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## Dog Bite Victim Representation

Assessing Claims and Managing the Unique Challenges of Negotiating and Litigating Dog Bite Cases

WEDNESDAY, JANUARY 23, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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# Dog Bite Victim Representation

## Assessing Claims and Managing the Unique Challenges of Negotiating and Litigating Dog Bite Cases

January 23, 2013

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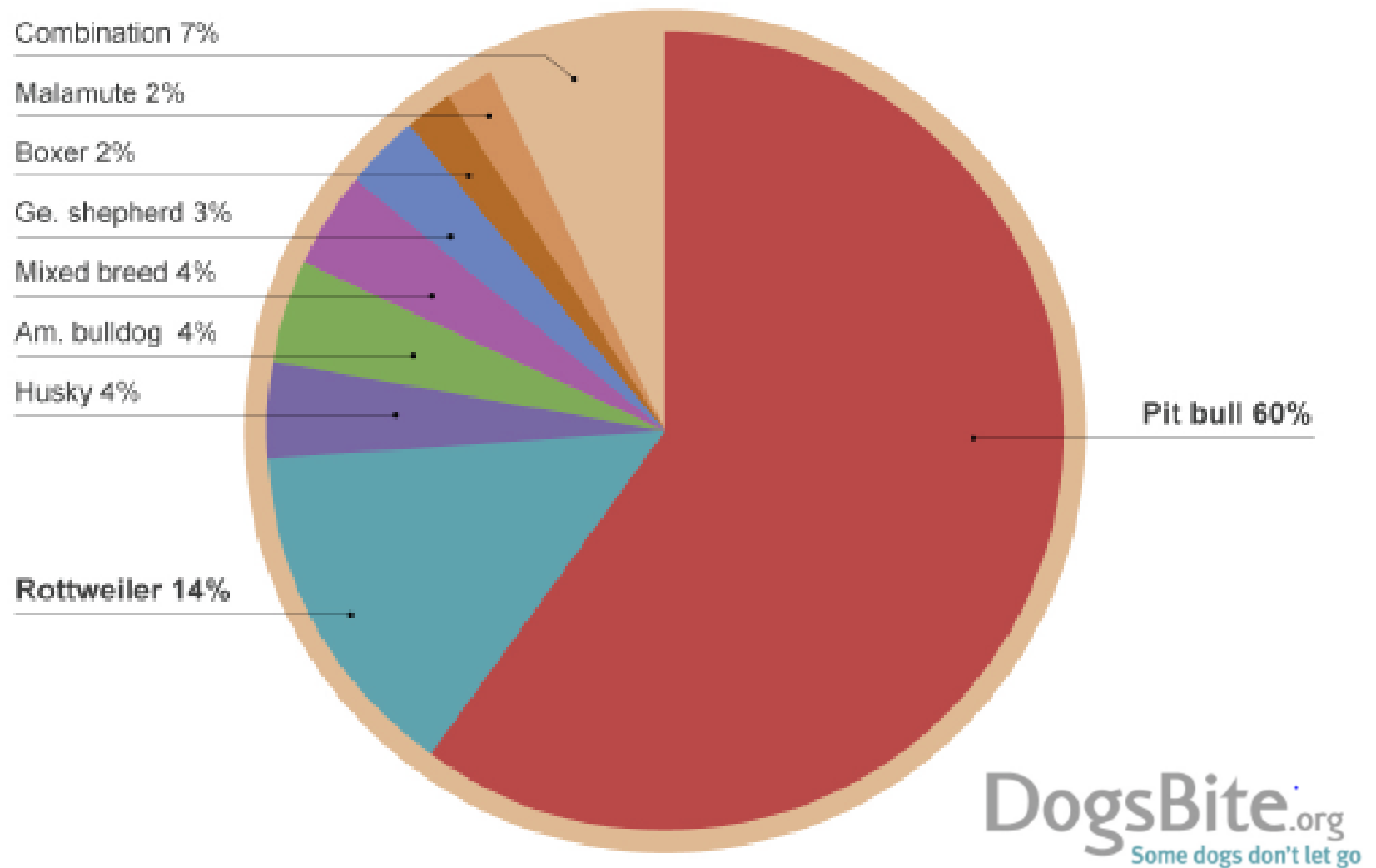
# U.S. Dog Bite Statistics

