“Learning the Ropes”

November 7-9, 2023
DoubleTree by Hilton Hotel Portland
1000 NE Multnomah St.
Portland, OR 97232

Visit Conference Site

Total MCLE credits: 15.75

Total Practical Skills Credits: 9.75

Total Ethics Credits: 2

Total Mental Health/Substance Use Credits: 1

Total Introductory Access to Justice Credits: 3

Day 1: 6.75 MCLE credits

4.75 Practical Skills Credits – Oregon Practice and Procedure

2 Ethics Credits – Oregon Specific

Day 2: 6 MCLE credits

3.5 Practical Skills Credits – Oregon Practice and Procedure

1 Mental Health/Substance Use Credit

1.5 Introductory Access to Justice Credits

Day 3: 3 MCLE credits

1.5 Practical Skills Credits – Oregon Practice and

Procedure 1.5 Introductory Access to Justice Credits

PLF Learning the Ropes

Learning the Ropes

Agenda

November 7-9, 2023

DoubleTree by Hilton Hotel
1000 NE Multnomah Street
Portland, OR 97232

conference.osbplf.org

DAY 1

Day 1 qualifies for 6.75 MCLE Credits (4.75 Practical Skills Credits - Oregon Practice and Procedure; 2 Ethics Credits – Oregon Specific)

8:00 – 8:30 Registration/Check-In

8:30 – 9:00 PLF Overview

Learn about the Professional Liability Fund (PLF) and your legal malpractice coverage, both at the primary and optional excess levels.

Megan I. Livermore, *PLF Chief Executive Officer*

Emilee Preble, *PLF Director of Administration & Underwriting*

9:00 – 10:00 Introduction to Claims and Risk Management

Get a general overview of the PLF's claims and risk management departments, the services they offer, and what to do when you make a mistake.

Matthew A. Borrillo, *PLF Director of Claims*

Hong Dao, *PLF Director of Practice Management Assistance Program*

10:00 – 10:15 Break

10:15 – 11:15 Regulation of Lawyer Conduct in Oregon *(1 Ethics Credit - Oregon Specific)*

Get to know the Oregon State Bar and revisit your ethical duties of loyalty, competence, and integrity as lawyers.

Linn D. Davis, *Oregon State Bar Assistant General Counsel and Client Assistance Office Manager*

11:15 – 12:15 Professionalism: Be the Person Your Dog Thinks You Are *(1 Ethics Credit - Oregon Specific)*

Understand the concept of professionalism from a judge's perspective, so even your pet would take pride in your conduct.

The Honorable John V. Acosta, *United States Magistrate Judge*

The Honorable Eric L. Dahlin, *Multnomah County Circuit Court Judge*

12:15 – 1:30 Meet the Judges Luncheon (included in registration fee)

OSB Professional Liability Fund

Learning the Ropes

Agenda

November 7-9, 2023

DoubleTree by Hilton Hotel
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DAY 1, continued

Choose a Concurrent Session

1:30 – 2:15	Civil Motion Practice Laura Caldera Loera *Bullivant Houser Bailey PC*	1:30 – 2:15	Estate Planning and Administration; Guardianships and Conservatorships Melissa F. Busley *Dunn Carney LLP*
2:15 – 2:20	Transition	2:15 – 2:20	Transition
2:20 – 3:05	Family Law Amanda C. Thorpe *Cauble & Whittington*	2:20 – 3:05	Personal Injury Robert Le *The Law Office of Robert Le*
3:05 – 3:10	Transition	3:05 – 3:10	Transition
3:10 – 3:55	Criminal Law Justin N. Rosas *The Law Office of Justin Rosas*	3:10 – 3:55	Business Transactions Scott D. Schnuck *Altus Law LLC*

3:55 – 4:05 Break

4:05 – 5:05 Alternative Dispute Resolution – Mandated and Voluntary

Explore the array of alternative dispute resolution (ADR) options for resolving conflict and understand when ADR may be mandatory or voluntary.

Lisa Brown, *Lisa Brown Attorney LLC*

Learning the Ropes

Agenda

November 7-9, 2023

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DAY 2

Day 2 qualifies for 6 MCLE Credits (3.5 Practical Skills Credits - Oregon Practice and Procedure; 1 MHSU Credit; and 1.5 Introductory Access to Justice Credits)

8:00 – 8:30 Registration/Check-In

8:30 – 10:00 Essential Guide to Practice Management

Gain fundamental insights and tips for handling the lawyer trust account, conflicts of interest, technology, office systems, file management, and avoiding common pitfalls.

Rachel Edwards and Monica H. Logan, *PLF Practice Management Attorneys*

10:00 – 10:15 Break

Choose a Concurrent Session

Creating a Firm

10:15 – 11:15 Solo Success: Launching Your Own Practice

Rachel Edwards
PLF Practice Management Attorney

11:15 – 12:15 Solo Success: Staying the Course

Jinoo Hwang
Northwest Legal

Jessica M. Nomie
Jessica Nomie Law

Maria Zlateva
Attorney at Law

Monica Logan, Moderator
PLF Practice Management Attorney

Joining a Firm

10:15 – 11:45 Associate Success: Tips for Joining Firms (Part I)

Anthony Li, Associate
Reynolds Defense Firm

Holly J. Martinez, Associate
Perkins Coie LLP

Nicholas Sanchez, Associate
Markowitz Herbold PC

Traci R. Ray, Moderator
Executive Director, Barran Liebman LLP

11:45 – 12:15 Associate Success: Tips for Joining Firms (Part II)

Parna Mehrbani, Partner
Tonkon Torp LLC

Bryan R. Welch, JD, CADC I
OAAP Attorney Counselor

Learning the Ropes

Agenda

November 7-9, 2023

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DAY 2, continued

12:15 – 1:30 Bar Leader Luncheon (included in registration fee)

1:30 – 3:00 Pro Bono, Legal Aid, and Other Tools to Provide Access to Justice for All *(1.5 Introductory Access to Justice Credits)*

Learn about the unmet legal needs in Oregon and discover the tools to assist lawyers in addressing these needs, ensuring that everyone has equal access to justice.

Ayla Ercin, *Executive Director, Campaign for Equal Justice*

Jill R. Mallery, *Statewide Pro Bono Manager, Legal Aid Services of Oregon*

William C. Penn, *Oregon Law Foundation Executive Director and Legal Services Assistant Director*

3:00 – 3:15 Break

3:15 – 4:15 Lawyer Well-Being *(1 Mental Health and Substance Use Education Credit)*

Join the Oregon Attorney Assistance Program (OAAP) to uncover challenges lawyers encounter in their practice and explore strategies for maintaining well-being.

Kyra M. Hazilla, JD, LCSW, *OAAP Director and Attorney Counselor*

Douglas S. Querin, JD, LPC, CADC I, *OAAP Senior Attorney Counselor*

Bryan R. Welch, JD, CADC I, *OAAP Attorney Counselor*

Kirsten Blume, JD, MA Candidate, *OAAP Attorney Counselor Associate*

Learning the Ropes

Agenda

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DAY 3

Day 3 qualifies for 3 MCLE Credits (1.5 Practical Skills Credits - Oregon Practice and Procedure; 1.5 Introductory Access to Justice Credits)

8:00 – 8:30 Registration/Check-In

8:30 – 9:30 Courtroom Do's and Don'ts

Hear about successful protocols and procedures that can help you navigate the courtroom effectively and make the most out of your legal proceedings.

The Honorable Adrian L. Brown, *Multnomah County Circuit Court Judge*

The Honorable Benjamin Souede, *Multnomah County Circuit Court Judge*

9:30 – 10:00 Tips, Traps, and Tools for Navigating Negotiations and Professional Relationships

Learn the basics of successful negotiations, how to find common ground, and how to achieve your desired outcomes while fostering positive relationships with your counterparts.

Richard Vangelisti, *Vangelisti Mediation LLC*

10:00 – 10:15 Break

10:15 – 11:45 Lawyering for Clients with Diverse Needs *(1.5 Introductory Access to Justice Credits)*

Gain practical tips and advice on representing a diverse range of clients, including minors, aging clients, and members of the LGBTQ community; understand their unique needs and challenges so you can provide them with the quality legal representation they deserve.

Darin J. Dooley, *Draneas Huglin Dooley LLC*

Talia Y. Guerriero, *Albies Stark & Guerriero*

Jennifer A. McGowan, *Youth Rights & Justice*

CHAPTER 19

COURTROOM DO'S AND DON'TS

The Honorable Adrian L. Brown
Multnomah County Circuit Court
The Honorable Benajamin Souede
Multnomah County Circuit Court

Chapter 19

COURTROOM DO'S AND DON'TS

TABLE OF CONTENTS

I. DECORUM STILL ISN'T DEAD 19-1

II. BEST PRACTICES IN THE COURTHOUSE AS OF JANUARY 1, 2023 19-9

III. MULTNOMAH COUNTY'S CENTRAL DOCKETING SYSTEM 19-13

IV. CJO 22-012 PERMITTING REMOTE PROCEEDINGS 19-17

V. CONSENT TO APPEARANCE THROUGH COUNSEL 19-20

VI. MULTNOMAH COUNTY CIRCUIT COURT MODE OF PROCEEDINGS 19-21

VII. TRIAL PRACTICE TIPS – CRIMINAL CASES 19-30

VIII. TIPS FOR BETTER BRIEF WRITING AND ORAL ARGUMENT 19-39

Decorum <u>Still</u> isn't Dead:
Courtroom Etiquette 101 – 2023 Top 10 Tips from the Bench

Presented by:

The Honorable Adrian Lee Brown, Multnomah County Circuit Court
and
The Honorable Benjamin N. Souede, Multnomah County Circuit Court

1. **Be on Time (*and communicate if you are running behind*).** If you aren't early, you will probably be late. Be early (there is always something you can do to improve your case – e.g. practicing your argument, witness prep, introduce yourself and/or confer with opposing counsel, etc. -- while waiting. Remember, depending on the courthouse, you may need extra time to find parking; time to walk several blocks to court; wait in line to get through security; and maybe even search for your client (or agent and/or witness(s)). Oh, and that restroom stop!

    a. If you are running late (life happens), you can still be professional about it by communicating to the court as soon as you know. The key is to *communicate* – whether with court staff (ideally directly through a call or email); or through your co-counsel, a fellow attorney or assistant from your office. If you are in the same courthouse and just in another courtroom, let that court staff or judge know so that they can alert the other courtroom.

    b. If you aren't on time, be humble and apologetic. Do not make excuses or blame others, although a matter-of-fact explanation is fine (e.g. my infant twins both had diaper blowouts as I was getting them in the car for daycare (*actual statement from counsel to court staff*). Bottom line: Recognize it, acknowledge it, and be humble about it.

    c. Being late to a court hearing should be an extremely rare circumstance. You don't want to develop a reputation for lateness –

you want judges and staff to find that running late is unusual and out of character for you, preferably to the point where they are concerned for the worst; happy to hear that you are okay; and relieved to see you when you walk in the courtroom.

d. If you do find yourself having trouble getting to court on time *regularly*, there is likely a professional practice or personal mental health issue you need to address. You are not alone, and there is help for lawyers struggling to keep up with the pace of the legal profession. The practice of law can be overwhelming. Please reach out to the Oregon Attorney Assistance Program (OAAP), for confidential, career-saving assistance on a range of issues. There is no shame in asking for help, and the court wants you to succeed in being the best professional you can be, for the bar, for your clients, and for the public. Take a look at what OAAP can offer at their website, https://oaap.org/. You can reach a counselor anytime by calling 503-226-1057, including after-hours for urgent matters.

e. Once you are in court, be the parent and make sure your phone and your client's phone are turned off, not just silenced - you don't want that unexpected alert or notification that comes through even if your phone is on silent.

f. If a phone needs to be turned on while you are at counsel table in order to check calendars, it is always safest to let the judge know and ask permission.

g. If you have a laptop that you are using at counsel table, make all apps that issue notifications are also disabled or off. Microsoft Teams is particularly pesky to control. If you use your computer to present evidence, make sure you take the steps necessary to disable the application from running.

2. **Dress to Impress (sorry soft pants).** When appearing in court, appropriate *and professional* attire is required. *See* UTCR 3.010. While some judicial districts may be more relaxed than others, always error on the side of formality. Yes, this means wear a suit or equivalent (blazer and tie, appropriate dress or pant suit, and professional accessories). Attorneys who dress professionally are noticed – in a positive way. How you dress is the beginning of your reputation – with the court, with opposing counsel, and with the jury. You will never be chastised for dressing professionally.

    a. Remind your clients and witnesses to dress appropriately for court -- no jeans, no sleeveless tops or sleeveless dresses; no shorts or mini-skirts; no chewing gum; and no hats (in courtroom).

    b. If your client is in custody, you need to make sure they have appropriate court clothes to wear for a jury trial. Some counties have clothing banks to borrow from; and some clients may have family who are able to provide clothes. Plan ahead and make sure your client has appropriate clothing for court and know the process with the jail and the court to ensure you have the appropriate permission for delivering the clothes.

3. **All Rise! (*Toto, we're not in Zoom court anymore*)**. Stand up when the judge enters the courtroom. *See* UTCR 3.050. Prepare your clients to do the same. Out of respect for those serving as a juror, stand during entry and exit of the jury from the courtroom, and during the reading of the jury verdict. Even if "All Rise," is not called when the judge leaves the bench, it is still best practice to stand.

    a. Always stand when addressing the judge (or jury) and have your clients do so as well. If you are unable to stand or need any accommodation, please notify judicial staff in advance – a simple call or email to the judicial assistant prior to your court date, or arriving a bit early to let the courtroom clerk know you need an accommodation to remain seated, is usually all that is needed.

b. It is generally acceptable to sit while asking questions of a witness, but it is always safest to ask the judge if you may remain seated for questioning.

c. Judges generally will allow attorneys some freedom of movement around the courtroom. Always ask if you may approach a witness, the bench, or to otherwise have that freedom. Play it safe and ask, "may I…?" before approaching witness or bench.

d. Remember that these are courts of public record – the mics around the courtroom are there to record the proceedings. You need to be close enough to a mic when talking for the record to be clear. Be mindful of mic locations when you are up and about so that you speak in proximity to one of them. You do NOT need to "eat the mic". If you are near a mic, remember it will pick up your conversation with your client. Press (and hold) the button on the base of your mic to mute your mic.

e. Your zoom camera is "on" in the courtroom at all times. Always be aware of how you and your client are showing up for the judge and jury. Periodically conduct a self-assessment at counsel table: how is your posture; what kind of feelings are you showing with your facial expression; are your hands covering your face or mouth; etc. This may seem like common sense, but if you or your client are feeling "checked out" because you are tired or "just over it," you likely may not be aware of how it is coming across, nor that the judge and jury are noticing. Pro tip: If a judge tells you they are having a hard time hearing you, it a nuanced way to alert you that its time to conduct a self-assessment, or its possibly the judge and/or the jury are just having a hard time hearing you.

