Learning The Ropes

A Practical Skills & Ethics Workshop
for new admittees & lawyers entering private practice

November 1, 2017
November 2, 2017
November 3, 2017

This seminar qualifies for
15.25 MCLE credits
(10.25 Practical Skills, 3 Introductory
Access to Justice, and 2 Ethics
Credits.)

Sponsored by the
OSB Professional Liability Fund
and the
Oregon State Bar
New Lawyers Division

Oregon Convention Center
Portland, Oregon
**MCLE FORM 1: Recordkeeping Form (Do Not Return This Form to the Bar)**

**Instructions:**
Pursuant to MCLE Rule 7.2, every active member shall maintain records of participation in **accredited** CLE activities. You may wish to use this form to record your CLE activities, attaching it to a copy of the program brochure or other information regarding the CLE activity.

Do not return this form to the Oregon State Bar. This is to be retained in your own MCLE file.

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<td>Oregon Convention Center, Portland, OR</td>
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☐ Activity has been accredited by the Oregon State Bar for the following credit:

- [ ] General
- [ ] Prof Resp-Ethics
- [ ] Access to Justice
- [ ] Child Abuse Rep.
- [ ] Elder Abuse Rep.
- [ ] Practical Skills
- [ ] Pers. Mgmt/Bus. Dev.*

☐ Full Credit. I attended the entire program and the total of authorized credits are:

- [ ] General
- [ ] Prof Resp-Ethics
- [ ] Access to Justice
- [ ] Child Abuse Rep.
- [ ] Elder Abuse Rep.
- [ ] Practical Skills
- [ ] Pers. Mgmt/Bus. Dev.*

☐ Partial Credit. I attended ______ hours of the program and am entitled to the following credits:

- [ ] General
- [ ] Prof Resp-Ethics
- [ ] Access to Justice
- [ ] Child Abuse Rep.
- [ ] Elder Abuse Rep.
- [ ] Practical Skills
- [ ] Pers. Mgmt/Bus. Dev.*

*Credit Calculation:*
One (1) MCLE credit may be claimed for each sixty (60) minutes of actual participation. Do not include registration, introductions, business meetings and programs less than 30 minutes. MCLE credits may not be claimed for any activity that has not been accredited by the MCLE Administrator. If the program has not been accredited by the MCLE Administrator, you must submit a Group CLE Activity Accreditation application (See MCLE Form 2.)

**Caveat:**
If the actual program length is less than the credit hours approved, Bar members are responsible for making the appropriate adjustments in their compliance reports. Adjustments must also be made for late arrival, early departure or other periods of absence or non-participation.

*Personal Management Assistance/Business Development. See MCLE Rule 5.11 and Regulation 5.300 for additional information regarding Category III activities. Maximum credit that may be claimed for Category III activities is 6.0 in a three-year reporting period and 3.0 in a short reporting period.*

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Day 1 - 5.75 MCLE Credits (4.75 Practical Skills Credits and 1 Ethics Credit).
Day 2 - 6.5 MCLE Credits (4 Practical Skills Credits, 1 Ethics Credit, and 1.5 Introductory Access to Justice Credits).
Day 3 - 3 MCLE Credits (1.5 Practical Skills Credits and 1.5 Introductory Access to Justice Credits).
Learning The Ropes - Day 1

Day 1 – Wednesday, November 1, 2017

Day 1 qualifies for 5.75 MCLE Credits (4.75 Practical Skills Credits and 1 Ethics Credit).

8:00 – 8:30 Registration/Check-In – Oregon Convention Center
777 NE Martin Luther King Jr. Blvd, Portland – 503-235-7575

8:30 – 9:30 Developing a Successful Practice and Avoiding Legal Malpractice/PLF Coverage Overview
Learn how to reduce your risk of being sued.
Carol J. Bernick, Professional Liability Fund Chief Executive Officer
Barbara S. Fishleder, Professional Liability Fund Director of Personal and Practice Management Assistance/Oregon Attorney Assistance Program Executive Director

9:30 – 10:00 Who Ya Gonna Call?
What to do when you’ve made a mistake.
Bruce Lee Schafer, Professional Liability Fund Director of Claims

10:00 – 10:15 Break

Jane E. Clark, Jane Clark Legal PC
Arthur J. Kohn, PhD, Portland State University Professor of Psychology,
AK Learning Productions Chief Executive Officer

11:15 – 12:15 Data Security/Data Breach: What Every Lawyer Needs to Know to Protect Client Information
(1 Ethics Credit)
Sheila M. Blackford, Professional Liability Fund Practice Management Advisor
Hong Dao, Professional Liability Fund Practice Management Advisor

12:15 – 1:30 Lunch/Meet the Judges (lunch is included in registration fee)
This luncheon gives you the unique opportunity to meet judges and ask questions.

CHOOSE ONE OF EACH OF THESE CONCURRENT SESSIONS:

1:30 – 2:15 Tort Litigation
Jane Paulson
Paulson Coletti Trial Attorneys

1:30 – 2:15 Estate Planning and Administration; Guardianships; and Conservatorships
Melissa F. Busley
Dunn Carney Allen Higgins & Tongue LLP

2:15 – 2:20 Transition

2:15 – 2:20 Transition

2:20 – 3:05 Family Law
Nicole L. Deering
Schulte, Anderson, Downes, Aronson, and Bittner, PC

2:20 – 3:05 Business Transactions
Dina E. Alexander
Radler White Parks & Alexander LLP
Gregory W. Levinson
Levinson Law LLC

3:05 – 3:10 Transition

3:05 – 3:10 Transition

3:10 – 3:55 Civil Motion Practice
Lindsey H. Hughes
Peter D. Eidenberg
Keating Jones Hughes PC

3:10 – 3:55 Criminal Law
Ryan J. Anfuso
Anfuso Law PC
Day 2 – Thursday, November 2, 2017
Day 2 qualifies for 6.5 MCLE Credits (4 Practical Skills Credits, 1 Ethics Credit, and 1.5 Introductory Access to Justice Credits).

8:00 – 8:30 Registration/Check-In – Oregon Convention Center
777 NE Martin Luther King Jr. Blvd, Portland – 503-235-7575

8:30 – 10:00 The Fundamentals of Practice Management (1.5 Practical Skills Credits)
Topics include trust accounting, conflicts, technology, office systems, and pitfalls to be aware of.
Sheila M. Blackford, Hong Dao, Rachel M. Edwards, and Jennifer L. Meisberger
Professional Liability Fund Practice Management Advisors

10:00 – 10:15 Break

CHOOSING ONE OF TWO TRACKS:

Creating a Firm
10:15 – 12:15 Opening a Law Practice: Planning for Success as a Solo or Small Firm
Elizabeth J. Inayoshi, Law Office of EJ Inayoshi LLC
Cassie Peters, Cassie Peters Legal + Consulting, LLC
Michael G. Romano, Romano Law, PC
Rachel Edwards, moderator
Professional Liability Fund Practice Management Advisor
Jennifer Meisberger, moderator
Professional Liability Fund Practice Management Advisor

Installing a Firm
10:15 – 11:45 Success Tips For Lawyers Joining Firms (Part I)
Jesse Calm, Associate, McEwen Gisvold LLP
Vamshi Reddy, Counsel, Lane Powell
Duke Tufty, Partner, Northwest Alcohol Law LLC
Traci Ray, moderator
Executive Director, Barran Liebman LLP

11:45 – 12:15 Success Tips For Lawyers Joining Firms (Part II)
Kristin Asai, Associate, Markowitz Herbold PC
Bryan Welch, OAAP Attorney Counselor

12:15 – 1:30 Networking Luncheon (lunch is included in registration fee)
Practitioners and Bar leaders will be joining you for roundtable discussions about practicing in various areas of the law.

1:30 – 2:30 Employment Law and Conscientious Communication (.5 Introductory Access to Justice Credit and .5 Practical Skills Credit)
Even if you don't advise clients in this area of law, you are an employer or an employee. Employment law is crucial to understanding your rights and responsibilities. It also offers great insight into how to improve communication with your colleagues and clients.
Clarence M. Belnavis, Fisher & Phillips, LLP

2:30 – 2:45 Break

2:45 – 3:45 Recognizing and Representing Clients with Mental Health Impairments (1 Introductory Access to Justice Credit)
Shari R. Gregory, LCSW, JD, Oregon Attorney Assistance Program Assistant Director/Attorney Counselor
Douglas S. Querin, JD, LPC, CADC I, Oregon Attorney Assistance Program Attorney Counselor
Bryan R. Welch, JD, CADC I, Oregon Attorney Assistance Program Attorney Counselor

3:45 – 4:45 Practice Tips for Avoiding Ethics Traps (1 Ethics Credit)
Mark Johnson Roberts, Oregon State Bar Deputy General Counsel
Linn D. Davis, Oregon State Bar Assistant General Counsel and Client Assistance Office Attorney
Learning The Ropes - Day 3

Day 3 – Friday, November 3, 2017

Day 3 qualifies for 3 MCLE Credits (1.5 Practical Skills Credits and 1.5 Introductory Access to Justice Credits).

8:00 – 8:30 Registration/Check-In – Oregon Convention Center
777 NE Martin Luther King Jr. Blvd, Portland – 503-235-7575

8:30 – 9:30 Courtroom Do’s and Don’ts
Successful courtroom protocol and procedures.
The Honorable Edward J. Jones, Multnomah County Circuit Court Judge
The Honorable Adrienne C. Nelson, Multnomah County Circuit Court Judge

9:30 – 10:00 Alternative Dispute Resolution – Mandated and Voluntary
Court-mandated arbitration/mediation and other alternative dispute resolution options.
Xin Xu, The Law Office of Xin Xu

10:00 – 10:15 Break

10:15 – 11:45 Bridging the Disability Gap – Making Your Practice and Workplace More Accessible: Improving Your Communication with Clients and Colleagues (1.5 Introductory Access to Justice Credits)
A discussion of the applicable laws, how to create an accessible office and office atmosphere, and tips for successfully working with a wide range of people’s needs.
Bob Joondaph, Disability Rights Oregon
Donald Dart, Attorney at Law, social security, personal injury, small business disputes
Stephen J. Doyle, Law Offices of Stephen J. Doyle, criminal defense
Gabrielle Richards, Martin & Richards LLP, estate planning, guardianships, litigation
Miranda Sumner, Summer Family Law LLC
Barbara S. Fishleder, moderator, Professional Liability Fund Director of Personal and Practice Management Assistance/Oregon Attorney Assistance Program Executive Director

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Miranda Sumner, Summer Family Law LLC
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5:00 – 6:00 Pre-Closing Ceremony – Oregon Convention Center
11:00 – 12:00 Final Roundtable Lunch

REGISTRATION DEADLINE – October 25, 2017

Preference in seating will be given to those who register early. Register online at www.osbplf.org.

Please indicate your first choice (#1) and second choice (#2) on the following list:

- Appeals
- Criminal Law
- Estate Planning
- Litigation
- Business Litigation
- Elder Law
- Family Law
- Real Estate
- Business Transactions
- Employment Law
- Family Law
- Litigation

Please indicate the days you plan to attend:

- November 1, 2017 – 8:30 a.m. - 3:55 p.m.
- November 2, 2017 – 8:30 a.m. - 4:45 p.m.
- November 3, 2017 – 8:30 a.m. - 11:45 a.m.

If you do not have a bar number and password for the OSB website, log in at https://www.osbplf.org/home/non-member-login.html with the username: lawstudent and password: lawstudent1 (both are lowercase, no spaces).

If you have a bar number and password for the OSB website, log in at https://www.osbplf.org/home/login.html. Once logged in, select CLE > Upcoming CLE.

Or, return this registration form and a $65 check made payable to the PLF to: Professional Liability Fund, P.O. Box 231600, Tigard, Oregon 97281-1600, Attn: DeAnna Z. Shields.

Lunch is included on November 1 and November 2. For information about accommodations for persons with disabilities, please call DeAnna Z. Shields at 503-639-6911 or 1-800-452-1639.

(No refunds will be issued for cancellations after October 25, 2017.)
Dina E. Alexander received her J.D. from Willamette University School of Law. She has been in private practice since 2003. She is currently a shareholder at Radler White Parks & Alexander LLP, which she co-founded in 2012. Her practice focuses on complex purchase and sale transactions, land acquisitions, joint ventures, equity and debt financings, construction contracts, condominiums, leases, acquisitions and dispositions. Dina is a fellow in both the American College of Real Estate Lawyers and the American College of Mortgage Attorneys.

Ryan Anfuso received his J.D. from Lewis & Clark Law School. He has been in private practice since 2010 and is the owner of Anfuso Law PC, which he started in 2013. He practices criminal law defense.

Clarence M. Belnavis received his J.D. from Howard University School of Law. He is a partner in the Portland, Oregon office of Fisher & Phillips, LLP, where his practice includes employment litigation and employment law related to wage and hour claims, employment class actions, and traditional labor matters. Mr. Belnavis began his legal career serving as a law clerk in the Office of the General Counsel for the Department of the Navy, and he served as a judicial intern for Judge A. Burnett of the District of Columbia Superior Court. Mr. Belnavis has been listed in Chambers USA, America's Leading Business Lawyers since 2006, and he has been listed in The Best Lawyers in America since 2009. In 2011 Mr. Belnavis was honored as a "Convocation on Equality Champion" in recognition of the diversity work that he has been engaged in during his career.

Carol Bernick received her J.D. from the University of Virginia School of Law. She is the Chief Executive Officer of the Professional Liability Fund. Ms. Bernick was an associate then partner with Davis Wright Tremaine LLP in Portland, Oregon from 1989 until 2014. She served in many roles including chair of the firm's Attorney Evaluation Committee, member of the firm’s Executive Committee, and Partner-in-Charge of the firm’s Portland office. Ms. Bernick is an experienced trial lawyer, including several significant wage and hour class action cases. She has been recognized as one of the best employment attorneys in Oregon by Chambers USA, Best Lawyers in America, and one of the Top 25 Women Lawyers in Oregon by Super Lawyers. She is the recipient of the Peter Perlman Service Award from the Litigation Counsel of America and a Fellow in the College of Labor & Employment Lawyers. She previously was a member of the board of the Multnomah Bar Association, where she chaired the Judicial Selection Committee and served on the Court Liaison and Equality and Diversity Committees. She is a member of the Board of Directors of Metropolitan Family Service.

Sheila Blackford received her J.D. with Tax Law Concentration from University of the Pacific, McGeorge School of Law. She is a practice management advisor for the Professional Liability Fund, providing confidential practice management assistance to Oregon attorneys to reduce their risk of malpractice claims, enhance their enjoyment of practicing law, and improve their client relationships through clear communication and efficient delivery of legal services.

Ms. Blackford is the former Editor-in-Chief of Law Practice Magazine, is coauthor of Paperless in One Hour for Lawyers, and is a contributing author to Flying Solo, 5th Edition, published by the ABA Law Practice Management Division. She is a member of the ABA Law Practice Division Education Board, eLawyering Taskforce Committee, and is currently serving on the Division’s Council. She is a member of the Sedona Conference Working Group Series on Data Security and Privacy Liability and the OSB eCourt Task Force and the Public Service Advisory Committee.
Prior to joining the Professional Liability Fund as a practice management advisor in 2005, Ms. Blackford was a sole practitioner. In addition to her legal experience, she has over 10 years of teaching and marketing experience.

**Melissa F. Busley** received her J.D. from University of Oregon School of Law. She also received a LL.M. in Taxation from University of Washington School of Law. She has been in private practice since 2004 and is currently a partner at Dunn Carney Allen Higgins & Tongue, LP, where she focuses on estate planning and tax. Ms. Busley also advises tax-exempt organizations on operational matters and tax compliance, assists new organizations in forming and receiving recognition of tax-exempt status, and frequently speaks on issues related to estate planning, as well as tax-exempt organization matters.

**Jesse Calm** received his J.D. from University of Michigan Law School. He has been in private practice since 2006 and is currently a partner at McEwen Gisvold, where he has practiced since 2015. Jesse's practice concentrates on complex transactions in the areas of real estate, finance, business (including formations, sales, and acquisitions) and corporate governance. He has been selected as an Oregon Rising Star by Oregon Super Lawyers from 2013 to 2017.

**Jane E. Clark** received her Bachelor’s in Law from Chester College of Law. Her practice is exclusively representation of plaintiffs in medical malpractice, personal injury, and wrongful death cases. She is licensed to practice law in Washington, Oregon, England, and Wales. During her 24 years of practice, she has gained experience practicing in multiple jurisdictions, and has represented both plaintiffs and defendants as well as serving as a mediator and arbitrator. She has also worked as an adjunct professor in the Psychology and Law Departments at Portland State University. Her experience has given her a wide-ranging perspective and experience with negotiation strategies and techniques.

**Hong Dao** received a B.A. from the University of Denver and her J.D. from Drake University Law School. She is a practice management advisor for the Professional Liability Fund, providing confidential practice management assistance to Oregon attorneys to reduce their risk of malpractice claims, enhance their enjoyment of practicing law, and improve their client relationships through clear communication and efficient delivery of legal services.

Ms. Dao is a member of Oregon Women Lawyers, the Multnomah Bar Association, and the Oregon Asian Pacific American Bar Association. She is active in the Asian Pacific legal community in Oregon and is fluent in Vietnamese. Ms. Dao is the 2014 recipient of the Oregon State Bar President’s Public Service Award.

Before joining the PLF as a Practice Management Advisor in 2014, Ms. Dao worked as a staff attorney at the Oregon Law Center for over four years, presenting community education programs and representing, advising, and advocating for clients in employment, consumer, and housing law matters. Prior to that, she worked on appellate cases as a contractor with the Criminal Division of the U.S. Attorney’s Office. She has also served as adjunct instructor of business law at Portland Community College.

**Donald Dartt** received his J.D. from Lewis & Clark Law School. He has been in private practice since 1989. He has been a sole practitioner at Donald Dartt Attorney at Law since 1997 where he focuses on social security disability law and personal injury. Prior to becoming a sole practitioner, he practiced with Pozzi Wilson Atchison O’Leary & Conboy and then at his firm of Empey & Dartt. He is the former chair of the Oregon Commission for the Blind.
Linn D. Davis received his J.D. from the New York University School of Law. He is an Assistant General Counsel and current CAO Manager for the Oregon State Bar. Prior to his current position, he was Assistant Disciplinary Counsel for the Oregon State Bar for nine years and a prosecutor in the New York County District Attorney’s Office for twelve years.

Nicole L. Deering received her J.D. from Lewis & Clark Law School. She is a partner at Schulte, Anderson, Aronson, Downes & Bittner PC. She is a native Portlander and has practiced family law exclusively for over 20 years. Nicole developed a passion for access to justice through her family law work at Oregon Legal Services in 1995. She continues to serve on committees and boards of organizations addressing the needs of the underrepresented. She is active in the Collaborative Law community and is firmly committed to client-centered alternative dispute resolution processes for family law disputes.

Stephen J. Doyle received his J.D. from Indiana University and then spent two years clerking for a federal judge in Indianapolis, Indiana. In 1982, Steve moved to Portland to work for the state's second largest law firm. Steve opened his own practice in 1990, where he originally focused on corporate/business law, employment disputes, and civil litigation. Over the past decade, Steve has shifted his focus to criminal defense work in Portland and the tri-county area. His main office is in downtown Portland, and he has a satellite office in Gladstone.

Rachel M. Edwards received her JD from Willamette University College of Law. Ms. Edwards is a practice management advisor for the Professional Liability Fund, providing confidential practice management assistance to Oregon attorneys to reduce their risk of malpractice claims, enhance their enjoyment of practicing law, and improve their client relationships through clear communication and efficient delivery of legal services.

Ms. Edwards is a member of the Oregon State Bar, Oregon Women Lawyers, and the Multnomah Bar Association. She served as an elected board member for the Washington County Bar Association, and was a founding subcommittee member of the New Lawyers Division of the Washington County Bar Association. Her volunteer activities include work with the Classroom Law Project, the Convocation on Equality, and the St. Andrew Legal Clinic. Prior to joining the Professional Liability Fund staff in 2016, Ms. Edwards was in private practice for four years, including work as an Oregon Department of Human Services Adoption Contract Vendor Attorney. Her areas of practice included Social Security disability, family law, adoption, and estate planning cases.

Peter D. Eidenberg received his J.D. from Gonzaga University School of Law, where he was a member of the Gonzaga Law Review and was founder of the Gonzaga Health Law Society. Peter is a partner at Keating Jones Hughes, where he started his legal career in 2007. He is a trial attorney, primarily defending physicians, nurses and hospitals in medical malpractice lawsuits. Mr. Eidenberg is also on the Professional Liability Fund Defense Panel where he provides liability defense for attorneys. Peter has been recognized as a Rising Star by Oregon Super Lawyers for the last three years. Outside of work, Peter enjoys time with his family, often traveling abroad or taking road trips throughout the Northwest.

Barbara S. Fishleder received her J.D. from John Marshall Law School and her Bachelor of Business Administration from the University of Michigan. She is the Professional Liability Fund Director of Personal and Practice Management Assistance/Executive Director of the Oregon Attorney Assistance Program. Her responsibilities include management of the PLF’s confidential programs [the Practice Management Advisor Program and the Oregon Attorney Assistance Program (OAAP)] and educating lawyers on malpractice traps (through seminars, practice aids, handbooks, and newsletters). Ms. Fishleder is a contributing author to A Guide to Setting Up and Running Your Law Office, A Guide to Setting Up and Using Your Lawyer Trust Account, and A Guide to Protecting Your Clients’ Interests in the Event of Your
Disability or Death, published by the Oregon State Bar Professional Liability Fund. Prior to her current work at the PLF, Ms. Fishleder was a PLF Claims Attorney (1986-1989) and was in private practice (1979-1986) specializing in insurance and workers’ compensation defense. She is on the board of directors of the Oregon Lawyer Assistance Foundation.

Garrett Garfield received his J.D. from The University of Chicago Law School. He is an associate in Holland & Knight's Litigation Section in the firm's Portland office. He represents clients in a wide range of matters such as complex business disputes, real estate litigation, product liability cases, and employment matters. Mr. Garfield is highly knowledgeable in the area of maritime litigation, including vessel arrests, enforcement of maritime liens, and Rule B attachments of tangible and intangible property. He is admitted to practice in state and federal courts of appeal as well as the United States Supreme Court. Additionally, Mr. Garfield serves as a member of the firm's local office diversity committee. During law school, he worked in the University of Chicago's Mandel Legal Aid Clinic where he represented juveniles accused of crimes.

Shari R. Gregory is a graduate of Wurzweiler School of Social Work (MSW 1987) and Rutgers School of Law (JD, 1992). She received her Certificate of Business Management from Portland State University (2003) and her license in clinical social work (LCSW, 2010). She is an attorney counselor and assistant director with the Oregon Attorney Assistance Program (OAAP) where she provides confidential assistance to lawyers, judges, and law students. She is experienced in career and life transition counseling, mental health counseling, crisis intervention, stress management, organizational challenges, and alcohol/drug and addiction counseling. Prior to joining the OAAP in 1999, she was in private practice specializing in criminal defense law for four years. Ms. Gregory has also served on the board of the Oregon Women Lawyers, the OSB Diversity Section Executive Board and as Liaison to the OSB Advisory Committee on Diversity and Inclusion.

Lindsey H. Hughes received her J.D. from Willamette University School of Law and is a shareholder at Keating Jones Hughes, P.C., Portland. Ms. Hughes focuses on appellate litigation in state and federal courts and defends medical negligence and hospital liability cases. She also assists and defends lawyers in matters concerning professional liability. Ms. Hughes currently serves on the Oregon Appellate Rules and Oregon Uniform Trial Court Rules Committees, chairs the Amicus Committee of the Oregon Association of Defense Counsel, and is on the executive board for the Oregon State Bar Litigation Section.

Elizabeth J. Inayoshi received her J.D. from Lewis & Clark Law School. She has been in private practice for 4 years at The Law Office of Elizabeth J. Inayoshi, LLC. Her practice focuses on plaintiff-side employment law, labor law, and small business law. Prior to her law career, Ms. Inayoshi was an operations and program manager at Intel Corporation. She volunteers with the Lewis & Clark Law School Small Business Legal Clinic. She is a member of the Oregon Trial Lawyers Association, the Washington County chapter of Oregon Women Lawyers Society, the Washington County Bar Association, the Oregon State Bar Labor and Employment Section, and is 2017 Chair of the Oregon State Bar Solo and Small Firm Section.

Honorable Judge Edward Jones received his BA from Reed College and his JD from Lewis & Clark Law School. He spent nine years in private practice and fourteen years as the director of MDI, a Portland public defender office before his 1999 appointment to the Multnomah County Circuit Court. He is a past president of the Oregon Criminal Defense Lawyers Association and now serves as the Chief Criminal Judge in Multnomah County.