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- ▶ **According to the United States Center for Disease Control and Prevention, dogs bite over 4.7 million victims every year in the U.S.**
- ▶ **800,000 people seek medical attention in the United States annually for dog bites.**
- ▶ **Of those, roughly half of them are children.**
- ▶ **386,000 require treatment in an emergency room.**
- ▶ **Between 2005-2011 an average of 30 deaths resulting from dog attacks per year were reported by the media (source DogsBite.org)**

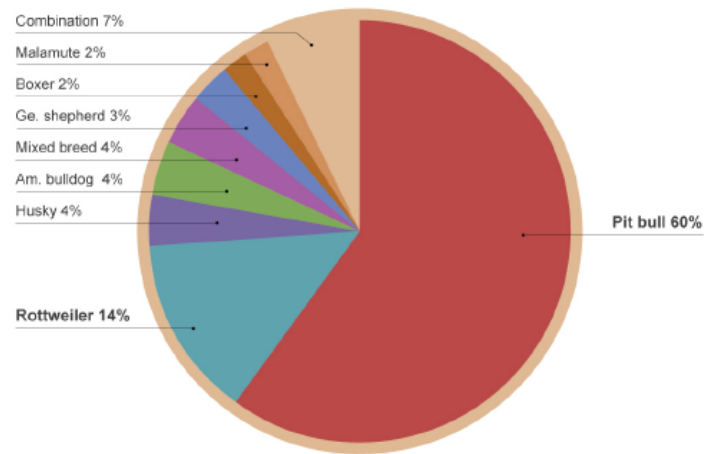
# 7-Year Dog Bite Fatality Chart - 2005 to 2011

During this 7-year period, 213 Americans suffered death due to dog bite injury.



%	Deaths	Dog Breed
60%	(128)	Pit bull
14%	(29)	Rottweiler
4%	(9)	Husky
4%	(8)	American bulldog
4%	(8)	Mixed breed
3%	(7)	German shepherd
2%	(4)	Boxer
2%	(4)	Malamute
7%	(3 and less)	Combination*

**7-Year Dog Bite Fatality Chart - 2005 to 2011**  
 During this 7-year period, 213 Americans suffered death due to dog bite injury.



*\*Multiple dog breeds contributed to the deaths of 3 or fewer persons during this period including, but not limited to: bullmastiff, chow chow, wolf hybrid, labrador retriever and doberman pinscher.*

Statistics provided  
 by:

**DogsBite.org**  
 Some dogs don't let go

<http://www.dogsbite.org/dogsbite-recent-dog-bite-statistics.php>



# Assessing the Case

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- ▶ **Interviewing the client**
  - ▶ If you want it done right, do it yourself
  - ▶ Get the story from the horses mouth
  - ▶ Get the COMPLETE address of where it happened
  - ▶ Determine the status of your client
  - ▶ Assess your client's prior knowledge of the dog & its owner
  - ▶ Identify known eyewitnesses and potential prior bite witnesses

# Ethics and Other Considerations When Representing Children

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- ▶ **Comparative & contributory negligence issues**
  - ▶ Assess your client's familiarity with dogs
  - ▶ Age of negligence and standard
  - ▶ Get the child's story
  - ▶ Gaining your client's trust
  - ▶ Parental negligence & picking the right guardian ad litem

# Assessing Insurance Coverage: Finding A Policy That Covers

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- ▶ Where did the attack take place?
  - ▶ Homeowners Insurance
  - ▶ Commercial General Liability Insurance
  - ▶ Dangerous Dog Insurance
- ▶ Put the dog owner on notice
- ▶ Put the property owner on notice
- ▶ Dog bite exclusion clauses

