thoroughly.

➢ ***PARALEGAL POINTER:*** Some plaintiffs’ offices charge an initial conference fee. If this is the case, the proposed client should be told that information during the first telephone conversation. Surprising the prospective client with a monetary demand when he or she is already at your attorney’s office will hardly get the relationship started on a note of trust and confidence. Again, however, this is a subject that an attorney, not you, should discuss.

1.1.9 FOLLOW UP WITH CONFIRMATION LETTER

No matter how sensible or intelligent the prospective client may be under normal circumstances, the stress, anxiety and physical pain caused by the

incident may well cause the person to forget much of what you say (and the advice your attorney may offer) over the phone. Consequently, if more than a few days will pass before the office meeting takes place, it is advisable to follow up the phone conversation with a letter. You can write this letter for your attorney's signature. Use it to confirm the appointment, mention the documents that should be brought to the interview and the preliminary advice your lawyer has given. (But don't mislead the prospective client into thinking that your office has accepted the case at this time.)

FORM: Letter to Claimant Confirming Consultation Appointment and Preliminary Phone Advice, *see Cal. Prac. Guide Pers. Inj. Form 1:A; see Form 1:A* in Rivera, *Cal. Prac. Guide: Civ. Pro. Before Trial FORMS* (TRG).

1.1.10 PREPARING FOR INITIAL MEETING

If you participated in the preliminary phone conversation, you should have a grasp of the prospective client's basic position. If the lawyer took the call and then asks you to prepare for the initial meeting, make sure she gives you as much information as possible, optimally all the facts conveyed by the potential client. In preparation for the meeting, consider the following information:

1) ***Preliminary research:***

The matter may be routine, of a type your office normally handles and involving an area of the law with which you are quite familiar. However, if you perceive possible unique or novel issues on which you or your lawyer are not "up to speed," it may be advisable to do some preliminary research. At minimum, brush up on the relevant statutory and case law. If there is a potential product liability claim involving a product with which you are unfamiliar, investigate the nature of the product, its manufacturer, its history of causing injury, and so on. If the claim involves medical malpractice, you may want to learn the fundamentals of the disease or condition at issue. At this stage, a search on engines such as Google (including Google Books and Google Scholar) may be all you need to do.

➢ ***PARALEGAL POINTER:*** Prepare a summary of the facts and the law that your attorney can review before the meeting. It does not have to be lengthy at this stage, but it should be enough to acquaint the attorney with the basic issues.

2) ***Initial conflict check:***

Run a preliminary conflict of interest check of the potential parties named by the prospective client in your first phone conversation. Determine whether your law firm represented any of these individuals or entities, or whether any of them consulted your office in the past. These conflicts may require your firm to decline representation of the prospective new client.

➢ ***PARALEGAL POINTER:*** Also perform a litigation check on the potential client. An Internet search may be helpful to learn more about the client's background. Whether the person is a potential plaintiff or potential defendant, you want to know if he has made, or been the subject of, personal injury claims in the past. Even if you are working for an insurance company and your attorney has to take the case in the absence of a conflict, it is good to know whether the client has been sued in the past for the conduct about which the plaintiff complains.

3) ***Will you attend:***

Don't be shy about asking your lawyer whether you will be able to sit on during the initial meeting. Some new clients will feel that the presence of a paralegal is a sign that the office will take their case seriously, that they are already assembling a "team" to handle the case. Other potential clients may feel intimidated if more than one person meets with them. Your attorney should want you there. You can take notes, and you will provide another pair of eyes and ears to help evaluate the case and the client. You may have a better sense than the attorney with respect to the impression the client will make in front of a jury.

1.1.11 CONDUCTING FIRST OFFICE CONSULTATION – GENERAL CONSIDERATIONS

The basic goal is to elicit the essential facts and then to explore the possible courses of action. After these basics are exchanged, you and your lawyer can then turn to whether this is a case your office wants to accept (and whether the proposed client would want your office to handle the claim), whether your attorney ethically can accept it, and then, if and when employment terms are agreed upon, what the first steps should be. This principle applies equally to plaintiff and defense counsel: Unless prospective clients feel that they can trust you, they will be reluctant to reveal their full story, particularly the unfavorable details. Remember that competent representation requires you to know "both sides of the story" – i.e., all the facts, pro and con. Therefore, be prepared at the first meeting to develop rapport with the prospective client. Listening patiently and saying that you recognize his or her emotional involvement in the case is time well spent.

To encourage candor, advise the prospective client that his or her consultations with you are privileged communications (Ev.C. §950 et seq.). Disclosure to the adversaries cannot be compelled even if you are not ultimately retained to handle the matter. [*Sullivan v. Sup.Ct.* (1972) 29 CA3d 64, 69, 105 CR 241, 244; *Barton v. United States Dist. Ct. for Cent. Dist. of Calif.* (9th Cir. 2005) 410 F3d 1104, 1111 (applying Calif. law)] Likewise your attorney's advice to the prospective client is protected by the attorney–client privilege even though your office has not yet been retained. [*Benge v. Sup.Ct.* (1982) 131 CA3d 336,

347, 182 CR 275, 281] The result is otherwise, however, once counsel informs the prospective client of an unequivocal decision to decline representation. Thereafter, communications between them are not protected by the attorney–client privilege because the exchange occurs outside the scope of an attorney–client professional relationship. [See *People v. Gionis* (1995) 9 C4th 1196, 1210-1213, 40 CR2d 456, 464-466] That rule applies to you as well. If your office declines the case, it is best to have no further discussions with the individual.

If you are handling the first meeting, be careful about who attends. The attorney–client privilege may be jeopardized if third persons are present during the conference unless their presence is *necessary to further the client's interest* (e.g., parent, spouse) or to facilitate communication with the lawyer (e.g., interpreter). [See Ev.C. §952 – no privilege for information transmitted in presence of unnecessary third persons; see, e.g., *Seahaus La Jolla Owners Ass'n v. Sup.Ct. (La Jolla View Ltd., LLC)* (2014) 224 CA4th 754, 776, 169 CR3d 390, 406-407]

➢ ***PARALEGAL POINTER:*** For a variety of reasons, clients may be inclined to conceal from their attorneys facts they believe may be adverse to their case. Let prospective clients know from the outset that their full candor is essential to competent and effective representation. Concealing details can backfire because almost invariably, the opposing parties will discover the unfavorable facts and use them against the client at trial.

➢ ***PARALEGAL POINTER:*** Even basic "rear-enders," "trip and falls," and other so-called "routine" cases that appear to resemble each other have their own unique facts and twists. No two cases are exactly alike, not even the simplest car accident. Don't fall into the trap of treating one case the same as another, even if they resemble each other.

➢ ***PARALEGAL POINTER:*** If you are handling the meeting, be sure to block out at least an hour for it. Do whatever you can to *avoid interruptions* at the first meeting. Interruptions not only distract you but also may cause the potential client to think you are too busy to handle his or her matter.