Bob Joondeph received his J.D. from Case Western Reserve Law School. For more than 25 years, Bob has served as Executive Director of Disability Rights Oregon helping to transform systems, policies, and practices across the state. He leads a team of lawyers and advocates who have helped Oregonians with
disabilities keep their jobs, their homes, and their access to health care and education. Under his leadership, Disability Rights Oregon, along with outside counsel, filed the first class action lawsuit in the nation that challenged segregated employment in sheltered workshops. As a result, thousands of Oregonians with intellectual and developmental disabilities who work in sheltered workshops are now able to pursue gainful employment and achieve greater independence and self-sufficiency that comes with it. Under Bob’s leadership, Disability Rights Oregon successfully secured the largest investment in safe and accessible transportation paths of travel in state history. He serves as a member the Governor’s Task Force on Brain Injury, the Oregon Intellectual and Developmental Disabilities Coalition, and the Oregon Council on Developmental Disabilities.

Greg Levinson received his J.D. from Lewis & Clark Law School and has 16 years’ experience advising small and emerging businesses on issues such as entity formation, contracts, trademarks, and estate planning. His clients span the business spectrum, from alternative healthcare professionals to those practicing in the trades; from specialty retailers to independent consultants. One area of business transactions that Greg really enjoys and provides his clients the most value is in buying and selling a small to mid-tier business.

Jennifer Meisberger received her J.D. from the University of Oregon School of Law. She is a practice management advisor for the Professional Liability Fund, providing confidential practice management assistance to Oregon attorneys to reduce their risk of malpractice claims, enhance their enjoyment of practicing law, and improve their client relationships through clear communication and efficient delivery of legal services.

Ms. Meisberger is a member of the Oregon State Bar, Oregon Women Lawyers, the Multnomah Bar Association, and has served on various Multnomah County Child Welfare Council subcommittees since 2009. In 2012, she was awarded the OSB Juvenile Law Section New Practitioner Advocacy Award.

Before joining the PLF as a practice management advisor in 2014, Ms. Meisberger was in private practice for two years, representing parents and children in child abuse and neglect cases. Prior to that, she worked as a staff attorney at the nonprofit organization Youth, Rights & Justice for four years, advocating for parents, children, and youth in juvenile court proceedings.

The Honorable Adrienne C. Nelson received her J.D. from the University of Texas at Austin. She was appointed to the Multnomah County Circuit Court in 2006, where she hears civil and criminal cases. Prior to her appointment, Judge Nelson practiced in the areas of criminal defense, family law, labor and employment law, and general litigation. She is a frequent speaker on diversity, leadership, and professional development, and serves as a mentor to a number of young people, law students, and lawyers. Currently she serves on the ABA Standing Committee on Public Education, is the Oregon delegate to the ABA House of Delegates (before this position, she had been elected seven times as an Oregon State Bar (OSB) delegate), chairs the Lewis and Clark Law School Judge Roosevelt Robinson Scholarship Committee, and is vice-president of the Owen M. Panner American Inn of Court. In addition to her professional activities, Judge Nelson serves on the Reed College Board of Trustees and on the Oregon Community Foundation Metropolitan Portland Leadership Council; chairs the Self-Enhancement, Incorporated (SEI) Board of Directors and the Girl Scouts Beyond Bars Advisory Board; and is a member of the Coalition of Advocates for Equal Access for Girls Initiative Project Steering Committee.

Jane Paulson received her J.D. from the University of Virginia School of Law. She has been in private practice since 1991. Ms. Paulson is a partner at Paulson Coletti Trial Attorneys PC, where she practices plaintiff’s personal injury, medical malpractice, and product liability. Before entering private practice, she clerked for the Honorable James M. Burns (U.S. District Court, District of Oregon). Jane had the honor of
serving on the Oregon Trial Lawyer’s Association (OTLA) Board 1995-2006, was one of Oregon’s two American Trial Lawyer Association Delegates 2000-2004, and was President of OTLA 2004-2005. She is President of the Oregon Chapter of American Board of Trial Advocates and is listed in Best Lawyers in America for personal injury and medical malpractice cases. Jane was invited in 2012 to join the American College of Trial Lawyers. She has also served on the Oregon State Bar Affirmative Action Committee, the Oregon State Bar Procedure and Practice Committee, and the Multnomah Bar Association Judicial Screening Committee. Jane is listed as one of the Best Lawyers in America and Oregon Super Lawyers (Oregon Top 10), one of Oregon’s Top 25 Women Super Lawyers and one of Portland’s Best Lawyers in *Portland Monthly* magazine. She was on the Habitat for Humanity Portland/Metro East Board and is currently on PSU’s Center for Women’s Leadership Board and the Campaign for Equal Justice Board.

**Cassie Peters** received her J.D. from University of Oregon School of Law. Cassie brings an integrated approach to her practice, drawing on her experience as an entrepreneur, researcher, consultant, and attorney. Prior to her legal career, Cassie owned and operated Dark Hollow, a Eugene-based hemp clothing company. After earning her law degree from University of Oregon School of Law and a master’s degree in agriculture and food law from the University of Arkansas, she spent four years working in the local food and farm realm. Through these diverse experiences, Cassie has developed a deep understanding of the interplay between federal, state, and local law and an appreciation of the powerful impact collaboration, support services, and access to information have on businesses operating in today’s fast-paced environment. In 2015, Cassie founded Cassie Peters Legal + Consulting, LLC, a Eugene-based boutique law firm focused on representing cannabis businesses throughout Oregon.

**Douglas S. Querin** is a graduate of the University of Oregon School of Law (J.D. 1971) and George Fox University (M.A. in Counseling 2006). He is an attorney counselor with the Oregon Attorney Assistance Program (OAAP) where he provides confidential assistance to lawyers, judges, and law students. Prior to his work at the OAAP, he was in the private practice of law in Portland for more than 25 years, working as a trial lawyer in state and federal courts throughout the Pacific Northwest. He is an adjunct professor with the Graduate Department of Counseling at George Fox University and at Portland State University. In recovery since 2002, Mr. Querin joined the OAAP staff as an attorney counselor in 2006. He is a Certified Alcohol and Drug Counselor (CADC I), a Licensed Professional Counselor (LPC), and is chair of the Ethics Committee of the Oregon Counseling Association.

**Traci Ray** received her J.D. from the University of Oregon School of Law. She is the executive director at Barran Liebman LLP, where she blends her enthusiasm, leadership, and solution-oriented mentality to guide the firm’s management, marketing, attorney development, recruitment, and operations. She oversees the firm’s speaking engagements and coordinates all the firm events and seminars, including Portland’s largest Award-Winning Employment, Labor & Benefits Law Seminar. Additionally, Traci manages the firm’s community involvement, public relations, charitable giving, brand awareness, and advertising. She also supports the business goals of Barran Liebman’s three highly-regarded practice areas with strategic planning and effective communication. She is the American Bar Association Law Practice Division’s secretary for 2017-2018. She has held leadership positions for the Multnomah Bar Association, as the YLS President; and Oregon Women Lawyers; and Dress for Success Oregon.

**Vamshi Reddy** received her J.D. from the Brooklyn School of law. She currently practices at Lane Powell where she focuses on securities and complex commercial litigation, data privacy, and white collar criminal and civil defense. Before joining Lane Powell, Vamshi worked for the Division of Financial Regulation of the Oregon Department of Consumer and Business Services, where she directed investigations and enforcement actions for securities violations and evaluated securities registration applications. Before coming to Oregon, Vamshi served first as an Assistant District Attorney and then as an Assistant United States Attorney in New York City. In those roles, Vamshi tried numerous criminal cases in the
Gabrielle D. Richards (Gabby) received her J.D. from Lewis & Clark Law School. She is an experienced litigator with a diverse practice including individuals, small businesses, large corporations and non-profits in a multitude of industries - from aviation and transportation to banking and forest products. Gabby has litigated cases throughout Oregon and Washington, in state and federal court. She also is experienced in alternative dispute resolution, having successfully concluded cases in mediation and arbitration. Gabby began her legal career at Perkins Coie before forming Martin & Richards, LLP. Prior to attending law school, Gabby enjoyed a career as an editor at one of the nation's preeminent newspapers, The Washington Post, where she spent time in the Sports and National news sections. Gabby is committed to pro bono work and frequently represents victims of domestic violence and seniors through programs offered by Legal Aid Services of Oregon. Gabby also has served on the Oregon State Bar Pro Bono Committee and is an advocate for people with disabilities.

Mark Johnson Roberts received his J.D. from the Boalt Hall School of Law, and an LL.M. in International Law from the Willamette University College of Law. Mr. Johnson Roberts is Deputy General Counsel to the Oregon State Bar. He provides prospective ethics advice to Oregon lawyers and provides counsel to the bar on regulatory, employment, and business matters. Mark practiced family law in Portland for 26 years before joining the bar’s staff in 2016. Mark is Chair of the American Bar Association’s Commission on Sexual Orientation and Gender Identity. He is a past president of the Oregon State Bar, a past president of the National LGBT Bar Association, and a past chair of Oregon's State Professional Responsibility Board. He was given the Multnomah Bar Association’s 2014 Professionalism Award in recognition of his many years of service to the bench and bar.

Michael G. Romano received his J.D. from Willamette University College of Law. He is a solo practitioner focusing on family law and criminal defense. He has two offices: one serving the Portland-metro area and the other serving Central Oregon. After being admitted to practice law in Oregon in 2000 and prior to opening his own firm in 2006, he worked as a prosecutor in Klamath, Coos, and Deschutes counties—building his misdemeanor, felony, and juvenile law experience. He has personally tried hundreds of jury trials and numerous bench trials. He is a member of the Deschutes County Bar Association, the Multnomah County Bar Association, the American Bar Association, the Oregon Trial Lawyers Association, the Association of Family and Conciliation Courts, and the Oregon Criminal Defense Lawyers Association.

Bruce L. Schafer received his J.D. from Emory University School of Law. Mr. Schafer has been the Director of Claims for the Professional Liability Fund since 1991, serving as a claims attorney from 1986 to 1991. Before his employment at the Professional Liability Fund, Mr. Schafer worked as an assistant prosecuting attorney in Toledo, Ohio and in private practice in Portland (1980-1986) with emphasis on construction law, business litigation, and insurance defense. He is a member of the Litigation and Alternative Dispute Resolution Sections of the Oregon State Bar. Mr. Schafer is a frequent author and speaker on lawyer professional liability.

Miranda Summer received her J.D. from University of Oregon School of Law. After graduating, Miranda practiced workers’ compensation litigation at a well-established firm in the Portland Metro area. She was appointed an Administrative Law Judge for the State of Oregon in 2010, and presided over hundreds of cases, involving issues from unemployment to child support. She returned to private practice, where she focuses her practice exclusively on family law at Summer Family Law LLC. She is a member of Oregon Women Lawyers, Oregon LGBT Lawyers Association, Oregon State Bar Diversity and Inclusion Committee, and Oregon State Board of Education. \
**Duke Tufty** received his J.D. from Lewis and Clark Law School. Duke is a partner at Northwest Alcohol Law in downtown Portland, Oregon. His practice focuses on alcohol regulatory law, including liquor licensing, compliance & training, license defense, and strategic counseling. He regularly helps businesses that make or sell alcohol understand the regulatory environment, obtain the right set of licenses and permits for their business, stay in compliance with applicable law, and defend their licenses and permits when necessary. His experience working at and managing restaurants gives him a practical understanding of the challenges of operating a business with many moving parts in a highly regulated environment. He is licensed in Oregon and Washington and assists businesses in both states.

**Bryan R. Welch**, JD, CADC I, is a graduate of Northwestern School of Law at Lewis and Clark College (JD 2003) and a Certified Alcohol and Drug Counselor (CADC I). Prior to joining the OAAP staff in 2015, he was in the private practice of law for 12 years, primarily in family law and family mediation. In addition to his work at the OAAP, his experience includes providing drug and alcohol counseling services for a court-mandated DUII treatment program, as well as for a local non-profit addressing homelessness, poverty and addiction. He has been in recovery since 2001, and has been actively involved in the recovery community, including the OAAP, since 2001. He can be reached at (503) 226-1057 ext. 19; bryanw@oaap.org.

**Xin Xu** received her J.D. from University of Oregon School of Law. She has been in private practice since 2000. She opened her own firm in 2011 and currently is the owner of The Law Office of Xin Xu where her practice emphasizes legal malpractice defense, ethics, securities, and commercial litigation. She is the current chair of the Executive Committee of the Oregon State Bar Alternative Dispute Resolution Section and a member of the Multnomah County Mandatory Arbitration Program. Ms. Xu was listed on the Oregon Super Lawyers® Rising Stars List for 2010-2015.
# LEARNING THE ROPES

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter #</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overview</td>
<td>Developing a Successful Practice and Avoiding Legal Malpractice/PLF Coverage</td>
</tr>
<tr>
<td>Chapter 1</td>
<td>Who Ya Gonna Call?</td>
</tr>
<tr>
<td>Chapter 2</td>
<td>Tips, Traps, and Tools for Successfully Navigating Negotiations and Professional Relationships</td>
</tr>
<tr>
<td>Chapter 3</td>
<td>Data Security/Data Breach: What Every Lawyer Needs to Know to Protect Client Information</td>
</tr>
<tr>
<td>Chapter 4</td>
<td>Tort Litigation</td>
</tr>
<tr>
<td>Chapter 5</td>
<td>Estate Planning and Administration; Guardianships, and Conservatorships</td>
</tr>
<tr>
<td>Chapter 6</td>
<td>Family Law</td>
</tr>
<tr>
<td>Chapter 7</td>
<td>Business Transactions</td>
</tr>
<tr>
<td>Chapter 8</td>
<td>Civil Motion Practice</td>
</tr>
<tr>
<td>Chapter 9</td>
<td>Criminal Law</td>
</tr>
<tr>
<td>Chapter 10</td>
<td>The Fundamentals of Practice Management</td>
</tr>
<tr>
<td>Chapter 11</td>
<td>Opening a Law Practice: Planning for Success as a Solo or Small Firm</td>
</tr>
<tr>
<td>Chapter 12</td>
<td>Success Tips for Lawyers Joining Firms (Part I)</td>
</tr>
<tr>
<td>Chapter 13</td>
<td>Success Tips for Lawyers Joining Firms (Part II)</td>
</tr>
<tr>
<td>Chapter 14</td>
<td>Employment Law and Conscientious Communication</td>
</tr>
<tr>
<td>Chapter 15</td>
<td>Recognizing and Representing Clients with Mental Health Impairments</td>
</tr>
<tr>
<td>Chapter 16</td>
<td>Practice Tips for Avoiding Ethics Traps</td>
</tr>
<tr>
<td>Chapter 17</td>
<td>Courtroom Do’s and Don’ts</td>
</tr>
<tr>
<td>Chapter 18</td>
<td>Alternative Dispute Resolution – Mandated and Voluntary</td>
</tr>
<tr>
<td>Chapter 19</td>
<td>Bridging the Disability Gap – Making Your Practice and Workplace more Accessible:</td>
</tr>
<tr>
<td></td>
<td>Improving Your Communication with Clients and Colleagues</td>
</tr>
</tbody>
</table>
CHAPTER 1

DEVELOPING A SUCCESSFUL PRACTICE AND AVOIDING LEGAL MALPRACTICE/PLF COVERAGE OVERVIEW

Carol J. Bernick
Professional Liability Fund
Chief Executive Officer

Barbara S. Fishleder
Professional Liability Fund Director of Personal and Practice Management
Oregon Attorney Assistance/Program Executive Director
Welcome to
Learning The Ropes
presented by the Professional Liability Fund

November 1-3, 2017
Oregon Convention Center – Portland Oregon

Introduction to the PLF and Tips to Avoid Legal Malpractice

Carol J. Bernick
Chief Executive Officer

Barbara S. Fishleder
Director of Personal and Practice Management Assistance
Professional Liability Fund

THE PLF IS UNIQUE
- Coverage is MANDATORY for any attorney who is a member of the Oregon State Bar, is in the private practice of law, and whose principal office is in Oregon – more than 50% of their time is spent in Oregon
  - Exception includes unemployed, volunteering for covered agency, law clerk
- No deductible
- No underwriting
- Prior acts coverage

THE PLF MISSION
- The PLF mission is to provide high quality coverage to attorneys and provide education and support to all Oregon attorneys.
- The duty of the PLF is to the Covered Parties.
- The public is benefited because of the certainty attorneys will have malpractice coverage, access to high quality resources and support when other factors affect ability to practice.

THE PLF IS UNIQUE
- The PLF has a board of 9 members – 7 are attorneys and two are public members. They are appointed by the Board of Governors of the OSB.
- The purpose of the Plan is to provide a minimum amount of money for each lawyer’s mistakes. The Plan covers individuals – NOT firms – shared risk.
- It is not designed to cover a catastrophic covered activity resulting in many claims against one lawyer or a number of lawyers.

BENEFITS
- Stable, long-term source of coverage
- Commitment of profession to protect public
- Oregon lawyers control terms of coverage and management of PLF
- High level of service, assistance and expertise
  - PMAs
  - OAAP
  - Claims Attorneys
HOW MUCH COVERAGE DO YOU HAVE?

- $300,000 for indemnity plus a $50,000 claims expense.
  - One claim limit per year
  - $3,500 per year
  - Discounts for 1st year: 40% ($2,100)
  - Discounts for 2nd and 3rd years: 20% ($2,800)

UNIQUE PART OF THE LEGAL COMMUNITY

- Coverage and Claim questions answered anytime
- Practice Management Advisors (PMA) / Oregon Attorney Assistance Program (OAAP)
- Practice aids / publications (*InBrief, InSight*) / CLE’s
- Overwhelming positive feedback on claims handling

PLF EXCESS INSURANCE

- Independent from Primary Program and totally self-supporting
- Providing Excess coverage for over 20 years
- Largest Excess carrier in Oregon
- Covers over 710 firms / 2300 attorneys
- Limits from $700,000 to $9,700,000
- No gap between Primary and Excess
- Cyber Liability coverage
  - Excluded at Primary

WHY EXCESS IS A GOOD IDEA

- PLF Primary limits have remained at $300,000 for 15 years
- For most practices – this is not adequate coverage
- Excess rates are reasonably priced
- The PLF recommends you consider excess coverage for your firm. There are other carriers to choose from.

MOST FREQUENT AREAS FOR CLAIMS


<table>
<thead>
<tr>
<th>AREA OF LAW</th>
<th>PERCENT</th>
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</thead>
<tbody>
<tr>
<td>Domestic Relations/Family Law</td>
<td>17%</td>
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<tr>
<td>Personal Injury</td>
<td>16%</td>
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<tr>
<td>Bankruptcy &amp; Debs-Creditor</td>
<td>13%</td>
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<tr>
<td>Real Estate</td>
<td>9%</td>
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<tr>
<td>Estate Planning &amp; Estate Tax</td>
<td>9%</td>
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<tr>
<td>Business Transactions/Commercial Law</td>
<td>7%</td>
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<tr>
<td>Criminal Law</td>
<td>7%</td>
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<tr>
<td>Workers’ Compensation/Admiralty</td>
<td>3%</td>
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<tr>
<td>Appellate</td>
<td>1%</td>
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COST OF CLOSED CLAIMS BY AREA OF LAW


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<thead>
<tr>
<th>AREA OF LAW</th>
<th>AMOUNT PAID</th>
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<tbody>
<tr>
<td>Torts</td>
<td>$1,824,798</td>
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<td>Business Transactions/Commercial Law</td>
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<td>Bankruptcy &amp; Debs-Creditor</td>
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<td>Domestic Relations/Family Law/Juvenile Law</td>
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<td>Estate Planning/ Probate/Trust</td>
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<td>Workers’ Compensation</td>
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<td>Criminal Law</td>
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<td>Appellate</td>
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<tr>
<td>Other</td>
<td>$3,976,660</td>
</tr>
<tr>
<td>TOTAL PAID</td>
<td>$8,937,106</td>
</tr>
</tbody>
</table>
Tips for Developing a Successful Practice and Avoiding Malpractice

Case and Client Screening
- Client Consent
- Communication
- Documentation

“It’s more important to know what cases not to take than it is to know the law.”
- Abraham Lincoln
CASE ACCEPTANCE CRITERIA

1. LAWYER/CLIENT MATCH
   What is a difficult client for you?
   • Boxes of papers
   • Attorney changers
   • Know-it-alls
   • Low Budget - “Let me help”
   • “Simple” case
   • Clients with an “attitude”

2. LEGAL KNOWLEDGE
   • Are you current in the law?
   • Do you need to associate another lawyer?

   Is it in the best interest of the client for you to handle this case?

3. ECONOMICS
   • Do you have adequate staff?
   • Does the client understand the cost?
   • Can you afford to take the case?
   • Voluntary vs. involuntary pro bono

“F” WORDS/CASE AND CLIENT SCREENING

Fast
Fees
Finances
Friends
Flattery
Fantastic!!
Frown
Filters

AROMA

S
FEE$
1. Get money up-front.
2. Work out a fee agreement and stick to it. *If the client doesn't withdraw.*
3. Offer to arbitrate if you do end up in a fee dispute.

FEE$
Suing a client for fees will bring you:
1. Aggravation;
2. A bad reputation with the client, client's friends, neighbors, ... ;
3. Probably more expense and no money;
4. More wasted time and energy; and
5. A malpractice claim.

THE GRAPH OF GRATITUDE

* Proper time for financial arrangements or retainer
** Psychological time to render final bill

Frequent
In detail
Sign
Timely

**Back at Office After Trial**
I didn't know how to thank you enough -
You saved my business!

ONE DAY LATER
I'm so glad it's over!

TWO DAYS LATER
I was great on the stand.

ONE WEEK LATER
They never had a chance.

ONE MONTH LATER
It was a snap —
I could have handled it myself.

KINDLY REMIT
Rushing me, huh?

PAYMENT DEMANDED
Who the h__ does he think he is?

COLLECTION SUIT BEGUN
That shyster!

COLLECTION SUCCESSFUL
I'll tell the world about that crook!
MOST COMMON CLIENT COMPLAINTS

- Never Understood
- Never Listened
- Never Kept Me Informed

VARIATIONS ON A THEME OF CONSENT

1. I don’t like it
2. I don’t get it
3. I like it and I get it *

* Avoid having client feel trapped

GRAPH OF CLIENT’S RESENTMENT/UPSET

- Lawyer Impatient
- Lawyer Seems Rushed
- Lawyer Not Available
- Lawyer Speaks Quickly
- Lawyer Late
- Phone Call Not Returned

Baseline = average level of resentment

R.E.S.P.E.C.T.
PATIENCE IS A MOST NECESSARY QUALITY FOR BUSINESS. MOST PEOPLE WOULD RATHER YOU HEARD THEIR STORY THAN GRANT THEIR REQUEST."

- Earl of Chesterfield

**USE YOUR RESOURCES**

**DOCUMENTATION**

1. Fee Agreements/Scope of representation
2. Advice
3. Important facts received
4. Strategy
5. What you are and are not doing

**NONENGAGEMENT AND DISENGAGEMENT LETTERS**

These should be used as part of your office routine!

- Confirm non-acceptance of case (or withdrawal).
- Mention if time limitations apply ... be general or be absolutely **SURE**.
- Offer no opinions or evaluations unless it is your field. Emphasize the need to retain another attorney.
- Consider whether or not your correspondence needs to be sent through regular mail and **CERTIFIED MAIL**.
VERBAL INFORMATION = LOST INFORMATION

- 50% - Lost in 48 hours
- 75% - Lost in 3 days
- 95% - Lost in a week

IN SUMMARY
- Select cases and clients carefully
- Shift to the client’s viewpoint
- Communicate fully with client
- Establish clear fee arrangements
- Document your files
- Listen to your instincts

FUN!!
“WHO YA GONNA CALL?”

Bruce Lee Schafer
Professional Liability Fund Director of Claims
Permanent Relationship

- Yearly Premium
- Loss Prevention Services
- OAAP Services
- CLAIMS

Likelihood of Claim in 2017

- 865 Claims (projected)
- 285 Incidents (projected)
- 1,050 TOTAL (projected)
- 7,200 ATTORNEYS
- CHANCES ARE ABOUT 1 IN 7 (approx. 15%)
PLF Claims Staff

- All are attorneys
- All in prior private practice (minimum 5 years)
- All experienced at PLF (12 attorneys—over 106 Years at PLF)

The PLF is Not the Enemy

- Discreet and confidential
- Not judgmental
- Separate from OSB discipline
**Client Doesn’t Know There Is A Problem**

- Analyze the problem
- Contact PLF
- Notify excess carrier
- Consider “repair” possibilities
- Consider the ethical issues
- Inform the client

---

**Informing Client of Potential/Actual Problem**

- Call PLF first
- Facts only
- No opinions
- Recommend independent legal advice
- Discuss ethical issues
- Send confirming letter

---

**Actual Claim by Client or Non-Client**

- Notify PLF and excess carrier immediately
- Respond promptly

**C O O P E R A T E**
Let the Professionals Help You!

- Do not communicate with claimant or claimant’s attorney without first consulting PLF or retained defense attorney.
- Accept your role as covered party and client.