4. **Check in with court staff when you arrive to court,** especially if you have not appeared in a particular courtroom before. Identify yourself, who you are representing, and what matter you are appearing on and its status. This

is helpful so that the staff and judge know when matters are ready to be heard and what order they should be heard in.

a. Make sure you file your notice of representation on cases so that everyone knows you are on the case and to make sure you receive court notices properly.

b. Unless a judge or another attorney has announced your name on the record when calling the case, state your name and bar number for the record when it's your turn to speak. Always best to make sure the record is clear and that all of the people involved – including the judge – know who you are, and there is no confusion.

5. **Pronouns Matter!** Every judge and court likely has a different procedure to address pronoun usage. The judge and court staff will always appreciate being informed of preferred pronouns, names, titles, and honorifics. None of us want to be rude or confused. Every person deserves to be called by their preferred name and pronouns. Help us get it right! This is particularly important if there could be any confusion by the judge. Learn more at the following website: https://pronouns.org/what-and-why.

6. **Be ready (Bring your "A" game!).** Be prepared when you get to court – each time; every time.

a. Have your calendar ready in case additional hearing dates are scheduled. And even if they aren't set by the judge at the time of your hearing, post-hearing you should seize any opportunity to confer with opposing counsel on future dates.

b. If you think you have a conflict with a date being proposed – double check, other client meetings and personal appointments can generally be rescheduled -- trials and other court appearances take precedent. A trial or hearing in another courtroom, pre-planned vacation, medical procedure, etc, are actual conflicts. Another trial the same week, a consult, an office conference, etc. are not. Also,

being ready means having paid your trial fees, if applicable, *before* your trial starts and remember to leave enough time to do so!

c. Keep your matter within the time allotted to you by the court. If you ask for a 5-day trial, the court assumes that is for the entirety of a trial – including motions, voir dire, opening statements, presentation of cases by all parties, completing instructions, closing argument, and deliberations. Confer with opposing counsel and be conservative in your requests for time. Certainly, unexpected events are bound to happen, and outside the unusual and unexpected, get in the habit of going through a trial checklist to estimate time, and then stick to it, especially for jury trials.

7. **Stay Hydrated and Nourished –** Hanger is real! Bring a *filled* water bottle and snacks (for short breaks) to court and advise your clients do so as well. While most courtrooms will have pitchers of water and paper cup, don't count on it. Come prepared.

    a. Don't plan to drink your coffee in a courtroom unless you are certain it is allowed in that courtroom. When in doubt, just ask the courtroom clerk.

    b. Do not eat in a courtroom or chew gum, but have those snacks ready in case you have to work through lunch, or don't have enough time to leave courthouse.

    c. Make sure to inform clients and witnesses of these rules – they apply to them as well.

8. **Requests for Accommodations**. Ask for accommodations in advance.

    a. Make sure that the court staff knows well in advance if any interpreter is needed for your client or a witness so that it can be arranged. Never plan to bring your own interpreter -- court certified

or qualified interpreters are the only interpreters allowed for court matters.

b. Let the court clerk know if you, your client or a witness needs an assistive listening device, or needs other accommodations (breaks for pumping breast milk, or to take medication). The court and judges want to provide accommodations, and we need to know that you need them.

c. In general, let the court know if you are in need of a comfort break. Do so at an appropriate time and in an appropriately deferential manner. The judge could probably use a break too. (Extra professionalism points if you let us know that a self-represented litigant on the other side of your matter needs an interpreter or accommodation.)

d. Please alert court staff if there are any security concerns in a case, particularly if you are in a county that doesn't have security for the building.

9. **Communicate, communicate, communicate** (politely and professionally). Every judge's staff may have a preferred communication method. Most prefer email as they are often in court and unable to communicate via phone.

    a. Email is generally the safest and most preferable method for communicating to court staff. It is the safest way to avoid any *ex parte* communications. Always make sure to cc opposing counsel.

    b. Do not have ex parte contact on a matter with a judge. Never email a judge directly on a matter (unless in a rare instance they have emailed you; and even then be sure to cc judicial staff and opposing counsel in your response).

c. Don't email staff a request that is actually a motion. When in doubt, check the UTCRs and SLRs, and confer with opposing counsel, before you reach out to judicial staff.

d. Avoid asking for special favors of court staff – it puts them in an awkward position.

e. Be polite to court staff at all times. They are underpaid, overworked, and doing their best. This goes for staff at filing counters, accounting, and other departments. Word gets around the courthouse if you are a rude or unpleasant person to work with. Kindness costs nothing.

10. **Know your Audience and Stay Curious.** It doesn't take much these days to learn about your judges—both background and their judicial practices.

a. Before appearing before a judge see if the court's website provides any information about judges – Multnomah County judges have a public webpage for each judge on the court's website.

b. Read the Uniform Trial Court Rules; the Supplemental Local Rules; and Consensus Statements; and any other practice guides available on the court's website.

c. For court filings, know the general standard practices of that court, and any individualized practices the judge you are appearing before may have (e.g. a paper copy of filings over 10 pages must be delivered to chambers; or do not submit any paper copies to judges). Remember, judges are people too (and each independently elected public officials) and we each have our own style. Instead of being frustrated by these differences, embrace them and go with the flow of the judge you are appearing before.

BEST PRACTICES IN THE COURTHOUSE AS OF JANUARY 1, 2023

The staffing shortages have created a need for everyone to examine how their work is completed. The Courthouse is experiencing the same difficulties as most office environments. We are also working to reinstate the Time to Disposition Standards for Oregon Circuit Courts recommended by the OJD Court Reengineering & Efficiencies Workgroup and adopted as OJD policy by Chief Justice Martha Walters. To streamline our work, adhere to time guidelines, and avoid a great deal of duplicative work, the court has developed the following best practices for the Presiding Judge Dockets.

Daily Trial Call Docket 9:00 am in Presiding

1. All attorneys must report in person. If you are unable to appear, have another attorney report for you.
2. If you are reporting ready for your hearing or trial, you may report in advance to Presiding per SLR 7.055(8)(b).
3. Defendants in criminal cases may appear in person, remotely, or through counsel after signing a Consent to Appear Through Counsel form as specified in PJO 2201-00006.
4. If the Defendant in a criminal case fails to appear at Call for Trial assignment and there is no Consent to Appear Through Counsel form, a bench warrant will issue regardless of whether the attorney says they are in good contact. The Presiding Judge or designee has discretion whether or not to require a defendant to appear in person, remotely, or to file a Consent to Appear Through Counsel form at a setting prior to the Call for Trial date.
5. In order to move toward adherence with the Time to Disposition Standards following the pandemic-caused delays, the court is adopting the following timeline for criminal trials on the Presiding Call docket:

   a) Cases issued in 2019 must be resolved or tried by December 31, 2022, or if good cause is shown, have a date certain trial date prior to February 28, 2023.

   b) Cases issued in 2020 must be resolved or tried by February 28, 2023, or if good cause is shown, have a date certain trial date prior to April 30, 2023.

   c) Cases issued in 2021 must be resolved or tried by June 30, 2023, or if good cause is shown, have a date certain trial date prior to August 31, 2023.

   d) Cases issued in 2022 must be resolved or tried by September 30, 2023, or if good cause is shown, have a date certain trial date prior to November 30, 2023. Parties may request a scheduling conference with the Presiding Court to request an extension beyond that date.

e) Cases issued on or after January 1, 2023 will follow the Time to Disposition Standards. Cases must be resolved or tried within 180 days of arraignment on the indictment. Parties may request a scheduling conference with the Presiding Court to request an extension beyond that date.[1]

f) The above timeline does not apply to cases specially assigned to an individual judge. The court will take into consideration time during which the defendant did not have access to an attorney, was in warrant status, or was unfit to proceed. The timelines apply whether the person is in or out of custody, though custody defendants have priority for purposes of scheduling trials.

6. Cases on the 9 a.m. Call for Trial docket will be sent out for trial unless it is the first trial setting as assigned at arraignment. If you are on the Call for Trial docket and believe you are not ready for trial, do not wait until the call docket to announce you need a postponement. Use ex parte to select new dates.
7. When using the ex parte process, it is best not to move the case ex parte to a future further proceeding to pick dates, just pick the dates when you appear at to avoid multiple appearances.
8. If you are sent out for trial and any party requests a setover, the attorneys must return to Presiding court.

Daily Short Matters Docket at 9:15 in Presiding

1. Do not sign up for a plea unless an offer has been made and accepted.
2. If the Defendant does not appear and the attorney cannot state they are in good contact, an appearance or bench warrant will be scheduled for one week.
3. Matters will only be carried a day for good reason.
4. Attorneys should confer regarding availability prior to placing a case on the docket.
5. If the short matter is assigned out and does not occur the matter needs to be placed back on the Short Matters docket and not rescheduled on the individual judge's docket.

Daily Preventative Detention Docket at 9:20 in Presiding

1. These hearings are scheduled 1-2 days prior by the Justice Center.
2. An Oral Waiver of the defendant's right to a hearing within 5-days will be accepted to set the hearing over for up to 34 days.
3. A written waiver must be filed by the defense to postpone the Preventative Detention hearing beyond 35 days.
4. Unless Defense can stipulate the 60-Days either does not apply, is not running due to tolling for A&A concerns, that the defendant is serving a sentence or if a 60-Day Waiver

[1] The shorter timeline for newer cases reflects that the parties in cases issued in 2022 or earlier did not have notice of the reinstated time to resolution standards. National agencies including Justice Management Institute and Center for Court Innovation recommend distinct time frames for cases issued during the pandemic

has been filed, the Preventative Detention hearing must be sent out to be heard by a judge.

ExParte at 10:30 and 1:30 (Criminal and Civil)

1. Attorneys should make sure they appear with the paperwork or, if they plan to appear remote, have emailed their documents to Mul.Presiding@ojd.state.or.us at least **24 hours** before they intend to appear.
2. Civil attorneys may prefer to attend 1:30 ex parte as the morning ex parte may be delayed due to lengthy morning dockets.
3. If you have a disputed matter, please wait until the end of ex parte.
4. If your matter involves a great deal of material (i.e. TROs), please make sure it is sent in advance to Presiding court. If materials are not sent in advance, the matter may have to be postponed allowing the judge time to read the material.
5. Motions for a Sitting Judge to hear a motion for Summary Judgment will be heard at ex parte, and if granted, the parties will be asked to contact Judge Marshall for assignment.
6. Assuming a case is at issue, once a motion is filed, the civil department will assign a motion judge within 10 days. If the case is not at issue and a motion judge is needed the parties may seek appointment of a motions judge at ex parte.
7. Criminal set over requests must be presented at least 2-days prior to the Call setting. Set overs of cases set within 2-days will need to be addressed at Call.

Civil Scheduling Conferences

1. Scheduling Conferences are set with the Presiding Judge on Wednesday afternoons between 2:00-4:00 pm and are set in 10-minute increments.
2. Scheduling Conferences will address requests for Complex designation or contested set trial set over requests. Requests for contested Abatements may also be set for a Scheduling Conference so long as the parties can make their arguments in 10 minutes or less. If a longer period is needed, parties need to contact their Motions Judge to set a hearing.
3. To set a conference, parties must contact Presiding to get available dates and times. Parties must then confer with all sides on an agreeable date and time and return Presiding to schedule.
4. Complex Case Assignments need to be requested as soon as the case becomes at issue.
5. If a postponement of a trial is requested, parties must keep in mind, cases filed before 2020 will need to given trial dates as soon as possible. Civil cases filed in 2021 need to be given trial dates before the end of 2023. These are guidelines.

Civil Trial Dates

1. Beginning in September 2022, all civil cases at issue will receive a form and instructions from the court advising them to talk with opposing counsel and find a trial date within certain parameters.

2. The form must be filed out and submitted to the court within 35 days. If a date cannot be agreed upon, counsel is to contact Presiding court (MUL.Presiding@ojd.state.or.us or 971-274-0660) to request a scheduling conference.
3. If the trial date submitted is denied the case will be placed on a Trial Scheduling Docket. These dockets are held on Tuesday and Thursday at 2:00 PM.
4. If no action is taken, a 30 notice of dismissal will be sent.

Medical Malpractice Docket

1. The medical malpractice docket has been moved to Judge Angela Lucero, as a result of Judge Hodson's retirement. She will continue the same practices. Most matters may continue to be forwarded to Judge Lucero. However, if a case has been given a trial date and because of the length of the trial, a request has been made to Cheri Coe for a specially assigned trial judge at least 45 days before trial and she is in the process of assigning a judge, all requests for postponement must come to a Scheduling Conference.

MULTNOMAH COUNTY'S CENTRAL DOCKETING SYSTEM

Judge Stephen K. Bushong
September 15, 2022

Introduction

As a practicing lawyer, I did not like Multnomah County's central docketing system. Why couldn't the court use individual docketing, like federal court, or at least use individual docketing for civil cases, like Marion County Circuit Court? I thought at the time that, if I ever had the power to change Multnomah County's central docketing system to an individual docketing system, I would.

But after 14 years on the bench, including 4 years as the Presiding Judge, I have concluded that Multnomah County's central docketing system works well and is the only realistic way for the court to handle the workload given current resources. Here's why.

How Central Docketing Works

Multnomah County's central docketing system really consists of two central dockets: the Presiding Judge docket for felonies and civil cases, and the Criminal Procedures Court (CPC) docket for misdemeanors. In general, the Presiding Judge handles case management for all felony and civil cases until those cases are ready for trial. The CPC judge handles case management for all misdemeanors until those cases are ready for trial. Cases that do not resolve before trial are assigned to an available judge. Those assignments are made just before trial from one of the "call" dockets (Presiding Court "call" for felonies and misdemeanors; CPC "call" for misdemeanors).[1]

There are 38 judges in Multnomah County Circuit Court. Eleven (11) of those judges are designated as family law judges assigned to cover the busy domestic relations and juvenile dockets full time. Four judges are assigned to treatment courts (START, STEP, DISP, and Mental Health court). Five more judges have full time responsibilities that make them unavailable for trial assignments (Presiding Judge, Chief Criminal Judge, CPC judge, Arraignment Court, Probation Violation Court).[2] That leaves 18 "general bench" judges to handle the felony, misdemeanor, and civil trials at any given time.

[1] This general description is an over-simplification; the system is more complicated. Motions judges are assigned to decide motions and manage cases pretrial in all civil cases. Complex civil cases and murder cases are specially assigned to a judge when the case is filed (murder cases) or when the case is designated complex (civil cases). Other longer trials in felony and civil cases may be specially assigned to a trial judge 4-6 weeks before trial.

[2] Felony arraignments are handled by a judge assigned to the JC3 docket in Courtroom 3 of the Justice Center. Many probation violation hearings are conducted by a judge assigned to the JC2 docket in Courtroom 2 of the Justice Center.

Every week, four of those 18 judges are assigned to misdemeanor rotations. The CPC judge assigns the misdemeanor cases that are ready for trial to those four judges. On average, as shown in the tables below, about 8 misdemeanor cases are reporting "ready" for trial at CPC call every week (though it varies; sometimes there can be as few as 3-4 cases or as many as 15-20 cases reporting ready for trial each week). That means that, on average, each of the 4 misdemeanor judges are expected to handle 2 jury trials each week (in addition to pleas, release hearings, judicial settlement conferences, and other "short" matters assigned by the CPC judge).