1.1.12 USE OF CLIENT "INFORMATION REPORT" (CHECKLIST)

Regardless of the interview methodology employed (narrative or question and answer), most attorneys also make use of a client "information report" or "checklist" to ensure that all essential information about the claimant and the claim is covered. The completed report will become a valuable reference source later on. You can consult it in preparing answers to interrogatories and in gathering documents to produce. You also can consult it in preparing discovery to send to the other side. The following are some of the topics generally covered in such a report or checklist:

1) ***Background information about claimant:*** E.g., name, address, age, marital status, dependents, employment history, earnings, medical and claim history, etc. This information is essential to proper valuation of the claim and, hence, to the decision on the amount of damages to seek.

2) ***Description of accident.***

3) ***Description of injuries*****.**

4) ***Identity of potential defendants*** **(i.e., who else was involved).**

5) ***Identity of potential witnesses*** **(i.e., who saw or might have seen what happened).**

6) ***Identity of all accident reports*****.**

7) ***Identity and scope of claimant's insurance coverage*****.**

8) ***Identity of all health care provided as a result of injury*****.**

FORM: Client Information Report, *see Cal. Prac. Guide Pers. Inj. Form 1:B; see Form 1:B* in Rivera, *Cal. Prac. Guide: Civ. Pro. Before Trial FORMS* (TRG).

➢ ***PARALEGAL POINTER:*** Whether you ask the prospective client to complete this report before commencing the interview or simply use it as a checklist guide during your meeting, it is imperative that both you and the client review the entire report together at the end of the meeting to be sure that all pertinent facts have been stated and recorded accurately. This information will become the foundation upon which you will be able to "build the case" and formulate appropriate legal advice.

➢ ***PARALEGAL POINTER:*** Some offices give their prospective client a copy of the Judicial Council Form Interrogatories and have the prospective client answer them. You might even suggest to your attorney that the client be told to verify the answers under penalty of perjury. This is an excellent way to learn information, and it carries the added benefit of saving time and reducing stress later. Regardless of whether the person will be a plaintiff or defendant, sooner or later the client will have to answer these interrogatories. The person might as well do so now. This also makes the prospective client appreciate that he or she will have various discovery obligations to fulfill during the life of the case. If the person is one who procrastinates or, worse, is not truthful, you will learn about those traits now, before your office agrees to take the case.

1.1.13 TAPE RECORDING MEETING

Instead of (or perhaps as well as) taking written notes on a checklist or information report, it may be useful to record the client's story on tape and have it transcribed later. There are pros and cons to this procedure. On the plus side, a tape recording ensures a precise record of what the client says. On the other hand, a client may be less willing to talk candidly. Tape-recorded first client interviews are normally reserved for exceptional cases.

1.1.14 OBTAINING DETAILS – INFORMATION TO ELICIT DURING INTERVIEW

1) *Claimant's account of incident:*

Every type of accident calls for a detailed account of what happened. In addition to a general account of the incident (e.g., "X broadsided me on Market Street"), obtain a detailed description of when it occurred, how it occurred, who was involved, and the surrounding circumstances. You cannot be too picky in your questioning. Cases are won or lost in the details. For example, in an interview with an auto accident claimant, consider the date and time of the occurrence. What type of vehicles were involved? How they were positioned just before impact? Was the light red or green? Was the traffic light or heavy? Did the accident happen in a residential or commercial district? Was there an obstruction in the road? How was the weather? Were there potholes in the street? Were there warning signs? What was your potential client doing just before the accident? Was the client talking on a cell phone? Drinking coffee from a mug? Listening to the radio? Typically, claimants and potential defendants alike are inclined to relay a conclusory account of what happened. You and your attorney have to make it clear that it's the facts (pro and con) that are important at this time, not the conclusions. For this purpose, you may have to direct the narration by asking specific questions such as the ones mentioned here. It is also a good idea to ask the person to draw a diagram of how the accident occurred. Confront the person with information contained in available accident reports that in any way contradicts claimant's version of how the accident occurred. A claimant's ability to provide credible explanations for these conflicts may be the pivotal factor in deciding whether to take the case.

If the case is a trip and fall, a description of the surroundings is crucial. So is a thorough account of what the claimant was doing not only just before the fall, but an hour, perhaps two hours, earlier. Had the person been drinking? What was the weather like? Was it raining or drizzling, or even misty outside? Was the claimant ever at the location before? What happened right after the fall? Who saw it happen? Did anyone talk to the claimant? If so, what did they say? If your client is the potential defendant, get a detailed account of how the area is maintained – by whom? How often? Following what procedures? Diagrams are also essential. In a trip and fall, a diagram of the location (e.g., sidewalk,

supermarket aisle) showing what was around the area can help you or an investigator ferret out evidentiary leads. In a product liability suit, a simple diagram showing how the person held, or used, or operated, the product is equally helpful. Better still is a series of diagrams showing the various steps the person took in using, handling, or otherwise dealing with the product.

2) *Who was involved:*

Next to what happened, the question of who was involved constitutes the most important facts you can elicit. Often, more than one defendant was involved. The facts of even the simplest auto vs. auto collision may implicate more than just the other driver. The governmental entity that maintained the street may become a party, if they maintained the street negligently. The engineer who designed the intersection may be involved. A property owner who allowed a tree to obscure a stop sign may be liable. Every person who had anything to do with the incident, however marginally, is a potential defendant. Failure to investigate all entities that are potentially liable could result in the claimant getting much less than he or she deserves. Even if you are going to represent a defendant, it is crucial to know who else was involved, because your client may have a claim against one or more of them. For these reasons, you and your attorney must carefully prod the potential client for this information. Consider the entire "universe of actors" – not only the obvious wrongdoers, but also those who might appear only peripherally liable. To elicit complete information, you may need to focus on where the event occurred, because, for example, the owner of the place where the accident happened may be one of the less obviously liable parties among whom fault will have to be apportioned in awarding "noneconomic damages."

If your office will be representing a defendant, make certain to nail down the number of people involved in the incident. If you are dealing with a car accident, make sure the client tells you how many people were in the other car(s). Staged car accidents are all too common. Worse, dishonest claimants (and sometimes their dishonest lawyers) have been known to present claims on behalf of individuals who had nothing to do with the accident, but later claim to have been passengers in the plaintiff's vehicle.

➢ ***PARALEGAL POINTER:*** By the same token, don't encourage your attorney to press the "universe of actors" theory to unrealistic limits. Suing a party without any legal basis to do so may expose your client and your attorney to liability. They could be sued for malicious prosecution, and they could become subject to monetary sanctions. If the sanctions exceed one thousand dollars ($1,000), the judge will have to report the attorney to the State Bar of California.

3) ***Potential client's account of injuries:***

Make sure you get a detailed account of the nature and extent of claimant's injuries to date – the type of injury, portions of the body affected, type of pain suffered, treatment currently being provided (including emergency treatment, if any, immediately following the accident). Also make sure the person gives you a detailed description of the effect of the injury on his work, personal life, and social activities. Again, this information should be documented with precision, for recollections of pain and suffering tend to blur over time. (Some attorneys record the client's account by depicting the injuries on a blank anatomy chart.) Even if your client is the defendant, get a description of the injuries your client believes each claimant sustained. Potential plaintiffs sometimes will exaggerate their injuries, and a solid account of what your client saw, and did not see, right after the accident will help refute fraudulent injury claims. Moreover, many defendants sustain injuries and may have their own claim against the potential plaintiff. That makes it important to determine early on exactly what happened. Your client may have the basis of a cross-complaint against the plaintiff, against someone else, or against both the plaintiff and other responsible parties.