# New York Dog Bite Exclusion

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- ▶ Coverage for any injuries to others or property of others caused by certain animals owned by or in the care of the insured will be excluded. This dog liability exclusion is added to exclude:
  - ▶ the following types of pure bred dogs:
    - ▶ American Staffordshire Terriers, American Pit Bull Terriers, or Staffordshire Bull Terriers, all commonly known as Pit Bulls;
    - ▶ Doberman Pinschers;
    - ▶ Rottweilers;
    - ▶ Chows; or
    - ▶ Presa Canarios
    - ▶ Wolves
  - ▶ dogs that have been trained to attack persons, property or other animals;
  - ▶ dogs that have been trained guard persons or property;
  - ▶ any dog used in any manner, as a fighting dog or bred specifically for fighting;
  - ▶ any dog with a prior history of biting or attacking persons, property or other animals as established through insurance claims records, or through the records of local public safety, law enforcement or other similar regulatory agency;
  - ▶ any dog that has not had inoculations as required by law.

Approved 2002.

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# Establishing Causation and Investigation the Attacking Dog

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- ▶ Proving a prior bite for negligence and strict liability
  - ▶ Check with the county and city animal control departments
  - ▶ Check with the neighbors
  - ▶ Depose the defendants
- ▶ Leash law liability – is “off the leash” enough?
- ▶ Breed-specific legislation states

# Working With Veterinarians and Other Experts

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- ▶ Veterinarians and veterinarian records
  - ▶ Kennel records
- ▶ Liability experts
  - ▶ Establishing knowledge of a dangerous propensity
  - ▶ Punitive damages
- ▶ Psychiatry experts
  - ▶ Future effects of scarring
  - ▶ Near death experience

# Assessing Injuries

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- ▶ Gather medical bills and records
- ▶ Mental damages – terror
  - ▶ Dogs go for the throat and the face
  - ▶ Using a Psychiatrist to prove mental damages
- ▶ Scarring and disfigurement
  - ▶ A picture is worth a thousand words
    - ▶ Wedding ring
    - ▶ Heels
  - ▶ Social Judgments of Facial Deformity by Joyce M. Tobiasen, Phd. Cleft Palate Journal Oct. 1987 Vol. 24 No.4
- ▶ Punitive Damages

# Filing the Lawsuit

- Drafting the Complaint: Sources of Duty
  - Common Law Negligence
  - Criminal/Civil Dog Laws
    - Strict Liability vs. One Free Bite
  - Local Ordinances
  - Restatement Torts
  - “Dog Case” ≠ “Dog Bite Case”
- Know state of the law – very fact specific area may require detailed/artful pleading



# Filing the Lawsuit

- Common Law Negligence
  - “As soon as the owner knows or has good reason to believe that the animal is likely to do mischief, he must take care of him; it makes no difference whether this ground of suspicion arises from one act or repeated acts. The only restriction is that the act done must be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of.” *Andrews v. Smith*, 188 A. 146, 147 (Pa. 1936)

# Filing the Lawsuit

- Criminal/Civil Dog Laws:
  - Vary immensely from state to state, e.g.:
  - Utah:
    - (1) Every person owning or keeping a dog is liable in damages for injury committed by the dog, and **it is not necessary in the action brought therefor to allege or prove that the dog was of a vicious or mischievous disposition or that the owner or keeper of the dog knew that it was vicious or mischievous.** Utah Code Ann. § 18-1-1

# Filing the Lawsuit

- Wisconsin: (1) Liability for injury.
  - (a) Without notice. [**First Attack or Bite**] The owner of a dog is liable for the full amount of damages caused by the dog injuring or causing injury to a person, domestic animal or property.
  - (b) After notice. [**Second Attack or Bite**] The owner of a dog is liable for 2 times the full amount of damages caused by the dog injuring or causing injury to a person, domestic animal or property if the owner was notified or knew that the dog previously injured or caused injury to a person, domestic animal or property.