Don’ts
- Don’t try to set aside own default.
- Don’t directly negotiate with client, if you make a mistake.
- Don’t contact claimant or claimant’s attorney without first consulting with PLF.
- Don’t testify in deposition without first consulting with PLF.

UPSIDE
• Objective confidential professional assistance

• Confidentiality

• Relieve pressure; avoid isolation

• Avoid making the problem worse

• Avoid risk to coverage

• Improved repair potential

• Assistance in decision-making

• Reduced risk of ethics violations

DOWNSIDE
CHAPTER 3

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

Jane E. Clark  
*Jane Clark Legal PC*

Arthur J. Kohn  
*Professor of Psychology at Portland State University, CEO of AK Learning Productions*
# TIPS, TRAPS, AND TOOLS for SUCCESSFULLY NAVIGATING NEGOTIATIONS AND PROFESSIONAL RELATIONSHIPS

## TABLE OF CONTENTS

### TIMING OF NEGOTIATIONS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-litigation settlements</td>
<td>3-1</td>
</tr>
<tr>
<td>Settlement during the course of the case</td>
<td>3-2</td>
</tr>
<tr>
<td>When to consider making a demand or offer</td>
<td>3-2</td>
</tr>
<tr>
<td>Settlement before or during trial</td>
<td>3-3</td>
</tr>
</tbody>
</table>

### NEGOTIATION TIPS AND TACTICS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Credibility and integrity</td>
<td>3-3</td>
</tr>
<tr>
<td>Listen and advocate</td>
<td>3-3</td>
</tr>
<tr>
<td>Disclosure of authority</td>
<td>3-4</td>
</tr>
<tr>
<td>“Bottom line” representations</td>
<td>3-4</td>
</tr>
<tr>
<td>Initial demands and offers – how to position them</td>
<td>3-5</td>
</tr>
<tr>
<td>Direct negotiation or mediation?</td>
<td>3-5</td>
</tr>
</tbody>
</table>

### PREPARING YOUR CLIENTS FOR SETTLEMENT NEGOTIATIONS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preparing plaintiffs</td>
<td>3-6</td>
</tr>
<tr>
<td>Preparing defendants and insurers</td>
<td>3-7</td>
</tr>
</tbody>
</table>

### CONCLUSION

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3-8</td>
</tr>
</tbody>
</table>
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 is 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 ruling on appeal and possible retrial.

**Negotiation tips and tactics**

**Credibility and Integrity**

The first rule in negotiation is maintain your credibility and integrity. As 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 fulfill 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 bringing 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 4

DATA SECURITY/DATA BREACH: WHAT EVERY LAWYER NEEDS TO KNOW TO PROTECT CLIENT INFORMATION

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Practice Management Advisor
Chapter 4

Data Security/Data Breach: What Every Lawyer Needs to Know to Protect Client Information

Table of Contents

PowerPoint Slides ................................................................. 4-1

Protecting Yourself and Law Firm from Data Breach Checklist ........................................ 4-12

To view these chapter materials and the additional resources below on or before November 1, go to www.osbplf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After November 1, select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

What to Do After a Data Breach, In Brief article, available at: https://www.osbplf.org/assets/in_briefs_issues/What%20to%20Do%20After%20Data%20Breach%20April%202016%20In%20Brief.pdf


Data Security/Data Breach:
What Every Lawyer Needs to Know to Protect Client Information

What is Data Breach
How to Protect Client Data
What to Do When a Breach Occurs
Lawyer’s Other Ethical Obligations
**What is a data breach?**

| Viewed, stolen or used without authority or knowledge |

**Safeguard client physical property & electronic property**

- Understand how to use technology safely
- Have a response plan
How it occurs

Lost or Stolen Device

Social Engineering
Phishing

Anatomy of a Phishing Email

- Sender’s email doesn’t look right
- You weren’t expecting that email
- Misspelled words & poor grammar
- Request personal information
- High sense of urgency
- References to threat/reward
- Ask you to open attachment or click on link

Ransomware
Warning!

Phish ➤ Infection ➤ Ransom Note ➤ Pay or restore

ORPC 1.6(c): Confidentiality: Make reasonable Efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

How to protect client data
- Use strong password
- Change frequently
- 2 factor authentication
- Consider password manager

- Don’t clink on suspicious attachments and links
- Avoid getting spam emails
- Update web browser
- Enable automatic updates
- Disable pop-ups

- Install OS, program & app updates
- Install/update anti-virus & malware protection
- Use firewall
- Don’t use free public WiFi
- Encrypt hard drive

- Back up | Use 3-2-1
- Use secured file sharing
- Encrypt before upload
More

- Educate and train
- Be vigilant
- Ensure files are properly destroyed
- Limit facility entry
- Question unknown people in secured areas

Contact Professional Liability Fund
Contact Oregon State Bar
Call IT expert
Change usernames and passwords
<table>
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<tr>
<th>Consider placing</th>
<th>File police report</th>
<th>Notify clients</th>
<th>Implement “How to protect client data” tips</th>
</tr>
</thead>
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<td>bank/credit/security freeze</td>
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</tr>
</tbody>
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<th>Contain the attack</th>
<th>Notify the FBI</th>
<th>Restore computer</th>
</tr>
</thead>
<tbody>
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</tr>
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ORPC 5.1
Responsible for another lawyer’s conduct that violates the RPCs

ORPC 5.2
Responsibilities of subordinate lawyer

ORPC 5.3
Have a duty to supervise staff

Thank you!

CONTACT US

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Protecting Yourself and Law Firm from Data Breach Checklist

Data breach is the unintended exposure of your data to unauthorized viewers. As lawyers, we are entrusted with confidential data about our clients. This checklist is intended to help you to become more secure. Think of it as a cyber security checklist that is helpful for identifying areas of concern for you to discuss with your IT support person. As cyber security is an area of ongoing change due to the increasing sophistication of cyber criminals, you should continue to seek out information about data security.

Passwords
1. Use passwords to protect all devices connected to the internet. Create strong passwords that are at least 14 characters or more using upper and lower case letters, numbers and special characters. Use a passphrase such as a sentence to help you to remember it.

2. Use a password manager program to store your passwords security in an encrypted vault on your computer or in the cloud. Don’t store passwords in files on your computer such as in a Word document or Excel spreadsheet. If you must write down your passwords, secure it in a locked location.

3. Use two-factor authentication which allows you to verify your identity using two methods of the following: something you know (for example a password), something you have (for example a key or hardware authentication device) something you are (for example a fingerprint or retina scan). There are authentication devices that provide strong two-factor authentication for example a YubiKey [www.yubico.com](http://www.yubico.com) itself is a two-factor authentication device incorporating a physical key with your fingerprint that plugs into your USB drive and supports one-passwords, public key encryption and authentication. Their YubiKey 4C Nano is the world’s smallest USB-C authentication device for use with USB-C ports.


5. Keep your password unique. Don’t re-use important passwords for multiple websites, devices or services.

6. Change your password frequently, such as every 30 or 45 days. Don’t recycle passwords!

Hardware and Software

7. Keep your hardware and software as current as possible with upgrades from the vendor. Those upgrades will typically include improved security features.

8. Secure your server in a locked room. Some cyber criminals have walked through law firms with clipboards posing as IT service personnel. Verify identities before granting access to your server.

9. Use intrusion detection systems. These systems will alert you to attempts to invade your computer system.
10. Use security software suites that include virus and malware protection and keep it up-to-date.

11. Have your IT support person set up your wireless network to include enabling strong encryption. Disable the WEP and WPA encryption and require WPA2 encryption.

12. Be sure to change the default passwords on all wireless routers and servers. Consult your IT support person for any help.

13. Be sure that any device holding client data is password protected and encrypted, especially if these devices are taken off site. Thumb drives, smart phones, tablets and laptops continue to be most frequently stolen or lost devices.

Protocols

14. Backup all data and do regular periodic test restores of the backup. Store your backup securely. Backups taken off site or stored on the internet should be encrypted. If you are storing your backup or any data on the internet, be sure that the vendor does not have access to the decryption key.

15. Be sure that your IT support person sets up your backup system so that it cannot be corrupted in the event your computer is attacked by ransomware. Otherwise, ransomware can travel onto your backup.

16. Develop a protocol for internet usage at work. Employees should not be allowed to download and install programs and apps on devices that connect to your server without prior authorization from your IT support person. Freeware frequently is infected with malware. Train your staff to avoid downloading any attachments sent by email especially if the extension ends in .exe which means it is an executable file.

17. Insure that all remote access to the office network occur through the use of a VPN, MiFi, smartphone hotspot or some other type of encrypted connection. Prohibit connecting to the office network using a public computer (such as at a hotel or library) and unsecured open public Wi-Fi network (such as at an airport, hotel, coffee shop, or library). Obtain guidance from your IT support person for setting up a VPN, MiFi, or smartphone hotspot.

18. Do not allow non-employees to have access to your network. This especially includes terminated employees.

19. Conduct an annual internal network security audit to ensure your network is secure. This is most helpful when it includes a vulnerability assessment.

Education

20. Provide mandatory social engineering awareness training to your staff annually.
21. Provide training to staff for how to respond to a cyber breach incident, including disconnecting the device from the internet and office network immediately if staff suspects the device has been breached and contact IT support immediately.

22. Instruct staff on how to properly dispose of any device or digital media that contains client or law firm data.

23. Instruct staff on proper safeguards if they are allowed to use their own device on your network.

24. Instruct staff on how to scrub documents for metadata.

25. Teach staff how to recognize phishing scams.

26. Teach staff to exercise caution on using social media as cyber criminals could use the same information to assist them in personal identity theft or hacking online accounts.

RESOURCES FOR FURTHER STUDY


32. Schneier on Security: Books by Bruce Schneier https://www.schneier.com/books/
CHAPTER 5

TORT LITIGATION

Jane Paulson
Paulson Coletti Trial Attorneys PC
# Chapter 5

**Tort Litigation**

## Table of Contents

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page #</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avoiding Legal Malpractice Tips and Traps for Lawyers</td>
<td>5-1</td>
</tr>
<tr>
<td>PowerPoint Slides</td>
<td>5-8</td>
</tr>
</tbody>
</table>

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### Additional Resources

- *Oregon Statutory Time Limitations Handbook Excerpts, 2014 Revision*
- *Settlements Proceeds and Other Traps, In Brief (Revised October 2011)*
- *Tips for Protecting Yourself from Malpractice Claims, In Brief, (Updated September 2013)*
- *Adjusted Tort Liability Limits Against Public Bodies Effective July 1, 2016, In Brief (August 2016)*
- *Settlements for Minors – 2009 Legislative Changes, In Brief (November 2010)*
- Duties of a Conservator (PLF Practice Aid)
- Acknowledgment of Restriction of Assets (PLF Practice Aid)
- Multnomah County Supplementary Local Rules 9.055
- Conservatorship Checklist (PLF Practice Aid)
Legal malpractice happens. Here are some tips to help you avoid common mistakes in tort cases. Malpractice occurs for many reasons other than failure to know the law. Plaintiff lawyers are often solo practitioners or in small firms with fewer people to bounce ideas off of. A plaintiff lawyer must not only know the law but also set up office procedures to prevent malpractice. The materials deal mostly with plaintiff errors because plaintiff attorneys, unfortunately, have most of the claims.

A simple way to minimize malpractice claims is keep your clients happy. A quick way to a malpractice suit is to have an unhappy client and not try to repair it. Use common sense. Keep your clients informed – send copies of pleadings, letters, answer emails, etc. It keeps your client informed and reduces phone calls from clients. Sometimes you are not going to recoup your costs or your time from your client -- remember a malpractice suit against you would be more costly and time consuming. If you plan to fight fees or costs when you and your client have parted ways consider calling the PLF first for advice.

Here are some additional tips for avoiding malpractice and keeping your clients happy:

1. CHOOSING CASES CAREFULLY:
   (See June 2006, In Brief, Revised October 2011, “Settlement Proceeds and Other Traps” by Jane Paulson)

   (a) Client Screening:
   Careful client and case screening can reduce the threat of malpractice and improve your days at work. Some cases shouldn’t be filed by you. Some cases shouldn’t be filed at all. Trust your gut and learn to know which clients and cases smell of trouble -- then do everything in your power to avoid them. Be leery of the following potential clients or cases:

   (1) Clients who are close to the statute of limitations. Carefully evaluate these cases before you take them. Do you have the time to do the case right now? Does the client have all the information needed to file suit? How long will it take to get the necessary information? Is it worth it?
(2) Clients who are unhappy with their previous attorney(s). While the client may have the right to be unhappy, the client may also have unreasonable expectations. If the unhappiness is from the client’s unreasonable expectations, you are simply setting yourself up for failure – don’t;
(3) Clients who want more money than you think the case is worth. Again a set up for failure and client unhappiness;
(4) Clients you don’t get along with. If you don’t like your client what makes you think a jury will;
(5) Cases beyond your area of expertise;
(6) Clients that want to negotiate every part of your retainer agreement. Sometimes these clients are simply savvy and good business people, sometimes they are trouble; and
(7) The PLF strongly cautions against representing friends and family. You are no longer an unbiased attorney and may not be able to see all sides clearly. Send the case to another lawyer and ask for a referral fee.

(b) Use Proper Forms of Engagement & Non-Engagement Letters: Use the PLF forms to sign up a client and set out the terms of engagement. If you do not take the case, send a letter (like the PLF samples) stating exactly that – remember to warn client that “time limitations apply…”

2. GET DETAILS RIGHT:
   a) Advise Clients That Bills Have to Be Paid Back
   b) Find Out The Following Information:
      (1) If Health Insurance Exists
      (2) What Other Insurance Exists
      (3) Where Your Client Received Medical Treatment
      (4) Ages:
         a) The time limit for a minor’s claim against a public body (Tri-Met, a city, a school district, etc.) is tolled just like for any other minor’s or disabled person’s claim (ORS 12.160). Smith v OHSU 272 OR App 473 (2015). Same for the minor’s medical bills. ORS 12.160.
         b) BE CAREFUL THOUGH because minority or disability does NOT toll the notice statute – you still have to send notice within 270 days (180 + 90 days).
         c) A parent’s action to recover the medical expenses of a minor child is the same as the minor’s but the parents must include a consent to add their claim to the child’s case. ORS 12.160(5). Many argue the medical bills of a child while the child is a minor are the claim of the parents – it is safest to file a consent of the parents with the child’s claim. The medical bills once the child reaches 18 are clearly the child’s.
(5) Names of All Defendants: Watch out for a tort-claim notice that needs to be or needed to be sent. 180-day/1-year tort claim notice requirement (see below). Also, dram shop cases (bars, etc. serving intoxicated patrons) have short, 180-day time notice requirements!

(6) Location of Injury: Time limitations in other states may be applicable. The 2, 2, 3 rule for filing personal injury cases based on negligence is **California – 2 years, Oregon – 2 years, Washington – 3 years.**

(7) Was Your Client Uninsured or Intoxicated? Recovery of non-economic damages is barred in a motor vehicle suit if the plaintiff was uninsured (ORS 806.010) or under the influence (ORS 813.010). The statute contains several exceptions, including if your client was a passenger.

d) **Obtain the Proper Name of All Parties:** Don’t wait until the last minute. Naming the wrong corporate defendant causes many malpractice claims. In many instances, the lawyer was given a corporate name that was very close to the corporate name. Call the corporation commission and ask for a “level 2” search of all companies. You need to name the proper defendant and obtain the proper addresses for service.

1) **Suing An Insurance Company:** If you plan to file suit against an insurer, you must check with the Department of Consumer and Business Services to verify the correct legal name, status and registered agent of the insurer. If you go to the Corporation Commissioner, you may end up with the name of an insurance agent that can be fatal to your case. (See PLF CLE “Avoiding Malpractice While Filing and Serving a Complaint,” June 2015, www.osbplf.org>CLE>Past).

2) **Obtain the Proper Address of All Parties:** Obvious, but a real problem when the defendant has moved and the statute of limitations is approaching.

3) **Send Tort Claim Notice if Required:**
   a. **Notice:** A plaintiff must give notice of the claim within 180 days of the injury or 1 year in a wrongful death action. ORS 30.275(2). Minors, incompetent persons or persons unable to give notice because of the injury are allowed an extra 90 days (270 days total). Minors only get 270 days from discovery of the claim. Catt v. Dept of Human Services (August 1, 2012) Or App Be careful – the notice period provided by ORS 30.275 is not tolled pending the appointment of a guardian ad litem for the minor. Perez v. Bay Area Hospital, 315 Or 474, 846 P2d 405 (1993). Obtain proper name and address for each entity that is to receive a Tort Claim notice.

4) **See if Your Client Has PIP Coverage:** PIP applies to pedestrians, bicycle riders, skate boarders and even in-line skaters involved in accidents involving motor vehicles. All of the above are considered pedestrians and entitled to PIP coverage under ORS 742.520(7). In order to avoid bar complaints or attorney malpractice claims by a “prevailing party” (who may now have to pay the losing party’s attorney fees) it is imperative that counsel fully disclose and discuss with clients both the benefits and the risks associated with pursuing contractual attorney fee claims. It is ultimately your client’s decision but make sure you put the decision in writing.

5) **Make Sure All Pleadings and Other Papers Are Filed With the Clerk of the Court:** ORCP 9E requires the original to be filed with the clerk of the court. Delivery of documents to the judge’s clerk, staff or even the judge is NOT filing per ORCP 9E. See Averill v. Red Lion, 118 Or App 298, 846 P2d 1203 (1993).

6) **Service:** A common source of legal malpractice claims. Many of these claims can be avoided with the help of an effective docket system and diligent follow through. (See PLF CLE “Avoiding Malpractice While Filing and Serving a Complaint,” June 2015, www.osbplf.org>CLE>Past).

   a. **Serve Within 60 Days of Filing Date To Use Filing Date As Commencement Date.** ORS 12.020(2). If you are within the quickly approaching statute of limitations but have not completed service consider dismissing and re-filing to get a new 60 days.
   b. **Action is Not Deemed Commenced Until Complaint is Filed and Summons is Served.** ORS 12.020(1); ORCP 3.
   c. **Calendar Service Verification.** Get your papers, information and deadlines to the process servers and/or the sheriff as soon as possible. Be careful, service is not complete until the follow-up mailing has been accomplished. ORCP 7D.
   d. **Service By Mail.** Follow the rules of ORCP 7D carefully!!
   e. **Never Grant Extensions Without Waiver of Service Challenge**
   f. **Check PLF Forms:** The PLF has a FREE litigation packet, which contains 16 forms, including a Service of Process Checklist.

7) **Send a Copy of the Complaint to Your Client’s Insurance Company:** In motor vehicle actions you must send a copy of the complaint by personal service or registered or certified mail for notice regarding PIP reimbursement. ORS 742.536(1). In addition, you need to file the proof of sending the notice with the court. ORS 742.536(1). The insurer has 30 days from receiving the notice to elect how it intends to recover its PIP. Don’t forget to send the
complaint and file the proof of notice because if done properly you may be able to get attorney fees on the recovery of the PIP.

BEFORE SETTLING:
(See June 2006, In Brief, Revised October 2011, “Settlement Proceeds and Other Traps” By Jane Paulson)

(a) Check With Any Potential UIM Carrier: If your client has a potential UIM claim, you must obtain the insurance company’s written consent to the underlying settlement before you settle the case. Failing to obtain written consent to the settlement can defeat any potential claim. Also, your client’s insurance coverage now “stacks” the liability insurance (defendant driver) with your client’s UIM coverage if the MVA happened on or after 1/1/16 and the insurance policy was new or renewed after 1/1/16 (“UIM Stacking” ORS 742.502 & 742.504).

(b) Check With PIP Carrier: Obtain updated lien in writing. Find out if you can negotiate the lien. Also, make sure lien is owed back. A new law ensures that injured motorists are able to recover their total damages first, before their insurer gets paid back for any PIP benefits it has provided (PIP “Made Whole” Law – ORS 742.544 (2015)).

(c) Make sure PIP carrier paid bills in full (not a reduced amount, like an HMO, yet charged client or took credit for paying full bill). Also, figure out how much of PIP, if any, you need to reimburse (see ORS 742.544 above). Follow the formula to determine the amount of PIP you must reimburse: total benefits received (liability proceeds plus UIM benefits plus PIP) minus economic damages = $ available to reimburse PIP).

(d) Invite Lien Holders to Settlement Conference

(e) Get Updated Liens In Writing
Medicare is very difficult to get a conditional lien out of and it can take months – start early! You will also need a final Medicare lien from the Medicare office once the case is over.

(f) Find Out if Settlement Could Affect Client’s Future Benefits: Some benefits can be cut or limited due to a personal injury settlement. If your client is receiving benefits the state will attach a lien to the settlement to the extent of all assistance provided (cash and medical) since the date of injury. Check affect on public assistance (including social security) and health insurance among others.

(g) Send Your Client a List of Bills

(h) Obtain Workers’ Compensation Carrier Approval: If there is a comp lien, the carrier must approve of the settlement. ORS 656.593

(i) Put All Settlement Offers To Your Client in Writing And Consent to Settle (Preferably In Writing): Protect yourself and put settlement discussions in writing. Even if you discussed the offer on the phone, send your client a note confirming the offer and discussion. It is especially important to put settlement offers your client has rejected in writing to prevent any problems in the future.
(j) **Advise Client If Any Portion of Settlement is Taxable:** Since the Small Business Job Protection Act of 1996 passed, most emotional distress and punitive damage payments (also check if laws if client is receiving money from an employment based claim) will be taxable if they are for damages not attributable to physical injury or sickness or are paid as punitive damages.


**ONCE A CASE SETTLES:**
(See June 2006, *In Brief*, Revised October 2011, “Settlement Proceeds and Other Traps” By Jane Paulson; Also See PLF Sample Settlement & Judgment Disbursal Forms, Checklist for Commencing and Settling Personal Injury Cases)

(a) **Report Case Settled to Court**

(b) **Prepare a Settlement Statement:** Have your client sign-off on the statement acknowledging the amounts paid and the amount your client will receive. List all bills you are aware of that have to be reimbursed and give notice to your client that s/he will have to pay any outstanding bills that come in.

(c) **Pay PIP Lien**

(d) **Pay Workers’ Compensation Lien**

(e) **Pay Outstanding Bills or Liens**

(f) **Find Out if Medicare is Involved**
   (a) This topic is very complicated and you should consult an expert. It is beyond the scope of these materials. In its simplest form you need to see if there is a Medicare lien that has to be paid back and if there will be future Medicare payments after the case is over which may require a future Medicare set-aside.

(g) **Be Careful Submitting Money Judgments:** Make sure your judgment complies with ORCP 70A. Judgments must include identification information for each debtor, the names of others that are entitled to any portion of a judgment, addresses of creditors and their attorneys, debtors and their attorneys. The judgment may be rejected by the court and cost you a priority lien position if it doesn’t comply with ORCP 70A.

3. **KEEP YOUR CLIENTS HAPPY**
   (a) **Do Everything to Make Sure Client is Happy:** While it is not always possible, if your client walks away happy your odds of future problems from the client are decreased. If the settlement is not great for your client but your client should take it, consider reducing your fee – especially if your client perceives you are trying to talk her/him into it. Even a small fee reduction can improve your relationship with your client or your client’s decision whether to accept an offer. Don’t forget -- happy clients also send you referrals and help keep your practice going!
4. **ASK FOR HELP:**

   By simply asking someone for help many malpractice traps can be avoided. Don’t be afraid of looking stupid or admitting you aren’t sure what to do – many lawyers like to help other lawyers and it’s a whole lot easier than calling the PLF after the fact. Ask more experienced lawyers for sample pleadings, motions, depositions or advice. It is a simple, inexpensive way to cut down on malpractice.

   “But, I don’t know any more experienced lawyers?” Join the Oregon Trial Lawyers Association (civil plaintiff attorneys, [www.oregontriallawyers.org](http://www.oregontriallawyers.org), 503-223-5587), Oregon Association of Defense Counsel (civil defense attorneys, [www.oadc.com](http://www.oadc.com), 503-253-0527) or Oregon Criminal Defense Lawyers Association (criminal defense attorneys, [www.ocdla.org](http://www.ocdla.org), 541-686-8716). These groups have list serves to help learn issues and ask questions and have continuing education and social gatherings to meet and interact with other lawyers.

   Another resource is the Professional Liability Fund (“PLF”). The PLF is there to help us and is a great resource for answering questions before you commit malpractice.