4) ***Medical and claim history:***

Review claimant's complete medical history to ascertain whether there is any relationship between present and past injuries or illnesses. Try to determine whether claimant's present condition might be a reoccurrence of an earlier injury, or whether a preexisting condition might have been aggravated by the present injury. In addition, ask about any prior bodily injury claims that claimant has filed, related or unrelated to the current incident, and the status of these claims (nature of claim, parties involved, and, if resolved, the manner in which the claim was resolved including the amount of settlement or judgment). If claimant testified or gave a deposition or statement in another proceeding in regard to such claim, this event should be carefully recorded and investigated. Again, even if your office is going to represent the defendant, it is essential that you obtain this information.

➢ ***PARALEGAL POINTER:*** Emphasize the importance of talking candidly about earlier claims and medical history. If your office represents plaintiffs, the adversary likely will be an insurance company with access to large databases containing information about the claimant's medical history and earlier claims. It is quite possible that the other side will contend that a preexisting physical condition was the actual cause of claimant's present disability. Your attorney must be prepared to combat that argument.

5) ***Employment and earnings history, including lost earnings to date:***

Review the person's employment history and future employment prospects – e.g., possible promotions and new employment opportunities on the horizon which may be in jeopardy because of the accident. Also, inquire into the amount of time claimant has lost from work due to the accident, whether unreimbursed or reimbursed time. Often, even reimbursed lost time will be an item of compensable damages (e.g., lost vacation or sick leave time). When you discuss the claimant's earnings, find out whether he or she is currently receiving (or planning to apply for) public assistance benefits. A personal injury award may disqualify the claimant from continued public assistance eligibility. Even if you are working for defense counsel, get this information. If it appears both sides sustained similar injuries, the claimant says he can't work for three months, but your client went right back to work, that might help show that the claimant is exaggerating his injuries.

6) ***Review Applicable Insurance Coverage:***

Regardless of which side your office may represent, ask about the existence, terms and conditions of insurance coverage not only for your potential client but also for the adverse party. Don't take the person's word for it. Insist on seeing copies of the policies and review them carefully. Your concern should focus, at minimum, on the claimant's insurance coverage, the adverse party's (parties') insurance coverage, and the existence of any workers' compensation claims.

a) ***Your client's own insurance:***

Should you accept the case on behalf of a potential plaintiff, it will normally be your duty to pursue any injury related claim the client may have. This includes claims under the client's own insurance policies, such as uninsured/ underinsured motorist, reimbursement for medical bills, disability benefits, workers' compensation, and the like. Policies should be reviewed for applicable medical pay coverage. If the case involves, or may involve, an uninsured motorist, check the claimant's automobile insurance policy for applicable uninsured motorist and/or underinsured motorist coverage. If the claimant has waived UM coverage, there might not be a viable source from which to satisfy a damages recovery. You also have to think about the impact of medical liens, or rights of subrogation on your client's potential recovery. Some insurance policies (e.g., Kaiser) cover the insured's medical bills, but give the carrier a right of reimbursement from the insured-claimant in the event of recovery from a third party. Such medical liens (or rights of subrogation) reduce the net value of the potential claim. This may make legal action economically impractical. The decision to proceed is, of course, not yours to make, but if you see this situation arise, you should mention it to your attorney. Apart from this situation, your

client's medical expense recoveries from her own insurance carriers generally will not reduce defendant's liability. This is known as the "collateral source rule," which provides that a defendant's liability is not reduced by claimant's medical expense recoveries from claimant's own insurance carriers. There are exceptions (Civ.C. §3333.1) re professional negligence actions against health care providers, and Gov.C. § 985 re government entity defendant's right to "verdict adjustment" to reflect collateral source benefits).

Note, however, that in professional negligence cases against health care providers, the collateral source rule has been partially abrogated. [Civ.C. §3333.1; BAJI 14.10, "Use Note"; *Barme v. Wood* (1984) 37 C3d 174, 207 CR 816; *Canister v. Emergency Ambulance Service* (2008) 160 CA4th 388, 408, 72 CR3d 792, 807 (disapproved on other grounds by *Gutierrez v. Tostado* (2025) 18 C5th 222, 241, 335 CR3d 36, 49); *Cox v. Sup.Ct. (Shields)* (2002) 98 CA4th 670, 673-674, 120 CR2d 45, 47]

Remember that all insurance companies owe their insureds an implied duty of good faith and fair dealing (see generally, *Gruenberg v. Aetna Ins. Co.* (1973) 9 C3d 566, 108 CR 480). Should the carrier fail to honor its implied contractual obligations to your potential client (e.g., unreasonable refusal to pay medical benefits under the terms of the policy; unreasonable refusal to defend; delay in negotiating reasonable settlement "without proper cause"), the insured may have an independent "breach of implied covenant" cause of action against the carrier (for emotional distress and other consequential damages and, in an appropriate case, punitive damages). Keep this point in mind even if your office will be representing the defendant. Suits for "bad faith" against an insurance company are beyond the scope of this book. The topic is discussed extensively in Croskey, Heeseman & Erlich, *Cal. Prac. Guide: Insurance Litigation* (TRG), Ch. 12.

Your client's insurance also may include uninsured motorist coverage (UM). If the case involves any form of traffic or automobile collision, ask your client if he or she has UM, and in any event, carefully check your client's auto insurance policy.

b) *Adverse party's insurance:*

Next, your potential client may have information about what insurance the adverse party has. This is particularly likely in car accident cases because the parties would have been required to exchange this information. The Financial Responsibility Law requires California vehicle owners and drivers to carry in the vehicle evidence of financial responsibility, usually a certificate of insurance. [Veh.C. §16020] Assuming the people involved in the accident did what they were supposed to do, your potential client should have at least the name of the carrier, the policy number, and the dates of coverage and expiration. Even if the incident was not an auto accident, ask whether the person has any information

about insurance coverage for anyone else who was involved in the incident. Even if you represent an insured defendant, this material is still good to have with respect to the potential plaintiff. Obtaining this information at the first consultation will equip you to begin investigating the potential for a third party damages recovery.