That leave 14 judges potentially available to the Presiding Judge for trial assignments in felony and civil cases each week.[3] On average, about 2 bench trials (one civil, one felony) and 5 jury trials (two civil, three felony) are reporting "ready" for trial and assigned to a trial judge at Presiding call every week (again, the number varies; there can be as few as 1-3 cases or as many as 10-15 cases reporting ready for trial each week). In addition, a few of the more complex landlord/tenant cases—on average, one or two per week—are assigned at Presiding call to a circuit court judge for trial each week.[4] Those 14 judges (assuming all are available) will handle the trial assignments plus other "short matters"—release hearings, judicial settlement conferences, and contested motions in criminal cases, plus *prima facie* hearings, temporary restraining order and preliminary injunction hearings in civil cases—every week.

The central docketing system works because, as demonstrated above, there should be enough judges available to handle trial and "short matter" assignments every week, on average. The system is flexible enough to manage the workload during peak times when there may be more cases reporting "ready" for trial than judges that are available for trial assignments. When that happens, the Presiding Judge and her staff manage the judges' dockets to "free up" one or more judges as needed to handle the trial assignments. This "freeing up" process may include one or more of the following strategies: reassigning or rescheduling matters on a judge's docket that would interfere with a trial assignment; reassigning one or more of the four designated misdemeanor judges to take a felony or civil trial; finding combinations of judges or referees who are able to cover arraignment court for all or part of a day, thereby freeing up that JC3 judge for a trial assignment; and other strategies.

Some Statistics

[3] This, of course, does not account for judges who are on vacation or who are not available for a trial assignment because the judge's docket is booked with specially assigned cases (murder cases, complex civil cases, or other pre-assigned cases). It also does not account for judges who are assigned to cover one or more of the high-volume dockets—parking, traffic, small claims, landlord/tenant, civil commitments—that are ordinarily handled by a full-time referee. Judges occasionally cover those dockets when referees are on vacation, sick leave, training, or other leave.

[4] The landlord/tenant docket is generally covered by a full-time referee in one of the court's high-volume courtrooms.

The following tables show statistics from the Oregon Judicial Department's database for Multnomah County Circuit Court. These statistics summarize the workload the court faces in a typical year. I used data from 2019 to avoid anomalies during the COVID-19 pandemic.

Case Type	Cases Filed	Cases Closed	Annual Cases Per Judge (assuming 18 available)
Civil (excluding small claims)	13,552	13,730	750
Felony	3,413	3,018	167
Misdemeanor	8,824	8,076	444
TOTAL	25,788	24,824	1,361

Case Type	Bench Trials	Jury Trials	Annual Trials Per Judge (assuming 18 available)
Civil (excluding small claims)	51	95	3 bench, 5 jury
Felony	42	132	2 bench, 7 jury
Misdemeanor	49	374	3 bench, 21 jury
TOTAL	142	601	8 bench, 33 jury

In summary, these statistics show that, on average, each of the 18 available general bench judges close 1,361 cases per year and conduct 8 bench trials and 33 jury trials per year.[5] Closed cases often involve many hours of judge work on pleas, motion hearings, settlement conferences, and other proceedings to bring the case to final resolution.

Why Individual Docketing Would Not Work

The statistics shown above demonstrate why an individual docketing system would not work in Multnomah County. In short, there are about 24,500 felony, misdemeanor, and civil cases filed (and about the same number of cases closed) each year. That's 1,361 cases per judge (assuming 18 judges are available for these assignments)

If we assume that cases are individually assigned to a judge when they are filed, and the judge sets trial dates in half of those cases, that means that each judge would be assigning trial dates for about 680 cases each year. Let's also assume that each

[5] The data also shows that 5,937 landlord/tenant cases were filed, and 5,897 landlord/tenant cases were closed in 2019; there were 216 bench trials in landlord/tenant cases that year. As noted above, most of those cases are handled by a referee, though some of the more complex landlord/tenant cases are assigned to circuit court judges for trial.

judge has 45 weeks available for trial assignments each year. That means that each judge would need to set 15 cases for trial each week. Judges' dockets would not be double, triple or quadruple booked each week, comparable to a busy trial lawyer's calendar. Instead, each judge would be required to schedule, on average, 15 trials every week! If we limited judges to scheduling only 5 trials each week, parties would have to wait 3 years for an available trial date, on average. Civil cases would have to wait even longer, because the criminal cases would have priority for trial settings due to statutory and constitutional speedy trial requirements.

In other words, under an individual docketing system, litigants in civil and criminal cases requesting a trial date would be given two options: (1) choose the next available trial date about 3 years later (and even then, there would be 4 other cases set for trial on the judge's docket that week); or (2) be assigned an earlier trial date (roughly within a year of filing) along with 14 other cases set for trial that week. Of course, neither option is acceptable. To be sure, many of the cases scheduled for trial on each judge's docket will resolve before trial. But we usually don't know that until shortly before the trial. If a judge scheduled half of the judge's individually assigned cases for trial (resulting in 15 trials scheduled per week), and those cases all resolve, that judge would be free to take a trial assignment from another judge whose cases did not all resolve before trial. Which gets us back to re-assigning cases on the eve of trial, just as we do now under our central docketing system.

Conclusion

Multnomah County's central docketing system understandably causes frustration among lawyers. Lawyers handling civil cases want their cases individually assigned to a judge from the beginning. The District Attorney's office and the criminal defense bar also want their cases individually assigned to a judge. Given the workload of the court, an individual docketing system would result in long delays and multiple overlapping trial settings for each case. That system would be inefficient and would not satisfy anyone. The central docketing system used in Multnomah County Circuit Court is the only way to handle the court's workload in a timely, efficient, and effective manner.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

In the Matter of Implementing CJO 22-012 Permitting Remote Proceedings and continuing Protective Measures	)	PRESIDING JUDGE ORDER 2201-00006
	)	ORDER IMPLEMENTING CJO 22-012 PERMITTING REMOTE PROCEEDINGS AND CONTINUING PROTECTIVE MEASURES

WHEREAS, the 2022 Oregon Legislative assembly enacted Oregon Laws 2022, Chapter 68, originally introduced as HB 4120 at the request of Chief Justice Martha Walters; and

WHEREAS Section 8 of Chapter 68, now codified as ORS 1.002(5), authorizes the Chief Justice to direct or permit any appearance before a court or magistrate to be by telephone, other two-way electronic communication device or simultaneous electronic transmission notwithstanding any statute or rule to the contrary, and ORS 1.002(11) permits the Chief Justice to delegate any of the powers specified by this section to the presiding judge of a court; and

WHEREAS Chief Justice Walters issued CJO 2022-012 on June 23, 2022, delegating to Presiding Judges of a Judicial District the authority to determine proceedings that are to be conducted remotely and proceedings that are to be conducted in person notwithstanding any other statute or rule requiring an in-person appearance,

IT IS HEREBY ORDERED, that beginning September 15, 2022, proceedings in Multnomah County Circuit Court will be held remotely or in person as set forth in Attachment B, the Multnomah County Circuit Court Mode of Proceedings, incorporated herein.

This order does not direct/apply to remote or in-person appearance in Family Law, Juvenile or Probate cases. The appended chart directs the mode of appearance in those cases. See Exhibit B.

PROVISIONS APPLICABLE TO THIS ORDER

In carrying out the directives of the Mode of Proceedings, the following provisions apply:

1. This order supersedes all prior PJO's regarding mode of proceedings issued in response to the Declaration of Emergency declared by Governor Brown due to the COVID-19 pandemic. Except for the provisions in the 10/29/2021 PJO related to domestic relations, juvenile and probate cases, which shall remain in effect.

2. If this order conflicts with any UTCR passed after the issuance of this order which governs mode of proceedings under authority of ORS 1.002, the terms of the UTCR apply.
3. The term "remote proceeding" is defined as a court proceeding that utilizes telephone, video, another two-way electronic communication device, or simultaneous electronic transmission for any participant to appear. The term video means simultaneous electronic transmission that allows the parties and the court to visually observe the participant and for the participant to visually observe the parties and the court.
4. Pursuant to ORS 1.002(5)(b) and (c), this order permits judges presiding in a particular proceeding to authorize in-person appearances in lieu of appearances that would otherwise be held remotely if there is a particular need for an in-person appearance or if it is determined that a party has a constitutional right to have the participant appear in person.
5. A participant who wishes to address whether they will be allowed to participate remotely or in person may e-mail or call the Judicial Assistant of the Judge assigned to the hearing. If a participant needs a ruling in advance, that participant's attorney or an attorney in the case may file a motion to be heard at Ex Parte requesting a determination of the mode of proceeding and appear on the Presiding Ex Parte docket, the Family Court Ex Parte Docket, or contact a specially assigned judge for a ruling.
6. A participant who appears by phone must verify their identity under oath if requested by any party or the court. An attorney shall verify on the record that they have had contact with their client and can verify that the client is the person appearing by telephone.
7. Exhibits must be submitted to the court 24 hours prior to the hearing to allow processing.
    a. Paper exhibits offered in proceedings at which counsel are appearing remotely may be submitted and e- filed in a unified single PDF file and: (A) Be accompanied by an index that identifies each exhibit, located at the beginning of the submission, with each identified exhibit electronically linked to the index; and (B) Include an electronic bookmark for each exhibit.
    b. Non-Paper exhibits, such as video or audio clips, must also be clearly marked and referenced on an index, and must be delivered to the court clerk no less than one hour prior to the hearing.
8. In criminal cases, parties submitting plea petitions, declarations, motions, memoranda, or other documents must submit the paperwork to the court prior to the hearing.
9. In criminal cases, appearance through counsel is permitted if a Consent to Appearance Through Counsel form is filed with the Court and personal or remote appearance of the defendant is not otherwise required by the Judge presiding over the matter to be heard. The form must be filed in prior to the first hearing at which it will apply. See Consent form attached as Attachment A.
10. When a party in a criminal case is submitting petitions, declarations or other signed documents, they must submit signed documents to the court who will confirm on the record that the signature represents the Defendant's stated intent.
11. Nothing in this order shall be construed in a way that violates a defendant's constitutional rights.

12. This order remains in effect until extended or terminated by further order of the court.

Dated: September 13, 2022

JUDITH H. MATARAZZO
Presiding Court Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
1200 SW FIRST AVENUE PORTLAND OREGON 97204

State of Oregon

vs

_____

Defendant

Case No: _____

_____

CONSENT TO APPEARANCE THROUGH COUNSEL

By signing this document and filing it with the Court I hereby consent to my attorney appearing on my behalf in the above-captioned case. Furthermore, I acknowledge the following:

1) I am the above-named Defendant.
2) It is my responsibility to know every date, time, and location set for a hearing in my case.
3) It is my responsibility to know if my personal appearance is required at a specific hearing.[1]
4) I understand I must contact my attorney and/or the Court[2] to get information about the date, time, and location of any scheduled hearing and whether my personal appearance is required at a hearing.
5) I understand that if I fail to appear for any hearing at which my personal appearance is required, a warrant for my arrest will be issued, my release will be revoked and I could be charged with the crime of Failure to Appear.
6) I understand that my attorney will appear on my behalf and represent my interests to the best of their abilities and in accordance with the ethical standards of their profession for hearings at which my personal appearance is not required.
7) I understand that I have the right to personally appear at any hearing in this case even though I have signed and filed this document.
8) I understand that I can revoke this consent to appearance through counsel at any time while this case is pending.

I have read and understand this entire document and have discussed it with my attorney. I understand that I am not required to consent to appearance through counsel and I am signing this document voluntarily.

DATED: _____ _____ _____
Defendant Name Signature

DATED: _____ _____ _____
Attorney Name Signature

[1] A defendant's "personal" appearance may be in person OR by phone or video as permitted by PJO 2201-00006. Personal appearance is required if ordered by the Court or, if a felony is charged, at arraignment, change of plea, trial, and sentencing. You must appear in person for felony arraignment and trial.
[2] To find out the time and location of your hearing you may call 971-274-0545, option 3.

Attachment A

PRESIDING JUDGE ORDER 2201-00006
MULTNOMAH COUNTY CIRCUIT COURT
MODE OF PROCEEDINGS

The Multnomah County Presiding Judge Orders can be found at this link: https://www.courts.oregon.gov/courts/multnomah/Pages/coronavirus.aspx. Please refer to the court website for the most updated information or send an e-mail inquiry to mul.criminal@ojd.state.or.us or mul.arraignments@ojd.state.or.us.

CIVIL DOCKETS	**Remote Attorney?**	**Remote Litigant?**	**Instructions**	**Webex Appearance**
Motions under 30 minutes	Yes – video recommended	Yes – video recommended	Judge has discretion to have any motion heard remotely or in person upon request by parties.	After assignment, contact Judge's JA for instructions
Motions over 30 minutes	No	No	Judge has discretion to have any motion heard remotely or in-person upon request by parties.	After assignment, contact Judge's JA for instructions
Ex parte	Yes – TROs must present in person	N/A	Paperwork must be emailed to Mul.Presiding@ojd.state.or.us 24 hours in advance for remote appearances.	(503) 988-3888 Code: 146-700-8974
Summary Judgments	Yes	Yes	Video required	(503) 388-9555 Code: 146-391-4134
Trials	No – unless stipulated	No – unless stipulated	Remote testimony at discretion of Judge.	After assignment, contact Judge's JA for instructions
HIGH VOLUME DOCKETS	**Remote Attorney or Officer?**	**Remote Litigant?**	**Instructions**	**Webex Appearance**
Parking	Yes	Yes	If appearing remotely, video is required	(503) 388-9555 Code: 187-317-4296

1 | PJO Regarding Remote Proceedings

Attachment B

Traffic – Downtown	Yes	Yes	If appearing remotely, video is required	(503) 388-9555 Code: 187-470-6429
Traffic – East County Courthouse	Yes	Yes	If appearing remotely, video is required	www.courts.oregon.gov/courts/multnomah/go/Pages/calendars.aspx
Small Claims	No	No		
Landlord/Tenant/FED	First appearance must be in person. Subsequent appearances may be remote.	First appearance maybe in person or remote. Subsequent appearances may be in person or remote. If there is a settlement agreement the tenant can appear remotely.	Can be in person	(503) 388-9555 Code: 2490-836-2270
Civil Commitments	Yes	Yes	Can be in person; judge has discretion to allow remote testimony of witnesses.	(503) 388-9555 Code: 146-826-4209
Temporary Stalking Order Docket	Yes	Yes	Can be in person	(503) 388-9555 Code: 146-909-1183
Permanent Stalking Order Docket	No	No		
FAMILY LAW DOCKETS	**Remote Attorney?**	**Remote Litigant?**	**Instructions**	**Webex Appearance**
Domestic Relations				
All proceedings except for ones listed below are in person			File request for remote appearance 10 days in advance	
Trial Assignment	Yes	Yes		
Applications for Protective Orders	Yes	Yes	May appear in person at their option.	
Contested motions for custody or parenting time evals.	Yes	Yes		