   Finally, if you feel a case is beyond your knowledge or ability, associate a more experienced attorney – not only is it the ethical thing to do, it is the smart thing to do. You do not have to commit malpractice (or an ethics violation) and you do not have to give up the case. Better yet, you can learn how to do the case for the next time. If you do not want to associate on the case, refer it to a more experienced lawyer and ask for a referral fee. Many lawyers give referral fees (generally 10-25+%) to referring lawyers.

**SUMMARY**

1. Carefully Screen Clients And Cases Before Taking Them
2. Get The Details Right
3. Work Hard To Keep Your Clients Happy
4. Don’t Be Afraid To Ask For Help
OVERVIEW

- Choose Cases Carefully
- Get Details Right
- Keep Client Happy
- Ask For Help

CHOOSING CASES CAREFULLY

CLIENTS TO AVOID

- Close To Statute of Limitations
- Unhappy With Previous Attorney
- Want More $ Than Case Is Worth
- Hard to Get Along With
- Want To Negotiate Everything
- Family & Friends

OTHER PITFALLS

- Defendant
  - Out-of-State
  - Out-of-Country
  - Not Sure of Name:
    - Individual or Corporate

Pitfalls (cont)

- Dead Defendant
- Service on Urn
- Not Sure of Address
  - How Are You Going to Get Service??
IT’S THE SMALL STUFF

- Failing to File in Time
  - Statute of Limitations
  - Tort Claim Notices
- Failing to Name the Proper Defendant

DEFENSE

- Failing to Timely:
  - Tender to Insurance Carrier
  - Raise Affirmative Defenses
  - File First Appearance (Default)
  - Name 3rd Party Defendants
  - Remove to Federal Court

PLAINTIFF & DEFENSE

- Failing to Timely:
  - Respond to Discovery Requests
  - Withdraw from Representation
  - File Request for Trial De Novo After Arbitration
  - File Notice of Appeal
- Failing to Memorialize Settlement at Mediation in Writing

STATUTES TO WATCH

- ORDER FREE OREGON STATUTORY TIME LIMITATIONS MANUAL FROM PLF (503-639-6911)
- http://www.osbplf.org
- FREE – FREE – FREE

STATUTES TO WATCH

- Minors:
  - Normally 5 Years + 2 Years For Discovery Or 1 Year Past 18th Birthday
  - Minor’s Claim Against Public Body
    - Same but notice is 270 days
  - Parents’ Claim To Recover Bills – same as minor’s (must file consent)
Potential Case

- Client calls
  - Run over by bus
  - Leg amputated
- What are my concerns?

NOTICE DEADLINES

- **180 DAY NOTICES:**
  - Public Bodies – Tri-Met, City, OHSU...
  - Dram Shop (Over-serving) – Bars, Etc.
  - Ski Resorts – ORS 30.970 et al.
- **MINORS: ADDITIONAL 90 DAYS**
  - 180 + 90 = 270 Total Days
  - Not Extended By Weekends, Holidays or Appointment Of Guardian
- **DEATH: 1 YEAR**

Potential Case

- Uninsured/Underinsured Driver
  - How long to file lawsuit?
  - What are my concerns?

Potential Case

- Client calls
  - Fell on oil on floor
  - In casino
- What are my concerns?

STATUTES IN OTHER STATES

- Watch Out For Accident In Another State
- Remember 3, 2, 2
  - Washington = 3
  - Oregon = 2
  - California = 2 (generally)

Obtain Proper Names

- Begin Early
- Corporate:
  - On-line Search With Corporation Commission
  - [http://www.filinginoregon.com/pages/search_main.html](http://www.filinginoregon.com/pages/search_main.html)
- Insurance Company:
  - Must Check With Department of CI & Business Services
BEWARE
- Discuss – Potential Contract Claim
  - Prevailing Party Can Get Attorney Fees

SERVICE
START EARLY!!!

SERVICE
- Set Up A Good Docketing System
  - Calendar & Watch Carefully!!
  - PLF Can Help (503-639-6911)
- Serve Within 60 Days of Filing
  - To Use Filing Date as Commencement
- Not Deemed Commenced Until Complaint Filed And Summons Served
- Get Papers to Sheriff, Process Servers ASAP

MORE SERVICE TIPS
- Service By Mail
  - Follow ORCP 7D Carefully!!
  - Never Grant Extensions Without Waiver of Service

Saving (Your A..) Statute
- ORS 12.220
  - Can re-file complaint dismissed involuntarily for failure of service
  - If defendant had actual notice within 60 days after service

In Trial
- Revised Jury Instructions Overnight
  - Who do I give them to?
BEFORE SETTLING
- Get Your Client’s Consent
- Obtain Written Consent UIM Carrier
- Obtain Consent Worker’s Comp Carrier
- Figure Out All Liens
  - PIP, Medical, MEDICARE, etc
  - Invite Key Lien Holders if Necessary

MORE BEFORE SETTLING
- Find Out If $ Could Affect Client’s Future Benefits
- Put All Offers To Client In Writing
- Advise Client If Any Portion Taxable Or To Consult Tax Advisor
- Assess Where $ Going If Minor

THINGS TO DO AFTER CASE SETTLES
- Report Case Settled to Court
- Pay Liens – PIP, Comp, Medical
- Be Careful Submitting $ Judgments

Protecting Minor’s Money
- Conservatorship
- Court Approval
- Annuity
- Trust
- Affect on Public Benefits??

You Don’t Have Control Over…
KEEP YOUR CLIENTS HAPPY

- Keep Clients Informed
- Be Available & Responsive
- Think Twice Before Fighting Over Fees & Costs

ASK FOR HELP

- Talk to Other Lawyers
  - Pleadings, Depositions, How To, Etc.
- Use PLF as a Resource
- Associate a More Experienced Attorney
- Refer Case & Ask for a Referral Fee

JOIN A PROFESSIONAL ORGANIZATION

- Oregon Trial Lawyer’s Association
  - www.oregontriallawyers.org
- Oregon Association Defense Counsel
  - www.oadc.com
- Oregon Criminal Defense
  - www.ocdla.org

OVERVIEW

- Choose Cases Carefully
- Get Details Right
- Keep Client Happy
- Ask For Help
Chapter 5

TORT LITIGATION

RESOURCES

Oregon Statutory Time Limitations Handbook Excerpts, 2014 Revision
Settlements Proceeds and Other Traps, In Brief (Revised October 2011)
Tips for Protecting Yourself from Malpractice Claims, In Brief, (Updated September 2013)
Adjusted Tort Liability Limits Against Public Bodies Effective July 1, 2016, In Brief (August 2016)
Settlements for Minors – 2009 Legislative Changes, In Brief (November 2010)
Duties of a Conservator (PLF Practice Aid)
Acknowledgment of Restriction of Assets (PLF Practice Aid)
Multnomah County Supplementary Local Rules 9.055
Conservatorship Checklist (PLF Practice Aid)
HB 2333 clarifies that Oregon’s Minority Tolling Statute applies to claims brought under the Oregon Tort Claims Act. In 2007, HB 2366 amended the statute to bring the statutes of limitations for claims brought by parents of injured children in line with the SOLs for the claims of the children themselves. In so doing, the wording of the Minority Tolling Statute was subtly changed from referencing “actions mentioned in” to “actions that are subject to” various relevant statutes. This resulted in at least some courts concluding that the Minority Tolling Statute no longer applied to claims against the state, because claims under the Tort Claims Act – having separate statutes of limitations – are not “subject to” the statutes listed.

HB 2333 corrects this unintended consequence by reverting to the pre-2007 phasing of the statute.

HB 2333 took effect on June 22, 2015.
§ 2.1A(2) Commencement of an Action for Purposes of a Statute of Limitations

For the purpose of determining whether an action has been commenced within the applicable statute of limitations, an action is deemed commenced as follows:

(1) If the summons is served on the defendant within 60 days after the date on which the complaint was filed, the action is deemed to have been commenced on the date that the complaint was filed. ORS 12.020(2).

(2) If the summons is not served within that 60-day period, the action is deemed to have been commenced on the date that the summons was served on the defendant. ORS 12.020(1). In such a case, the summons must be served within the applicable statute of limitations for the action to commence timely. Johnson v. MacGregor, 55 Or App 374, 637 P2d 1362 (1981), rev den, 292 Or 589 (1982); Baker v. Kennedy, 115 Or App 360, 362, 838 P2d 634 (1992).

NOTE: ORS 12.020 does not toll the statute of limitations. It merely provides that when a complaint is filed against a defendant within the limitations period, the summons may be served on the defendant within 60 days thereafter, even though service is beyond the limitations period. Johnson, 55 Or App at 376 n 2.

NOTE: ORS 12.020 is both a procedural rule and a substantive rule. The 60-day limitation of ORS 12.020 does not apply to causes of action based on federal law brought in state court (e.g., admiralty claims under the Jones Act). Hurley v. Shinmei Kisen K.K., 98 Or App 180, 184–85, 779 P2d 1041 (1989), rev den, 309 Or 291 (1990).

See § 2.6 to § 2.6B(3) (statutes of limitations; tolling).

§ 2.1A(3) Oregon Tort Claims Act (Minor Children)

ORS 12.160, which extends the time limit for a minor to commence an action, may not toll the two-year statute of limitations found in ORS 30.275(9) for a minor to commence a cause of action under the Oregon Tort Claims Act (OTCA). See § 7.3B for further discussion.

NOTE: If a minor has a claim against a public body, the 270-day notice period prescribed in ORS 30.275 is not tolled pending the appointment of a guardian ad litem. Perez By & Through Yon v. Bay Area Hosp., 315 Or 474, 482–83, 846 P2d 405 (1993). See, however, ORS 30.275(8), pertaining to a claim brought by a minor against the Department of Human Services or the Oregon Youth Authority.

For further discussion of the OTCA, see § 2.18A(4)(b).
§ 2.6B Tolling the Statute of Limitations
§ 2.6B(1) Minors; Personal Disabilities

§ 2.6B(1)(a) General Rule

If a person is entitled to bring an action that is subject to a statute of limitations under ORS 12.010 to 12.050, ORS 12.070 to 12.250, or ORS 12.276, and, at the time that the cause of action accrues, the person is either (1) younger than 18 years of age or (2) insane, the statute is suspended for the period of minority or insanity, except that the time for bringing the action cannot be extended for more than five years or for more than one year after the disability ceases, whichever occurs first. ORS 12.160.

Using the disability to suspend the running of the statute of limitations requires that the disability exist when the right of action accrued. ORS 12.170.

When two or more disabilities coexist at the time that the right of action accrues, the time limitation does not attach until all disabilities are removed. ORS 12.180.

ORS 12.160 applies only at the time that the cause of action accrues or comes into existence as an enforceable claim. If the cause of action never accrues, the tolling provision cannot apply. Wright v. State Farm Mut. Auto. Ins. Co., 223
Or App 357, 363, 196 P3d 1000 (2008) (ORS 12.160 did not apply to an underinsured-motorist claim when none of the requisite events set forth in ORS 742.504(12)(a) occurred within two years of the accident).

An infant suffering a personal injury has five years (ORS 12.160) plus the two years provided in ORS 12.110, for a total of seven years, to commence an action, Shaw v. Zabel, 267 Or 557, 559, 517 P2d 1187 (1974), unless a shorter period of repose applies, see ORS 12.110(4); Christiansen v. Providence Health Sys. of Oregon Corp., 344 Or 445, 452, 184 P3d 1121 (2008) (a claim based on medical negligence must be brought within five years after the date of treatment, omission, or operation).

NOTE: A statute of ultimate repose may limit the time for tolling based on minority or insanity to less than the period of minority without violating the remedies clause, Article I, section 10, of the Oregon Constitution. Christiansen, 344 Or at 454 (the court rejected a remedies-clause challenge to a statute of repose for a medical-malpractice claim on behalf of a minor child); see also Fields v. Legacy Health Sys., 413 F3d 943, 959 (9th Cir 2005) (the repose period for a wrongful-death action in ORS 30.020(1) barred the claim). See § 2.7A to § 2.7G(2) for further discussion of statutes of ultimate repose.

The five-year suspension of the limitations period for minors and insane persons is not lost by the commencement and subsequent dismissal of a claim by a conservator or by the appointment of a conservator. Luchini By & Through Luchini v. Harsany, 98 Or App 217, 221, 223, 779 P2d 1053, rev den, 308 Or 608 (1989) (as long as the right to sue remains in the person, the appointment of a conservator does not remove the statutory extension of the statute of limitations for minors).

See § 2.6B(1)(b).

§ 2.6B(1)(b) Applicability of the Minority-Tolling Statute to the Oregon Tort Claims Act

CAVEAT: It is not clear whether the minority-tolling statute (ORS 12.160) tolls the two-year limitations period under the Oregon Tort Claims Act to commence an action. See § 2.18A(4)(b) for further discussion.

NOTE: If a minor has a claim against a public body, the 270-day notice period prescribed in ORS 30.275 is not tolled pending the appointment of a guardian ad litem. Perez By & Through Yon v. Bay Area Hosp., 315 Or 474, 482–83, 846 P2d 405 (1993). However, see ORS 30.275(8) regarding a claim against the Department of Human Services or the Oregon Youth Authority.

See also § 2.1A(1) to § 2.1B (actions in general), § 2.18A to § 2.18D (actions involving governmental and public bodies), § 7.3A (actions for wrongful death against a governmental body), § 7.4A to § 7.4D(1) (actions for personal
injury), § 7.16D (actions for wrongful death based on products liability), § 7.14A(5) (actions for wrongful death against a governmental body based on medical malpractice).

§ 2.6B(2)  Death of a Party

§ 2.6B(2)(a)  Death of Plaintiff

If a person who is entitled to bring an action dies during the time allowed for bringing the action, an action may be commenced by the person’s personal representative after the statute of limitations has run, as long as the action is commenced within one year after the person’s death. ORS 12.190(1).

See § 2.18A to § 2.18D (governmental and public bodies), § 2.2G to § 2.2G(4) (survival of actions), § 2.7A to § 2.7G(2) (statutes of ultimate repose), § 6.5A to § 6.5C(2) (actions for wrongful death in general).

§ 2.6B(2)(b)  Death of Defendant

If a person who would be a defendant in an action dies before the statute of limitations has run, an action may be commenced against the person’s personal representative after the statute has run, as long as the action is commenced within one year after the person’s death. ORS 12.190(2).

See § 6.4B(2) (survival of actions), § 6.5D (death of wrongdoer).

§ 2.6B(3)  Absence or Concealment of Defendant

If a cause of action accrues against a person when the person is out of state and service cannot be made on the person in Oregon, or if the person is concealed in Oregon, the action may be commenced within the applicable statute of limitations after the person returns to Oregon or is no longer concealed. ORS 12.150.

If a person leaves Oregon or hides in Oregon after the cause of action accrues, the statute of limitations is suspended during the time that the person is absent from, or concealed in, Oregon. The time of concealment or absence will not be counted as any part of the time within which the action must be commenced. ORS 12.150.

NOTE: A question exists regarding whether a student in Oregon who maintains a permanent residence outside the state and returns to his or her home in another state during breaks and vacations is “absent from Oregon” for those periods for purposes of tolling the statute of limitations.

NOTE: A question also exists regarding whether the statute of limitations is tolled in motor-vehicle cases against drivers who are absent from the state after the cause of action accrues. A plaintiff’s alternative form of service for an action against a nonresident motorist, or against an Oregon motorist who moves out of state, is service by mail in compliance with ORCP 7 D(4)(a)(i) to the addresses specified in that provision. Service in this manner is deemed complete on the latest date on which any of the required mailings is made. ORCP 7 D(4)(a)(i). See Whittington v. Davis,

In Herzberg v. Moseley Aviation, Inc., 156 Or App 1, 6, 964 P2d 1137 (1998), rev den, 328 Or 275 (1999), the court held the two-year statute of limitations on a products-liability claim was tolled when personal service could not be effected in state and the defendant’s partnership ultimately was served by mail to an address outside of Oregon.

When the maker of a promissory note defaults and moves out of state after the claim has accrued, the statute of limitations is tolled during the maker’s absence from Oregon. Gary M. Buford & Associates, Inc. v. Guillory, 98 Or App 691, 694, 780 P2d 783, rev den, 308 Or 660 (1989), modified by Wright v. Osborne, 151 Or App 466, 949 P2d 321 (1997) (citing ORS 12.080(1) and ORS 12.150).

§ 2.6C Advance Payments for Death, Injury, or Property Damage

§ 2.6C(1) Notice of Expiration of Limitations Period

ORS 31.560 and ORS 51.565 allow a person to make an advance payment for damages arising from the death or injury of a person or the injury or destruction of property without admitting liability for the death or injury.

If, within 30 days after making the first advance payment referred to in ORS 31.560 or ORS 51.565, the payor gives to each person entitled to recover damages for the death or injury written notice of the date that the limitations period expires, then the making of any such advance payment does not suspend the running of the limitations period. ORS 12.155(1).

If such notice is not given within 30 days after the first advance payment is made, the limitations period is suspended from the date of the first advance payment until the date that the payor gives the person entitled to recover damages written notice of the expiration date of the limitations period. ORS 12.155(2); Pipkin v. Zimmer, 113 Or App 737, 740–41, 833 P2d 1350, rev den, 314 Or 727 (1992) (when the defendant’s insurance company paid for property damage to the plaintiff’s car but failed to give the notice, the statute of limitations was tolled).

See § 2.6C(2) for the meaning of the word person for purposes of ORS 12.155. See also § 2.6C(3) regarding an advance payment to a minor.

§ 2.6C(2) Person Defined

A “person” making an advance payment within the meaning of ORS 12.155 is not limited to insurers. See § 2.6C(1). An advance payment by any person, as defined in ORS 174.100(5), made without providing written notice of the statute of limitations as set forth in ORS 12.155(1) to (2), will toll the limitations period. Hamilton v. Paynter, 342 Or 48, 58, 149 P3d 131 (2006).
§ 2.6C(3)  Advance Payment to Minor


§ 2.6D  Court Actions

§ 2.6D(1)  Limitations Period When Action Is Stayed by Injunction or Statutory Prohibition

If the commencement of an action is stayed by an injunction or a statutory prohibition, the statute of limitations does not run during the continuance of the injunction or prohibition. ORS 12.210.

§ 2.6D(2)  Extension of Limitations Period for Trustee on Debtor's Bankruptcy or Debtor's Action

Under 11 USC section 108(a) to (b), a trustee, stepping into the debtor's shoes, receives an extension of time for filing an action or doing some other act required to preserve the debtor's right.

"If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action," and if that period has not expired before the date of the filing of the bankruptcy petition, the trustee may commence the action before the later of "(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) two years after the order for relief." 11 USC § 108(a).

Thus, the statute of limitations or the time period fixed by a nonbankruptcy order or agreement is extended for the commencement or continuation of an action by the debtor (trustee) for two years after the date of the order for relief, unless the fixed period would expire after two years from the order of relief. 11 USC § 108(a).

Under 11 USC section 108(b), the trustee receives an extension of 60 days from the date of the order for relief within which the trustee may file any pleading, demand, notice, or proof of claim or loss; cure a default; or perform any other similar act, such as filing an insurance claim, or any action not covered by 11 USC section 108(a). If the period for doing the act expires after 60 days from the date of the order for relief, the date of expiration of the time otherwise allowed for performing the action applies. 11 USC § 108(b).

§ 2.6D(3)  Bankruptcy Creditor's Action

Section 108(c) of the Bankruptcy Code extends the statute of limitations for creditors. 11 USC § 108(c).

If a statute of limitations, a nonbankruptcy order, or an agreement "fixes a period for commencing or continuing a civil action in a court other than a bank-
bankruptcy court on a claim against the debtor,” and if that period has not expired before the date of the filing of the bankruptcy petition, then that period does not expire until the later of:

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of [the Bankruptcy Code], as the case may be, with respect to such claim.

11 USC § 108(c).

Thus, the creditor is given an additional 30 days after notice of the termination or expiration of the automatic stay if the statute of limitations runs while the stay is in effect. An event that could result in the termination or expiration of the stay could include relief from the automatic stay under 11 USC sections 362, 922, 1201, or 1301; dismissal of the petition; or the debt on which the creditor bases its claim being excepted from discharge. 11 USC § 108(c).

The creditor must bring its action against the debtor within the later of the 30-day extension or the expiration of the statute of limitations period on the creditor’s claim. 11 USC § 108(c).

Section 108(c) applies to chapters 7, 11, 12, and 13 bankruptcies. 11 USC § 103(a).

The period for giving notice of a claim for a statutory lien against the debtor is not suspended or extended by the debtor’s filing of a bankruptcy petition. 11 USC § 546(b).

See § 11.18 to § 11.18E(19) for further discussion of creditors’ rights on the bankruptcy of a debtor.

§ 2.6E Effect of Involuntary Dismissal on Statute of Limitations

If a case is involuntarily dismissed, ORS 12.220 allows a plaintiff to refile that same action within 180 days even if the statute of limitations has then run on the action. See § 2.8 to § 2.8C (commencing a new action after involuntary dismissal). See also 2 Torts § 32.7 (OSB Legal Pubs 2012).
§ 2.18A(4) When Action Must Be Commenced

§ 2.18A(4)(a) General Rule: Action Must Be Commenced Within Two Years

Except as provided in ORS 12.120, ORS 12.135, and ORS 659A.875, “but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action,” an action arising from any act or omission of a public body or an officer, employee, or agent of a public body must be commenced within two years after the alleged loss or injury. ORS 30.275(9). But see § 2.18A(4)(b) regarding the commencement of an action by a minor or insane person.

NOTE: Construction-defect actions must be commenced within two years, but ORS 12.135 can affect the period of ultimate repose. ORS 12.135, ORS 30.275.

§ 2.18A(4)(b) Commencement of Action by Minor or Insane Person

It is not clear whether the two-year statute of limitations found in ORS 30.275(9) for commencing a cause of action against a public body under the Oregon Tort Claims Act (OTCA) is tolled by ORS 12.160 during the plaintiff's minority. Lawson v. Coos Cnty. Sch. Dist. No. 13, 94 Or App 387, 390–91, 765 P2d 829 (1988), abrogated by Baker v. City of Lakeside, 343 Or 70, 164 P3d 259 (2007) (the plaintiff’s status as a minor did not toll the two-year limit to commence an action under ORS 30.275); but see Bradford v. Davis, 290 Or 855, 861–62, 626 P2d 1376 (1981) (the court held that the tolling statute for minors applies to the OTCA; however, Bradford was decided before the legislature enacted ORS 30.275(9)); Baker, 343 Or at 82 (“Nothing in the legislative history ... suggest[s] that the legislature intended to deny children and persons with mental disabilities bringing OTCA claims the advantage of a tolling provision that is available to them in every other action.”).

CAVEAT: A question exists regarding whether the minority tolling statute (ORS 12.160) tolls the two-year limitation period when commencing an action under the OTCA. Lawyers should research this area of the law carefully before relying on this or any tolling statute.

See also § 2.1A(1) to § 2.1A(3) (discussing when an action is commenced), § 2.6 to § 2.6E (statutes of limitations and tolling the limitations period), § 2.18A(2) (wrongful death actions), chapter 7 (actions for personal injury or property damage), § 7.14A(1) to § 7.14D (medical and dental malpractice actions).
§ 6.1E Guardian Ad Litem; Civil Litigation

(1) Appearance in court action. A minor or incapacitated person who has a conservator or guardian must appear in court through the conservator or guardian or, if no conservator or guardian has been appointed, through a guardian ad litem. ORCP 27.

(2) Tolling during minority or insanity. The statutes of limitations for most causes of action (except for those relating to land sale contracts) held by a person who is under the age of 18 are tolled for up to five years before the person reaches age 18. ORS 12.160(1)-(2). Causes of action that accrue while a person is insane are also tolled. ORS 12.160(3)-(4). The time for commencing an action
cannot be extended under the statute for more than five years, or for more than one year after the person reaches age 18 or is no longer insane, whichever occurs first. ORS 12.160(2), (4). See § 2.6B(1)(a) to § 2.6B(3) for further discussion on the tolling statute, including applicability of the statute to the Oregon Tort Claims Act.

NOTE: A claim brought by a parent, guardian, or conservator of a minor child for medical expenses resulting from the same wrongful conduct that is the basis of the minor’s cause of action is also tolled. ORS 12.160(5). See § 7.4D to § 7.4D(1).


CAVEAT: It is not clear whether the minority-tolling statute (ORS 12.160) tolls the two-year limitation period under the Oregon Tort Claims Act to commence an action. See § 2.18A(4)(b) for further discussion.


§ 6.1F References

See generally Guardianships, Conservatorships, and Transfers To Minors (OSB Legal Pubs 2009).
§ 6.3 DEATH OR DISABILITY

§ 6.3A Death of a Party

§ 6.3A(1) Action Continued by Personal Representative

On the death of a plaintiff, the court, on motion, must allow the action to be continued by the plaintiff’s personal representative or successors-in-interest if the motion is made any time within one year after the plaintiff’s death. ORCP 34 B(1). See § 6.5A to § 6.5E (wrongful death).