c) *Workers' Compensation claims and benefits:*

If the claim involves an on-the-job injury, the client will have to be advised of rights and remedies under the workers' compensation law (Div. 4 of the Labor Code, §3200 et seq.) and how this may impact the value of related claims against third parties (other than the employer). An injured worker's remedies against the employer or a co-employee are (absent narrow exceptions) solely under the workers' compensation law. There is no "common law" action against the employer or a co-employee because, as a general rule, workers' comp is the exclusive remedy for injury or death of an employee occurring in the course and scope of employment. [Lab.C. §§3600, 3601; and see generally, *Jones v. Kaiser Industries Corp.* (1987) 43 C3d 552, 556, 237 CR 568, 570-571] The California workers' compensation law is basically a scheme of employer liability without fault. In most cases, liability is conceded and the carrier begins making appropriate payments. When there is a dispute (e.g., over benefits coverage), the claim is handled administratively, through the Workers' Compensation Appeals Board. However, all final decisions of the WCAB are subject to appellate court review (Lab.C. §5950 et seq.); and the WCAB and civil courts have concurrent jurisdiction to determine jurisdiction – i.e., whether the claim is subject to the workers' comp law (as where issue is whether employment relationship existed at time of the injury so as to trigger the workers' comp "exclusive remedy" rule). [See *Scott v. IAC* (1956) 46 C2d 76, 84-88, 293 P2d 18, 23-25]

The workers' comp exclusive remedy rule does not prevent the employee from suing a third party responsible for the injury. An independent civil action seeking traditional tort damages against the third party may be prosecuted separately from and simultaneously with the workers' comp claim. [Lab.C. §§3601 (suit against coemployee) & 3852 (suit against nonemployee); see also *Nichols v. Keller* (1993) 15 CA4th 1672, 1683-1686, 19 CR2d 601, 607-609 – lawyer retained for limited purpose of handling workers' comp claim also owes duty to advise client of related third party tort claims]

1.2 AFTER THE INITIAL INTERVIEW

After the first interview, you and your attorney should be able to place the claim into one of three categories: The first includes cases that have no merit. Naturally, your office should immediately reject these. Law firms are in business to make a profit, and meritless lawsuits are a sure fire route to financial ruin. Cases belong in this category for any of several reasons. For example, the

claimant may be totally at fault (e.g., the person ran a red light or was following too closely). The statute of limitations may have run out or the potential defendant has statutory immunity from liability.

Meritless cases like these must be turned down, not only because they are unprofitable, but because your attorney has a legal and ethical obligation to decline such cases. Lawyers have a duty to maintain only such actions "as appear to him or her legal or just ... " [Bus. & Prof.C. §6068(c)] Moreover, the Rules of Professional Conduct forbid accepting a case (or conducting a defense) "without probable cause and for the purpose of harassing or maliciously injuring any person" and also require attorneys to refrain from presenting any claim or defense that is "not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification or reversal of such existing law." [CRPC 3.1(a) (formerly CRPC 3-200); see *Finton Const., Inc. v. Bidna & Keys, APLC* (2015) 238 CA4th 200, 204, 190 CR3d 1, 5 – "we remind ... all attorneys ... that while they owe their clients a duty to zealously represent them, that zealousness does not trump the duty they owe the courts and the judicial process to prosecute only lawsuits with merit"]

Counsel's obligation to decline nonmeritorious actions prevails over the duty of "zealous" representation of the client's interests. Therefore, an attorney who declines representation (or withdraws from a case) in the good faith belief that it lacks merit ordinarily is not liable for legal malpractice should it later develop that the claim was in fact legitimate and the attorney's belief was mistaken. [*Kirsch v. Duryea* (1978) 21 C3d 303, 309, 146 CR 218, 222]

On the other hand, an attorney who takes a meritless case and proceeds to file a lawsuit that lacks a legal or factual foundation risks both disciplinary action and monetary sanctions. Similarly, pursuing a claim without "probable cause," resulting in a judgment against plaintiff, presents potential liability for the lawyer as well as the client – for malicious prosecution. [See *Siebel v. Mittlesteadt* (2007) 41 C4th 735, 740, 61 CR3d 155, 158; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 C4th 260, 292, 46 CR3d 638, 663; *Silas v. Arden* (2013) 213 CA4th 75, 89, 152 CR3d 255, 266] Even an attorney whose name appears on the pleadings as a counsel of record may be liable for this tort even though he or she, as associated counsel, never personally signed any pleading, took no active role in the case and relied upon the active cocounsel in assessing the merits of the case. It is vital that before one agrees to become an attorney of record, an attorney should be familiar with the client's claims and make a preliminary determination that probable cause exists. [*Cole v. Patricia A. Meyer & Assocs., APC* (2012) 206 CA4th 1095, 1115-1120, 142 CA3d 646, 663-666; *Sycamore Ridge Apts. LLC v. Naumann* (2007) 157 CA4th 1385, 1407-1411, 69 CR3d 561, 579-582]

➢ ***PARALEGAL POINTER:*** If your office has been asked to associate in on a case, suggest to your attorney that she not appear as counsel of record until she is actually needed in the case, e.g., counsel associated in for trial purposes. [*Cole v. Patricia A. Meyer & Assocs., APC,* supra, 206 CA4th at 1119, 142 CA3d at 666]

1.2.1 PROMPTLY CONFIRM REJECTION IN WRITING

Perhaps the most common reason for attorney discipline and malpractice liability is the attorney's failure to perform the services for which he or she was retained. An equally serious malpractice trap is the attorney's failure to clearly communicate to the client his or her decision not to take the case. Indeed, many disciplinary proceedings and malpractice suits are based on allegations that counsel orally agreed to prosecute a claim but failed to commence suit within the statutory period. [See generally, *Gary v. State Bar* (1988) 44 C3d 820, 244 CR 482] Therefore, your attorney's decision not to represent a prospective client (for whatever reason) should immediately be documented in a letter sent to the prospect by certified or registered mail with return receipt requested. In addition, if the prospective client is a "referral," send a copy of that letter to the referring attorney. The letter should both confirm your office's rejection of the case and put the prospective client on notice of all potentially applicable time bars (statutes of limitations, government entity claim filing period, probate creditor claim filing period, etc.). [See, e.g., *Davis v. State Bar* (1983) 33 C3d 231, 188 CR 441 – miscommunication over whether attorney agreed to represent client resulted in attorney's suspension for failure to prosecute claim within limitations period]

➢ ***PARALEGAL POINTER:*** If you know your office is turning down a case on which you were active, don't hesitate to ask your attorney if she has written a rejection letter. If the answer is no, offer to draft one for the attorney's signature. The office where you work may have such form letters on file and may ask you to adapt them to the particular case and client who is being turned down. If you get such an assignment, do it immediately. Do not sign the letters yourself. The communication should come from the attorney. However, you should proofread the letter to make sure it references the right case, is going to the right client, and contains accurate information regarding time deadlines.

You and your attorney should also bear in mind that the statutory duty to communicate regularly with a "client" includes both actual clients and those who think they are clients, "at least to the extent of advising them that they are not clients." Your attorney's initial consultations with a prospective client may have led him or her to reasonably believe that your office agreed to handle the case. In this event, your lawyer has an affirmative obligation promptly to set the record straight. [See *Butler v. State Bar* (1986) 42 C3d 323, 329, 228 CR 499, 503 – attorney who was disciplined for (among other things) failure to communicate with clients could not defend on ground that he never agreed to represent them, since he led them reasonably to believe he had taken the case on their behalf]

Even your activity as a paralegal may lead a potential client to believe that your office agreed to take the case. For that reason, you must be very careful about what you say to a potential client. Always make it clear that you are not the person who will decide whether to accept the case. That responsibility rests with the lawyer.