WI ST 173.01-40

# Filing the Lawsuit

- Pennsylvania:
  - (a) SUMMARY OFFENSE OF HARBORING A DANGEROUS DOG.-- Any person who has been attacked by one or more dogs, or anyone on behalf of such person, a person whose domestic animal has been killed or injured without provocation, the State dog warden or the local police officer may file a complaint before a district justice, charging the owner or keeper of such a dog with harboring a dangerous dog. The owner or keeper of the dog shall be guilty of the summary offense of harboring a dangerous dog if the district justice finds beyond a reasonable doubt that the following elements of the offense have been proven:

# Filing the Lawsuit

- Pennsylvania:
- (1) The dog has done any of the following:
  - (i) Inflicted severe injury on a human being without provocation on public or private property
  - (ii) Killed or inflicted severe injury on a domestic animal without provocation while off the owner's property.
  - (iii) Attacked a human being without provocation.
  - (iv) Been used in the commission of a crime
- (2) The dog has either or both of the following:
  - (i) A **history** of attacking human beings and/or domestic animals without provocation.
  - (ii) A **propensity** to attack human beings and/or domestic animals without provocation. A propensity to attack may be proven by a **single incident** of the conduct described in paragraph (1)(i), (ii),(iii) or (iv).
- (3) The defendant is the owner or keeper of the dog

# Filing the Lawsuit

- Local Ordinances – check your jurisdiction; may be additional leash laws, fence requirements, licensing requirements, breed/size/number restrictions
  - Also look at:
    - Homeowners' Association Restrictions/Requirements
    - Condominium Agreements/Restrictions

# Filing the Lawsuit

- Restatement of Torts:
  - § 518: Except for animal trespass, one who harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if,
    - (a) he intentionally causes the animal to do harm, or
    - (b) he is negligent in failing to prevent the harm

# Filing the Lawsuit

- Restatement of Torts:
  - § 344: A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
    - (a) discover that such acts are being done or are likely to be done, or
    - (b) give a warning adequate to enable visitors to avoid the harm, or otherwise protect them against it.



# Filing the Lawsuit

- “Dog Case” ≠ “Dog Bite Case”:
  - Liability is *not* premised on an actual “bite”
  - Chase/pursuit cases
    - Victim injured while fleeing (no contact w/ dog)
    - Dog knocks victim down
  - “Friendly” dog cases
  - “Leash Law” cases – dogs running loose
  - Non-traditional cases
    - Any “dangerous” propensity of dog, e.g., dog has a tic that causes it to snap its teeth

# Filing the Lawsuit

- Who really is the “owner,” as term is defined by your state?
  - "OWNER." When applied to the proprietorship of a dog, includes every person
    - having a right of property in such dog, and
    - every person who keeps or harbors such dog or has it in his care, and
    - every person who permits such dog to remain on or about any premises occupied by him.

3 P.S. § 459-102

# Filing the Lawsuit

- Who really is the “owner,” as term is defined by your state?
  - Keeper?
  - Landlord out-of-possession?
  - Business owner?
  - Public Housing Authority?
  - Homeowner’s/Condominium Association?
  - Township/Municipality charged with enforcing the dog laws?
  - Police Department/Municipality? (Police dogs)
  - Boarding facilities? Dog walkers? Doggie Daycare?
- Even if not an “owner,” may be basis for non-owner liability

# Filing the Lawsuit

E.g., landlord liability in Pa:

- **General Rule**: a landlord out of possession is not responsible for tenants' animals on leased premises where the tenant has exclusive control over the premises
  - *Palermo by Palermo v. Nails*, 483 A.2d 871 (Pa. Super. 1984).
- Landlord out-of-possession is, by definition, not an owner or keeper – does not occupy the premises where the dog resides
  - Must rely on common law to establish liability for non-owners/non-keepers
  - Must prove actual knowledge of viciousness of dog
  - *Underwood v. Wind*, 954 A.2d 1199 (Pa. Super. 2008)
- **Exception**: Out of possession landlord may be liable for tenant's animals when
  - (1) he knows of the presence of the dangerous animal and
  - (2) has the right to control or remove the animal from the premises