Non-evidentiary discovery motions	Yes	Yes		
Petitions for Attorney Fees	Yes	Yes		
Form of Judgment hearings	Yes	Yes		
Contested motions for special settings	Yes	Yes		
Status Conferences	Yes	Yes		
Pre-trial Conferences	Yes	Yes		
Motions involving legal arguments only	Yes	Yes		
UCCJEA conferences	Yes	Yes		
Juvenile Cases	**Remote Attorney?**	**Remote Litigant?**	**Instructions**	**Webex Appearance**
TPR & Dependency Trials	No	No	File request for remote appearance 10 days in advance	
"Big" call	No	No	"	
Delinquency & Dependency Prelims	No	No	"	
Contested Permanency Hearings	No	No	"	
Contested Motions to Dismiss	No	No	"	
Delinquency Adjudications (including pv's)	No	No	Unless Youth waives appearance	
Delinquency Dispositions	No	No	Unless Youth waives appearance	
Waiver Hearings	No	No		
Delinquency Call	Yes	Yes	Presumed remote unless otherwise ordered	
Delinquency/ Dependency Ex Parte	Yes	Yes		
UCCJEA Conferences	Yes	Yes		
Case Management Conferences	Yes	Yes		
Probate Docket	**Remote Attorney?**	**Remote Litigant?**	**Instructions**	**Webex Appearance**

Short Matters Docket	Yes	Yes		
All other Probate Matters	No	No		File request for remote appearance 10 days in advance
CRIMINAL DOCKETS	**Remote Attorney?**	**Remote Defendant?**	**Appearance Through Counsel Permitted?**	**Webex Appearance & Instructions**
Arraignments				
Felony arraignments – JC3	No	No	No	
Misd. Arraignments – JC4 (including PV arraignments)	No	Yes	Yes, with signed Consent. See Section 10, PJO.	(503) 388-9555 Code: 146-696-4571
PV Arraignments – JC2	No	Yes	Yes, but only for misdemeanors with signed Consent. See Section 10, PJO.	(503) 388-9555 Code: 146-308-6154
Felony Hearings & Trials	**Remote Attorney?**	**Remote Defendant?**	**Appearance Through Counsel Permitted?**	**Webex Appearance & Instructions**
Presiding Call/Case Assignment – 7A	No	Yes	Yes, with signed Consent. See Section 10, PJO.	(503) 388-9555 Code: 146-700-8974
Presiding Ex parte – 7A	Yes	In-person appearance required for warrant lifts.	Yes.	(503) 988-3888 Code: 146-700-8974 Paperwork must be emailed to Mul.Presiding@ojd.state.or.us 24 hours in advance for remote appearances.

Felony pleas (see below for felony sentencing)	Yes	Yes	No	E-file signed plea petitions 2 days prior to hearing. After assignment, contact judge's JA for instructions.
Felony Sentencing	If permitted by sentencing judge	If permitted by sentencing judge.	No	After assignment, contact judge's JA for instructions.
Felony release hearings or release modification hearings.	No	No	No	After assignment, contact judge's JA for instructions.
JSC's in felony cases	No	By video; In person highly recommended.	No	After assignment, contact judge's JA for instructions.
Felony restitution hearings	Yes	Yes	Yes, with signed Consent. See Section 10, PJO.	E-mail sentencing judge's JA for instructions.
Felony Substitution of Counsel (other than those permitted as ex parte under SLR 4.109)	No for defense counsel; Yes for State	If permitted by court, defendant may appear by video.	No	E-mail Vanessa DeJesus, Vanessa.j.dejesus@ ojd.state.or.us
Case Management Conferences with Chief Criminal Judge	Yes	Yes	Appearance presumed waived, but may participate by request	Microsoft Teams invitation sent to parties. No in person conferences scheduled.
Other felony motions assigned off presiding docket	As permitted by Presiding Judge	As permitted by Presiding Judge	As permitted by Presiding Judge	After assignment, contact judge's JA for instructions.
Felony trials – bench or jury	No	No	No	After assignment, contact judge's JA for instructions.
Fitness to Proceed docket	Yes	Yes	As permitted by judge	See Webex invitation for number.
Specialty Courts – START, MH Court, DISP, STEP	As permitted by judge	As permitted by judge	As permitted by judge	Contact judge's JA for instructions.
Felony Probation Violations – JC2	Yes, except for contested hearings.	Yes, per ORS 137.545(10) for purposes of	No for contested hearing. [1] As	Call (503) 388-9555 Code: 146-308-6154

[1] For contested violation hearings, PO may appear in person or remotely by video.

5 | PJO Regarding Remote Proceedings

Attachment B

		admitting or denying a violation. As permitted by judge for sanction or contested hearing.	permitted by judge for sanction.	
Motion for Warrant Lift in Felony case – 7A	No	Yes, if FTA was at a remote hearing; No if FTA was at a hearing requiring an in-person appearance	No	Appear at Presiding Ex Parte after consulting with opposing counsel: (503) 988-3888 Code: 146-700 8974
Misdemeanor Hearings (DV & Non-DV)	**Remote attorney?**	**Remote Defendant?**	**Appearance Through Counsel Permitted?[2]**	**Webex Link & Instructions**
Misdemeanor Trial Readiness	Yes	Yes	Yes, with signed Consent. See Section 10, PJO.	Call (503) 388-9555 Dom Misd docket (A): Code: 146-172-5532 Private Bar docket (B): Code: 146-871-2041 MPD docket (C): Code: 146-384-1122 MDI docket (D): Code: 146-722-9212
CPC docket	Yes.	Yes	Yes, with signed Consent. See Section 10, PJO.	Call (503) 388-9555 Code: 146-596-9700
CPC Call/Trial Assignment	Yes	Yes	Yes, with signed Consent. See Section 10, PJO.	"
Reckless setover sentencing	Yes	Yes	Yes, if defendant submits declaration and case expected to be dismissed. Otherwise, with signed Consent.	" E-file signed declarations or other documents at least 2 days prior to hearing.

[2] Pursuant to 135.030(2), 136.040, and 137.030, people charged in misdemeanor cases may appear in person or through counsel. The court will require a signed Consent to Appear Though Counsel for arraignment, plea, trial, sentencing and probation violation proceeding, and for any court date at which a future court date is set. The court will require remote or in—person appearance for hearings as specified in the chart.

Misdemeanor plea hearings	Yes	Yes	Yes, with signed Consent and plea paperwork signed by both defendant and counsel.	" E-file signed plea petitions at least 2 days prior to hearing.
Misdemeanor trials – jury or bench	No	No	Yes, with signed Consent. See Section 10, PJO.	Contact CPC or, after assignment, judge's JA for instructions.
Misdemeanor Release Hearings or Modification of Release Hearings.	No	No	No	
Civil Compromise	Yes.	Yes. Defendant must submit signed documents. Judge may notarize def's signature.	No, unless permitted by court.	" E-file paperwork at least 2 days prior to hearing. Judge may require in person appearance.
Misdemeanor sentencing	Yes	Yes	Yes, with signed Consent. See Section 10, PJO	Contact Judge's JA for instructions.
Misdemeanor restitution hearing	Yes	Yes	Yes, with signed Consent. See Section 10, PJO.	"
DUII Diversion Entry	No	No	No	Call (503) 388-9555 Code: 146-489-3962
Contested Diversion Docket	Yes	Yes	No	"
Expedited DUII program	Yes	Yes, unless ordered otherwise.	No	Call (503) 388-9555 Code: 146-949-7534 E-filed signed paperwork 2 days prior to hearing.
Misdemeanor probation violations – JC2	Yes, except for contested hearings.	Yes, per ORS 137.545(10) for purposes of admitting or denying a violation As permitted by judge for sanction or contested hearing.	No for contested hearing. [3]As permitted by judge for imposition of sanction.	Call (503) 388-9555 Code: 146-308-6154

[3] For contested violation hearings, PO must appear in person if requested by defense attorney. Otherwise, PO may appear remotely by video.

VRO Trials	No	No	No	
Motion for Warrant Lift in Misdemeanor Case	Yes, if FTA was at a remote hearing; No if FTA was at a hearing requiring an in-person appearance	Yes, if FTA was at a remote hearing; No if FTA was at a hearing requiring an in-person appearance	No	Call (503) 388-9555 Code: 146-596-9700
EAST COUNTY COURTHOUSE	**Remote Attorney?**	**Remote Defendant?**	**Appearance Through Counsel Permitted?**	**Webex Link & Instructions**
Diversion & ExDUII Entries	Yes	Yes, unless ordered otherwise	No	Call (503) 388-9555 Code: 146-664-6335 E-file signed plea petitions at least 2 days prior to hearing.
Misdemeanor Arraignments	Yes	Yes	Yes, with signed Consent. See Section 10, PJO.	Call (503) 388-9555 Code 146-664-6335
Misdemeanor Pleas	Yes	Yes, unless ordered otherwise	Yes, with signed consent and plea paperwork signed by defendant and counsel.	Call (503) 388-9555 Code: 146-664-6335 E-file signed plea petitions at least 2 days prior to hearing.
Misdemeanor Sentencings	Yes	Yes, unless ordered otherwise	Yes, with signed Consent. See Section 10, PJO.	Call (503) 388-9555 Code: 146-664-6335
Misdemeanor Restitution Hearings	Yes	Yes, unless ordered otherwise.	Yes, with signed Consent. See Section 10, PJO.	"
Misdemeanor Trials – Jury or Bench	No	No	Yes, with signed Consent. See Section 10, PJO.	
Misdemeanor Reckless Setover Sentencing	Yes	Yes	Yes if if defendant submits declaration and case expected to be dismissed. Otherwise with signed Consent.	Call (503) 388-9555 Code: 146-664-6335 E-file signed declarations or other documents at least 2 days prior to hearing.
Misdemeanor Trial Readiness	Yes	Yes, unless ordered otherwise.	Yes, with Signed Consent. See Section 10, PJO.	Call (503) 388-9555 Code: 146-664-6335

Misdemeanor Call/Trial Assignment	Yes	Yes, unless ordered otherwise	Yes, with signed Consent. See Section 10, PJO.	"
Traffic	Yes – video required	Yes – video required	If appearing remotely, video is required	www.courts.oregon.gov/courts/multnomah/go/Pages/calendars.aspx

TRIAL PRACTIC TIPS—CRIMINAL CASES

Judge Stephen K. Bushong
Multnomah County Circuit Court
October 28, 2021

I. Pre-Trial Preparation

A. Trial Schedule. Be realistic on how much time you will need for trial. It is better to overestimate than underestimate. Contact opposing counsel before requesting a trial date; attempt to agree on dates, or at least inform the other side that you will be requesting a trial date. Be sure your witnesses and experts are available before committing to a "Date Certain" trial date.

B. Motions to Suppress & Other Dispositive Motions. File your motions ahead of time; discuss them with opposing counsel. Consider whether truly dispositive motions can be decided in advance of trial. Consider a stipulated facts trial.

C. Motions in Limine. Use motions in limine to get pretrial rulings excluding (or admitting) evidence that is in dispute. Do not submit "boilerplate" motions. Emphasize quality, not quantity.

D. Jury Instructions. Use the Uniform Criminal Jury Instructions whenever possible. Don't forget to fill in the blanks, or choose from suggested alternatives. Special instructions should be stated in neutral terms, with appropriate citations (including jump cites). When necessary, summarize complex statutory or regulatory schemes to make them understandable. Consider whether a "lesser included" instruction should be given.

E. Verdict Form. Your verdict form should logically follow from your jury instructions. Use the same terminology. Make sure you have a good understanding of the questions the jury will be expected to answer before you start the trial.

F. Best Practices

- Use an elements checklist
- Prepare your jury instructions and verdict form before trial

- Practice your opening statement in front of a colleague or mirror
- Consider demonstrative exhibits to assist jurors' understanding of the evidence
- Confer with opposing counsel regarding exhibits, other issues that may or may not be in dispute
- Stipulate in advance of trial to the admissibility of exhibits
- Test technology in the courtroom beforehand; edit video testimony to minimize juror boredom

G. Common Mistakes

- Failing to organize/edit trial exhibits
- Failing to edit videotaped evidence in advance
- Failing to talk to opposing counsel before trial about trial exhibits and other issues

II. Jury Selection

Ask potential jurors about relevant life experiences, opinions and attitudes. Use short, open-ended questions. Don't make a speech or talk too much. Do not use "conditioning" questions that attempt to "plant the seed" for a favorable verdict. Don't be afraid to challenge a juror for cause.

A. Best Practices

- Ask open-ended questions; learn about their life experiences and get them to tell you their stories.
- Remember that you are trying to figure out which jurors you will excuse, either for cause or with a peremptory challenge; you will not win your case in voir dire.
- Use favorable jurors to educate others and establish themes, even though the other side will likely bump them.

- Screen questions with your trial judge in advance if you think the other side might object.

- Orient jurors by explaining their task is to speak honestly and to share their experiences and attitudes – one way is to say the parties are looking for the "best fit."

- Listen to jurors' answers to your questions; follow up where appropriate, but don't argue or correct them.

- Ask jurors about their attitudes and experiences with the critical issues in your case, but don't attempt to condition them.

- Manage juror personalities; don't let an outgoing juror dominate or ignore shy jurors.

B. Common Mistakes

- Attempting to argue your case or "condition" the jurors to rule in your favor.

- Talking too much; not listening.

- Arguing with prospective jurors who express views that are contrary to yours or harmful to your case.

- Failing to ask questions that matter – about prior experiences and attitudes.

- Asking questions designed to use a juror as an "expert" witness for your case.

- Attempting to condition or manipulate jurors; jurors understand and resent you for trying this.

- Taking too long; there may not be a time limit, but jurors resent it when they think you're wasting their time

III. Opening Statement

Tell the story from a key player's perspective. Make it interesting; don't just summarize the testimony you expect to elicit from each witness. Set the scene; paint a picture with your words. Establish (and use) a theme for the trial. Define complex or technical words/phrases. Identify the cast of characters. Use visuals. Use a timeline where appropriate.

A. Best Practices

- Tell a story; pick your client's or a key witness's perspective and let the jury re-live the experience
- Use active and descriptive words; make the jury "see" and "feel" what happened
- Use demonstrative exhibits
- Define key terms; introduce the cast of characters; use a timeline
- Make it interesting; jurors are used to seeing the whole story unfold in an hour, as on "Law and Order"
- Pick a theme and stick to it
- Keep it short; you can fill in some of the details later
- Introduce your client; tell your client's story

B. Common Mistakes

- Reciting what each witness will say in order of appearance
- Telling the jury that the opening statement is not evidence
- Relying too much on technology
- Arguing and drawing conclusions for the jury; let them draw the conclusions

- Waiving or deferring opening statement

IV. Presenting the Evidence

A. Direct Examination

Focus the jury's attention on the witness. Get the testimony out in bite-sized pieces instead of a lengthy narrative. Stop the witness and ask a "why" question when appropriate. Use part of the answer in the next question to emphasize important points ("looping"). Use short, open-ended questions, but use leading questions to get through non-essential information more quickly or to avoid a misstep in a problem area. Use your experts to "teach" the jury about complex, technical issues. Use graphics, demonstrative exhibits, and other visuals to reinforce and explain the testimony. Avoid using lengthy videotaped evidence.