However, once a person consulting an attorney for legal advice *actually secures* that advice, a prima facie relationship of attorney and client is established. The absence of a formal retainer agreement between the attorney and client is of no consequence. [See *People ex rel. Dept. of Corps. v. SpeeDee Oil Change Systems, Inc.* (1999) 20 C4th 1135, 1148, 86 CR2d 816, 825; *National Grange of Order of Patrons of Husbandry v. California Guild* (2019) 38 CA5th 706, 716, 250 CR3d 705, 715]

Avoid expressing an opinion about the merits of the case; but even if you sincerely think there is "no liability," urge your attorney to advise the prospective client (*in writing*) to contact other counsel immediately if he or she is still interested in pursuing the matter. The letter should emphasize that the potential client should not delay seeking other legal advice because the statute of limitations is still running on the claim.

FORM: Employment Rejection–Confirmation Letter, *see Cal. Prac. Guide Pers. Inj. Form 1:C; see Form 1:C* in Rivera, *Cal. Prac. Guide: Civ. Pro. Before Trial FORMS* (TRG).

1.2.2 COMPARE – WITHDRAWAL AFTER ACCEPTING REPRESENTATION

Sometimes a case is accepted because at first blush it appears to have merit, but further investigation reveals legal impediments to the attorney's continued representation. Examples would include new facts that show the claim lacks merits or facts that would lead to a conflict of interest if the lawyer took on the case. Having agreed to commence legal proceedings on the client's behalf, the attorney may not simply walk away from the matter. An attorney's failure to perform services for which he or she was retained constitutes a serious ethical violation (CRPC 1.0(a) & (b)(1)), as is any improper withdrawal from employment (CRPC 1.16(d) (formerly CRPC 3-700(A)(2)). [See *King v. State Bar* (1990) 52 C3d 307, 276 CR 176; *Hickey v. State Bar* (1990) 50 C3d 571, 268 CR 170; also see *Johnson v. State Bar* (1993) 12 CA4th 1561, 16 CR2d 6 – attorney's failure to refund retainer after concluding client's case had no merit constituted "dishonest conduct" under State Bar Rules]

Thus, attorneys who wish to withdraw after having accepted representation must take proper steps to terminate the relationship. If a lawsuit has been filed, counsel must arrange for a substitution of attorney or obtain a court order (after notice to the client) allowing them to withdraw as attorneys of

record. [See Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 9 Part I] Regardless of whether withdrawal is consensual or pursuant to court order, withdrawing counsel owe their clients a written explanation.

➢ ***PARALEGAL POINTER:*** Again, write a letter for your attorney's signature confirming the withdrawal, and send it by certified or registered mail, return receipt requested. If a lawsuit has not yet been commenced (so that no formal substitution of attorney is required), advise the client to immediately contact another attorney if he or she is still interested in pursuing the claim. Also, warn of all applicable time bars on the claim.

1.2.3 CASE WITH CLEAR VALUE WARRANTING LEGAL ACTION

Sometimes the initial interview discloses the case is so good that the decision to take it need not await a preliminary investigation. That means a fee agreement can be executed immediately. Again, your attorney will present the agreement to the client and obtain the needed signatures. Depending on how your office delegates tasks, you may be in charge of knowing where these agreements are (e.g., in what computer file, in what form file). On the other hand, the first interview may disclose the case has only potential value; the decision to accept or reject employment will have to be deferred pending further investigation of the claim. For instance, counsel may want to wait to obtain additional medical reports, to contact certain witnesses, or to inquire into the adverse party's insurance coverage. If the case falls into this category, make it clear to the claimant, by written confirmation letter signed by the attorney, that your office is simply undertaking the limited duty of further investigation and is not yet agreeing to prosecute the claim or to form an attorney–client relationship. Failure to follow this practice could subject counsel to malpractice claims. If the investigation will cost money, the letter should also estimate the amount and confirm that the claimant will be responsible for it.

FORM: Letter Confirming Limited Investigation Undertaking, *see Cal. Prac. Guide Pers. Inj. Form 1:D; see Form 1:D* in Rivera, *Cal. Prac. Guide: Civ. Pro. Before Trial FORMS* (TRG).

➢ ***PARALEGAL POINTER – Filing May be Required to Toll Time Bars:*** Time may be a factor. If the case has potential merit, suit may have to be filed to toll the statute of limitations. You may not have the luxury of awaiting results of a preliminary investigation and can always advise the client to dismiss without risk of sanctions for filing in "bad faith."

1) *Statute of limitations:*

If the statute of limitations is about to run, there may not be sufficient time to conclude a preliminary investigation before determining whether to file suit. In this case, a complaint should be filed to toll the limitations period, naming

fictitious parties ("Doe's") with appropriate charging allegations. So long as you have a good faith belief in the validity of your client's claim at the time of filing and you defer service of the complaint until you're confident of the merits of the action, there is no risk of sanctions. However, you must keep in mind that prolonged delay in serving the complaint risks "mandatory dismissal" under the CCP § 583.210 three-year time limit, which may be shortened to as little as 60 days under "fast track" rules! [See Gov.C. §68616(a)]

2) *Government entity claim filing period:*

Likewise, if a government entity could be a potential defendant, advise claimant about the six month claim filing deadline under the California Government Claims Act (Gov.C. §911.2). It may be necessary to accept representation simply for the purpose of filing such claim, with the understanding that your office is not yet agreeing to employment for purposes of prosecuting an eventual lawsuit.

1.2.4 FACTORS TO CONSIDER IN MAKING DECISION

Deciding whether to take a case requires an analysis of the following factors:

1.2.4.1 LIABILITY V. DAMAGES

Each defendant's liability for *noneconomic* damages must be *apportioned* according to the respective defendant's *percentage of fault* – i.e., *several*, not joint and several, liability. [Civ.C. §1431.2(a); *B.B. v. County of Los Angeles* (2020) 10 C5th 1, 8, 267 CR3d 203, 208; *Evangelatos v. Sup.Ct. (Van Waters & Rogers, Inc.)* (1988) 44 C3d 1188, 246 CR 629; *DaFonte v. Up-Right, Inc.* (1992) 2 C4th 593, 604, 7 CR2d 238, 245 – Civ.C. §1431.2]

The probability of establishing third-party liability and the extent of claimant's damages *both* contribute to the claim's value. And, the apparent value of the claim is usually the decisive factor in determining whether or not it should be pursued. Consider these points: First, any claim – even if it involves substantial injury – will be valueless if there is no reasonable possibility of establishing compensable liability against someone else who can afford (or whose insurance company can afford) to pay. Moreover, in cases to which Proposition 51 Civ.C. § 1431.2 applies, pinpointing all of the specific wrongdoers responsible for the injury is crucial. Even if the client has a clear liability case, each defendant's responsibility for noneconomic damages will be limited to his or her percentage of fault (no joint and several liability for "noneconomic" damages). Thus, counsel must evaluate issues of who is at fault among the entire "universe of actors," and the odds of establishing liability against each of those responsible – in other words, what evidence will be available to prove each defendant's fault. Next, you and your attorney have to evaluate the chance of collecting on any

judgment you win for the client. Even if the case presents clear liability and substantial injury, if the defendant has no insurance and no assets, there's probably no reason to waste your time. The effort will produce no value if the potential defendants do not have insurance coverage or other means by which to satisfy a judgment.