*Palermo, supra.*

# Filing the Lawsuit

- Damages
  - Does your state allow for automatic economic damages?
  - Statutory “punitive” damages (e.g., Wisconsin)
  - Common law punitive/exemplary damages
    - Based on breed?
  - Emotional distress/psychological effects of attack
  - Compensatory damages permissible by law

# Filing the Lawsuit

- Emotional Distress Claims
  - Can the victim himself claim negligent infliction of emotional distress as a separate and distinct cause of action or is this an item of damages in your state?
  - Are there other potential plaintiffs who witnessed the attack?
    - Evaluate – does my state's NIED laws permit a claim on behalf of any other person?
    - Will the dog owner's/defendant's insurance policy cover a pure NIED claim?

# Filing the Lawsuit

- Potential Defenses:
  - Strict Liability vs. Traditional Negligence States
  - In a state with a dog law like Utah – aren't many defenses re: liability – remember:
    - (1) Every person owning or keeping a dog is liable in damages for injury committed by the dog, and **it is not necessary in the action brought therefor to allege or prove that the dog was of a vicious or mischievous disposition or that the owner or keeper of the dog knew that it was vicious or mischievous.** Utah Code Ann. § 18-1-1

# Filing the Lawsuit

- Potential Defenses:
  - Contributory Negligence
    - Usually premised on provocation of some type
    - Defense is limited in cases involving minors, as most states have laws making minors incapable of negligence under a certain age
  - “Prior good nature” of the dog (i.e., owner’s lack of notice of dog’s propensity to attack)
  - Defenses based on specific requirements of state common or statutory law
    - “Reasonableness” of owner’s efforts to control dog
    - Excuse for statutory violation (e.g., dog was chained up but someone let the dog loose)
  - Parental negligence (in case of minor)



# Filing the Lawsuit

- Potential Defenses:
  - In cases of minors:
    - Do you need to file in name of both parents or is one enough?
      - What if there is no formal custody agreement?
    - Do parents have an independent claim for their own damages and, if so, must this be pled a certain way?
    - Statute of Limitations
      - For minor's own claim – 2 years after 18<sup>th</sup> birthday?
      - What about medical expenses incurred during minority?
        - 2 years after date of loss?
        - 2 years after last medical expense?

# Filing the Lawsuit

- Depositions
  - Who to depose?
    - Veterinarian?
    - Breeder?
    - Prior Owner?
    - Neighbors?
    - Friends of Owner?
    - Mailman?
  - What does your state require that you establish to survive summary judgment?
    - What degree of knowledge is required on the part of the owner?
    - Must the attack have occurred on the owner's premises for strict liability?
    - Does status (trespasser/licensee/invitee) matter?
  - What do your state's evidentiary rules permit?
    - In PA, evidence of a *subsequent* bite is admissible to show the dog's vicious propensities, but *not* to show owner's knowledge of the vicious propensities

# Filing the Lawsuit

- Summary Judgment on Legal Issues
  - Filing vs. Defending
  - Strict Liability states: proactively file to establish liability?
    - Will you still be able to get in the details of the attack in proving your damages case?
    - Do you need to prove the circumstances of the attack if you are claiming punitive damages?
  - Traditional Negligence states: more likely to be defending on failure to meet burden of proof

# Filing the Lawsuit

- Summary Judgment on Legal Issues
  - Likely to face summary judgment challenge on liability claims against non-owners, particularly:
    - Landlords out-of-possession
    - Business Owners
    - Condo/Homeowner's Associations
    - "Non-owners"