§ 6.3A(2) Action Continued against Personal Representative

“The action against a decedent commenced before and pending on the date of death of the decedent may be continued as provided in ORCP 34 B(2) without presentation of a claim against the estate of the decedent.” ORS 115.315.

Under ORCP 34 B(2), if a defendant dies, the court, on motion, must allow the action to be continued against the defendant’s personal representative or successors-in-interest, unless (1) the defendant’s personal representative or successors-in-interest mail or deliver notice that includes the information required by ORS 115.003(3) to the claimant (or the claimant’s attorney, if represented) and (2) the claimant or the claimant’s attorney fails to move the court to substitute the personal representative or successors-in-interest within 30 days of mailing or delivery of the notice.

§ 6.3A(3) Abatement

If a plaintiff or defendant dies in an action in which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate. ORCP 34 D. The proper procedure is to move the court for an order substituting parties as described in § 2.2G(1) to § 2.2G(4).

§ 6.3B Disability of a Party

§ 6.3B(1) Action Continued

If a party to an action becomes disabled, the court may allow the action to be continued by or against the disabled party’s guardian, conservator, or successors-in-interest on a motion made within one year after the disability. ORCP 34 C.

§ 6.3B(2) Tolling for Minority or Insanity

If a person is younger than 18 years of age or insane at the time of the accrual of a cause of action mentioned in ORS 12.010 to 12.050, ORS 12.070 to 12.250, or ORS 12.276, the statute of limitations for the action is tolled for as long as the person is younger than 18 or for as long as the person is insane. ORS 12.160(1), (3). However, the statute of limitations will not be extended for more than five years by reason of age or insanity, or for more than one year after the person reaches 18 years of age or is no longer insane, whichever occurs first. ORS 12.160(2), (4). See § 2.6B(1)(a) to § 2.6B(1)(b) for further discussion.
NOTE: If a child’s cause of action is tolled under ORS 12.160(1), an action seeking damages for medical expenses incurred by a parent, guardian, or conservator of the child is tolled for the same amount of time if the medical expenses resulted from the same wrongful conduct that is the basis of the child’s cause of action. ORS 12.160(5). See § 7.4D(1).

To be sufficient to toll the statute of limitations for insanity, the insane person must suffer from “such a condition of mental derangement as actually to bar the sufferer from comprehending rights which he is otherwise bound to know.” Roberts By & Through Drew v. Drew, 105 Or App 251, 254, 804 P2d 503 (1991). Whether that condition existed when the cause of action accrued is usually a question of fact. Roberts By & Through Drew, 105 Or App at 255.

§ 6.3C  Effect of Death on Unfiled Action

§ 6.3C(1)  Commencement of Action by Personal Representative

If a person who is entitled to bring an action dies before the applicable statute of limitations expires, the personal representative may commence the action after the expiration of that time, but the action must be commenced within one year after the death of the person. ORS 12.190(1).

However, the limitation period set forth in ORS 30.075, rather than ORS 12.190(1), applies to personal-injury actions in which the injured person dies before the action is commenced. Under ORS 30.075, the personal representative must commence the action within three years. See Giulietti v. Oncology Associates of Oregon, P.C., 178 Or App 260, 36 P3d 510 (2001). “ORS 30.075 is specific to personal injury claims,” whereas ORS 12.190(1) applies to all other actions in which the decedent died before the action was brought. Giulietti, 178 Or App at 265–66.

NOTE: An action for wrongful death is subject to the limitations period set forth in ORS 30.020(1).

CAVEAT: A cause of action may be subject to a specific statute of limitations. See chapter 7 (discussing statutes of limitations applicable to various torts, including actions based on a products-liability civil action).

§ 6.3C(2)  Commencement of Action against Personal Representative

If a person who would be a defendant in a case dies before the statute of limitations expires, the plaintiff may commence an action against the defendant’s personal representative after the statute of limitations expires, but the action must be brought within one year after the defendant’s death. ORS 12.190(2).

However, with certain exceptions, “no action against a personal representative on account of a claim shall be commenced until the claim of the plaintiff has been presented to and disallowed by the personal representative.” ORS 115.325. See Meissner v. Murphy, 58 Or App 174, 177–78, 647 P2d 972 (1982).
§ 6.3D Death of an Attorney

If an attorney for a person dies, the person must commence the action within 180 days after the death of the attorney, or within the statute of limitations, whichever is later, if:

1. "The attorney has agreed to represent the person in the action";
2. "The attorney-client relationship between the person and the attorney is confirmed in a writing prepared by the attorney or at the direction of the attorney"; and
3. The attorney dies before the statute of limitations expires.

ORS 12.195.

§ 6.3E References

See 1 Oregon Civil Pleading and Practice ch 7 (OSB Legal Pubs 2012). See also 2 Torts ch 30 (OSB Legal Pubs 2012).
§ 7.4 PERSONAL INJURY

§ 7.4A Statutes of Limitations—In General

An action for personal injury may be governed by one of several different statutory limitation periods, including medical, surgical, and dental malpractice (ORS 12.110(4)); products liability (ORS 30.905); wrongful death (ORS 30.020); and claims against public bodies (ORS 30.275). Those actions are covered separately in this chapter.

§ 7.4B Assault, Battery, False Imprisonment, or Injury to Person or Rights

“An action for assault, battery, false imprisonment, or for any [other] injury to the person or rights of another, not arising on contract and not especially enumerated in ORS chapter 12 shall be commenced within two years” after accrual of the cause of action. ORS 12.110(1). See ORS 147.065 (extending the statute of limitations to five years after the commission of a compensable crime); see § 7.18 to § 7.18F (compensable crimes).

§ 7.4C Tort Actions Do Not Abate on Death of Injured Person

Causes of action arising out of injuries to a person, caused by the wrongful act or omission of another, do not abate on the death of the injured person and may be maintained by the personal representative for the deceased person if the decedent might have maintained an action had the decedent lived. ORS 30.075(1).

The personal representative of the decedent may commence an action against the wrongdoer on behalf of the decedent if the action is commenced within three years after the injury causing the decedent’s death. ORS 30.075(1).

The personal representative also may continue an action already commenced by the injured person before his or her death, assuming that the cause of action was commenced within the time limits allowed by ORS 12.110. ORS 30.075(1).

§ 7.4D Medical Bills of Injured Child

Medical expenses incurred due to the negligent injury of an unemancipated minor are damages suffered by the parent, not the child. Palmore v. Kirkman Laboratories, Inc., 270 Or 294, 305–06, 527 P2d 391 (1974). A parent’s action to recover the medical expenses of the child is governed by the two-year statute of limitations set forth in ORS 12.110(1) or, if the action is one for medical, surgical, or dental negligence, ORS 12.110(4). If a child’s guardian ad litem files an action on behalf of the child against the wrongdoer, the parents or conservator may file a consent along with the complaint in order to include the claims for medical expenses in the guardian’s action. ORS 31.700(1). If the court allows that consent, the parents may not thereafter maintain a separate action to recover the medical expenses paid to treat the child’s injuries. ORS 31.700(2). See § 7.3B (tolling of child’s action).

2014 Edition
§ 7.4D(1) Tolling (Claims Arising on or after January 1, 2008)

For actions arising on or after January 1, 2008, if a child’s cause of action is tolled by ORS 12.160(1), the cause of action brought by the parent, guardian, or conservator of the child is tolled for the same period of time as the child’s cause of action if the medical expenses resulted from the same wrongful conduct that is the basis of the child’s cause of action. ORS 12.160(5).

However, if the action is one for medical, surgical, or dental negligence, the time to file pursuant to ORS 12.160(1) may not exceed the five-year statute of ultimate repose found in ORS 12.110(4), absent fraud, deceit, or misleading representation. ORS 12.110(4).

Caveat: It is not clear whether the two-year statute of limitations found in ORS 30.275(9) for commencing a cause of action under the Oregon Tort Claims Act is tolled during the plaintiff’s minority by ORS 12.160. See § 7.3B for further discussion of this issue.

See also § 2.1A(1) to § 2.1B (actions); § 2.6B(1)(a) to § 2.6B(1)(b) (tolling the statute of limitations); § 7.14A(1) to § 7.14C(3), § 7.26A(2)(b) (medical and dental malpractice); § 7.22A(1) (wrongful death).

§ 7.4D(2) References

See, e.g., 2 Torts chs 28, 32 (OSB Legal Pubs 2012).
SETTLEMENT PROCEEDS AND OTHER TRAPS

Here are a few simple, but critical, tips for avoiding malpractice while handling and settling personal injury claims.

CASE INFORMATION AND CLIENT EXPECTATION

Resolving claims to everyone’s satisfaction begins when clients first walk into your office. You can prevent many problems by reviewing issues with your clients at an early stage in your representation.

Provide a Case Settlement/Cost Overview. Many clients do not understand that settlement money they have received for medical expenses or lost wages must be paid to their medical providers or insurance carriers of PIP (Personal Injury Protection), health, disability, or workers’ compensation coverage. Informing the client early helps everyone have the same expectations going into a case.

There are three basic categories of claims for reimbursement from personal injury settlement proceeds: (1) Claims by the client’s insurer for PIP payments made; (2) Claims by health plan insurers for payments to the client’s medical providers; (3) Claims by medical providers for unpaid bills for services, including liens by hospitals and physicians; and 4) claims made by Medicare or state welfare agencies for payments made to medical providers.

This article will refer to these categories of potential claimants collectively as “insurers and providers.”

Ask About Health Insurance. If you know who the health insurance carrier is, call and find out whether a right of subrogation exists under the policy. Inquire about medical providers so you can determine whether there are any bills you were not aware of or whether a provider has filed a lien.

Medicare and Medicaid. Medicare and Medicaid liens are very tricky. Start early and hire help if needed.

Department of Human Services (DHS) Welfare Liens. Start early and hire help if needed.

Determine Whether Other Insurance Payments Are Involved. The sooner you learn what insurance exists, the sooner you can determine what portion of the settlement proceeds would be owed to the client’s insurers for benefits paid. Examples are PIP, workers’ compensation, and disability benefits.

Make Sure You Have All the Medical Bills.

The sooner you identify all of your client’s providers, the sooner you can begin locating bills, liens, and records. This is especially important for the invoices that slip through the cracks because they are billed separately (e.g., ambulance, radiology, surgery, and anesthesiology). Quite often these bills do not show up on a hospital summary and can be missed. Also, these types of bills are often sent to collection much sooner than others.

Determine Whether a Minor Is Involved.

The time limit for a minor’s claim against a public body (e.g., Tri-Met, a city, a school district, the police) is short – it must be filed within two years. ORS 30.275(9). See Lawson v. Coos Co. Sch. Dist. No. 13, 94 Or App 387, 765 P2d 829 (1988). Also, watch out for the minor’s medi-
THINGS TO DO BEFORE SETTLING

Check with the UIM Insurer. Before you settle, evaluate whether your client has an underinsured motorist (UIM) claim or potential claim. If your client has a potential UIM claim, you must obtain the UIM insurer’s written consent to the underlying settlement before you settle the case. Failing to obtain written consent to the settlement can defeat any potential UIM claim.

Check with the PIP Insurer. Before a settlement conference: (1) Write the PIP insurer and obtain an updated total of PIP payments in writing. PIP totals can change, and you cannot negotiate effectively if you do not have the correct amount. If you obtain a current statement of PIP payments, in writing, there can be no dispute later. (2) If the PIP insurer has not authorized you to collect its PIP reimbursement, clarify in writing to the insurer that you will take no responsibility for collecting its PIP reimbursement from the liability insurer. If the PIP insurer authorizes you to collect its PIP reimbursement, clarify in writing your right to deduct your contingent fee and pro rata costs from the amount collected. However, be aware that you have a potential conflict of interest if you deduct your contingent fee for collecting reimbursement for the PIP carrier. (3) Confirm the total of the bills that have been paid by the PIP insurer. Make sure that the PIP insurer, if it paid a discounted amount, is not credited for paying the full bill (thus reducing your client’s total limit of PIP available).

Determine the extent of PIP reimbursement allowable pursuant to ORS 742.544.

Invite Insurers and Providers to the Settlement Conference. If significant PIP or medical bills are an issue, request that the interested insurers or medical providers attend the settlement conference or be available by phone. The more significant the payments or bills, the more you need the insurers’ or providers’ participation. Be aware that some insurers are also claiming a lien for projected (future) medical expenses. The insurers and providers are more likely to reduce their reimbursement demands if the defense lawyers explain the comparative fault facts or other reasons why your client should lose. Calling the insurers or providers after the case is settled is much less effective.

Get Updated Totals in Writing. Obtaining written confirmation of insurance payments and medical bills before the settlement helps prevent problems later. If a bill or adjusted total comes in after the settlement, you have a written confirmation of the totals provided by the insurers or providers. This is much more effective than your telephone notes.

Send Your Client a List of Bills. Create a list of medical providers and the amounts they tell you they are owed. Send this list to your client and request confirmation that it is accurate and complete. You may even want to have the client sign off on the list. If you are missing a bill, your client may spot it. If your client comes back to you later with a new bill, you have written confirmation of the bills you were given.

Obtain Workers’ Compensation Carrier Approval. If there is a workers’ compensation lien, the carrier must approve of the settlement. ORS 656.593. Make sure you get this approval in writing, including the amount of any future disability, medical, or other payments estimated by the workers’ compensation carrier. For Medicare issues, it can take up to 60 days to get a payoff figure.

THINGS TO DO ONCE THE CASE SETTLES

Inform the Court That the Case Is Settled. Advising the court when a case has settled helps keep the courthouse staff happy.

Prepare a Settlement Summary. Prepare a settlement
accounting for your client showing the breakdown of attorney fees, costs, liens, PIP, and all outstanding bills you are aware of that need to be paid. Include a statement that the client is responsible for paying any additional bills. Have your client sign the statement. This protects you in the event another bill surfaces.

**Pay the Workers’ Compensation Lien.** Repayment of a workers’ compensation lien is governed by statute (ORS 656.593), or as otherwise agreed to in writing. If there is a future disability rating or if medical bills are outstanding, consider (1) waiving future rights or payments so that the case can be resolved; or (2) holding the portion of the workers’ compensation carrier in your trust account until there is closure of the claim. The general distribution is as follows: (1) attorney fees and costs; (2) one-third of the balance of the recovery to the client; (3) the remainder of its total lien to the workers’ compensation carrier; and (4) all remaining money goes to the client. ORS 656.593. Always check the statute to make sure your case falls within the general guidelines.

**Pay Outstanding Bills or Liens.** Verify whether any providers will give an attorney fee discount on their bill, and try to negotiate the extent any settlement affects your client’s future medical coverage with a provider. If there is no future medical coverage for this injury and the carrier is unwilling to negotiate, be sure to list the exact amount of money going to your client for future medical care and inform the provider. Consider whether PIP should be collected and reimbursed. When you pay outstanding bills, PIP, and/or other necessary payments, include them in your settlement summary for the client (see section above, Prepare a Settlement Summary).

**Make Accurate Representations.** In negotiating discounts with insurers and providers, it is a crime to misrepresent the amount of the settlement proceeds received by the client. See State v. Pierce,153 Or App 569 (1998), rev. den. 372 Or 448 (1998).

By following all of these tips, you are protecting your clients and yourself.

_JANE PAULSON_  
P A U L S O N  C O L E T T I  T R I A L  A T T O R N E Y S  P C

_Thanks to Janet M. Schroer, Hoffman Hart & Wagner LLP, Robert K. Udziela, and Gregory K. Zeuthen for their assistance with this article._

Continued on page 4
Professional Liability Fund
www.osbplf.org
Malpractice Prevention Education for Oregon Lawyers

Tips for Protecting Yourself From Malpractice Claims

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


2. EDUCATE THE FIDUCIARY. Unfortunately, the people most likely to take money belonging to your client are the client’s own family members. In times of financial crisis, family members may try to gain access to the injured family member’s funds. If you are bringing a claim on behalf of a minor or other incapacitated person, you must educate the person acting on his or her behalf. (This will be a guardian, guardian ad litem, or conservator.) At the beginning of your representation, make sure that the fiduciary understands his or her fiduciary responsibilities and that if he or she receives the incapacitated person’s money, you will work with him or her to make special arrangements to protect it. Confirm your discussion in writing early on. This is particularly important if there is a delay between the time you are retained and when a fiduciary is appointed.

3. REFER THE CASE TO A CONSERVATORSHIP ATTORNEY. Conservatorships require ongoing review of the assets and annual accountings and may pose traps for the unwary. Generally, lawyers who handle personal injury cases are unfamiliar with the rules and procedures of probate court. If you do not regularly practice in probate court, you and your client may be better served by referring the case to a separate attorney for the conservatorship.

4. BE SURE TO DOCUMENT YOUR EXPLANATION OF FIDUCIARY DUTY TO YOUR CLIENT. If the conservator is successful in finding a way to run off with the conservatorship funds, you may find yourself as a target defendant. Thorough file documentation of your efforts to restrict the accounts, as well as documentation of your advice to the fiduciary on the fiduciary responsibilities, are critical to a successful defense.

5. BOND THE FIDUCIARY WHENEVER POSSIBLE. See To Bond or Not to Bond in the August 2003 issue of In Brief.

6. MAKE SURE THE RESTRICTED ACCOUNT IS RESTRICTED. If you want to restrict access to the conservatorship assets, be sure that you make the special arrangements. This means much more than sending the conservators to the bank and getting a bank teller to sign and acknowledgment that the account is restricted. It means making special arrangements with a person in a position of authority at the bank, depositing the money yourself, and making sure that the bank acknowledges the order restricting conservatorship assets, and making sure that the bank understands what it is supposed to do. Many of the larger banks are familiar with this process. Be sure you are dealing with a bank official who has experience setting up restricted accounts. This requires a lot of additional involvement by the attorney. It is the only way to make sure that the conservatorship assets are restricted.

7. USE STRUCTURED SETTLEMENTS. Structured settlements are an excellent vehicle when dealing with funds of a minor, and can be utilized in combination with other mechanisms when dealing with an incapacitated person. See Structured Settlements in the August 2003 issue of In Brief.

Thanks to Robert K. Udziela and Gregory K. Zeuthen for their assistance with this article.
Adjusted Public Body Tort Liability Limits – Effective July 1, 2017

The Office of the State Court Administrator (OSCA) has followed the required statutory methodology identified in ORS 30.271(4), 30.272(4), and 30.273(3) to calculate the annual adjustment to the limitations on liability of state and local public bodies for personal injury, death, and property damage or destruction. Based on these calculations, the limitations are adjusted as shown in this table:

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<th>Claimant(s)</th>
<th>Claim</th>
<th>Adjusted Limit</th>
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</thead>
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<td>state or local</td>
<td>multiple</td>
<td>property damage or destruction</td>
<td>$ 579,000</td>
</tr>
</tbody>
</table>

These new limitations became effective on July 1, 2017, and apply to all causes of action arising on or after July 1, 2017, and before July 1, 2018.

OSCA opened a public comment period on the adjustments from March 6, 2017, to 5:00 p.m. on May 5, 2017. They received no public comment.

A list of past and current limitations on liability of public bodies can be found on the Oregon Judicial Department website at http://www.courts.oregon.gov/Pages/tort.aspx.

Please submit questions or comments to Bruce.C.Miller@ojd.state.or.us.
The problem: A minor has a tort claim for personal injuries. Luckily, the minor’s injuries are not severe, so the claim’s value as determined by a jury is probably modest. A settlement can be reached with the defendant’s insurer. However, minors are unable to contract.

Prior to the passage of ORS 126.725, the only certain way for an insurer to guarantee that the claim against its insured was discharged was the appointment of a conservator and the court approval of the settlement. This is time-consuming (entailing yearly reports to the court until the minor reaches majority) and expensive (including costs such as filing fees and attorney fees). It is an unpalatable solution when the minor’s net recovery is only a few thousand dollars.

ORS 126.725 [passed in 2007 and amended in 2009] now solves this problem when the minor’s net recovery is $25,000 or less. This statute allows the parties to enter into a settlement agreement without court oversight and without the establishment of a conservatorship if the following conditions are met:

● There is not already a conservator for the minor;
● The total amount to be received by the minor (after payment of medical liens, attorney fees, and the like) is $25,000 or less; and
● The person authorized by the statute to sign a settlement agreement and extinguish the minor’s claim is “a person having legal custody of” the minor with the claim. The statute speaks in the singular. From a plain reading, it appears that when parents have joint legal custody but only one has physical custody of the minor, either parent can settle a claim of the minor under this statute. However, practitioners should note that if the minor is in the physical custody of a relative such as a grandparent due to an informal arrangement with the parent or parents of the minor, mere physical custody does not, pursuant to the statute, confer the ability to settle a claim.

Practice Tip: When prosecuting a claim for a minor’s injuries, determine the legal authority of the person with custody of the minor as soon as possible. It may be that one or both parents may need to be located to finalize a settlement and avoid the expense of a conservatorship proceeding. Conversely, defense counsel should consider demanding proof of legal custody as part of a settlement to ensure that the release obtained for the defendant is, in fact, binding on the minor and the minor’s claim.

Once you are satisfied that the person seeking to settle the minor’s claim has authority to do so and that the settlement is reasonable, the following steps are required to comply with the statute:

1. Affidavit of Custodian. First, the person having legal custody of the minor must sign an affidavit swearing:
   ● To the best of that person’s knowledge, the minor will be fully compensated by the settlement; or
   ● Though the minor will not be fully compensated, there is no practical way to obtain more from the party with whom the settlement is being made.

The attorney for the minor’s legal custodian must keep the affidavit for two years after the minor reaches the age of 21. Caution: This represents a departure from the usual practice of dis-
posing of closed files after 10 years. Attorneys settling claims for minors pursuant to this statute may have to keep the original affidavit signed by the person having legal custody for as long as 23 years.

2. Receipt and Disbursal of Funds. The funds (whether by check or by cash) must first be deposited into the plaintiff’s attorney’s IOLTA account. After attorney fees, costs, and medical liens are paid, the lawyer must deposit the minor’s net recovery into “a federally insured savings account that earns interest in the sole name of the minor.” (Emphasis added.)

If defense counsel is dealing with a person having legal custody of the minor who is also pro se, the statute indicates that defense counsel must deposit the funds directly into a “federally insured savings account that earns interest in the sole name of the minor.” (Emphasis added.)

If the funds are to be used to purchase an annuity, they must be paid directly to the annuity issuer, with the minor designated as the sole beneficiary of the annuity.

Caution: Note that the statute requires the account to be set up in the minor’s name only. The parent(s) may not also be named on the account.

ORS 125.735, enacted in 2009, provides that minors may contract with banks or other financial institutions to establish a bank account, and that such contract is binding on the minor and may not be voided or disaffirmed by the minor based on the minor’s age or minority.

3. Notice. Counsel must then provide notice of the deposit to the minor and the person who entered into the settlement on the minor’s behalf, by personal service or first-class mail.

4. Funds Remain Untouched. The funds cannot be withdrawn or spent for any reason by any person, including the minor, unless under court order, the minor attains majority, or the minor dies.

The overriding theme is to avoid situations in which the person having legal custody of the minor has an opportunity to mis-deposit the funds, err in the creation of the account, or take the funds from the minor’s account.

Practice Tip: Attorneys who represent the injured minor and the person having legal custody should document providing this important caution to the minor and the person having legal custody. It is not hard to envision claims against counsel and the person having legal custody if the minor’s funds are misappropriated during the period of minority.

The statute also provides that the signature on a settlement agreement of a person in compliance with this statute is binding on the minor. Defendant’s attorney can assure the client that the claim is fully and completely extinguished. A person acting in good faith on behalf of the minor is not liable to the minor for any claim arising out of the settlement.

All in all, ORS 126.725 should assist attorneys in settling modest claims of minors without the expense and effort involved in the establishment of conservatorships.

Brooks F. Cooper  
Attorney At Law

Thanks to Neil W. Jackson, Neil Jackson Attorney LLC, for his assistance with this article.
DUTIES OF A CONSERVATOR

The purpose of this handout is to summarize your duties as a conservator for a minor or incapacitated person. You must exercise scrupulous good faith in the management of the protected person’s affairs. Everything you do must be for the benefit of that protected person and to protect his or her economic interests.

Oregon law imposes significant financial penalties for financial or physical abuse of a protected person and on the failure to report such abuses. If you have any questions about specific rights or duties involved in the conservatorship, please ask an attorney. The following list describes some of your important duties as conservator:

1. Take possession of all of the property of the protected person and the income arising from that property.

2. If real property of the protected person is located in a county other than the county of appointment, you must file a certified copy of the inventory or a real property abstract in the county or counties where that real property is located.

3. Within 90 days of appointment, you must file with the court an inventory of all property of the protected person. This must include all property of the protected person that you know about or that is in your possession. Amend the inventory in case of later-discovered property.