1.2.4.2 EXTENT OF DAMAGES

The economics of bodily injury litigation (costs of investigation and discovery, expert's fees, etc.) may determine whether it is worthwhile to prosecute a claim that is worth only minimal damages – i.e., where a damages recovery would, in effect, only slightly exceed (or even fall below) the litigation costs. Thus, before making the employment decision, counsel should be sure that the damages suffered sufficiently contribute to the value of the claim to merit legal proceedings. Of course, this is not to discount the merits of a "low-value" claim for settlement purposes. Normally, barring statute of limitations problems, your office should explore settlement even before a lawsuit is filed; indeed, most routine injury cases will settle whether or not a lawsuit is filed. However, when the damages are very minimal, it may not be worthwhile for the client to hire an attorney to negotiate a settlement because, once attorney fees are deducted, the client may end up getting nothing (or at best a pittance) out of the settlement proceeds.

➢ ***PARALEGAL POINTER – Balancing Liability and Damage Factors:*** In making a realistic valuation of the claim, the liability and damage factors usually cannot be judged in a vacuum. Rather, an effective approach is to weigh the probability of establishing liability against the extent of damages incurred:

- If liability is clear and claimant has sustained significant injury, the claim has potential value and should be pursued.

- If liability is questionable, but damages are severe, the case might have value. Substantial consideration should be given to the merits of the claim before an employment decision can be made.

- If liability is highly speculative and damages are slight, the case probably has little value and should not be pursued (unless, of course, an offer of settlement has been received).

1.2.4.3 LIABILITY RISKS FROM PURSUING MERITLESS SUIT

Lawyers are legally and ethically bound not to pursue meritless litigation. They risk incurring personal liability and sanctions if they do so. Attorneys who pursue a claim that has no merit expose themselves to suits for malicious

prosecution and abuse of process. They also open themselves to motions for sanctions.

Further, the Rules of Professional Conduct forbid accepting a case (or conducting a defense) "without probable cause and for the purpose of harassing or maliciously injuring any person"; and also require attorneys to refrain from presenting any claim or defense that is "not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification or reversal of such existing law." [CRPC 3.1(a) (formerly CRPC 3-200); see *Finton Const., Inc. v. Bidna & Keys, APLC* (2015) 238 CA4th 200, 204, 190 CR3d 1, 5 – "we remind . . . all attorneys . . . that while they owe their clients a duty to zealously represent them, that zealousness does not trump the duty they owe the courts and the judicial process to prosecute only lawsuits with merit"]

CCP § 128.5 authorizes the court to order a party, the party's attorney, or both, to pay another party's reasonable expenses, including attorney fees, incurred as a result of "bad-faith" or tactics that are "frivolous or solely intended to cause unnecessary delay." For this purpose, "frivolous" means "*totally and completely without merit* or for the *sole purpose of harassing* an opposing party." [CCP §128.5; see CCP §128.5(a), (b) (emphasis added)] [*Marriage of Sahafzadeh-Taeb & Taeb* (2019) 39 CA5th 124, 134-136, 251 CR3d 610, 617-619]

➢ ***PARALEGAL POINTER:*** The chances are good that someday you will meet a prospective client who is indignant and self-righteous, the kind of person who "demands" that suit be filed "at once." Regardless of how badly your office may need new business, no attorney should give in to such demands without considering the merits of the claim. If you find yourself working for a lawyer who gives in to this sort of pressure, you should seriously consider changing jobs.

1.2.5 ARE PARALEGALS LIABLE FOR ASSISTING ON MERITLESS CLAIMS?

The authors are unaware of any published cases holding a paralegal liable for helping an attorney who maliciously prosecutes a lawsuit or makes a frivolous motion. That does not mean it will never happen. A paralegal is the agent of the lawyer or law firm that employs him, and in California an agent is generally liable "when his actions are wrongful in their nature" (Civ.C. §2343(3)), which means essentially when the agent's acts constitute a tort. That is exactly what malicious prosecution and abuse of process are. If you face a situation in which an attorney insists that you help in a lawsuit that you believe has no merit, don't to it. Politely refuse to work on such a matter and be prepared to explain why. A good reason may convince the attorney to stop what could be a serious blow to his or her assets as well as his or her reputation.

1.2.6 COMPARE – NO SANCTIONS FOR GOOD FAITH FILING OF SUIT TO TOLL STATUTORY TIME BARS

If the applicable limitations period is about to run, the risk of sanctions should not dissuade counsel from accepting and filing suit on a potentially meritorious case simply because preliminary investigations are not yet completed. The good faith filing of a suit without serving the complaint should not draw sanctions. This step will "buy time" pending further claim analysis. Service may be effected after preliminary investigations pinpoint likely liability; or, upon a later determination that there is no viable cause of action and the suit can be dismissed before defendant suffers any palpable injury from the meritless filing. [See *Atchison, Topeka & Santa Fe Ry. Co. v. Stockton Port Dist.* (1983) 140 CA3d 111, 115, 189 CR 208, 211 – P acted reasonably in filing but not serving complaint as precautionary measure to avoid running of limitations period; also see CCP §128.7(b) – attorney must make inquiry "reasonable under the circumstances"]

1.2.7 IMPACT OF PROP. 51

In multi-defendant cases to which Civ.C. § 1431.2 (Proposition 51) applies, this factor is especially significant. The defendants cannot be held jointly and severally liable for "noneconomic" (general) damages; each defendant's noneconomic damages liability is limited to his or her proportionate fault in causing plaintiff's injuries. As a result, plaintiff cannot look only to the "deep pocket" defendants to satisfy a damages recovery. Counsel must evaluate each responsible defendant's likely financial ability to satisfy a judgment – including those peripheral or marginal players (tortfeasors) who in the past might not have been sued. Hence, if the major wrongdoer who is clearly liable has no insurance and little money, the value of plaintiff's claim may be negatively affected. This becomes especially true when "pain and suffering" and other general damages make up the bulk of the recovery.

➢ ***PARALEGAL POINTER:*** Unfortunately, the prospective defendants' financial responsibility – and sometimes even their identities – cannot always be readily ascertained. The decision whether to pursue the claim will have to be made without this information. When this occurs, lawyers often call on paralegals to conduct the research that is necessary to determine the exact names of the responsible parties. That is one reason why you should become thoroughly familiar with the public records that are available and how to access them. You should also develop a working knowledge of the (relatively simple) steps to follow in making a request under state and federal Freedom of Information Acts. Finally, since not everything is available on the Internet (at least not yet), become familiar with your local libraries.

1.2.8 CLAIMANT'S PERSONALITY

Counsel's evaluation of the claimant also should play a role in the employment decision. If there is a personality conflict, or if counsel doubts claimant's credibility, an attorney–client relationship probably will be unmanageable. Moreover, it is often hard to hide one's negative reaction to a client. Little nonverbal cues may result in counsel's negative feelings "leaking" to the adversary during settlement negotiations, or to a jury during trial. If this happens, it will detract from the claim's potential value.