B. Cross Examination

Don't try to do too much. Don't go over the witness's testimony on direct in excruciating detail in the hopes that he will get tripped up on the details. Figure out what points you expect to make with the witness, make those points, and then stop. Typical points: perception; memory; interest in the litigation or other bias; qualifications to offer expert opinions. Control the witness. Use leading statements to make your points and ask the witness to confirm them. Use the other side's expert to get testimony that helps your case, when possible.

C. Redirect Examination

Use redirect to give your witness a chance to explain any troublesome or confusing answers. Do not "save" key testimony for redirect; that will typically open the door for re-cross.

D. Effective Use of Exhibits and Technology

If you use documents or other exhibits, make sure the jury can or will be able to see the exhibit. Publish the exhibit to the jury after it is accepted into evidence. Make a clear record by referring to documents by exhibit number. Power point presentations can be effective, but don't rely too heavily on them and be sure to clear it with the judge first.

E. Objections

Make short, one-word objections (relevance, hearsay) in front of the jury. Ask to be heard outside the presence of the jury if you want to argue the point. Don't be afraid to object (jurors expect lawyers to object on occasion), but don't overdo it. Use your judgment; don't object on minor points that don't make a difference.

F. Best Practices

- Make sure an exhibit has been received before showing it to the jury
- Let your witnesses tell the story on direct examination; don't lead your own witnesses
- Make your points on cross-examination and stop; don't try to do too much
- Object when necessary; jurors expect lawyers to object occasionally. Remember, you're making a record for possible appeal
- Don't object just because you can; jurors don't like lawyers who object too much and make it appear that they have something to hide (or want to make life difficult for opposing counsel)
- Make specific objections based on the rules of evidence
- Use Rule 104 hearings appropriately (to challenge an expert's qualifications or the basis for an expert's opinion)
- Use your experts to teach the jurors

G. Common Mistakes

- Offering exhibits that include objectionable material; better to redact objectionable material and have the exhibit received than to have it excluded

- Showing illustrative or other exhibits to the jury without the judge's approval; can be embarrassing in front of the jury if objection is sustained

- Failing to object when necessary, or failing to make specific objections based on the rules of evidence

- Making "speaking" objections in front of the jury

- Trying to do too much on cross; don't lose control, and don't let the other side's witness repeat (and reinforce) testimony on direct

V. Closing Argument

Trust the jury; by the end of the trial, they understand. Do not summarize evidence the jury has already heard several times. Argue the circumstances, the credibility of the witnesses, or other critical issues. Use analogies and examples. Explain why your version of the facts makes more sense. Use the jury instructions and verdict form; tell the jury how you want them to answer the questions and why. Ask questions; answer some of them. Focus on the key issues, and give the jury some direction. Tell them the exhibit numbers of the exhibits you want them to look at during deliberations. Don't bluster or overstate the facts of the case. Pay attention to the time; don't be afraid to stop.

A. Best Practices

- Use the jury instructions and verdict form

- Argue and persuade; don't just summarize the evidence

- Use demonstratives and visuals

- Trust the jury; by the end of the trial, they understand and want to decide the case

- Focus on the key points in dispute; don't try to argue everything

- Juries want to do the right thing; explain why ruling in your favor is the right thing to do

- Address any weakness or “elephants in the room”

- Ask jurors to look at specific exhibits (by number), but don’t overdo it

- Keep it short, and end on a strong point

B. Common Mistakes

- Torturing the jury by making them sit through lengthy, unnecessary recitation of all the evidence

- Referring to facts that are not in evidence

- Attacking opposing counsel; do not make it personal

- Ignoring the jurors’ body language

VI. Verdict

If you lose, ask the judge to poll the jury on the record. Confirm the results on the record.

VII. PERSONAL CONDUCT

A. The Judge’s Perspective

- Be professional and respectful at all times. Lawyers must behave with courtesy towards everyone in/outside the courtroom. You are never offstage if you are within sight or hearing distance of any juror or member of the court staff.

- If you know a matter for the court is going to take more than a few minutes, let the judge know in advance so it can be arranged to coincide with a jury break.

- Speaking objections are never appropriate during a jury trial. If you need to make a record, ask to be heard outside the presence of the jury.

- Judges do not like surprises – keep your judge apprised of the order of witnesses, which exhibits you intend to offer and legal issues that are critical to your case.

- Be realistic in your estimates about how long the matter will take. Don't tell the judge that you can try the case in 2 days and then take 4. Make a schedule and stick to it.

B. The Jury's Perspective

- Jurors do not appreciate lawyers who are disorganized and seemingly unprepared. If you are using a video, PowerPoint, or other "high tech" device, make sure the equipment works and you know how to operate it. Cue the equipment to begin at the correct place. Be prepared with your exhibits.

- Jurors do not like it when lawyers seem to be wasting their time with cumulative evidence, repetitive arguments, or numerous "matters for the court" during trial.

- Jurors do not like lawyers being rude to each other, to their support staff, to court staff, or anyone else. They're always watching.

- Jurors do not like to be manipulated. Persuade jurors to come to a just decision; manipulation rarely works.

TIPS FOR BETTER BRIEF WRITING AND ORAL ARGUMENT

BRIEF WRITING

1. Concede Nothing: Judges are impressed by tough lawyers. Make your opponent fight for every inch of ground, no matter how indefensible your position. If your opponent says today is Monday, move to strike for lack of personal knowledge. If you are persistent, you'll eventually wear the other side down.

2. Use the Shotgun Approach: Make as many arguments as possible, no matter how weak. When in doubt, most judges just tote up the points, e.g., "plaintiff has ten arguments in her favor, defendant only one, so plaintiff must have the stronger case."

3. Phrase Every Argument in the Alternative: If the complaint accuses your client of violating NEPA by not preparing an environmental impact statement, you should simultaneously argue that your client: (a) fully complied with all NEPA requirements for this project; (b) fully complied with NEPA for a prior project, and this is just a continuation of that project; (c) was not required to comply with NEPA; (d) complied with NEPA in spirit; (e) plaintiff lacks standing to contest your failure to comply with NEPA; or (f) . . .

4. Don't Give Away the Surprise Ending: Briefs are like mystery novels -- you don't want to ruin the suspense by revealing the surprise ending too early. Use the first 34 pages of your brief to lay out the most complicated legal puzzle imaginable. Only after you have completely befuddled the other side (and the judge as well) should you play your ace in the hole. "In any event, this is all academic because [fill in the blank]." The judge will be awed by your legal *tour de force.*

5. Use All 35 Pages: One of the most embarrassing things you can do as a lawyer is to file a 15-page brief when the local rules allow up to 35 pages. Your little brief looks wimpy sitting on the table next to your opponent's power-brief with its 49 attached exhibits all housed in deluxe imitation wood-grain binders. You might as well attach a note saying: "Sorry, but my client has a very weak case and I can't think of any other arguments to make on her behalf." If you run out of things to say, just repeat the same arguments over again. No one will notice.

6. Always Attach Exhibits: Exhibits lend an air of authority to a brief. It is no longer just a lawyer making an argument; now you have documentary proof of your client's position. If you don't have any exhibits, invent some. It really doesn't matter what you use because, if they are fat enough and contain lots of technical-sounding fine print and rows of numbers, no one will read them anyhow.

7. Ignore Controlling Authority: A lot of lawyers assume they have an ethical duty to cite controlling authority contrary to the position advocated by their client; that is nonsense. By definition, if the judge doesn't follow a case, then it is not controlling. If it is not controlling, then you have no ethical obligation to cite the case. Seems simple enough to me.

8. Use String Citations: Anyone can cite the latest Ninth Circuit authority. What really impresses the judge is citing a long list of pre-World War II cases from district courts in Louisiana and Mississippi that your law clerk cribbed from an old ALR article.

9. Cite *Corpus Jurus Secundum:* Can't find a case on point? Just cite CJS. It is comprehensive, authoritative and those Latin titles get the judge every time. It always worked for Perry Mason. In a pinch, the Harvard Law Review will suffice.

10. Don't Shephardize: Shephardizing is expensive. If you cite a few dozen cases in a brief (or for you string-citers, perhaps a few hundred cases), that adds up to a lot of pocket change, not to mention the time involved. Don't waste your money -- the odds are that the key cases you cited are still good law. If they aren't, you're cooked and there is nothing you can do about it anyhow so, why throw good money after bad?

11. Cite Out-of-Circuit Authority: I don't know why people think the Ninth Circuit is so special -- it's just one of thirteen circuits. If Ninth Circuit case law doesn't favor your client, then cite a circuit that is more hospitable. Timid attorneys may want to put a little "*but cf.* XYZ (9th Cir. 1993)" at the end of the string-citation to avoid possible ethical problems. Alternatively, point out that the Ninth Circuit's position has not been followed by other circuits and urge the trial judge to overrule the Ninth Circuit. Example: "The circuits (with the sole exception of the Ninth Circuit) are unanimous in holding that the Civil Rights Act of 1991 is not retroactive. The Ninth Circuit's position is clearly an aberration and should not be followed."

12. Attack Your Opponent: Your opponent is a sleazebag who should not be believed and that is reason enough to rule against him. So be sure you attack your opponent in the brief, call him names and impugn his motives.

13. Whine: Few federal judges are young enough to still have small children at home, but all it takes is a pair of whining lawyers to bring back those nostalgic memories of two six-year-olds squabbling. "Judge, his brief is one page too long." "Judge, he pretended to be negotiating with me while he was secretly preparing a complaint." It will make the judge feel twenty years younger.

14. Omit No Defense: Defenses were put on this earth for only one purpose -- to be used by defense attorneys. There's no sense letting them go to waste. Example: A prisoner filed a civil rights action alleging that female clerical employees at a local jail had been viewing strip searches of male inmates through a peep window. The defendants promptly moved to dismiss the inmate's claim on grounds of qualified immunity, *i.e.*, they didn't know that such conduct was wrong. Some attorneys might have trouble asserting that defense with a straight face -- but that's what junior associates are for.

15. Don't Read the Cases You Cite: You're thumbing through the Federal Digest and you find the perfect headnote -- you couldn't have written a better holding if you'd tried. Should you read

the case just to be sure it really stands for that proposition? Of course not! Why spoil perfection? A lot of bad things can happen when you go beyond the headnote and read the actual case. You might discover that the court was applying Washington law instead of Oregon law, or that there were some distinguishing circumstances. Ignorance is bliss.

16. **Employ *See* Creatively:** This is one of the most useful signals in brief writing. For instance, you can cite a terribly complicated case to support an obscure procedural point (which the case does not stand for). No one who reads the case can "see" in it what you could -- but are they going to admit that? Of course not, because they don't want to admit they are not smart enough to see the brilliant point you are making. This strategy works particularly well with law clerks who graduated from big name law schools but are haunted by subconscious feelings of inadequacy.

17. **Argue Issues Not Before the Court:** This strategy works for both briefs and oral arguments. If the issue before the court is not your strongest, don't fight a losing battle. Change the subject and argue some other issue where you have a chance of prevailing. For instance, if the issue is change of venue, argue the merits of the case, e.g., there is no point transferring this case because defendant can't win in any court.

18. **A Little Latin Goes a Long Way[1]:**

A. Because plaintiff has not shown he suffered measurable injury, his claim must be denied.

B. *De minimis non curat lex. Damnun absque injuria. Cadit quaestio.*

Which paragraph sounds more authoritative? The second one, of course. *Vel caeco apparat.* (It would be apparent even to a blind man.) Would you rather tell the jury that your client was "caught between a rock and a hard place," or *"a fronte praecipitium a tergo lupi"* ("a precipice in front, wolves behind")? If the defendant calls your client a "lying cur", just smile and say: *"Proprium humani ingenii est odisse quem laeseris."* (It is human nature to hate a person whom you have injured.) Everyone will assume that if you're smart enough to use all these Latin phrases, the rest of your arguments must be of similar caliber. *Experto credite.*

19. **Don't Search for Recent Decisions:** The job of a law clerk can be tedious. One of the few pleasures they get is to uncover a recent decision that neither party cited. Why deprive them of that pleasure by reading slip opinions or doing a Westlaw search?

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[1] If you don't know any Latin, ask your local bookstore to order copies of Eugene Ehrlich's *Amo, Amas, Amat and More: How to Use Latin to Your Own Advantage and to the Astonishment of Others* (Harper & Row 1985); Richard A. Branyon's *Latin Phrases & Quotations* (Hippocrene Books 1994); and Henry Beard's *Latin For All Occasions* (Random House 1990) and *Latin For Even More Occasions* (Random House 1991).

20. Let Your Opponent Do Your Research: Don't have time to research the theories of your case? No problem. Include the whole kitchen sink in your complaint and let the other side sort them out in its motion to dismiss. Or maybe the judge's law clerk can figure out which theories are viable.

21. Always Get the Last Word: If your opponent files a reply brief, then you *must* file a supplemental response. If she files a sur-reply brief, then you immediately file another supplemental response. Following oral argument, send the judge a letter responding to your opponent's points. A letter is more effective than a brief because the judge won't realize it is a brief in disguise until after he has begun to read it. The better letters start by discussing some innocuous procedural matter and then digressing to merits almost as an afterthought, or so the reader should believe.

22. Assume the Judge Knows Everything About Your Case: You've been working on this case for months. You know the facts and the relevant law, and so should the judge. After all, if she wasn't so smart she wouldn't be a judge. So, when writing a brief, just dive right into your arguments without any introduction or background. Don't bother including a capsule summary of your argument at the beginning -- the judge will figure it out eventually.

Conversely, you should assume the judge knows nothing about basic legal principles. A classic example is a major law firm that devoted ten pages of a brief to explaining the concept of *stare decisis* to a veteran trial judge. Unfortunately, the "controlling" case was construing California law and the judge was applying Oregon law. Oh well, *non omnia possumus omnes.* (No one can be an expert in all things.)

23. File Your Brief Late: The best time to file a brief is Friday afternoon at 4:30 for an oral argument on Monday. That's particularly effective when the judge's law clerk has already finished her memo and now has to stay all weekend to revise it. You are assured of getting the last word. You should also mail a copy to your opponent on Friday afternoon. With some luck, he won't receive it until oral argument is over.

24. Cite Unavailable Materials: When citing unpublished district court opinions or similar materials, never attach a copy to your brief. If the judge can't read the case you've cited, he'll have to take your word on its contents. That also applies to obscure 19th Century treatises, or $600/year industry newsletters.

25. Move to Strike: Federal judges love motions to strike. Don't like something in your opponent's complaint? Move to strike the offending words. If your opponent files affidavits opposing your summary judgment motion, move to strike the entire affidavits or particular sentences in them. If you prevail on the motion to strike, you win the case since your summary judgment motion is now unopposed.