4. Pay the obligations of the protected person that are chargeable against the conservatorship estate.

5. Make prudent investments with the conservatorship assets. In most cases, this will require the advice of a professional.

6. When managing the conservatorship assets, take into consideration the estate plan of the protected person, including review of any Will, trusts, or joint ownership arrangements.

7. Evaluate the need to obtain insurance on conservatorship assets and obtain such insurance if advisable.

8. Pay, contest, or settle claims submitted against the conservatorship estate.

9. Prepare and submit necessary tax returns.

10. Set up a separate conservatorship bank account. Depending on the county in which the conservatorship is filed, you may be required to have the checks returned to you by the bank and to submit those canceled checks to the court with your periodic accountings.

11. Carefully account for all income and expenditures. Written statements of all accounts and a final accounting upon termination of the conservatorship must be prepared and filed with the court annually within 60 days after each anniversary of your appointment, and within 60 days after the death of the protected person or a minor becoming 18 years of age.
12. Submit a list of disbursements, including check numbers, in chronological order with each account filed with the court, as well as a statement from depositories showing current balances. Some counties may require you to file the original canceled checks.

13. Copies of the accountings, at a minimum, must be provided to the protected person, the protected person’s spouse, parents of a minor under age 14, any guardian appointed for the protected person or personal representative of the estate, and other persons either requesting notice through the court or directed to be notified by the court.

14. Court approval must be obtained before payment can be made to you as conservator, or to an attorney who is the attorney for you as conservator.

15. When the court is satisfied that the protected person’s disability no longer exists, you must pay all claims and expenses of administration, and you must file a final accounting with the court. You must then distribute all funds and properties to the former minor or protected person as soon as possible.

16. Upon the death of the protected person, you must deliver to the court any Will of the deceased that has come into your possession, inform the personal representative or a beneficiary named in the Will that you have done so, and preserve the conservatorship estate for delivery to the personal representative of the deceased protected person.

I have provided this list of duties to the conservator.

__________________________________________________________  _______________________________________________________

Attorney for Conservator  Date

I have read these duties and understand that I must fulfill these duties as conservator.

__________________________________________________________  _______________________________________________________

Conservator  Date
IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF [COUNTY]

In the Matter of the Conservatorship of ) Case No. [Case Number]
) 
[Name of Protected Person], ) ACKNOWLEDGMENT OF
) RESTRICTION OF ASSETS
A Protected Person. )

We acknowledge receipt of a copy of the Court Order signed on [date of order] that restricts access to the assets of the above conservatorship and the assets described below. We will not allow any withdrawal of principal or income from these assets or use of the assets as security of any obligation without specific, prior order of the Court.

The assets on deposit with our financial institution that are subject to the restrictions ordered by the Court are:

<table>
<thead>
<tr>
<th>Account Number</th>
<th>Value of Account</th>
<th>Assets Type</th>
<th>Maturity</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The name of the holder of the account shown on our records is:

__________________________________________

We understand that the conservator may do the following without court order:

(1) transfer restricted assets to other accounts with us that are subject to the restrictions stated above; and

(2) change the investments of assets, as long as all assets remain in an account with us subject to the restrictions stated above.

We agree to abide by the restrictions set out in the court order. We understand that if assets are removed from a restricted account without prior court order, this financial institution [shall] [may]* be required to pay the value of those assets to the conservatorship.

DATED: ________________________________

Name and Title

Name of Financial Institution

Address and Telephone Number

Note: This document must be signed by an officer or person authorized to bind the institution.

*Insert appropriate language based upon what is required in your jurisdiction.
I HEREBY ORDER, pursuant to ORS 1.002, ORS 3.220(2)(b), and UTCR 1.050(2)(f), that:

1. Good cause has been shown and the time limits established by UTCR 1.050(2) are waived for the amendments approved by this order.

2. Out-of-cycle amendment of Supplementary Local Rules 9.025, 9.045, 9.055, 9.075, 9.076, and 9.095 for the Fourth Judicial District (Multnomah County), as shown in Attachment A to this order, is approved. For the convenience of the reader, deleted wording is shown in [brackets and italics] and new wording is show in {braces, underline, and bold}.

3. The Fourth Judicial District shall provide notice of these amendments to state and local bar organizations, appropriate state and local agencies, and appropriate business partners in a manner that the Presiding Judge determines will give sufficient notice.

4. Pursuant to ORS 3.220(2)(b), these amendments take effect 30 days after a certified copy of the amendments is filed in the Office of the State Court Administrator.

5. This order takes effect immediately.

Dated this 23 day of June, 2016.
9.055 SETTLEMENT OF PERSONAL INJURY OR WRONGFUL DEATH CLAIMS: REQUIREMENTS WHEN MINOR CHILD OR INCAPACITATED PERSON APPEARS BY GUARDIAN AD LITEM

(1) Except as permitted by ORS 126.725 for a minor child, a petition for approval of a settlement of a personal injury or wrongful death claim on behalf of a minor child, incapacitated person or decedent shall be accompanied by an affidavit which sets forth the following:

(a) A description of the incident causing the injury or death;

(b) A description of the injuries;
(c) The amount of the prayer and settlement. (If a structured settlement is requested, the present value of the future payments should be indicated);

(d) The amount of the attorney fees and costs;

(e) The proposed disposition of the settlement proceeds;

(f) A concise statement explaining the reasons for the settlement and the efforts to maximize recovery;

(g) A statement explaining that the attorney has independently evaluated the interests of the injured party;

(h) A statement explaining that the attorney has examined every medical record; and

(i) A statement explaining why it is necessary and proper to settle the case at the present time.

(2) [If a civil action has been filed in this circuit court on behalf of a minor child, incapacitated person or decedent for the loss, injury or death which is the basis of the proposed settlement, the original petition and affidavit must be filed in the civil action. A copy of the petition with a form of proposed order for approval of the settlement shall be delivered to the Probate Section to be forwarded to the probate judge for action.]

(The Chief Probate Judge, or designee, shall approve any settlement in a civil action which has been filed in this circuit court on behalf of a minor child.

(a) For personal injury, the original petition and affidavit must be filed in the civil action. The order shall be directed to the Probate Department by the Civil Department.

(b) For wrongful death, the petition and affidavit shall be filed in the Probate case.)

(3) A conservatorship on behalf of the minor child or incapacitated person generally will be required for any case where personal injury or wrongful death settlement proceeds are at issue (in excess of the amount allowed in ORS 126.725).

(a) Bond and standard annual accounting requirements may be waived if the funds are restricted until the minor attains the age of majority. In lieu of such accountings the court will require copies of the first and last bank statements for each standard accounting period to be filed with the court.

(b) Restricted accounts on behalf of a minor child or incapacitated person must be confirmed by a signed acknowledgment from the bank or brokerage firm which discloses the account number, type and account balance as required by UTCR 9.050 and 9.080. Exceptions for diminutive amounts may be requested.

(c) Approval of damage settlement amounts for the benefit of a minor child or incapacitated person appearing by a guardian ad litem in a lawsuit, except those cases assigned for trial to a trial department, are a basic responsibility of the
Probate Court. The allocation of funds and the structuring of such funds is likewise the Court’s responsibility. Minors and incapacitated persons should be provided with independent counsel for such issues and most commonly when a minor’s funds are proposed to be withheld from them after age 18.

(4) A fiduciary appointed by the Probate Court is required to comply with paragraph (1) of this rule and must file a motion for an order approving a settlement of a personal injury or wrongful death claim on behalf of a protected person. The motion must be supported by an affidavit setting out the required information.
CONSERVATORSHIP CHECKLIST

<table>
<thead>
<tr>
<th>Conservatorship of:</th>
<th>Probate No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respondent’s SSN:</td>
<td></td>
</tr>
<tr>
<td>Fiduciary:</td>
<td></td>
</tr>
<tr>
<td>Address:</td>
<td></td>
</tr>
<tr>
<td>City/State/Zip:</td>
<td></td>
</tr>
</tbody>
</table>

**ESTABLISHMENT OF PROTECTIVE PROCEEDING**

<table>
<thead>
<tr>
<th>Initial Appointment:</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Intake questionnaire</td>
</tr>
<tr>
<td>☐ Fee Agreement signed</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Petition for Conservatorship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respondent:</td>
</tr>
<tr>
<td>Address:</td>
</tr>
<tr>
<td>Phone:</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Interest of Petitioner:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petitioner: Age:</td>
</tr>
<tr>
<td>Address:</td>
</tr>
<tr>
<td>Phone:</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Fiduciary: Age: Relationship:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address:</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Is proposed fiduciary a certified (ORS 125.240(1)(a)) professional?</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Yes ☐ No</td>
</tr>
</tbody>
</table>

Does proposed fiduciary have a pecuniary interest in Respondent’s estate? |
☐ Yes ☐ No

(If yes to either of the above, review ORS 125.240 and 125.221(4) and make necessary disclosures.)

<table>
<thead>
<tr>
<th>Required information:</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Statement regarding whether fiduciary has been convicted of a crime, filed for bankruptcy, had a professional or occupational license canceled or revoked, or is the parent or former guardian of Respondent, who has been the subject of proceedings under ORS, Chapter 419b of the Juvenile Code. (e.g. child abuse, removal of Respondent from the parent’s or former guardian’s home.)</td>
</tr>
<tr>
<td>☐ Statement that fiduciary is willing to serve</td>
</tr>
<tr>
<td>☐ Name, address, and phone number of existing fiduciary, trustee, health care representative or Agent under Power of Attorney</td>
</tr>
<tr>
<td>☐ Name, address, and phone number of Respondent's treating physician and any person providing care to Respondent</td>
</tr>
<tr>
<td>☐ Specific factual information supporting a finding of financially incapable; names, addresses, and phone numbers of persons who have information supporting finding</td>
</tr>
<tr>
<td>☐ General description of estate of Respondent and source and amount of income (Court will use information to set bond amount)</td>
</tr>
<tr>
<td>☐ Statement indicating whether nominated fiduciary is a public or private agency or organization providing services</td>
</tr>
<tr>
<td>☐ Consent to serve, if petitioner is not fiduciary</td>
</tr>
<tr>
<td>☐ Dependents of Respondent</td>
</tr>
<tr>
<td>☐ Members of Respondent’s household</td>
</tr>
<tr>
<td>☐ Pecuniary conflicts of interest disclosed for court approval</td>
</tr>
<tr>
<td>☐ Principal residence and intent to keep or sell</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Petition Filed:</th>
<th>Fee Paid:</th>
</tr>
</thead>
</table>
Does jurisdiction issue electronic court notices? □ Yes □ No
(If yes, set spam or junk e-mail filters to allow receipt of e-notices. You may need to make this change at the Internet Service Provider (ISP) level and in the settings of your specific e-mail program.)

Create agent or rule in e-mail program to duplicate and forward copies of e-notices from attorney-of-record to appropriate staff.
(Some electronic case filing systems only generate e-notices to the attorney-of-record. Staff e-mail addresses or firm addresses (docketing@johndoefirm.com) may not be permitted.)

**Notice and Order Requirements**

<table>
<thead>
<tr>
<th>Form of Notice:</th>
</tr>
</thead>
<tbody>
<tr>
<td>□ Review ORS 125.060 and 125.070(1), (2) and (5)</td>
</tr>
</tbody>
</table>

**Date of personal service on Respondent (if age 14 or older):**

**Date of personal service on parent (if Respondent is a minor):**

<table>
<thead>
<tr>
<th>Service to:</th>
</tr>
</thead>
<tbody>
<tr>
<td>□ Spouse, parents, and adult children of Respondent (if none, persons most closely related)</td>
</tr>
<tr>
<td>□ Any person cohabiting with Respondent</td>
</tr>
<tr>
<td>□ Fiduciary nominated by Respondent</td>
</tr>
<tr>
<td>□ Fiduciary appointed by court</td>
</tr>
<tr>
<td>□ Any attorney who is representing the Respondent in any capacity</td>
</tr>
<tr>
<td>□ Trustee</td>
</tr>
<tr>
<td>□ Health care representative</td>
</tr>
<tr>
<td>□ Agent under a Power of Attorney</td>
</tr>
<tr>
<td>□ Notice required by court</td>
</tr>
<tr>
<td>□ Department of Veterans Affairs, if applicable</td>
</tr>
<tr>
<td>□ Department of Human Resources, if Respondent is receiving public assistance under ORS Chapter 411 or 414</td>
</tr>
<tr>
<td>□ Oregon Health Authority, if applicable</td>
</tr>
<tr>
<td>□ Office of the Long-Term Care Ombudsman, if applicable</td>
</tr>
<tr>
<td>□ Disability Rights Oregon, if applicable</td>
</tr>
<tr>
<td>□ Foreign consulate if Respondent is a foreign national</td>
</tr>
</tbody>
</table>

For service requirements, review ORS Chapter 125. Also see the PLF Service of Process Checklist on the PLF website, [www.osbplf.org](http://www.osbplf.org) > Practice Management > Forms > Litigation.

If Respondent is a minor:

□ Custodian for prior 60 days
□ Nominated fiduciary under parent’s will

**Last day for objections:**

(By statute: not less than 15* days after date of service, 21* days if subject to U.C.C.J.E.A.)

*Add 3 days for mailing under ORCP.

**Tickled:**

**Received:** □ Yes □ No

<table>
<thead>
<tr>
<th>Date proof(s) of personal service to Respondent (or parent, if minor) filed:</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Date proof of mailing/personal service to others filed:</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Request for notice of further filings or motions received and noted (attach list including date filed):</th>
</tr>
</thead>
</table>

**Limited Judgment Appointing Conservator:**

Reminder tickled for:

| Date filed: |
|*********|

**Received from court:**

**Asset Restrictions:**

| Date obtained: |
|*********|

**Filed with court:**

**Bond Application:**

| Date applied for: |
|*********|

**Fiduciary signature:**

**Date obtained:**

**Filed with court:**

**Letters of Conservatorship:**

| Date received from court: |
|*********|

**Date transmitted to Conservator:**

*It is recommended that a copy of the Limited Judgment be attached to the letters.*
Date informational letter sent to Fiduciary explaining duties/responsibilities:

<table>
<thead>
<tr>
<th>ANNUAL ACCOUNTING DUE:</th>
<th>Reminder tickled:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Due 60 days after appointment anniversary along with annual accounting fee of $100-$200-$300)</td>
<td></td>
</tr>
</tbody>
</table>

Names and addresses of persons requesting notice: (check with fiduciary and court file)

<table>
<thead>
<tr>
<th>Names and Addresses</th>
<th>Names and Addresses</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**INVENTORY**

<table>
<thead>
<tr>
<th>Date inventory due (90 days after appointment):</th>
<th>Tickled:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date inventory information requested:</td>
<td>Date received:</td>
</tr>
<tr>
<td>Date attorney fee petition and declaration filed:</td>
<td></td>
</tr>
<tr>
<td>Date inventory filed:</td>
<td>Filing fee paid in full:</td>
</tr>
<tr>
<td>Date inventory served on Protected Person (if age 14 or older):</td>
<td></td>
</tr>
<tr>
<td>Date inventory served on parent (if minor):</td>
<td></td>
</tr>
<tr>
<td>Date proof of mailing/service filed:</td>
<td></td>
</tr>
</tbody>
</table>

If Real Property, date Certified Copy of inventory, or abstract per ORS 125.470(3) recorded in County where situated:

Date petition freezing/restricting assets filed (if applicable):

**FIRST ANNUAL ACCOUNTING***

<table>
<thead>
<tr>
<th>Date client notified:</th>
<th>Date documentation received:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date annual accounting filed:</td>
<td>Date attorney fee petition and declaration filed:</td>
</tr>
</tbody>
</table>

Accounting recite bond amount: Date prepared: Date signed:

Date of Request for payment of fiduciary & attorney from protected person's funds, per ORS125.095 and 125.098:

Date notice to protected person and those requesting sent:

<table>
<thead>
<tr>
<th>Last date to object:</th>
<th>Objections received:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>□ Yes □ No</td>
</tr>
</tbody>
</table>

Date Order Approving Annual Accounting: Date filed: Date approved by court:

Date copy of Order Approving Final Accounting sent to client:

Date approved costs and fees paid:

*Accountings are due 60 days after each anniversary of appointment.*
SECOND ANNUAL ACCOUNTING*  

<table>
<thead>
<tr>
<th>Date client notified:</th>
<th>Date documentation received:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date annual accounting filed:</td>
<td>Date attorney fee petition and declaration filed:</td>
</tr>
<tr>
<td>Accounting recite bond amount:</td>
<td>Date prepared:</td>
</tr>
<tr>
<td>Date notice to protected person and those requesting sent:</td>
<td></td>
</tr>
<tr>
<td>Last date to object:</td>
<td>Objections received: ☐ Yes ☐ No</td>
</tr>
<tr>
<td>Date Order Approving Annual Accounting:</td>
<td>Date filed:</td>
</tr>
<tr>
<td>Date copy of Order Approving Final Accounting sent to client:</td>
<td></td>
</tr>
<tr>
<td>Date approved costs and fees paid:</td>
<td></td>
</tr>
</tbody>
</table>

**TERMINATION OF PROCEEDINGS**

Notice of a motion for the termination of the protective proceedings, for removal of a fiduciary, for modification of the powers or authority of a fiduciary, for approval of a fiduciary’s actions or for protective orders in addition to those sought in the petition must be given by the person making the motion to the persons described in ORS 125.060(3).

<table>
<thead>
<tr>
<th>Date notification received from client or triggering event:</th>
<th>Reason for termination:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date Petition for Termination/Final Accounting signed:</td>
<td>Date filed:</td>
</tr>
<tr>
<td>Date General Judgment Approving Termination/Final Accounting filed:</td>
<td></td>
</tr>
<tr>
<td>Date received from court:</td>
<td>Date client notified of termination:</td>
</tr>
<tr>
<td>Date Receipts filed:</td>
<td>Closing Order signed:</td>
</tr>
<tr>
<td>Date bonding company notified:</td>
<td></td>
</tr>
</tbody>
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NOTE: Whether a filing fee is necessary for a General Judgment Approving Termination and/or Closing Order is not clear under 2009 Or Laws Ch 659 (HB 2287) (specifying filing fee surcharges in certain instances). Check with your local court clerk.

**FILE CLOSED:**  
Final fees/costs paid:

**NOTE:**


**IMPORTANT NOTICES**

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CHAPTER 6

ESTATE PLANNING AND ADMINISTRATION;
GUARDIANSHIPS AND CONSERVATORSHIPS

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Chapter 6

ESTATE PLANNING & ADMINISTRATION
GUARDIANSHIPS & CONSERVATORSHIPS

TABLE OF CONTENTS

INTRODUCTION ....................................................................................................................... 6-1

I. WHAT IS THE SUBSTANCE OF THIS PRACTICE AREA? ...................................... 6-1
   A. Estate Planning ................................................................................................... 6-1
   B. Administration ................................................................................................... 6-4
   C. Guardianships and Conservatorships ............................................................... 6-5
   D. Resources ............................................................................................................ 6-6

II. WHAT IS AN AVERAGE DAY LIKE IN THIS PRACTICE AREA? ................. 6-6

III. WHAT ARE THE PROS AND CONS OF THIS PRACTICE AREA? ................. 6-6
    A. Pace of Practice .............................................................................................. 6-7
    B. Litigation ........................................................................................................ 6-7
    C. Profitability ...................................................................................................... 6-7
    D. Working Independently .................................................................................... 6-7
    E. Personality Characteristics .............................................................................. 6-7

IV. CONCLUSION ...................................................................................................................... 6-7

V. POWERPOINT SLIDES. ................................................................................................ 6-8

To view these chapter materials and the additional resources below on or before November 1 go to www.osbplf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After November 1 select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

Circuit Court letter to the Personal Representatives of the Estate, September 2016
Duties of a Conservator, Professional Liability Fund
Capacity Issues in Representing Clients, Oregon Estate Planning and Administration Section Newsletter, April 2010
INTRODUCTION

The estate planning and administration area, including guardianships and conservatorships, is an ideal choice for a practitioner who wants to be challenged intellectually, have minimal contentious negotiations, and experience a sense of service to and interpersonal connection with individuals and families.

I. WHAT IS THE SUBSTANCE OF THIS PRACTICE AREA?

This practice area includes establishing wills and trusts, powers of attorney and advance health care directives for clients, as well as guardianships and conservatorships for individuals who are unable to manage their health care, residential decisions and/or financial matters due to incapacity. Some practitioners in this area also handle litigation matters and negotiate prenuptial agreements; some even cross into pure domestic relations work, handling divorces and custody disputes. Others blend a general business practice with their estate planning practice, which works nicely when your firm clientele includes many small business owners. Estate planning attorneys regularly become generalists, to some extent, because our clients face so many issues – as employees, as business owners, as real property owners, as landlords, as parents, and so on. If you want to practice in this area and do not want to be a generalist, you will quickly learn that having a referral list for trusted attorneys who provide services that are complementary to your own gives you a value-added service you can provide to your clients.

A. Components of an estate planning practice. Estate planning is more of a process than a product. Executing a will, for example, is just one piece of the overall practice. We provide a service that generally results in the delivery of a product (i.e., estate planning documents). Working with client through the estate planning process often involves a great deal of client education, so that the client has an understanding of how the pieces of his or her plan fit together to accomplish the client’s goals.

1. Developing a client base. This, of course, occurs over time. The practice of law is truly a relationship-driven practice. As you develop relationships in your community (with other lawyers in your firm and elsewhere, with clients, with CPAs and financial planners, with brokers, fellow alumni, and so forth) and those relationships are based on mutual respect, the work will come through referrals. In this practice area, knowing your referral sources and taking care of them is a very important key to success. It is even more important to simply do good work: be responsive, respectful and pragmatic in all of your dealings. The most valuable referrals you receive will be those that begin with the following declaration: “I received your name from my friend who worked with you on her estate planning. She highly recommended you.”

2.  
   a. Engagement letter.  
   b. Joint representation memo. Representing both spouses in their estate planning is common, but informed consent of the jointly represented clients is a must.

1 Thank you to my colleague Heather Guthrie for graciously allowing me to use her presentation materials.
c. **First meeting(s).** The most important thing to do in an initial meeting with clients is to listen. Ask open-ended questions and let the clients tell you their stories. By doing this, and listening actively, you accomplish two things: first, you immediately establish who the important people in the room are – this process is all about the client. Second, you learn what is important to the clients so that you can identify issues and build a plan that is the right plan for them. You cannot create an estate plan that accomplishes your client’s goals until you understand what those goals are. Do not be surprised when even in multi-million dollar estates the clients are more interested in talking about their children’s special challenges with money – or other issues – than about reducing their overall estate tax risk. Your job is to deal with both of these issues, but pay attention to what matters most to the client. By letting your client know that you are listening to what they have to say and problem-solving around their concerns, you establish credibility and trust. Often, I have just one initial meeting with clients and in the next meeting we sign documents, working through drafts by telephone and email. However, some clients have such complicated plans that it can take more than a year and many meetings before a plan is finalized.

d. **Educate the client.** Estate planning is not something clients do every day and many clients will only have a basic understanding (at best) of what it entails. A common assumption is that the passage of all of one’s assets will be governed at death by the individual’s will. However there are lots of different methods for passing property at death that can affect the overall distribution of assets following one’s death. Be prepared to educate your clients about these different methods and how they will be used to carry out the overall distribution scheme desired by the client.

3. **Evaluating challenges and strategies for the particular client.** The unique challenges of a client may be myriad. While listening to your client’s story, you will need to identify issues which may include any or many of the following:

   a. Blended family issues. Second marriages and children from previous marriages or relationships. Support obligations to previous family.
   b. Special needs of children or grandchildren.
   c. Anticipated inheritances.
   d. Non-traditional families. Unmarried and/or gay and lesbian clients.
   e. Taxable gift issues. Did the clients make a substantial gift recently to help a child buy a first home? Did they give beyond the gift tax exemption threshold?
   f. Real estate in multiple states or out of the country.
   g. Children in troubled marriages.
   h. Charitable inclinations and goals.
   i. Beloved pets. To whom should these pets go? Is a pet trust wanted or warranted?
   j. Care of parents of the clients. Many children support their parents in some way. How should that care continue after your client dies if the parents survive?
   k. Health issues of the client.
1. Rental property issues. If the clients own rental property, do they own it outright or in an entity? Who manages the property? Do they have adequate insurance? Is entity ownership advisable?

m. Death tax exposure at the state and/or federal level.

n. Selecting fiduciaries. Who will care for minor children? Who will manage money for the beneficiaries? Who will make health-care decisions for the client in the event of incapacity?

o. Business ownership and transition planning.