1.3 COMPLICATIONS OF CASE

1.3.1 COSTS

By their very nature, some cases can be handled competently only through substantial outlays of time and money. And, in many cases, counsel will have to advance substantial upfront costs for an indefinite period of time. Counsel who are not prepared to spend the time and incur the necessary expenses for effective representation should either reject the case or refer it to another competent attorney. One such example is a product liability defective design case against a major corporation. Winning such a lawsuit requires the employment of numerous experts, the purchase of an identical or similar product for testing, attendance at numerous depositions, review of documents (including but not limited to e-mails and computer files) that may number in the thousands, and a substantial amount of time propounding and responding to interrogatories. Moreover, if the case cannot be settled, these kinds of trials can easily last up to two months or longer; and if judgment is rendered in claimant's favor, there might be an appeal, involving further work and delay of at least two years. The costs of experts, discovery and court fees alone can be exorbitant.

1.3.2 COMPETENCE; ASSOCIATING SPECIALISTS AND CASE REFERRAL

Attorneys should never accept a case they are not competent to handle. Attorney competence is policed by the State Bar; and, apart from risks of professional discipline (suspension or disbarment), there is serious malpractice exposure should a lawyer lack the expertise to handle a client's otherwise meritorious claim or defense. [*Horne v. Peckham* (1979) 97 CA3d 404, 414-415, 158 CR 714, 720 (disapproved on other grounds in *ITT Small Business Finance Corp. v. Niles* (1994) 9 C4th 245, 256, 36 CR2d 552, 559); *Lewis v. State Bar* (1981) 28 C3d 683, 170 CR 634] This is where you may be able to help. There are occasions when a paralegal who is particularly experienced and knowledgeable in personal injury litigation (e.g., a person who has worked extensively in a firm handling such cases) can educate the lawyer and make it possible for the attorney to accept a case that the office would otherwise have to

reject or refer elsewhere. A knowledgeable paralegal may help the attorney acquire sufficient learning and skill in the personal injury field.

Paralegals may also allow attorneys to accept more matters than they otherwise could. Even if a lawyer is well skilled to perform the job for which they are retained, they still risk "incompetent" representation if they take on more work than they can reasonably expect to handle in light of their existing caseload. Neglecting one's duties and failure to perform appropriate legal services (e.g., serving complaint, conducting relevant discovery and settlement negotiations) are not excused by the fact counsel may be burdened with a heavy caseload. [See *McMorris v. State Bar* (1981) 29 C3d 96, 99, 171 CR 829, 831 – client neglect not mitigated by attorney's "busy practice"; and, e.g., *Calvert v. State Bar* (1991) 54 C3d 765, 782, 1 CR2d 684, 693 – continuing representation despite insufficient time to devote to case warrants discipline; *Harris v. State Bar* (1990) 51 C3d 1082, 275 CR 428 – attorney's careless pleading of wrongful death complaint (failure to name all appropriate heirs as plaintiffs) and failure to conduct appropriate discovery and pursue timely settlement caused substantial diminution in value of case] Paralegals can help an attorney handle a larger volume of cases. They can make the office run more efficiently. A paralegal who is experienced in the field can help prevent mistakes and check for errors. That said, the attorneys with whom you work still have to supervise your work. The duty of "competent" representation cannot be "passed off" to subordinates: Counsel is ultimately responsible for your work. [See "Discussion" following CRPC 1.1 (a), (b) (formerly CRPC 3-110(A)); *Farnham v. State Bar* (1988) 47 C3d 429, 445, 253 CR 249, 258 – failure to perform legal services not mitigated by attorney's "lack of management skills"; *McMorris v. State Bar*, supra, 29 C3d at 99, 171 CR at 831 – attorney misconduct not mitigated by failure to secure adequate secretarial help]

1.3.3 FEE SHARING WITH SPECIALIST

Often, competence problems can be solved by associating a specialist and negotiating a fee sharing agreement which gives the associated lawyer a percentage of the contingency fee if the claim is successfully resolved (by settlement or judgment). (E.g., the agreement might allocate 1/3 to the referring attorney and 2/3 to the specialist.) This kind of fee splitting with a lawyer who is not counsel's "partner" or "associate" is ethically permissible even if counsel does not perform services proportionate to his or her fee share so long as*:*

- The client consents in writing to employment of the lawyer after full written disclosure that a division of fees will be made and of the terms of such division; and

- The total fee is not increased solely by reason of the fee-splitting arrangement. [CRPC 1.5.1(a) (formerly 2-200(A); see *Cohen v. Brown* (2009) 173 CA4th 302, 320, 93 CR3d 24, 38-39

– client consent may be obtained after attorneys enter into fee-split agreement and perform services so long as obtained before actual "division" of fees]

Although no particular form of client consent is required, the client must *expressly consent* to the fee split. The client's mere acknowledgment of the fee split is insufficient. [*Reeve v. Meleyco* (2020) 46 CA5th 1092, ___, ___ CR3d ___, ___ (2020 WL 1429362, *2-3)]

FORM: Confirmation and Consent Letter to Associate Specialist and Divide Fees, *see Cal. Prac. Guide Pers. Inj. Form 1:E; see Form 1:E* in Rivera, *Cal. Prac. Guide: Civ. Pro. Before Trial FORMS* (TRG). (This client consent letter can also be incorporated in the employment/retention agreement.)

1.3.4 TIME BAR PROBLEMS

Time may be a factor. If the case has potential merit, your office may have to file suit immediately in order to toll any statute of limitations that is about to run. You may not have the luxury of awaiting results of a preliminary investigation. If the eventual results show no merit to the claim, you can always advise the client to dismiss without risking sanctions for filing in "bad faith." At the very least, if a potential government entity defendant is involved, a formal claim must be filed post haste. The claim is due six months after the cause of action accrues (normally, the date of the injury). If too much time has lapsed, diligence is required to obtain leave to file a late claim. Absent compliance, the government entity cannot be sued, and it won't make any difference what your investigations ultimately reveal.

1.3.5 SUBROGATION RIGHTS AND LIENS

The existence of liens and subrogation rights may reduce a claim's potential value and for this reason should be considered in evaluating the desirability of pursuing a damages suit. This area of the law can be intricate. At this point, we just want you to be sensitive to the overall concept. Essentially, other persons and entities may have first call on whatever the potential client recovers. Sometimes these rights will consume all the money the case is worth, even if your attorney "wins big." In these situations, your attorney may decide the case is not worth pursuing.