CHAPTER 20

TIPS, TRAPS, AND TOOLS FOR NAVIGATING NEGOTIATIONS AND PROFESSIONAL RELATIONSHIPS

Richard Vangelisti
Vangelisti Mediation LLC

Chapter 20

TIPS, TRAPS, AND TOOLS for SUCCESSFULLY NAVIGATING NEGOTIATIONS AND PROFESSIONAL RELATIONSHIPS

TABLE OF CONTENTS

Page #

TIMING OF NEGOTIATIONS
- Pre-litigation settlements 20-1
- Settlement during the course of the case 20-2
- When to consider making a demand or offer 20-2
- Settlement before or during trial 20-3

NEGOTIATION TIPS AND TACTICS
- Credibility and integrity 20-3
- Listen and advocate 20-3
- Disclosure of authority 20-4
- "Bottom line" representations 20-4
- Initial demands and offers – how to position them 20-5
- Direct negotiation or mediation? 20-5

PREPARING YOUR CLIENTS FOR SETTLEMENT NEGOTIATIONS
- Preparing plaintiffs 20-6
- Preparing defendants and insurers 20-7

CONCLUSION 20-8

NEGOTIATION STRATEGIES

By Jane Clark

Timing of Negotiations

There is no right or wrong time to negotiate. Much will depend on the nature, strengths and weaknesses of the case, the attitudes of the parties and or/insurance adjusters and the preferences and personalities of the attorneys. One thing is sure however - there will never be a settlement without at least some disclosure and exchange of information. Cases can potentially settle at any time in the litigation or pre litigation process. The advantages and disadvantages of settling at different points in the life of a case are set out below.

Pre litigation settlements

Cases will only likely settle pre litigation where the plaintiff has a strong case on liability, can demonstrate this and the defendant is motivated to avoid a lawsuit. Oftentimes plaintiff's counsel will send a Demand Letter before filing a lawsuit offering the defense an opportunity to evaluate the case and make an offer. In order to evaluate the case, the defense will need information about the plaintiff's case and usually details of the supporting evidence. One disincentive to early settlement is that often, plaintiff's counsel will not have all this evidential information without formal discovery in the case. However, if it appears relatively straightforward in terms of liability e.g. a rear end collision with a police report available, and plaintiff can provide documentation e.g. through medical and employment records of the injuries sustained, the economic loss claims and the current status re both, it should not be too difficult to prepare a formal and detailed demand letter. In clear cut cases of liability, car accident cases are one of the more likely types of cases where pre suit settlement is possible and this often does occur. Oftentimes however, pre suit offers are so low, it is necessary to file the case to pressurize the defense into increasing the offer. Many times these cases will proceed to a trial on damages only, unless information has come to light during discovery that causes either or both parties to change their view of the case.

If however you have a strong case there are clearly advantages to settling pre litigation - the most significant of which is the saving in time and money of having to litigate and possibly try the case. In cases where the expenses will be significant, e.g. medical malpractice cases or other complex cases involving costly experts and requiring more extensive discovery, the cost of litigating can be substantial.

With saving in cost and time being the primary advantage of early settlement, what are the disadvantages? Often in a case, discovery is needed to fully evaluate the strengths and weaknesses and only limited information may be available before litigation - in particular the testimony of opposing witnesses. Sometimes the plaintiff feels strongly that he or she wants their day in court - and this desire may change only after they have been through deposition with a fast approaching trial date and a sense of the risk of loss. Without knowledge of the opposition's case, the attorneys will likely have a one sided and maybe unrealistic view of the case, making it more difficult to settle due to unrealistic expectations.

Another disincentive to settle is a fear of "showing your hand" to your opponent. Oftentimes to obtain a settlement, the defense will need information. Oftentimes the information you have may not be discoverable in litigation before trial e.g. the opinion of a supportive expert. Some attorneys worry that if they reveal key information about their case too early, their opponent will use it against them and they will lose the element of surprise. This is particularly so in states such as OR where there is generally not disclosure of experts. If however you are litigating in Washington, federal courts or a state where there is disclosure of experts, you will have to assess whether tactically it is to your client's advantage or disadvantage to reveal information such as expert opinions too early in the case.

In a clear cut case of liability and damages, early settlement should at least be considered. Whether you achieve a settlement at this stage will depend on the nature and value of the case and the personalities of the parties and attorneys involved. Often you will work with the same opposing attorneys and oftentimes the same insurance adjusters on multiple cases. If you are viewed by your opponent as being reasonable and fair with integrity, and if your credibility is maintained, the likelihood of early settlements will increase.

Settlement during the course of the case

Of course, settlement can occur at any point during the progression of a case. Oftentimes, as discussed above, the parties simply need information that can be obtained from the discovery process to allow them to evaluate the strengths, weaknesses and potential value of the case. Litigation can be a costly business and you should bear this in mind when you develop your discovery and settlement strategies. It can be tempting to take the deposition of everybody even remotely involved in the case and hire multiple experts to testify. This is entirely appropriate and reasonable if the case so justifies You should always bear in mind the potential value of the case when considering what costs should be incurred and be strategic about the timing of discovery. Are you positioning a case for trial or settlement? How you proceed with discovery and even the questions you ask during the discovery process may be influenced by this decision. For example, if you know the case is unlikely to settle, you may want to save those "killer" cross examination questions for trial and not alert or rehearse the witness during the deposition process.

After a case has been filed, give early thought to what discovery is required to give both parties the information they need to at least consider settlement. Identify the key witnesses that need to be deposed and the key documents that need to be obtained and reviewed through discovery to allow that evaluation to occur. After that "key discovery stage" has been concluded, evaluate the case and explore the possibility of a settlement. If attempts are made at settlement and fail, you know that you are in "trial mode" and can prepare the rest of the case accordingly.

When to consider making a demand or offer

Consider doing so when your case it at its strongest and before the weaknesses in your case become apparent during the discovery process. If you have a particularly good

witness or a document that strongly supports your case, following disclosure of that document or deposition of that witness may be a good time to consider trying to engage in settlement negotiations. Similarly if you know you have a witness about to be deposed who will harm your case consider trying to settle before that deposition takes place.

Settlement negotiations will often start after the parties have completed the discovery stage of the case and before trial preparation starts. If you have not already considered settlement or started negotiations by this point in the case, you should consider doing so before you spend the hours needed to prepare for trial.

Settlement before or during trial

Some cases are settled at the door of the courtroom or even during trial. There are many reasons for this. Oftentimes discovery is not completed until shortly before trial and parties therefore do not have the information they need prior to this to engage in meaningful negotiations. In other cases, attorneys for the parties are not fully engaged and realistically evaluating the strengths and weaknesses of the case until they start to prepare it for trial. In other cases, the procedures of the insurer may delay settlement until close to the trial date.

Of course settlement can and often does occur during trial as counsel continue to assess the strengths and weaknesses of each side of the case as the trial progresses. Cases even settle while the jury if out - a time when parties and their attorneys become anxious and may second guess their earlier evaluation of the case. Even after a verdict and pending appeal cases may settle. Better the certainty of a settlement than the uncertainty and possibility of an adverse ruing on appeal and possible retrial.

Negotiation tips and tactics

Credibility and Integrity

The first rule in negotiation is maintain your credibility and integrity. Aa soon as you lose your credibility you lose your ability to negotiate effectively from a position of strength. Therefore throughout the case and even before you reach the point of starting negotiations, do not make promises or threats you cannot follow through on. Of course it can and does sometimes happen that witnesses do not testify as you expect them to testify and the face of your case can change during the litigation process. However, if you make representations to your opponent that you cannot fulfil they will not trust you in negotiations and any information you communicate as part of the negotiation process will be regarded with suspicion. This makes it very difficult to argue a strong case and maximize your client's position in settlement negotiations. Cases are far more likely to settle when the opposing attorneys trust and respect each other and are willing to listen to each other's positions.

Listen and advocate

The key to successful negotiations is listening and advocating. You must listen to what your opponent is saying about his case, evaluate that information and then advocate your client's position. Your opposing attorney may give you information during settlement

negotiations that could impact your view of the case and its settlement value. Therefore hear what he is saying and acknowledge that you have done so. If your opponent believes that you have heard and understood his position and you have maintained your credibility during the case in terms of exchange of information and representations of facts and evidence, he is more likely to listen to and understand your position when you advocate for your client. The more credible you have been during the case, the more credible will be your arguments supporting your offer or demand.

You must also be prepared to advocate your client's position - in much the same way as you would do during a closing argument. If you represent a plaintiff and want the defendants to increase their offer, you have to be able to explain and justify why you believe the case has a higher value with reference to the facts and the evidence.

Sometimes attorneys are unprepared for settlement negotiations. If you are not prepared, do not be afraid to delay discussions until you are. If for example you get a call out of the blue one day from your opposing counsel wanting to discuss settlement and making a demand or an offer and asking for your evaluation of the case and reaction to the offer, do not be afraid to put off such a discussion until you have had time to formulate a response. Of course, you generally cannot respond to any demand immediately without consulting with your client (unless you already have authority to settle up to a certain amount). However, without giving the matter some thought, you likely will not do your case justice. Before calling your opponent back, consider making a list of all the points you want to make regarding your case and your response to the points he made to ensure that you do not forget anything.

When making your counter demand or offer - be prepared to justify your response by reference to your evaluation of the strengths and weaknesses of the case.

Disclosure of authority

The defense will typically have a limit of authority placed on the case by the insurer. Oftentimes the insurer will give the attorney authority to negotiate a settlement up to a certain amount. Sometimes additional funds are available in addition to that authority or the adjuster may need to seek an increase in the authority. If you are defense counsel and are asked the limit of your authority -how do you respond? Oftentimes you will not want to give this away early in the settlement negotiations. Just because you have authority up to a certain amount does not mean that you have to offer the complete amount of your authority. However, you cannot lie to your opponent and advise that you have authority less than you do - this would be wrong ethically and goes to the issue of credibility discussed earlier. Be prepared for this question and know how you will respond. An answer such as "I am not at liberty to disclose that at this time" or " that information is confidential at this stage of the negotiation" will usually suffice. Your opponent cannot force you to disclose your authority.

"Bottom line' representations

Attorneys commonly represent an amount as being the "bottom line" and then go beyond the bottom line. Sometimes this is not unreasonable. Bottom lines can of course change as the litigation proceeds and information comes to light that changes the evaluation of

the case. Sometimes a client will refuse to go beyond a certain figure and represent that as the bottom line but change their mind after further consideration.

Again - from a credibility perspective, be wary of consistently going beyond your bottom line - if you do this you will lose credibility in future negotiations. Your opponent may well say "Oh Jo always says $100,000 is his bottom line but always end up settling for 50% of that". If you do so, and on the day you have that case where $1000,00 really is your bottom line, you may be unable to settle it!

Initial demands and offers - how to position them

Most cases have a settlement range. That is a figure within a range that the defense will be prepared to pay and the plaintiff will be prepared to accept to avoid the risk of trial. If the case has such a range, the case will likely settle within it irrespective of the opening demand and offer amount. However, how long it takes to reach that figure in settlement negotiations and how much credibility the attorneys maintain during the process will depend on the amounts of the opening demand and offer.

As a general rule, if the opening demand is excessively high the opening offer will be unreasonably low. That is because the defense will want to leave sufficient room to increase offers during the negotiation process but still ending up in the settlement range. For example, if the settlement range on a case is $50-$60,000, parties will likely reach that range much more quickly if the opening demands and offers are realistic and closer to that range.

However, the risk of making a demand close to that range - particularly if you have not worked previously with your opposing counsel, is that your opponent will believe that as you have made a demand of $80,000, you probably value it at around $20,000. It is only with experience and ongoing relationships with your opponent can you reach a point where you have sufficient credibility to be able to make a demand close to the settlement range and know that it will settle within this range, as your opponent knows from experience that you are credible and realistic in your negotiations. Until you reach that type of relationship, make initial demands sufficiently high to give yourself plenty of room for negotiation but not so high that the defense is not even willing to engage in discussions believing there is no possibility of settlement. You also lose credibility if you demand $500,000 and ultimately settle the case for $30,000.

On the defense side - the same rules generally apply. As the defense holds the purse strings, their position it a little easier. When you are at your authority and there is no more money, the plaintiff must then take it or leave it. If that take it or leave it offer is in the settlement range the case will likely settle. If however your opening offer is unreasonably low plaintiff may be reluctant to engage in negotiations and simply prefer to take his chances and spend his time preparing for trial.

Direct Negotiation or Mediation?

There are advantages and disadvantages to direct negotiation versus mediation. One advantage is that it is cheaper - you avoid the mediator's fee, which is more of a factor in smaller value case. Oftentimes, defense counsel will put the authority out there on the

table and it will be a take it or leave it situation with mediation unlikely to be effective in changing what the insurer will pay. There are cases however where mediation is justified both in terms of the value of the case and efficiency of the process. Oftentimes during direct negotiation, parties will go back and forth over a number of weeks, sometimes even months. That whole process can take place with a mediator over the course of a few hours.

Another advantage of mediation is that many mediators are "evaluative" mediators. This means that they evaluate the case and give feedback to the parties during the course of the mediation process. Oftentimes, having a neutral party with experience in the relevant legal field mediate and evaluate the case can help to change the positions of the parties and reach a faster settlement. This is particularly so where the parties and/or the attorneys perhaps have an unrealistic view of the case in terms of its strengths or valuation. A mediator who has experience in handling personal injury cases either as an attorney or judge, may be useful in helping to educate a plaintiff who has unrealistic expectations regarding the value of the case and what they will likely recover at trial. The same may be true of an insurance adjuster who is taking an unrealistic position and failing to understand the issues in the case.

The parties must agree on the identity of the mediator and the personality of the mediator will often be a factor in the selection process. Some mediators are very "let's get down to it and move this forward", others like to talk about other cases and their other experiences and others are willing to listen. Many good mediators will do some or all of these things depending on the case. If however you have a case where you represent a plaintiff who really wants to tell her story and you know a particular mediator wants to get down to business- that person may not be the best mediator in the case. The case is more likely to settle if the parties trust the mediator and feel that their side of the case has been heard and communicated by the mediator to the other side.

Typically the cost of mediation is split between the parties - although sometimes one party is willing to pay the cost. Sharing the cost typically engages both parties in the process - rather than just coming along for the ride because the other side is paying with no real willingness to settle the case.

Preparing your clients for settlement negotiations.

Preparing Plaintiffs

Preparing your client for settlement negotiations can be a challenging process, particularly when representing plaintiffs. On the one hand you want to maintain your role as being a strong advocate for and believing in the case. On the other hand you need to be realistic with your client regarding what the likely outcome is of the trial and what lies in store if the case does not settle. One thing that is certain is that the outcome of a trial is uncertain. Clients need to understand this and all you can do is give them your considered opinion as to the likely range of outcomes if the case does not resolve. It is then for the client to decide whether they want to "roll the dice".