# Insurance Settlement Negotiations

## ARGUE, ARGUE, ARGUE:

- Scarring:
  - Serial scarring photographs
  - Professional photographs
  - School photos, family photos, events, functions
  - Videos (if possible)
- Permanent Disfigurement:
  - Expert report from plastic surgeon re: permanency, need for revisional surgery
- Emotional Distress:
  - Body image/self-perception issues
  - Anxiety/Depression risks
  - Social stigma/prejudice associated w/ facial “deformities”
  - Report from treating psychologist or expert

# Insurance Settlement Negotiations

- Do you want the insurance adjustor to meet your client in person?
  - Have YOU met your client?
  - Do the scarring photos accurately depict the scar?
- Structured Settlements
  - Should be negotiated as part of the settlement
- Lien Repayment/Medical Bills
  - Don't forget about med pay coverage
  - How will a lien or unpaid medical bills be handled?
    - Dependent on your state's laws & practices

# Seeking Court Approval of Settlement

- Generally for cases involving minors, incompetents, & decedents
- Dependent on your state's particular rules
  - May be different if suit was filed vs. settled at claims phase
  - Information required to be disclosed to the court will ordinarily be set by statute or rule

# Seeking Court Approval of Settlement

- PA example:
  - No action to which a minor is a party shall be compromised, settled or discontinued except after approval by the court pursuant to a petition presented by the guardian of the minor. Pa.R.C.P. 2039(a)
  - Rules allow for payment of counsel fees and expenses incurred, but must be requested and set forth
  - Rules allow for structures & restrict disposition of funds into an account accessible only to the minor upon attaining the age of majority



# Seeking Court Approval of Settlement

PA example (Allegheny County LR 12.16G – Orphans' Court):

1. Contents of Petition. Where no action has been instituted, a petition by a guardian of a minor (as the term "guardian" is defined under Pa. R.C.P. 2026) for authority to settle a claim for damages proposed to be paid to the estate of a minor shall be verified by the guardian of the minor, shall contain a statement of the nature of the evidence relied upon to show liability, the elements of damage, the injuries sustained, and the list of expenses incurred or to be incurred. The petition shall be accompanied by the following exhibits:

(a) A statement by counsel as to such counsel's professional opinion regarding the desirability of the settlement and reasons therefor, a description of the services rendered, a description and the amount of reimbursable expenses requested, and the amount of fees requested, which, except in extraordinary circumstances, shall not exceed 33-1/3 percent of the present value of a structured settlement or 33-1/3 percent of the gross recovery of any other settlement;

(b) A statement by the attending physician as to the injuries sustained by the minor, treatment administered and the prognosis; and

(c) In property damage claims, a statement by the party who made the repairs or appraised the loss.

# Seeking Court Approval of Settlement

2. Deposit of Funds by Order of Court. All petitions under this Rule where the proceeds of settlement are to be deposited in a savings account or in a certificate of deposit, shall have attached to the petition an order including the following:

It is hereby ordered and decreed that the amount of \$      shall be deposited in the name of      , a minor, by counsel of record in a savings account or certificate of deposit in a federally insured bank, savings and loan association or credit union. The savings account or certificate of deposit shall be marked "NOT TO BE WITHDRAWN UNTIL THE MINOR REACHES THE AGE OF MAJORITY OR BY FURTHER ORDER OF COURT."

3. Settlement of Filed Action. For approval of a minor's claim where an action has been instituted, see Allegheny County Civil and Family Division Rule 2039.

# Seeking Court Approval of Settlement

- What do you need to account for?
  - Attorney's Fee/Costs
  - Liens
  - Unpaid Medical Bills
  - Parents' out-of-pocket expenses (if permitted)
  - Will minor have uncovered medical expenses during minority?
    - May need to set up a bank account for a small portion to cover these costs (i.e., may not want to structure whole settlement)
- Confidentiality?
  - May need to file petition under seal
  - May need to seal case by separate petition prior to filing settlement petition
- Local Procedure
  - Will the Court require a hearing?
  - Will parents have to be present?