There are several types of liens and subrogation rights that can be asserted. First, medical providers may assert a lien on your potential client's recovery for services rendered in treating the person's injuries. Ordinarily, such liens are contractual – i.e., granted expressly by the patient or the plan or policy under which the services are rendered. [See *Nager v. Allstate Ins. Co.* (2000) 83 CA4th 284, 291, 99 CR2d 348, 352-353; *Kaiser Found. Health Plan, Inc. v. Aguiluz* (1996) 47 CA4th 302, 305-308, 54 CR2d 665, 666-668 (disapproved on

other grounds in *Snukal v. Flightways Mfg., Inc.* (2000) 23 C4th 754, 775, 98 CR2d 1, 19, fn. 6)]

Second, insurers have a right to assert liens against what a claimant may recover. As earlier indicated, workers' compensation carriers have statutory reimbursement/lien rights for benefits paid directly to, or on behalf of, the insured claimant (or the insured decedent in a wrongful death action). Specified health benefits trusts for California peace officers may assert a lien against a settlement, arbitration award or judgment for medical benefits paid on behalf of a "participant" who was injured by a third party tortfeasor. "Participant" includes a peace officer, family member or annuitant who is a member of the trust. [Gov.C. §§22891, 22892(a)]

Third, to the extent an insured receives benefits from his or her insurer on account of the injury, the policy may require the insured to reimburse the insurer. [See *21st Century Ins. Co. v. Sup.Ct. (Quintana)* (2009) 47 C4th 511, 518, 98 CR3d 516, 520-521; *Farmers Ins. Exch. v. Smith* (1999) 71 CA4th 660, 664-673, 83 CR2d 911, 913-919 – insurer's contractual reimbursement right did not itself create a lien enforceable against an attorney who received insured's settlement proceeds] Sometimes known as the "made whole" rule, this right ordinarily precludes an insurer from demanding reimbursement unless the insured has been fully compensated for his or her injuries. (The insured's payment of attorney fees is not taken into account when determining whether the insured has been "made whole.") Thus, the fact the insurer paid the insured for a portion of his or her damages will not necessarily decrease the insured's recovery. [*21st Century Ins. Co. v. Sup.Ct. (Quintana)*, supra, 47 C4th at 519, 527-528, 98 CR3d at 521-522, 528-529 – "made whole" rule does not require automobile insurer to forego recoupment of $1,000 "med-pay" where insured paid over $2,000 in attorney fees to recover $6,000 from culpable third party (insurer entitled to $1,000 less aliquot share of attorney fees; see also *Chandler v. State Farm Mut. Auto. Ins. Co.* (9th Cir. 2010) 598 F3d 1115, 1119-1121 (distinguishing reimbursement claim against insured from subrogation claim against third-party tortfeasor)]

Fourth, and vitally important, various government entities may have statutory lien or subrogation rights for government benefits provided. These include Medi-Cal benefits and crime victim restitution. The State is *subrogated* to the rights of any victim who receives such assistance payments, up to the amount of the payments; and also has a *lien*, up to the amount of the payments, on any judgment, award or settlement obtained by, or on behalf of, the victim. [Gov.C. §13963(a) & (b); see *Karpinski v. Smitty's Bar, Inc.* (2016) 246 CA4th 456, 201 CR3d 148] Although the federal government does *not* have a lien for medical benefits furnished to or on behalf of a beneficiary, it *may seek reimbursement* from any amounts the beneficiary recovers from the tortfeasor. Additionally, the government has *subrogation* rights that may be asserted by joining or intervening in the plaintiff's lawsuit or (if no action is filed) by bringing its

own suit against the tortfeasor. [See 42 USC §2651(a), (d); *Thomas v. Shelton* (7th Cir. 1984) 740 F2d 478, 482 (medical benefits received by injured dependent of armed forces member); see also *Cockerham v. Garvin* (6th Cir. 1985) 768 F2d 784, 787 – government's share of recovery from third party tortfeasor reduced to account for litigation costs and for inability of P (veteran entitled to medical benefits) to recoup all losses]

➢ ***PARALEGAL POINTER:*** The takeaway for paralegals is that attorneys should not summarily reject a case simply because medical liens may leave little or nothing for attorney fees or for the client. A lienholder (including a government entity) faced with no other prospect for recovery may be willing to consent to a substantial reduction of its lien. Moreover, even where little is left for the client, such an arrangement may still benefit a client who would otherwise remain personally liable for the lienholder's claim. [See *Tapia v. Pohlmann* (1998) 68 CA4th 1126, 1129-1130, 81 CR2d 1, 2-3] It is quite possible that your attorney may ask you to negotiate with one or more of the lienholders. Should this occur, your leverage is the fact that if the lienholder refuses to be flexible, it may obtain no money whatsoever. It is better for them to recover a portion, however small, of the lien and allow the client and counsel to have some of the recovery as opposed to no recovery for anyone.

1.3.6 CLAIMANT'S CONSULTATIONS WITH OTHER ATTORNEYS IMPACTING EMPLOYMENT DECISION

Before your office makes a final employment decision, it is also important to determine if the prospective client has consulted with, or already employed, another attorney. There is no problem in accepting a case where a client comes to you after having already decided to discharge existing counsel. But you are not justified in encouraging a client to "ditch" existing counsel with whom there was no prior dissatisfaction. Obtaining employment by persuading the client to discharge another lawyer could give rise to liability for tortious interference with a contract relationship, unless justification for the interference is shown. [*Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 CA3d 200, 220-223, 194 CR 180, 192-194 (disapproved on other grounds in *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 521, 28 CR2d 475, 485, fn. 10)]

CHAPTER 2

PART I –

PRELITIGATION INVESTIGATION AND EMPLOYMENT OF EXPERTS

2.1 INTRODUCTION – WHY THE "INFORMAL" INVESTIGATION

Once the retainer agreement is signed, you and your attorney must immediately focus on the need to gather and preserve evidence and define the issues. This is true regardless of which side your office represents. It is vital to identify all potentially responsible parties. Even if your client is the defendant, there may be a basis for a cross-complaint against the plaintiff as well as against other parties. It is essential to develop all potential defenses, if your client has been sued, as well as all potential theories of liability against anyone who may be responsible for what happened.

You also must keep in mind that an insufficient investigation could expose your office to a malpractice suit. If you are working for plaintiff's counsel, your office needs to conduct a proper investigation of the claim so as to be able to competently advise the client about the merits of the potential cause (or causes) of action. An attorney may be liable for malpractice when his or her negligent investigation, advice or conduct of the client's affairs results in loss of the client's claim, such as where the attorney's incompetent investigation causes the client to prolong filing suit (erroneously thinking the claim has no merit) until after the statute of limitations has run. [See *Gutierrez v. Mofid* (1985) 39 C3d 892, 900, 218 CR 313, 318; *Reyes v. County of Los Angeles* (1988) 197 CA3d 584, 591-592, 243 CR 35, 38-39] Defendants and their attorneys likewise have strong reasons to conduct thorough investigations and seek out available information regarding the accident. The failure to preserve evidence critical to plaintiff's case can result in sanctions or an instruction allowing the jury to draw an inference adverse to the defense. On occasion, it may even lead to liability.

2.1.1 FINANCIAL DISCOVERY DILEMMA

Under present case law, discovery of "financial worthiness" information is limited to insurance coverage. Except where punitive damages are in issue, privacy rights protect all other financial information from compelled disclosure (apparently, even in Prop. 51 cases).

Of course, plaintiff's counsel is not precluded from pursuing private investigation (within lawful bounds) to obtain this information. Nor is broader