4. Drafting documents. Every estate plan should consist of the following documents at a minimum:

a. **Will.** This document establishes how property (that is owned by the client in his/her own name and which will not pass by beneficiary designation) will pass at the client’s death. The document must be carefully drafted and properly executed. (two witnesses)

b. **Power of Attorney.** Preparing for incapacity with a power of attorney is a critical part of this process. If the client has a stroke, for example, the Will does nothing – it speaks only at death – and absent a power of attorney (or trust – see below), it may be necessary to commence conservatorship proceedings to manage assets.

c. **Advance Directive.** An important part of this process is to discuss with your clients whether or not they would like to execute an advance directive giving decision-making authority related to end-of-life circumstances and giving advance direction about the client’s wishes regarding tube feeding and life support.

Many estate plans will also include trusts of one sort or another, whether revocable living trusts (as a privacy and probate-avoidance vehicle, and an alternate mechanism for managing assets in the event of incapacity) or irrevocable trusts as part of a death-tax minimization plan (such as an Irrevocable Life Insurance Trust or ILIT). Also, it is not uncommon for a client’s Will to create trusts (testamentary trust) that are funded after death. These testamentary trusts don’t typically avoid the need for probate, but can be helpful in dealing with different client concerns (such as minor beneficiaries).

5. Executing documents and following-up on executing the plan.

a. **Execution and Safe-keeping of Documents.** Overseeing the proper execution of and providing guidance about safe-keeping of estate planning documents is also part of the process.

b. **Beneficiary designations.** Providing the client with beneficiary designations that are tailored to dovetail with the client’s plan and advising the client about updating their beneficiary designations is essential. This is becoming an increasingly important piece of estate planning as many clients have much of their wealth in retirement plans that pass based on beneficiary designations.
c. “Funding” a Trust. If the client has entered into a trust agreement, transferring assets to the trust – so-called “funding” of the trust – is essential. You should provide instructions to the client that explain exactly what needs to be done: how should the new accounts be titled? How can they change title to their cars? What about time-share interests? Specific instructions for each type of asset should be provided. Prepare deeds where appropriate. Advise clients to obtain lender consents, where applicable. Provide alternative recommendations for POD designations. Explain. Note: funding a trust does not occur until after a client’s death, if you only have testamentary trusts.

6. Staying in touch with the client.

The key to staying in touch with clients is maintaining a good database of client information that allows you to search for, for example, all clients with tax-planning documents so that when a change in the tax laws occurs, you are able to readily sort through your clients to determine who should receive a letter from you regarding the change and any updates that the client should consider. Many clients will execute their plan and you will not hear from them again for years. Other clients have plans of such complexity that the process involves several phases (establishing the basic plan; enhancing that plan with irrevocable trust(s) and the like) and demands regular maintenance. Some clients will become friends with whom you have regular contact.

B. Administration. Administering trusts and estates is all about putting the plan into action after death.

1. Probating a Will. The process of probating a Will involves the following basic steps:

   a. Preparing a petition asking the court to admit the Will to probate and appoint the person designated in that Will as personal representative.
   b. Sending notice of the probate to heirs and devisees.
   c. Publishing notice of the probate and appointment to commence the period during which creditors may bring claims against the decedent’s estate. Giving 30-day bar letters to known creditors.
   d. Preparing and filing an inventory of assets that are probate assets (assets not passing by beneficiary designation or by survivorship).
   e. Preparing and filing an affidavit of compliance with respect to certain duties of the personal representative.
   f. Reporting to the court all acts of the personal representative, including accounting for all income and expenditures, and asking the court to approve distribution of assets.
   g. Confirming the filing of fiduciary income tax returns (with the taxing authorities, not the court, but an important step nevertheless).
   h. Distributing assets in accordance with the Will, obtaining and filing receipts for distributions, discharging the personal representative and closing the estate.

If the decedent died without a Will, the same basic steps are followed except that: (1) assets pass to the decedent’s heirs by the laws of intestacy; (2) the statute
establishes an order of preference for individuals who may serve as personal representative; and (3) bonding of the personal representative may be required. Probate can take anywhere from 6 months to several years, depending on a myriad of complicating factors. Every estate is different, and the foregoing is intended as a general outline to give you a sense of the basics. Probate is a cooperative process between attorney and client; paralegals can be invaluable in this process to track deadlines, draft documents and coordinate with the client while keeping fees as low as possible.

2. **Administering a Trust.** Trust administration includes many of the same basic steps as probating a Will (e.g., determining who the beneficiaries are, determining what the assets are and taking control of them, filing necessary tax returns (income and estate), reporting to the beneficiaries, and so forth), but without court oversight. Instead of working from the Will and the statutes, trust administration is controlled by the terms of the trust agreement itself; it is fundamentally a matter of contract. If a trust agreement calls for outright distribution, trust administration can be quite brief. If it calls for assets to continue in trust, it may continue for many years. You should become familiar with the provisions of the Oregon Uniform Trust Code in order to comply with reporting requirements that are imposed by statute, some of which can be waived by the terms of the trust agreement but some of which can not. See ORS Chapter 130.

3. **Estate Tax Returns.** Estate tax returns can be required whether you are administering a probate or doing a post-mortem trust administration. Whether they are required depends on the fair market value of the decedent’s assets on the date of death rather than on the estate planning vehicle used. Some CPAs will prepare these returns; however, in most cases the attorney is better positioned to prepare them because so much of how assets are valued and reported for estate tax purposes is driven by an estate plan developed by the attorney.

4. **Administering Based on Estate Planning Documents Prepared by Another Attorney.** Keep in mind that not every administration will be an administration of documents you prepared; quite often, you will never have seen the documents before. Your job is to figure out what was intended based on the words of the document. Keep this in mind when you are drafting, too. Someone else may be administering your documents twenty years from now, so draft clearly and carefully.

C. **Guardianships and Conservatorships.**

1. **Guardianships.** Establishing a guardianship is necessary when an individual is unable to make health-care or residential decisions for him/herself. Typically, the need arises when an elderly person with some mental disability becomes combative and unwilling to go along with a caregiver’s plan. Guardianships may also be necessary in the case of a minor whose natural parent is deceased or otherwise unable to care for the child. Note the following standard that must be met in order to establish a guardianship: “A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person. A guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence of the protected person and may be ordered only to the extent necessitated by the person’s actual mental and physical
limitations.” ORS 125.300. See ORS 127.505-660 regarding Advance Directives for health care. See ORS 127.700-737 regarding Declarations for Mental Health Treatment.

2. **Conservatorships.** Establishing a conservatorship is necessary when an individual is unable to make financial decisions in his/her own best interests. Typically, the need arises when an elderly person begins mismanaging money or in the event of a stroke or similarly debilitating condition that limits the person’s ability to handle his or her own financial affairs. A conservatorship may also be necessary in the case of a minor who is entitled to receive funds but as a matter of law is deemed to not have capacity to manage those funds. Note the following standard that must be met in order to establish a conservatorship: “Upon the filing of a petition seeking the appointment of a conservator, the court may appoint a conservator and make other appropriate protective orders if the court finds by clear and convincing evidence that the respondent is a minor or financially incapable, and that the respondent has money or property that requires management or protection.” ORS 125.400. See ORS 125.005(3) for definition of financially incapable.

3. **Generally.** The tests relating to and the process of establishing guardianships and conservatorships are set forth in ORS Chapter 125. Often, a debilitating condition makes it necessary to establish both a guardianship and a conservatorship at the same time, though the need for a conservatorship can generally be avoided if the individual has an adequate Power of Attorney in place. Guardianship and conservatorship practice is generally a fairly small part of most estate planning and administration practices because in many cases, if a plan is in place that includes incapacity planning – as any such plan should – a guardianship or conservatorship can often be avoided. With respect to conservatorships for minors, there are mechanisms for avoiding a conservatorship altogether in certain circumstances, such as where the dollar amount is relatively small or where the conservatorship is thought to be needed solely to settle a claim. See ORS 126.700 and ORS 126.725.

D. **Resources.** The following are some helpful resources for this practice area:

5. Oregon Revised Statutes chapters 111 through 130.
7. The list-serve of the Estate Planning and Administration section of the Oregon State Bar, as well as periodic publications by this group, which in many cases are available on-line.
8. OSB site generally for form letters, conflicts waivers, etc.

II. **AN AVERAGE DAY IN MY PRACTICE**

III. **PROS AND CONS OF THIS PRACTICE AREA**

6-6
A. **Pace of practice – the prospect of balance.** One of the reasons I have chosen to practice in this area is that for the most part I can control the pace. Whereas the pace of many practice areas is purely client driven (such as in the business transaction environment), the estate planning area is usually a fairly calm and controlled process that allows me to maintain some balance between my personal and professional life. Exceptions include client illness and client travel plans, among other things. On the administration side of practice, there are statutory deadlines that drive much of the practice.

B. **Litigation – knowing your limits.** Fortunately, I practice in a firm where I have litigators who are available to handle contentious matters that are headed for court. However, many estate planning and administration attorneys handle litigation as part of their practice.

C. **Profitability – the small matter challenge.** Keeping the estate planning and administration balance in your practice is important because while the estate planning side often consists of small matters that generate minimal fees relative to the administrative tasks involved (opening the file, running conflicts, overseeing or doing the work in a cost-effective fashion), the administration side generally involves much more time and generates more significant fees. This is a business reality that practitioners deal with in different ways, but doing both sides of the practice – planning and administration – also makes you a better resource for your clients and helps you develop a better skill set because you know how the plan you drafted works out in practice.

D. **Working independently.** Many who practice in this area work very independently. If you are conscientious and detail-oriented, this can be a plus – no one is looking over your shoulder. On the other hand, not having a second set of eyes reviewing your work and not having a second brain to help you think through difficult concepts means you must be meticulous in your drafting and in your communications with your client.

E. **Personality characteristics of a good estate planning and administration practitioner.** The following is a list of personality characteristics that are important to have in order to succeed and enjoy practicing in this area:

1. A good listener
2. Compassionate
3. Detail-oriented
4. Practical
5. Patient
6. Must enjoy working with elderly people

IV. **CONCLUSION.** Practicing in this area can be tremendously rewarding, both personally and professionally, but it is not for everyone. If you crave the challenge of the courtroom or if you thrive on the adrenaline of fast-paced transactional work, working solely in this practice area is probably not for you. On the other hand, if you are looking for a practice that offers a sense of service to individuals, a richness of intellectual challenge, and a relatively controlled pace, you should consider pursuing the estate planning and administration area.
Estate Planning, Administration, Guardianships and Conservatorships

Melissa F. Busley | Portland, Oregon

Overview

• Estate planning
• Probate and trust administration
• Guardianships and conservatorships

Client Education

• You need to learn about the client:
  o Who are they and their family?
  o What are their assets?
  o Any “special” challenges?

• You need to educate the client:
  o Different ways for assets to pass
  o Different tools for different tasks
  o A good estate plan is tailored to the client
Evaluating Challenges and Strategies: Issue Spotting

- Family issues
- Asset issues
- Tax issues
- Other issues

Family issues may include:
- Blended family situation
- Special needs of children or grandchildren
- Non-traditional families
- Children in troubled marriages
- Care of parents of the clients

Asset issues may include:
- Anticipated inheritances
- Real estate in multiple states or out of the country
- Rental property issues
- Business ownership and transition planning
- Retirement plans, annuities and life insurance
Evaluating Challenges and Strategies:
Issue Spotting

• Tax issues may include:
  o Taxable gift issues
  o Death tax exposure at the state and/or federal level
  o What states may be able to tax
  o Oregon exemption is $1,000,000
  o Federal exemption in 2017 is $5,490,000
  o Federal estate tax portability
  o Basis consistency reporting

• Other issues may include:
  o Charitable inclinations and goals
  o Beloved pets
  o Health issues of the client
  o Selecting fiduciaries

Drafting Documents:
The Essentials

• Will
• Power of attorney
• Advance directive for health care
Executing Documents and Follow-Up

- Execution ceremony and document safekeeping
- Beneficiary designations – this can be critical
- "Funding" trusts
- Staying in touch

Post-Mortem Administration

- Wills – probate
- Trusts – post-mortem trust administration
- Estate tax returns
- Survivorship and beneficiary designations
- Administering based on documents prepared by other attorneys

Guardianships and Conservatorships

- What they are
  - Guardianship: Decisions about the person
  - Conservatorship: Decisions about the person's stuff
- How to avoid them
  - Powers of attorney
  - Trusts
  - Advance directives
Guardianships and Conservatorships

- Process and follow-up
  - Petition and appointment
  - Annual reporting

The Realities of Estate Planning

“In this world nothing can be said to be certain, except death and taxes.”
Benjamin Franklin, 1789

Developing a Book of Business and Keeping Clients (Happy)

- Developing a client base
  - Relationship, relationship, relationship
- Establishing the client relationship
  - Your first meeting(s)
- Evaluating challenges and strategies for the particular client
The Pros and Cons of this Practice Area

• Pace of practice and prospect of balance/control
• Litigation
• Profitability
  ▪ The small matter challenge
• Working independently
  ▪ Details, details, details
• Who is happy doing this kind of work?

Questions?

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CHAPTER 6

ESTATE PLANNING & ADMINISTRATION
GUARDIANSHIPS & CONSERVATORSHIPS

Resources

Circuit Court letter to the Personal Representatives of the Estate, September 2016
Duties of a Conservator, Professional Liability Fund
Capacity Issues in Representing Clients, Oregon Estate Planning and Administration Section Newsletter, April 2010
DUTIES OF A CONSERVATOR

The purpose of this handout is to summarize your duties as a conservator for a minor or incapacitated person. You must exercise scrupulous good faith in the management of the protected person's affairs. Everything you do must be for the benefit of that protected person and to protect his or her economic interests.

Oregon law imposes significant financial penalties for financial or physical abuse of a protected person and on the failure to report such abuses. If you have any questions about specific rights or duties involved in the conservatorship, please ask an attorney. The following list describes some of your important duties as conservator:

1. Take possession of all of the property of the protected person and the income arising from that property.

2. If real property of the protected person is located in a county other than the county of appointment, you must file a certified copy of the inventory or a real property abstract in the county or counties where that real property is located.

3. Within 90 days of appointment, you must file with the court an inventory of all property of the protected person. This must include all property of the protected person that you know about or that is in your possession. Amend the inventory in case of later-discovered property.

4. Pay the obligations of the protected person that are chargeable against the conservatorship estate.

5. Make prudent investments with the conservatorship assets. In most cases, this will require the advice of a professional.

6. When managing the conservatorship assets, take into consideration the estate plan of the protected person, including review of any Will, trusts, or joint ownership arrangements.

7. Evaluate the need to obtain insurance on conservatorship assets and obtain such insurance if advisable.

8. Pay, contest, or settle claims submitted against the conservatorship estate.

9. Prepare and submit necessary tax returns.

10. Set up a separate conservatorship bank account. Depending on the county in which the conservatorship is filed, you may be required to have the checks returned to you by the bank and to submit those canceled checks to the court with your periodic accountings.

11. Carefully account for all income and expenditures. Written statements of all accounts and a final accounting upon termination of the conservatorship must be prepared and filed with the court annually within 60 days after each anniversary of your appointment, and within 60 days after the death of the protected person or a minor becoming 18 years of age.
12. Submit a list of disbursements, including check numbers, in chronological order with each account filed with the court, as well as a statement from depositories showing current balances. Some counties may require you to file the original canceled checks.

13. Copies of the accountings, at a minimum, must be provided to the protected person, the protected person's spouse, parents of a minor under age 14, any guardian appointed for the protected person or personal representative of the estate, and other persons either requesting notice through the court or directed to be notified by the court.

14. Court approval must be obtained before payment can be made to you as conservator, or to an attorney who is the attorney for you as conservator.

15. When the court is satisfied that the protected person’s disability no longer exists, you must pay all claims and expenses of administration, and you must file a final accounting with the court. You must then distribute all funds and properties to the former minor or protected person as soon as possible.

16. Upon the death of the protected person, you must deliver to the court any Will of the deceased that has come into your possession, inform the personal representative or a beneficiary named in the Will that you have done so, and preserve the conservatorship estate for delivery to the personal representative of the deceased protected person.

I have provided this list of duties to the conservator.

__________________________________  __________________________
Attorney for Conservator              Date

I have read these duties and understand that I must fulfill these duties as conservator.

__________________________________  __________________________
Conservator                           Date
Re: In the Matter of: [Decedent Name]
Case No. [Case No.]

Dear [Personal Representative Name(s)],

The Court has appointed you Personal Representatives of this estate. You are now officers of and responsible to the Court for the proper administration of the estate’s assets. Court rules require that you have an attorney. Please seek your attorney’s advice on all matters concerning the estate, but pay special attention to the following rules:

1. If your case was filed on or after February 2, 2015, you must complete Non-Professional Fiduciary Education and Training within 60 days. You must schedule your training within 15 days of appointment. Included with this letter is additional information regarding this requirement as well as directions for scheduling your class.

2. Immediately take possession of all of the decedent’s assets now belonging to the estate. Within 60 days of your appointment you must file an inventory with the Court listing your estimated values of all of the estate’s assets as of the date of decedent’s death.

3. Keep the money and property of the estate separate from your own assets and from any other person’s assets. Do not commingle or mix assets of the estate in your personal bank or brokerage accounts. Do not mix any estate money with your own or anyone else’s.

4. Do not lend funds of the estate to anyone without first obtaining permission from the Court by Court Order. Never borrow money from the estate for yourself.

5. Make estate checks payable to the provider of goods or services, not to “cash” or yourself. Keep estate funds in accounts for which the financial institution provides you a written record showing the date, payee and amount for each disbursement from the account. The record may be an original canceled check, a copy of the canceled check showing it has cleared the bank, or information printed in a regular statement from the financial institution. Keep accurate records of all receipts of funds. Every receipt and disbursement must be separately itemized. Avoid cash transactions.

6. Do not pay any bill of the estate without determining that you have the authority to do so. Use estate funds, not your own funds, to pay estate expenses whenever possible. If you have paid estate expenses, such as funeral expenses, from your own funds, and if you have a receipt or other proof of the payment, you may reimburse yourself from estate funds. Keep all payment proofs for filing with the Court. If the decedent owed a debt to you, you must have written order from the Court before you pay that debt.

7. Do not give any estate property to any heirs or other persons without the prior written approval of the Court.

8. You must be able to file an accounting of all receipts and expenditures in the estate. It must also show assets on hand at the beginning and end of the accounting period. Written proofs of payment and the first and final statements for each bank or other account in the estate must be filed with the accounting. If you are unable to file a final accounting within a year plus 60 days of your appointment, you must file an annual accounting at that time.

Your compliance with these requirements and your prompt attention to any notices from the Court will simplify your task and will be appreciated by the Court. The Court cannot offer legal advice, so please consult your attorney if you have any questions. Thank you for your cooperation.

Cc: [Personal Representative’s Attorney]
MANDATED TRAINING for NEW NON-PROFESSIONAL TRUSTEES and PERSONAL REPRESENTATIVES
Effective February 2, 2015

Effective February 2, 2015, all non-professional trustees and personal representatives appointed by the Multnomah County Circuit Court must, within 15 days of their appointment date, register for a Oregon fiduciary education class. Non-professional fiduciaries should select a session keeping in mind that they must complete Oregon fiduciary education within 60 days of their appointment date.

Oregon fiduciary education classes are one hour classes about the responsibilities of Trustees and Personal Representatives. There are separate classes for trustees and personal representatives. The class will orient non-professional fiduciaries to decision-making, laws, working with the court and attorneys; and give practical tips about successfully managing the issues that are common for non-professional fiduciaries.

Currently, the mandated content is delivered by the non-profit Guardian Partners. This class is held at least once a month. Please contact Guardian Partners for the scheduled time and place. For people who live more than 2 hours from Portland or for whom it is impossible to attend, remote learning opportunities may be available. You can request more information on this option when you register.

The fee for the class is $100 per trustee or personal representative. To see the class schedule, register, and pay go to guardian-partners.org. If you do not have internet access, please call Guardian Partners at (971) 409-1358.
Capacity Issues in Representing Clients

By Mark M. Williams, Gaydos Churnside & Balthrop

Introduction

Pornography and legal capacity have two things in common: (1) they are difficult terms to define, and (2) we tend to rely on the standard of “we know it when we see it” in making case-by-case determinations, as Justice Potter Stewart famously framed the issue of defining pornography in *Jacobellis v. Ohio*, 378 US 184, 197 (1964).

To establish an attorney-client relationship with an adult, a client’s legal competency to make and articulate decisions is a threshold question. The attorney should understand the standards for the capacity required to perform legal acts and what steps can be taken to maximize a client’s decision-making ability. An understanding of the legal requirements for capacity is crucial for an attorney to effectively represent clients who may have diminished capacity. Finally, the ethical obligations of the attorney vary widely with the ability of the client to evaluate the attorney’s advice and give the attorney direction.

Estate planning lawyers are routinely called upon to determine the capacity of clients. Do they have the ability to articulate their wishes? Are they able to enter into a contract of employment? Do they need a surrogate decision-maker? What fiduciary standard will be applied in making decisions for the client? What standard applies to the particular legal question at hand? How is legal capacity determined?

Few of us have formal training in capacity assessment, but we have some excellent guides available to us. The Oregon State Bar has published *The Ethical Oregon Lawyer* with an entire chapter (18) entitled “Representing Clients with Diminished Capacity and Disability” by Michael Levelle. It provides a summary of a “sliding scale” of capacity appropriate to different situations. The American Bar Association in conjunction with the American Psychological Association (ABA/APA) has also published *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*. Both of these publications are available online at no charge to Oregon attorneys.

The ABA/APA publication includes a helpful chapter, “Capacity Worksheet for Lawyers,” which includes observational signs from cognitive functioning (memory, language, calculation skills, disorientation) and emotional functioning (distress, liability) to behavioral functioning (delusions, hallucinations, hygiene). Then we are asked to record mitigating factors and consider the varying standard of legal capacity. The form is a useful tool in assisting a lawyer with marshalling the information that supports a conclusion regarding capacity. It is not a mental status exam, which is the province of highly trained professionals, and it is not a substitute for the diagnosis or opinion of medical or psycho-social professionals.

Consider three different, but typical, scenarios from my practice: (1) estate planning for a client with bickering devisees; (2) filing a guardianship/conservatorship petition against
an alleged incapacitated person; and (3) filing a guardianship/conservatorship petition against a client whose capacity has deteriorated since my initial representation and legal services.

Estate Planning for a Client with Bickering Devisees

Early in my career I had a terminally ill woman referred to me for estate planning by her son. It turned out that the son was alcoholic and dependent fiscally and psychologically on his mother. It also turned out that he had a sister who was fiercely independent and highly suspicious of anything her mother did to benefit her brother. Mother wanted me to prepare a will for her. We established at the outset that mother was my only client, but her son brought her to the initial appointment and it was apparent that her estate plan was to be skewed to his substantial benefit. Mother’s terminal illness had her on hospice care, and there were significant issues about her mental health. Did mother have the capacity to enter into a retainer agreement with me? Was she being unduly influenced by her son to articulate the choices she made in defining her estate plan? Did she have testamentary capacity to sign the documents I prepared for her? All of these questions require answers.

After meeting with her, I felt confident that she had the capacity to engage me and direct me, but what was that confidence based upon? I met with her several times, and she had a lively personality, she was oriented to time and place, she understood the gravity of her health conditions, she knew that her time on this Earth was limited, she was able to articulate reasons for her decisions about who should be in charge of her affairs and how her assets should be divided, and she was consistent in her analysis and determinations. Over the course of the relationship I came to be acquainted with her personality and her biases. I also got to meet both the son and the daughter and had various interactions with them, which were consonant with her descriptions of them. She certainly knew the natural objects of her bounty and was familiar with the nature and extent of her assets, so I determined that I was willing to sign her will as a witness to her testamentary capacity.

But I am a lawyer, and I also had concerns about the impending will contest that seemed likely to follow, so I wanted to have some back-up. I called in a gero-psychiatric specialist to administer a formal mental status exam and had my client release those test results to me for future use in defending her capacity. I also had the specialist sign as the second witness to attest to her capacity. No will contest was ever filed.

Was this necessary, prudent, or even advisable under the circumstances? Soon after going through this process, I heard noted will contest attorney Jim Cartwright speak at a CLE program and ask the rhetorical question: If you sought a professional evaluation for this client, but did not do it for every client, isn’t that evidence that you doubted your client’s capacity? It was a statement that struck me dumb. Since most clients would not begin to consider the added cost and inconvenience of a mental status test, requiring every client to get one is infeasible. I have relied on my own determination of testamentary capacity ever since, relying on my ever-increasing years of experience to buttress my ability to make that determination. I consider a number of factors from my observation of the
client’s cognitive, emotional, and behavioral functioning, but in the final analysis, it comes back to the pornography standard: I know it when I see it.

Filing a Petition for Guardianship/Conservatorship Against an Incapacitated Person

I think of guardianship and conservatorship as solutions to assist someone with medical and financial decision-making. Of course, there are limits. ORS Chapter 125 provides that the court may only impose this solution if it is the least restrictive alternative available to accomplish the purpose of keeping a person or his or her money safe from his or her own inability to make appropriate decisions. How do lawyers get sufficient information to make this determination and get a court to sign a limited judgment appointing another person to serve as a decision-maker?