Attorneys often have problems with clients who have unrealistic expectation with regard to outcome. Some clients simply do not want to accept or acknowledge that they may get

less than $200,000 on a whiplash case or that the failed root canal and need for 4 other procedures is not worth $500,000 because they could not eat for three months. All you can do is to educate and advise your client as to likely value with a plaintiff verdict at trial and represent the percentage risk of a loss at trial with no recovery, explaining that this has to be factored into the settlement process.

It is a useful tool, before discussing settlement with your client to have formed an opinion as to the likely verdict range in the event of a plaintiff verdict with an evaluation of the percentage likelihood of prevailing at trial. As a starting point, if it is a case with a likely value of $40-$50,000 with a 50/50 change of prevailing at trial, you may represent a reasonable settlement range to be $20-$25,000. Be prepared to discuss your rationale with your client.

Having discussed the acceptable settlement range, you should then discuss with your client, what demand you should make to allow sufficient room to negotiate down to your range. Oftentimes, this will depend on the nature and value of the case and the nature of your relationship and prior dealings with opposing counsel.

If you have not agreed the settlement range with your client before making a demand and explained to them the reason for making a demand higher than the settlement range you run the risk of having a client who is upset with you for having "sold them short" in settlement. You want to avoid a situation where, having achieved what you consider to be a great settlement for your client, they are unhappy because "you told the defense in the demand that my case was worth $100,000 so why did we end up settling for $50,000?". This can be avoided if you communicate your reasoning to the client ahead of time.

In situations where your valuation of the case is different to that of your client and you consider your client to have unrealistic expectations, you may want to consider brining in a mediator whose role in part will be to educate your client. An attorney with a lot of experience in the relevant field of law involved in the case or a retired judge will make excellent mediators in this kind of situation.

When you get into the negotiation process - whether it be direct negotiation or mediation - warn your client to expect low offers at the beginning and not to be offended. I will never let my client walk out of a mediation until at least 4 or 5 exchanges have taken place. Early on in the negotiations the parties are testing the waters and to disengage from the process at this stage is not to be recommended. Tell your client "you will likely be offended by the first offer". That way when they are offended they are expecting it and are not so offended by it.

Preparing Defendants and Insurers

Where there is insurance available, the defendant is often not involved or engaged in the negotiation process. Remember however that the defendant is still your client and entitled to be involved and consulted if they so wish. In some case e.g. medical malpractice cases, the defendant will have a say in whether the case settles and therefore should be involved

in the process. Of course, in cases where the restitution sought is something other than monetary compensation e.g. reinstatement in an employment case, the defendant will be very actively involved in the process as will the parties in a divorce case.

The primary rule again is to ensure that your client is educated as to what to expect, the possible outcomes at trial and the percentage chance of a favorable verdict at trial. If you are dealing primarily with an insurance company - ensure that you have followed all their procedures and provided to them the information and documentation they need to come up with appropriate authority. If you fail to provide key information and authority is granted not having taken that information into account, the case may not settle and the client and insurer may be compromised at trial.

If you are engaged in direct negotiations, consider asking the insurer to give you authority up to a certain amount so you do not have to go back to them with each offer. Whether the adjuster will do this will depend on the nature and size of the case and your previous dealings and relationship with them. Some adjusters want to take more control over the negotiations than others. Some may even prefer to do the negotiation direct with plaintiff's counsel. If the case proceeds to mediation, it is preferable that the adjuster or person with authority is present. If they are only available by phone-they are not getting the benefit of the communication of information that may impact how they view and evaluate the case.

Conclusion

Negotiation is a skill that comes with practice. Do not be afraid of it. Remember the basic rules:

1. Be prepared;
2. Have integrity and credibility
3. Listen to your opponent
4. Advocate for your client
5. Be realistic

CHAPTER 21

LAWYERING FOR CLIENTS WITH DIVERSE NEEDS

Darin J. Dooley
Draneas Huglin Dooley LLC
Talia Y. Guerriero
Albies Stark & Guerriero
Jennifer A. McGowan
Youth Rights & Justice

Chapter 21

LAWYERING FOR CLIENTS WITH DIVERSE NEEDS

TABLE OF CONTENTS

I. REPRESENTING CHILD CLIENTS 21-1

II. PROVIDING LEGAL SERVICES TO MEMBERS OF THE LGBTQ+ COMMMUNITIES 21-10

III. WORKING WITH ELDERLY CLIENTS OUTLINE 21-30

IV. WORKING WITH ELDERLY CLIENTS POWERPOINT SLIDES 21-35

REPRESENTING CHILD CLIENTS

ATTORNEY FOR THE CHILD

CHILD'S ATTORNEY – WHERE DO WE START?

When a child client has the capacity to instruct a lawyer, the lawyer-client relationship is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, and communication and the duty to provide independent advice.

- OSB Standards for Representation in Juvenile Dependency Cases Commentary (2017)

ATTORNEY FOR THE CHILD STANDARDS

DEPENDENCY CASE

FOR A CHILD CLIENT WITH FULL DECISION-MAKING CAPACITY, THE CHILD-CLIENT'S LAWYER MUST MAINTAIN A NORMAL LAWYER-CLIENT RELATIONSHIP WITH THE CHILD CLIENT, INCLUDING TAKING DIRECTION FROM THE CHILD CLIENT ON MATTERS NORMALLY WITHIN THE CHILD CLIENT'S CONTROL.

DELINQUENCY CASE

THE LAWYER FOR A YOUTH IN A DELINQUENCY CASE SHOULD PROVIDE QUALITY AND ZEALOUS REPRESENTATION AT ALL STAGES OF THE CASE, ADVOCATING AT ALL TIMES FOR THE CLIENT'S EXPRESSED INTERESTS.

FAMILY LAW CASE

LOCAL PRACTICE VARIES MULTNOMAH COUNTY SLR: APPOINTED COUNSEL WILL REPRESENT THEIR CLIENTS' LEGAL INTERESTS IN OBTAINING A SECURE, STABLE HOME LIFE AND A BALANCED RELATIONSHIP WITH BOTH PARENTS AND WILL BE ANSWERABLE ONLY TO THEIR CLIENT AND TO THE COURT.

ORPC RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make **adequately considered decisions** in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Adequately Considered Decisions

"DETERMINATION ABOUT CAPACITY SHOULD BE GROUNDED IN INSIGHTS FROM CHILD DEVELOPMENT SCIENCE AND SHOULD FOCUS ON THE CHILD'S DECISION-MAKING PROCESS RATHER THAN THE CHILD'S CHOICES THEMSELVES."

HOW DO YOU DETERMINE A CHILD'S CAPACITY?

Does the child have sufficient maturity to understand and form an attorney-client relationship?

Is the child capable of making reasoned judgments and engaging in meaningful communication?

IS THE CHILD'S CAPACITY DIMINISHED?

- Child's developmental stage/cognitive ability
- Emotional and mental development
- Ability to communicate a preference and articulate reasons for the preference
- Decision-making process used by the child (is it logical, consistent, influenced by others)
- Ability of child to understand consequences
- Consistency of the child's decisions
- Strength of wishes
- Opinions of others (social workers, therapists, teachers, family) while watching for bias

IT'S NOT ALL OR NOTHING!

"Children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." ABA Rule 1.14 commentary

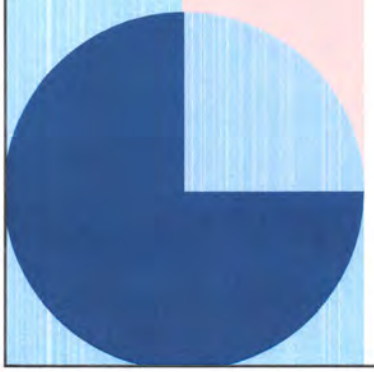
Substituted Judgment

WHAT DO WE DO WHEN OUR CLIENT DOESN'T HAVE CAPACITY TO DIRECT OUR REPRESENTATION?

SUBSTITUTED JUDGMENT

Substituted judgment means the lawyer attempts to determine what the child would decide if the child was capable of making an adequately considered decision.

SUBSTITUTED JUDGMENT



MAINTAIN ATTORNEY – CLIENT RELATIONSHIP TO EXTENT POSSIBLE

- Child-centered - guided by this particular child
- Child's verbal expressions are an important factor in making substituted judgment determination
- Consider child's legal interests - may include basic physical and emotional needs, such as safety, shelter, food and clothing

INVESTIGATE – GATHER INFORMATION

- Investigate child client's circumstances, including important family relationships, the child client's strengths and needs, and other relevant information
- Seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert

SUBSTANTIAL RISK OF HARM – TAKING PROTECTIVE ACTION

1.14(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action…

WHAT IS PROTECTIVE ACTION?

Includes "consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." Rule 1.14(b)

WHAT ABOUT ORPC RULE 1.6 – CONFIDENTIALITY?

When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests

FINAL NOTE

- Young people's voices deserve to be heard. Even when the Judge makes a different decision, buy in is greater when they feel like they were part of the decision.


THANK YOU
Jennifer McGowan
Jennifer.Mc@youthrightsjustice.org
https://youthrightsjustice.org/

Providing Legal Services to Members of LGBTQ+ Communities

Talia Yasmeen Guerriero, Esq.
Albies, Stark & Guerriero
talia@albiesstark.com

Objectives

PART 1:

Terminology, Implicit Bias, and Microaggressions

PART 2:

Application to our offices, work with clients, & in the courtroom

LGBTQIA2S+:

- Lesbian
- Gay
- Bisexual
- Transgender
- Queer
- Intersex
- Asexual or agender
- Two-spirit

Sex ≠ Gender

Gender Binary: A social system and/or cultural belief related to the classification of gender into two distinct, opposite forms of masculine and feminine, and the social assignment of associated traits.

Gender Spectrum: The reality that there is a range of gender identities between and outside of the categories of male and female.

Sexual Orientation ≠ Gender Identity

Gender Identity: An internal sense of being female, male, a blend of both or neither at all. Can be the same as or different from their sex assigned at birth.

Sexual Orientation: A reference to the identity of the persons to whom we have a physical, emotional and/or romantic attraction.

Cisgender: a person whose sense of personal identity and gender corresponds with their sex assigned at birth.

Non-Binary: An adjective describing a person who does not identify exclusively as a woman or a man. They may identify as both, somewhere in between, or outside the categories of a "woman" and a "man."

They/Them: An increasingly used set of pronouns that dissociate sex/gender from referencing an individual person.

Assigned Name: Name assigned to a person at birth and with which which they may or may not identify.

Deadname: Deadnaming occurs when someone refers to a transgender or nonbinary person by the name they used before they transitioned.

Intersectionality

The overlapping or intersecting social identities and related systems of oppression, domination, and discrimination.

How do various biological, social and cultural constructs such as gender, race, class, ability, sexual orientation, religion, age, nationality, and other sectarian axes of identity interact on multiple and often simultaneous levels?

Microaggressions: What Does This Mean?

Everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, that communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership.

Microaggressions: What is the effect?

- Increases experiences of "imposter syndrome"
- Increases isolation (fewer models, less institutional support)
- Increases minority stress/exposure to micro-aggressions
- Increases feelings of not-belonging

Potentially Microaggressive

- "What does your husband do?"

Re-phrase

- "What does your husband do?"

"Do you have a spouse? What does your spouse do?"

Potentially Microaggressive

- "Do you have a boy or a girl?"

Re-phrase

- "Do you have a boy or a girl?"

"How does your kid identify?" Or "What pronouns does your kid use?"

Potentially Microaggressive

- "Are your pronouns he, she or they?"

Re-phrase

- "Are your pronouns he, she or they?"

"My pronouns are he/him/his."

If not volunteered, maybe ask "what pronouns would you like me to use for you?"

Potentially Microaggressive

- After accidentally using she/her instead of they/them:

"Sorry, using 'they/them' is so hard in the singular" or "it's so hard cause it's just not grammatically correct"

Re-phrase

- "Sorry, using 'they/them' is so hard in the singular" or "it's so hard cause it's just not it's not grammatically correct"

"My apologies – I'll keep at it until I get it right"

(don't over-apologize….

then practice "they/them" at home!)

Potentially Microaggressive

- "I'm supportive of my cousin's gay lifestyle" or
- "I'm supportive of my cousin's choice to be gay"

Re-phrase

- "I'm supportive of my cousin's gay lifestyle" or "I'm supportive of my cousin's choice to be gay"

"I'm proud of my cousin's gay identity"

Potentially Microaggressive

- "Have you had surgery yet?"

Re-phrase

- "Have you had surgery yet?"

Say nothing.

Don't ask overly invasive questions that have no relevance to the person's identity or your representation of them.

If you need to know for your representation, ask the person what they need to have a supportive environment for the conversation.

Why is POWER Important?

- Dominant groups that establish and reify what is considered “normal” or “acceptable” can marginalize the values, aesthetics, and abilities of others.
- Can interrupt microaggressions.

Application to Our Work

Where does it show up?

- Staff in Your Office
- Selecting and Working with Clients
- Deciding Whether to Take a Case to Trial
- Jury Selection and Voir Dire
- Litigating the Case and Developing Themes

Staff

- Use respect, privacy, & good terminology
- Enforce strong anti-discrimination policy
- Guidance on transition in workplace
- Examine & change policies: ID, uniform, health insurance, gendered language, payroll
- Don't put burden on the person!
- Bathroom assessment, signage, & policy
- Groups or associations? Supportive symbols?

Liability for Transgender Healthcare Exclusions

- https://transhealthproject.org/documents/51/2022-06-16_TLDEF_memo_on_trans_health_exclusions.pdf

Bathroom Signage Example

- "You are welcome to use the restroom that best aligns with your gender identity."

https://ofm.wa.gov/sites/default/files/public/shr/Diversity/DEIMEDIA/Inclusive-Bathroom-Signage-Recommendations_RAIN.pdf.

Clients

Write down the ways in which a person's LGBTQ identity might be important to your practice area.

Think specifically about your intake forms or intake questions – what information is relevant to a person's sexual orientation or gender identity?

Cases with no legal name change

- Caption:

Michael Smith (a.k.a. Michelle Smith)

- Help the client get a legal name change

Third Parties Disrespecting Pronouns

- If **parties**, seek an order or sanction from the Court
- If a **judge**, use Lambda Legal's arguments in amicus brief in *U.S. v. Varner*, available at https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/jett_tx_20200319_amicus-brief.pdf
- If **opposing counsel**, cite ORPC 8.4(a)(7):

"It is professional misconduct for a lawyer to in the course of representing a client, knowingly intimidate or harass a person because of that person's [ ] sex, gender identity, gender expression, sexual orientation [. . .]."

Intentional Misgendering as Harassment

- ***Jameson v. U.S. Postal Service***, EEOC Appeal No. 0120130992 (May 21, 2013) (repeated intentional misuse of the employee's name and pronoun may constitute sex-based disparate treatment and harassment).

- ***Lusardi v. Dep't of the Army***, EEOC Appeal No. 0120133395 (April 1, 2015) (agency restrictions on a transgender woman's ability to use a common female restroom facility constituted disparate treatment and complainant stated a hostile work environment claim based on those restrictions combined with offensive remarks and intentional repeated pronoun misuse)

Court Video and Jury Instructions on Implicit Bias (Oregon)

decide this case on guesswork, conjecture, or speculation.

You should make every effort to be aware of your biases, including unconscious biases, and what effect those may have on your decision making. In your deliberations, you must not be biased in favor of or against any party, witness, or lawyer because of the person's disability, gender, gender identity, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or *insert any other impermissible form of bias against a group or status that is not a protected class, e.g., a person's profession*]. We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of, and others we may not be fully aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions.

Do not allow any personal feelings, sympathy, prejudice, or bias—whether conscious or unconscious—to influence your decision making.

https://www.youtube.com/watch?v=BA-z4mS_Evg

Oregon LGBTQ-related Nondiscrimination Statutes

- **ORS 174.100:** Sexual orientation includes actual or perceived gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.
- **ORS 659A.030**: non-discrimination in workplace
- **ORS 659A.403**: public accommodations
- **ORS 659.850**: educational settings
- **ORS 659A.421**: housing

- **ORS 30.198: Civil action for intimidation** as a result of person's sexual orientation/gender identity

- "Bias crime" –
  - property damage,
  - physical contact,
  - intentionally subjecting person to alarm by threatening physical injury or property damage
  - places another person in fear of imminent serious physical injury

- Allows economic, noneconomic, and punitive damages and attorney fees and costs

Sample: Multnomah County Transgender Booking Policy

- https://s3-us-west-2.amazonaws.com/oregonknowledgebankmedia/other/Multnomah-sheriff-special-order-14-32.pdf

Resources

- https://www.pdxqcenter.org/findresources
- http://www.genderspectrum.org/
- https://www.portlandoregon.gov/71350
- https://www.ohsu.edu/transgender-health

Law Review Articles

- *Implicit Bias in the Courtroom - 59 UCLA L. Rev. 1124 (2012)*
- *Shadowing the Bar: Attorneys' own Implicit Bias - 28 La Raza L.J. 18 (2017)*
- *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias, 59 HASTINGS L.J. 1389 (2008).*

Talia Guerriero is a plaintiff-side employment lawyer in Portland, Oregon with a background in labor and union rights that enriches her employment practice. She has always been a strong voice for the underdog with a passion for social justice and civil rights that defines her life. Her work has focused on empowering and protecting the rights of marginalized communities, including lesbian, gay, bisexual, transgender, and queer ("LGBTQ") communities in particular.

Talia has significant civil rights and litigation experience both in her current position with and her previous positions with Meyer Stephenson and Bennett Hartman. Her law review article on implementing effective non-discrimination policies for LGBTQ youth in foster care was published in the U.C. Davis Journal of Juvenile Law and Policy.

Talia can be reached at 503-308-4775 or talia@albiesstark.com.

Working With Elderly Clients

I. Who is your client?

II. Duty to Client under Oregon Rules of Professional Conduct (ORPC)

III. Accommodations

IV. Capacity

V. Mandatory Elder Abuse Reporting

VI. Resources

I. Who is your client?

A. Know who your client is and clarify at initial consultation.

B. It is not unusual for someone other than the elderly person to call to make an appointment.

C. It is not unusual to have family members or friends attend the initial consultation with the elderly person.

D. Consider meeting with the elderly person alone prior to meeting with the larger group to assess capacity and ensure there are not any undue influence, etc., concerns.

II. Duty to Client under Oregon Rules of Professional Conduct (ORPC)

A. In general, attorneys owe a duty of competent and diligent representation to their clients. ORPC 1.1, 1.3, and 1.6.

B. When the client's capacity is diminished, for whatever reason, the attorney should attempt to maintain a normal attorney-client relationship, as far as reasonably possible. ORPC 1.14.

C. A respondent in a protective proceeding has the right to contact and retain legal counsel. ORS 125.300(3) and ORS 125.080(3).

III. Accommodations

A. Consider elder client's needs when you set up your physical space, and plan to adapt how you communicate with them. The Americans with Disabilities Act applies to your office, so become familiar with what's required under the law.

B. Don't assume that every elderly person needs an accommodation. Everyone ages differently. Some become physically frail, while their minds remain sharp. Others have memory problems but are perfectly capable of working through complicated decisions. Hearing and vision loss are common, but not universal.

C. Meeting time

D. Home visits

E. Memorialize all meeting in writing; mail / email; consider appropriate font type and size.

IV. Capacity

A. Presumption of capacity: Oregon law presumes a person to be competent absent an adjudication of incompetence.[i] A diagnosis of dementia by itself does not mean a person lacks the requisite capacity to act. Dementia has many forms: Alzheimer's; Lewy body; Vascular; Frontotemporal. Strokes may also affect capacity.

B. Capacity is measured at the moment the act is taken.

C. The requirements for capacity to perform a specific act cover a spectrum, as discussed below.

1. Testamentary capacity in Oregon is well established.[ii] The person must (1) be able to understand that by signing the will he or she is disposing of his or her assets at death; (2) know the nature and extent of his or her property. An exact accounting is not required however; (3) know, without prompting, who his or her heirs are; and (4) be cognizant of the scope and reach of the provisions of the document.

a) See In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958), for factors used in determining if a will has been the product of undue influence. See also, Matter of Swenson's Estate, 48 Or App 497, 500–502, 617 P2d 305 (1980).

2. The capacity to create, amend, revoke, or add property to a revocable trust is the same as the capacity to make a will. ORS 130.500.

3. A power of attorney for finances creates an agency relationship.[iii] The capacity to execute a valid power of attorney requires that, at the time of the execution of the document, the grantor is able to comprehend the nature of the business in which the grantor is engaged.[iv] The grantor needs to understand the purpose, intent, and effect of granting authority to the agent, but not necessarily be able to perform every act under the power granted to the agent.

4. The same basic standard applies to executing a deed, entering into a contract, or making a lifetime gift. The capacity required in all three situations is greater than testamentary capacity.[v] Presumably, this is because of the irrevocable nature of acts taken under deeds, contracts, and lifetime gifts.

5. A capable adult is authorized by statute to make health care decisions. ORS 127.507. *See also* ORS 441.098. There is a presumption that an adult has the requisite mental capacity to give informed consent even if a guardian has been appointed for the person. ORS 125.300. The standard for mental capacity to consent to or refuse proposed medical treatment is the ability to understand the basic information necessary for informed consent and to understand the nature and consequences of authorizing treatment.[vi]

D. Documenting Capacity: capacity assessments by attorneys create a "sliding scale" of capacity -

1. Ability to articulate reasoning behind the decision. Can your client articulate the reasons for his decision and are the reasons consistent with your client's goals and objectives?

2. The extent to which the client's cognition fluctuates from time to time.

3. The client's ability to understand the consequences of a decision.

4. The substantive fairness of the decision. We cannot "look the other way" if a client is being taken advantage of in a blatantly unfair transaction. Judging fairness risks substituting the attorney's own values and beliefs over the client's so self-awareness and caution must be used.

5. The consistency of a decision with a client's known long term commitments and values. Although we all can change our values over time, a decision consistent with our client's long term perspective may be easier to support.

6. Irreversibility of the decision. "The law historically has attached importance to protecting parties from irreversible events. Doing something that cannot be adjusted later calls for caution on the part of the attorney."[vii]

7. The first three factors are "functional" in that they reflect the cognitive functioning of the individual. The latter three are "substantive" in that they look at the content and nature of a decision itself. Under this approach, the latter three factors may be thought of as a sliding scale of capacity. The greater the concerns under these three substantive variables the greater the level of function needed under the first three variables. That is, the higher the risk, measured by the client's values and the finality and fairness of an act, the more the attorney needs to ensure decisional capacity.[viii]

V. Mandatory Elder Abuse Reporting

A. Oregon's elder abuse reporting law is at ORS 124.050 to ORS 124.095

1. It imposes a legal obligation on certain "public and private officials" to report elder abuse.

2. Lawyers are included in the definition of "public or private officials" having a duty to report. ORS 124.050(9).

B. Recognizing elder* abuse - *persons 65 and older

1. Any unexplained injury that doesn't fit with the given explanation for the injury.

2. The elder is not given the opportunity to speak for themselves without the presence of the caregiver.

3. The elder is extremely withdrawn and non-communicative or non-responsive.

4. Unpaid bills, overdue rent, utility shut-off notices.

C. Complying with mandatory reporting

1. If you have:

a) Reasonable Cause to Believe;

b) Elder Abuse has Occurred; and

c) Contact with Elder or Abuser

2. Then you MUST report UNLESS an Exception Applies

a) Attorney-Client Privilege – ORS 40.225, and/or

b) Information communicated during representation that is detrimental to client if disclosed.

D. Confidentiality

1. RPC 1.6(A) Requires lawyers to preserve confidences:

a) Attorney-client privileged information, and

b) Other information gained during the course of representation if (a) client requests to keep secret; (b) embarrassing if disclosed; or (c) likely detrimental to client if disclosed.

2. RPC 1.6(A), (B) allow lawyers to reveal confidences if:

a) Client consents;

b) Required by law – including ORS 419B.010 et seq.);

c) Client intends to commit future crime; or

d) Necessary to prevent reasonably certain death or substantial bodily harm.

VI. Resources

A. OSB Elder Law section website

B. OSB Estate Planning section website

C. Long Term Care Ombudsman

D. Adult Protective Services (APS)

E. OSB General Counsel's Office – Ethics Hotline

[i] *See Schultz v. First Nat. Bk. of Portland*, 220 Or 350, 359, 348 P2d 22 (1960); *Kruse v. Coos Head Timber Co.*, 248 Or 294, 306, 432 P2d 1009 (1967); *Van v. Van*, 14 Or App 575, 513 P2d 1205 (1973).
[ii] See *Kastner v. Husband*, 231 Or 133, 372 P2d 520 (1962), *In re Phillips' Will*, 107 Or 612, 213 P 627 (1923). See also, *In re Bond's Estate*, 172 Or. 509, 519 (1943)
[iii] *Scott v. Hall*, 177 Or 403, 163 P2d 517 (1945).
[iv] *Wade v. Northup*, 70 Or 569, 140 P 451 (1914).
[v] *Legler et al. v. Legler*, 187 Or 273 (1949), *First Christian Church v. McReynolds*, 194 OR 68, 241 P.2d 135 (1952).
[vi] Fay A. Rozovsky, *Consent to Treatment, A Practical Guide* 21 (2d ed 1990 & Supp 1994); 1 *Oregon Health Law Manual* §6.2-3 (Oregon CLE 2003).
[vii] *Macy v. Blatchford, 330 Or 444, 8 P3d 204 (2000)*.
[viii] ABA Commn. on L. and Aging, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers,* 19, (2005).

2023 PLF LEARNING THE ROPES
WORKING WITH ELDERLY CLIENTS

DARIN DOOLEY

Draneas Huglin
Dooley LLC

1

I. Who is your client?
II. Duty to Client under Oregon RPC
III. Accommodations
IV. Capacity
V. Mandatory Elder Abuse Reporting
VI. Resources

I. WHO IS YOUR CLIENT?

II. DUTY TO CLIENT UNDER OREGON RULES OF PROFESSIONAL CONDUCT (ORPC)

- Duty of competent and diligent representation to clients. ORPC 1.1, 1.3, and 1.6
- If client's capacity is diminished, for whatever reason, the attorney should attempt to maintain a normal attorney-client relationship, as far as reasonably possible. ORPC 1.14.
- Respondent in a protective proceeding has the right to contact and retain legal counsel. ORS 125.300(3) and ORS 125.080(3).

III. ACCOMMODATIONS

- Consider elderly client's needs when you set up your physical space, and plan to adapt how you communicate with them. Americans with Disabilities Act (ADA) applies to your office.
- Don't assume that every elderly person needs an accommodation. Everyone ages differently. Some become physically frail, while their minds remain sharp. Others have memory problems but are perfectly capable of working through complicated decisions. Hearing and vision loss are common, but not universal.
- Meeting time
- Home visits
- Memorize all meeting in writing: mail / email; consider appropriate font type and size

IV. CAPACITY

- Oregon law presumes a person to be competent absent an adjudication of incompetence. A diagnosis of dementia by itself does not mean a person lacks the requisite capacity to act.
- Capacity is measured at the time the act is taken. There may be 'moments of lucidity.'
- The requirements for capacity to perform a specific act cover a spectrum
- Testamentary capacity: The person must (1) be able to understand that by signing the will he or she is disposing of his or her assets to death; (2) know the nature and extent of his or her property. An exact accounting is not required however, (3) know, without prompting, who his or her heirs are; and (4) be cognizant of the scope and reach of the provisions of the document.

IV. CAPACITY CONTINUED

- The capacity to create, amend, revoke, or add property to a revocable trust is the same as the capacity to make a will. ORS 130.500.
- The capacity execute a power of attorney for finances, a deed, make a contract, or making a lifetime gift requires greater capacity than testamentary capacity because of the irrevocable nature of the authority given or act.
- A capable adult is authorized by statute to make health care decisions. ORS 127.507. There is a presumption that an adult has the requisite mental capacity to give informed consent even if a guardian has been appointed for the person. ORS 125.300.

IV. CAPACITY CONTINUED

- Documenting Capacity: capacity assessments by attorneys create a "sliding scale" of capacity –
  - Ability to articulate reasoning behind the decision. Can your client articulate the reasons for his decision and are the reasons consistent with your client's goals and objectives?
  - The extent to which the client's cognition fluctuates from time to time.
  - The client's ability to understand the consequences of a decision.
  - The substantive fairness of the decision.
  - The consistency of a decision with a client's known long-term commitments and values.
  - Irreversibility of the decision.
  - The first three factors are "functional" in that they reflect the cognitive functioning of the individual. The latter three are "substantive" in that they look at the content and nature of a decision itself. Under this approach, the latter three factors may be thought of as a sliding scale of capacity.

V. MANDATORY ELDER ABUSE REPORTING

- Oregon's elder abuse reporting law is at ORS 124.050 to ORS 124.095.
  - It imposes a legal obligation on certain "public and private officials" to report elder abuse.
  - Lawyers have a duty to report. ORS 124.050(9).
- Recognizing elder abuse (persons 65 and older)
  - Any unexplained injury that doesn't fit with the given explanation for the injury.
  - The elder is not given the opportunity to speak for themselves without the presence of the caregiver.
  - Being extremely withdrawn and non-communicative or non-responsive.
  - Unpaid bills, overdue rent, utility shut-off notices.

V. MANDATORY ELDER ABUSE REPORTING CONTINUED

- Complying with mandatory reporting
  - If you have:
    - Reasonable Cause to Believe *(1) Elder Abuse has Occurred, and* (2) *Contact with Elder or Abuser*
  - Then you MUST report UNLESS an Exception Applies
    - Attorney-Client Privilege – ORS 40.225, and/or
    - Information communicated during representation that is detrimental to client if disclosed
- Confidentiality

VI. RESOURCES

- OSB Elder Law section website
- OSB Estate Planning section website
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