Remember that reasonable investigation is required. When a client suggests a need for a guardianship for another person, the attorney for the petitioner must establish that (1) the need exists (and the court will likely recognize that need), and (2) the proposed guardian is appropriate for the role. This is usually done based on information provided by the petitioner and without contact with the proposed protected person. The attorney is required to make a reasonable investigation before filing a petition and must believe the petition is well founded in law and fact. ORCP 17; Whitaker v. Bank of Newport, 101 Or App 327, 333, 795 P2d 1170 (1990), aff’d, 313 Or 450 (1992).

The need exists when the proposed protected person is “incapacitated,” that is, suffering from an impairment that affects the person’s ability to receive and evaluate information or to communicate decisions to such an extent that the person presently lacks the capacity to meet the essential requirement for physical health or safety. “Meeting the essential requirements for physical health or safety means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.” ORS 125.005(5).

ORS 125.400 provides that “upon the filing of a petition seeking the appointment of a conservator, the court may appoint a conservator and make other appropriate protective orders if the court finds by clear and convincing evidence that the respondent is a minor or financially incapable, and that the respondent has money or property that requires management or protection.” “Financially incapable” means a condition in which a person is unable to manage his or her financial resources effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance. ORS 125.005(3). These requirements bootstrap from one to the other to the logical and legal conclusion of the need for appointment of a conservator.

To get an order from the court, it is simplest if medical evidence is offered. A letter from the treating or primary care physician of the proposed protected person stating that there is a medical condition warranting the imposition of the guardianship or conservatorship
may be obtained under some circumstances but not in others. A particular diagnosis, for example, that the person has Alzheimer’s disease, is not sufficient. See Shafer v. Schaefer, 183 Or App 513 (2002). The impairment must be shown. See In the Matter of Baxter, 128 Or App 91 (1994) (holding that double amputee status did not equal financial incapacity). Important information may be provided by social workers, caregivers, and other persons with the ability to observe the functioning of the proposed protected person. Depending on the credentials of these individuals (RN, LCSW, MSW, PhD), their evidence may be sufficient to support a petition. Sometimes the lawyer may need to rely solely on the observations of friends and neighbors. In such a case, an opportunity to observe and the length and nature of the relationship are important factors to describe in the petition.

The lawyer must always consider lesser measures than a full-blown guardianship/conservatorship to achieve the purpose of protection. See ORS 125.150(7)(c). Intervention and support from a local area agency on aging may be adequate to meet the needs of the proposed protected person. A power of attorney, an advance directive for health care, and a living trust may exist or be creatable. The lawyer should make certain these avenues have been explored. If they have, they may provide additional evidence to support the petition.

Filing a Petition for Guardianship/Conservatorship Against an Incapacitated Client

What happens when a person who apparently needs a guardian or conservator is your own client whose capacity has deteriorated over time since your last contact? Oregon Rule of Professional Conduct 1.14 provides some guidance, exhorting the maintenance of a “normal client-lawyer relationship” “as far as reasonably possible” when the client is incapacitated and the taking of reasonable action to protect the client as deemed necessary by the attorney.

There is no Oregon case law interpreting the current ethical rule. The Oregon State Bar has given us Formal Ethics Opinion 2005-41, which does little more than recite the above rule when asked what duties a lawyer has when a current/former client begins to demonstrate a lack of capacity that is damaging. The American Bar Association has given us ABA Formal Ethics Opinion 96-404. The ABA analysis is this: Attorneys should not bring an action against a client to seek the initial appointment of a fiduciary in a protective proceeding, but may do so if the determination that it is necessary and reasonable has been made by the attorney. And once a court has made a determination that the client is incapacitated, the lawyer may represent the fiduciary appointed by the court to protect the client.

A lawyer may refer the matter to another appropriate party and continue to represent the client in the ensuing protective proceeding. The altruistic view of this posture is that it allows the attorney to ensure that the proceeding is fair and the client has every opportunity to avoid the imposition of authority against him or her, but it allows the attorney with a long-term relationship with the client to remain in the role of advisor and protector of the client, while advocating for the long-time judgments of the client.
Continuing to represent a client deemed by the attorney to be incapacitated raises its own issues. How does the attorney take direction from the incapacitated client? What position does the attorney take if the client changes long-held views regarding estate disposition, fiduciary preferences, or other matters expressed when the client’s capacity was not in question?

**Conclusion**

Incapacity can be devastating to a client. Recognizing incapacity may be as simple as knowing it when you see it, but making the appropriate determination of how to proceed as an attorney once the incapacity is recognized requires a sophisticated analysis of the psycho-social, legal, and ethical components of appropriate representation of a client.

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Chapter 7

DOMESTIC RELATIONS AN OVERVIEW

TABLE OF CONTENTS

I. INITIAL CONSULTATION ........................................................................................................... 7-1
   A. Confronting Emotionally Charged Issues ........................................................................ 7-1
   B. Fee Agreements .............................................................................................................. 7-1
   C. Evaluate Your Client .................................................................................................... 7-1
   D. Outline Temporary and Final Judgment Issues ......................................................... 7-1

II. MOTION PRACTICE ........................................................................................................... 7-1
   A. Automatic Restraining Orders .................................................................................... 7-1
   B. Temporary Protective Orders of Restraint ................................................................. 7-2
   C. Temporary Orders and Limited Judgments ............................................................... 7-2
   D. Family Abuse Prevention Act .................................................................................... 7-4

III. EX PARTE COMMUNICATION .................................................................................. 7-4
   A. Judicial Ex Parte Communication ............................................................................... 7-4
   B. Ex Parte Communication With Opposing Party ....................................................... 7-5

IV. TIPS AND TRAPS .......................................................................................................... 7-7

V. POWERPOINT SLIDES .................................................................................................. 7-13

To view these chapter materials and the additional resources below on or before November 1, go to www.osbplf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After November 1, select Past CLE select Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

The following resources can be found at www.osbplf.org, select Practice Aids and Forms, then Family Law.

Resources: Client Relations and Attorney Fees from the Trenches
Resources: The Art of Divorce Settlement Negotiations
Oregon Judicial Department Family Law Forms
DOMESTIC RELATIONS – AN OVERVIEW

I. INITIAL CONSULTATION

A. Confronting Emotionally Charged Issues.

B. Fee Agreements. A retainer contract is essential to define the nature and scope of representation. Discuss attorney fees from the outset.

C. Evaluate the client.

D. Outline your plan with client: temporary issues vs final judgment issues.

II. MOTION PRACTICE: EARLY DETECTION IS ESSENTIAL

All dissolution of marriage and separation proceedings begin with a Petition, Summons, Confidential Information Form (UTCR 2.130), and Vital Statistics form. There are only a few court-mandated forms.

There are several excellent resources for forms. Sample forms are available at the OSB PLF website:

www.osbplf.org

The Oregon State Bar CLE Book on FAMILY LAW along with any supplements contains reference forms for practitioners. Courthouse clerks can also provide packets of forms that were prepared for use by unrepresented parties (but they are useful for attorneys as well). If you join the Family Law Section of the Bar, you can also access the Family Law Listserv.

However, attorneys should already have carefully analyzed the preliminary issues that may present problems in the case well before filing any of these documents with the court. In virtually every case, attorneys must assess your client, the case, and possibly the opposing counsel. This assessment will provide the basis for determining what motions may be required at the time of the filing of the case. Failure to file the appropriate motions in a timely manner (often at the outset of the case) can result in serious detriment to the clients’ interests. The issues that an attorney needs to analyze at the outset of the case usually fall within the following categories:

A. Automatic Restraining Orders. ORS 107.093 prohibits both parties from disposing, hiding, or selling real or personal property. The statute is enforceable through remedial contempt proceedings under ORS 33.055.

There are exceptions to the automatic order that permit sale or access of accounts for personal necessities, business necessities, and attorney fees. Read it

1 Earlier versions of these materials were prepared by Gil Feibleman, Carol Westendorf, Herb Trubo Lilian Bier, and Saville Easley who have graciously permitted me to adapt and reprint them for this program.
carefully as it is not as restrictive as lawyers may think. However, a more detailed or expansive order might be appropriate to your case, and counsel should consider filing a motion and scheduling a hearing for such an order.

B. Temporary Protective Order of Restraint (“Status Quo Order”). The attorney must examine the placement of the children as part of the initial consultation. Counsel must try to determine whether this is a case where a parent may attempt to relocate the children without notice to the other parent. If so, it is imperative that counsel obtain a status quo order, which prohibits either party from removing the children from the state, interfering with the present placement, hiding, or secreting the children from the other parent, interfering with the parent’s usual contact, or changing the child’s place of residence. ORS 107.097 (The court may also issue a status quo order in a modification case, see ORS 107.138, however that cannot be obtained ex-parte and the rules are different).

Cases where the children may be in “immediate danger,” a temporary custody order may be appropriate.

PRACTICE TIP: The provisions of ORS 107.097 are very specific and attorneys must observe them precisely. They require information as to where the children have lived for the past ninety days, a definition of the children’s schedule, and notice for a hearing to contest the order. It is imperative that counsel carefully and accurately report this information to the court. The attorney must also provide the information required under ORS 109.767 (UCCJEA). Amongst other requirements, the UCCJEA also requires parties to provide the court with all known addresses for the children for the last five years. A careful reading of these statutes is essential prior to attempting to file a status quo order.

Be sure that you provide notice before going ex parte, and where required, have your client available. Given the exceptional circumstances justifying an emergency custody order, try to get more than one supporting affidavit of the circumstances.

C. Temporary Orders and Limited Judgments (ORS 107.095). The relief under this statute is broad, allowing temporary orders regarding use of the family home, temporary custody, establishment of a parenting plan, child and spousal support, payment of debts, and payment of suit money to prosecute the divorce.

PRACTICE TIP: The Court of Appeals has issued an unpublished letter opinion, which says that the financial matters need to be in the form of a Limited Judgment and the other matters need to be in the form of a Temporary Order. Some counties will not sign an order/judgment unless they are filed as separate pleadings.

A thorough examination of these issues at the beginning of the case will assist counsel in assessing whether the case may need extensive judicial involvement, and the attendant expense. These factors, in turn, will help you determine whether you wish to undertake representation. Consider the following:
1. Is this a case where the spouse with access to funds is likely to cut off the “have-not” spouse, leaving him/her without funds to pay basic expenses? If so, the attorney may need to file an immediate motion for temporary relief from the court.

2. Is this a case where the “custodial” parent is likely to cut off the other parent, allowing little or no parenting time? If so, the attorney may need to file an immediate motion seeking the establishment of a parenting plan. Alternatively, if your client is still living with his/her spouse, get a Stipulated Limited Judgment signed before your client leaves the home. This keeps leverage for your client and avoids fees.

**PRACTICE TIP:** The right to child and spousal support and the right to have contact and parenting time with the children are absolutely critical issues. Failure to address them at the beginning of the case can be extremely problematic. In certain counties, it requires a period of weeks (sometimes months) simply to get on the motion docket. Therefore, if the attorney determines that the client requires temporary relief, it is imperative that he or she file the motions early.

Counsel against delay based on what may be overly optimistic assurances of the client that the other side will soon begin to “behave” and that “things will calm down.” If cooperation is not forthcoming, after reasonable efforts, file your motions and negotiate after the filing. The simple filing of the motion can have significant impact when the other party realizes that he or she will be explaining to a judge why the children have been unsupported or withheld from the other parent.

**PRACTICE TIP:** Remember that filing a motion seeking payment of temporary child or spousal support requires the filing of a Uniform Support Declaration (USD) with the accompanying documentation (wage stubs, daycare statements, tax returns, etc.). The Responding USD is not due until fourteen days before hearing.

In the final trial on the merits, the attorney must also file an updated Uniform Support Declaration with the court. An understanding of the Uniform Child Support Guidelines is also essential, both in motion and trial practice, as this will control the award of child support under Oregon law. Any deviation from the Guidelines must be supported by one of the limited deviation factors set forth in the Guidelines, and the practitioner must be prepared to plead and present the client’s case for deviation in a clear and cogent form. The current Guidelines, the commentary, and the Child Support Calculator are now available online, as well, at:


3. Does the client have sufficient funds to pay his or her legal fees, or to retain necessary experts (real property appraisers, business appraisers, actuaries to value pension plans, and personal property appraisers)? If not, a motion under ORS 107.095 for attorney fees and suit money may be necessary to prepare or defend the case.
PRACTICE TIP: Far too many lawyers wait this one out, hoping that family members will come to the assistance of the client or that the other side will cooperate. If you represent the “have-not” spouse and can foresee that the client is in need of funds for both attorney fees and expert valuations, and the “have” party will not cooperate, file your motion early. Failure to do so will leave you in the unenviable position of: (1) having to withdraw for lack of payment of fees (which the court may or may not allow, depending on the age of the case); (2) staying on the case, and preparing for trial without funds for badly needed experts; or (3) staying on the case and funding the experts and attorney fees yourself, with slim hope of payment at the conclusion of the case.

4. Always check the practice of the county in which you are filing your action, to determine where and how things are done.

D. Family Abuse Prevention Act (“FAPA” Order under ORS 107.700).

The FAPA order may be the most necessary and the most abused statute in family law. When used appropriately, it can be the best (and possibly only) protection for your client. When abused, it can result in inappropriate awards of temporary custody, monetary payments, as well as damage to reputation and significant deprivation of rights. Counsel must try to make an early (and hopefully accurate) assessment of prior abuse in the marital home and the potential for future abuse. After an initial screening, counsel should advise every client of the procedures for obtaining a FAPA order and the repercussions of the application. Counsel should also immediately caution any client likely to be accused of abuse about the devastating effects of a FAPA order and how to avoid having one entered or upheld.

PRACTICE TIP: The issues involving FAPA’s are complex, and there is an overlap of Oregon law with federal law in certain areas. For example, under federal law, entry of a domestic abuse restraining order can result in the loss of use of a firearm, to the dismay of hunters, security guards, police officers, and others who routinely use them. The Oregon Revised Statute also allows entry of a special “emergency monetary assistance” order. In addition, entry of a FAPA gives rise to a legal presumption that “it is not in the best interests and welfare of the child to award sole or joint custody of the child to the parent who has committed the abuse.” See ORS 107.137(2). These points are particularly important, since it is possible to enter FAPAs ex parte with a subsequent right to a hearing if requested. Thus, the former practice of simply allowing the order to continue, without contest, now requires much closer scrutiny.

III. EX PARTE COMMUNICATION

A. Judicial Ex Parte Communication. As noted, many of the above issues require early detection and quick action in order to protect the client. Domestic relations practice presents many opportunities for ex parte motion practice. The unique
nature of the practice, in which the support and custody of children is of paramount concern, often dictates expediency. Still, counsel must be very cautious to observe ensure the ethical requirements of *ex parte* practice. See RPC 3.5(b). RPC 3.5 strictly limits the situations in which a lawyer may have contact with a judge. It provides that a lawyer shall not communicate ex parte with such a person during a proceeding unless authorized to do so by law or court order. Written communications to a judge require prompt delivery of a copy of the writing to the opposing counsel or the adverse party (if the other party is not represented). Oral communications *must* be upon adequate notice to opposing counsel or to the adverse party if not represented by counsel.

Many counties' local rules discuss prompt delivery of adequate notice. For example, the existing Multnomah County Supplemental Rule requires a party seeking "*ex parte* relief" in dissolution matters to provide "two (2) working days' notice to the opposing party of the date, time, and court where the relief is sought." Multnomah County Supplemental Rule 8.041(3). Washington County Supplemental Rules require that any motion presented *ex parte* must have attached to it a certificate of service showing the date, time and manner of service upon the opposing party and requires specific language to be included in the certificate of service. The rule further provides that when service is required, counsel must complete service upon the opposing party at least 24 hours prior to the *ex parte* appearance. Washington County Supplemental Local Rule 5.061(3). Generally, give the professional courtesy of at least 2-3 days of notice even when the local rule may require only one day of notice.

**PRACTICE TIP:** *Ex parte* contact with a judge is a violation of not only the RPC’s but the experienced divorce lawyer’s code of ethics. Late night faxes, inadequate notice, the “I called and left a message on your voice mail” notices, all followed by entry of substantive *ex parte* orders for which there was no opportunity to be heard, are an absolute breach of fair play. They will draw the ire of seasoned practitioners more quickly than any other error you may make, and will often draw a complaint to the Oregon State Bar, as well. No matter what the notice rules say, *err on the side of expanding them*. Letters to judges, appearances at *ex parte*, and any other types of *ex parte* communication will do more to damage your reputation than any other single act amongst a Bar of closely knit attorneys with very long memories. Put simply: If your client needs *ex parte* relief, provide adequate notice, in writing, so that the other party will have an opportunity to appear and defend. Doing so will save not only your reputation, but, also significant legal fees that might otherwise have to be spent wrangling with opposing counsel to “undo” the order.

**B. *Ex Parte* Communication with the Opposing Party.** The second most frequent problem with *ex parte* communication arises when an attorney has *ex parte* communications with a represented party. You cannot have *any* contact with a party who is represented by an attorney, absent the representing attorney’s consent. This can arise in a number of settings in the divorce arena:

1. Opposing party contacts you on the telephone, just to discuss a few
details, and you speak with that party. If you know there is a lawyer involved, there can be no contact of this sort. You must advise the party that you cannot speak directly with him or her so long as he or she is represented by counsel. Query: What if the party tells you he has seen a lawyer, just to answer a few questions, but has not retained that lawyer? I would recommend declining speaking with the party until you determine for certain that the other lawyer is, in fact, not representing the party.

2. Your client does not mention that the other party has retained counsel, and you send the entire service package, with accompanying letters, to that party. This may or not be a problem. Ex parte communication is problematic only if the attorney already knows of the existence of opposing counsel. If you suspect there is another lawyer on the case, investigate before having contact with the other party. If necessary, call that attorney and ask if he or she represents the party. Check OJIN records to make sure a party’s former attorney withdrew, or still has no attorney.

3. You call your client’s home, who still lives with his or her spouse (not that uncommon of a scenario), and the spouse, who is represented by counsel, answers the phone and immediately tries to engage you in substantive conversation. You should hang up the phone and notify opposing counsel. Try to have a cell phone number for your client and a separate P.O. Box number to avoid this problem.

4. You have been dealing with a lawyer throughout the case, and your client tells you that the spouse has fired that lawyer. Let us say you get a letter from the opposing party stating that he or she has fired the lawyer, and instructing you to send communication directly to him or her. However, you have not received a formal notice of withdrawal or other communication from the attorney. Here again, you should have no contact with the party until you call the other lawyer and verify that he or she has been removed from the case. Insist that the other attorney file a withdrawal and verify that the court has record of the withdrawal on OJIN.

5. You are having a hard time getting cooperation from the opposing spouse and his or her lawyer is of no help (counsel might, in fact, be a hindrance). You know that if you could just get word to the opposing party how “reasonable” your position is, the case might settle. You also suspect that the other lawyer may not be transmitting your letters or conveying offers. Therefore, you suggest your client sit down with his or her spouse, and you explain to your client exactly how to negotiate the issues. Such an approach would be inadvisable. Remember that the rule provides that you cannot communicate in any way with a represented party or “cause another” to do so.

PRACTICE TIP: A related issue involves just how much communication you can have with an unrepresented (pro se) party as well. You are allowed to communicate with an opposing party who has not retained counsel. Obviously, in a divorce case, the interests are in conflict, and this is a continuing problem in cases where the other party is unrepresented. For this reason, it is imperative that you avoid providing any sort of advice to a pro se opponent. Further, virtually every communication you have with an unrepresented party (including oral
conversations) should be in writing or memorialized in writing. The communications should contain a clear reminder that you are representing only the interests of your own client, that you cannot offer legal advice to the unrepresented party, and that he or she should obtain his or her own independent counsel to represent his or her own interests.

IV. TIPS AND TRAPS

The above points are lessons that are well (and, in most cases, quickly) learned. It only takes one or two cases of kidnapping, dissipated assets, hungry and dependent children, and deprivation of a client’s parenting time to discover that certain domestic relations issues must be dealt with promptly and correctly. The learning curve on these issues, while painful, is not particularly high.

Presuming the practitioner has survived the learning the forms and pleadings discussed above and continues to practice family law, there is another, steeper, learning curve ahead. The following are some suggestions gleaned from many years of domestic relations practice. To the extent you find even one that you can use, it may help guard you from malpractice or ethics violations, or at least may simply make your daily practice a bit more enjoyable.

Also, excellent checklists (some of which are incorporated into these materials) and form letters are available at the website of the Professional Liability Fund in the Loss Prevention Material section: http://www.osbplf.org/

A. Select your clients very carefully, and do not take every case that walks in the door. This is the #1 point of consensus among virtually all experienced divorce lawyers. The nature of the practice is that divorce clients are often angry, hurt, disappointed, and simply at their worst. Client’s often have compromised or limited ability to make decisions. That said, if you do not like the client in the initial interview, and have the gut feeling that you might not be able to work with him or her, do not take the case. It will not get any better as the case progresses. If the client has unrealistic expectations or wants you to be more (or less) aggressive than you believe is appropriate, don’t take the case.

If the client is too hostile/hurt/stubborn/foolish or whatever to accept your advice (or to let you control and manage the case), the same advice applies: drop the client. Make this determination as early as possible, since the rules regarding withdrawal in the middle of the case can be tricky. A court may refuse to allow you to withdraw from representation if the case is close to trial and such withdrawal would result in prejudice. Thus, be very, very careful about the clients you select, and if a problem client does slip through, get rid of that person early, while you still can without difficulty.

B. Have a firm understanding with your client about fees, and make the client remain current in payment throughout the case. This is probably the #2 agreed-upon point. It is imperative that you send out current bills (no less often than every thirty days), and that you insist that your client pay you as the case proceeds. Consider establishing your billing system so that you can accept credit cards. Legal
bills that go unpaid, with a “final” billing of thousands of dollars presented at the end of the case, are probably the number one cause of malpractice claims. Indeed, many malpractice claims are nothing more than “sour grapes” fee disputes. It is much easier to find fault with the legal work done in a case when the client still owes the attorney several thousand dollars.

Further, the hourly cost of performing your work is the number one controller of unreasonable behavior among divorcing spouses. It’s easy to have one lawyer lob written missives, take unreasonable positions in court and refuse to cooperate with discovery, hide the children (and the assets) when one has no idea how much these antics are costing. The failure of attorneys to bill their clients (and to make them pay) during the pendency of the case often accounts for the protracted litigations that are far too costly and common in divorces. The bottom line is that you must set your retainer, stick to it, and require that your client remain current with payments. The clients will quickly get the idea that unreasonable behavior benefits no one when they understand that they are paying for it.

PRACTICE TIP: As a related matter, there are practitioners who would say that it is never wise to sue a client for a fee (and certainly not within the two-year malpractice window). The connection between fee disputes and malpractice claims cannot be overstated. For what it’s worth, fee disputes with clients are also a very common cause of Oregon State Bar complaints.

C. Beware the client who has had a change of lawyers in the middle of the case. One change is cause for concern, two changes is a serious caution, and three changes is a red light. When a client approaches you, always take a serious look at the previous lawyer’s letters in the file (and don’t accept the case without seeing that file). If the legal work looks sound, or if the attorney has a good reputation, probably the client is the problem. Often, the conflict between the client and lawyer is apparent from the written communication (for example, letters regarding unpaid fees).

D. Find a mentor. While there is no consensus about the advisability of managing a family law practice as a sole practitioner, there is no question that, with a new attorney can greatly benefit by working with experienced lawyers. Domestic relations is a minefield of forms, rules, and practices which vary even among the local judiciary. There is no substitute for directly observing an expert over an extended period. Divorce law may also require substantial courtroom work, and the court docket is filled with “show cause motions” and trials. The ability to observe a seasoned trial lawyer, before embarking on your own trial work, can be very helpful.

E. Observe appropriate boundaries (both your own and the client’s). This pointer is one of the most difficult; it is critically important that if you are to survive in a family law practice and if you are to be an effective advocate for your client: Your client needs to respect your boundaries, and you need to establish those boundaries with the client, at the onset of the case. Always tell the client what he/she “needs” to hear, not what he/she “wants” to hear. Firm working hours, hours that do not allow for late-night calls at your home, for example, are critical. Making your client know that
you are not on call 24/7, that you will return client calls in a timely manner—considering the demands and emergencies of your other clients—is critical. Making your clients understand that you are not their counselor, minister, mother, father, babysitter, friend, or anything other than their lawyer, is also critical. Be prepared to make appropriate referrals to mental health professionals for clients who are not coping well with the process. Be prepared to be firm (to the point of absolute bluntness) to protect your boundaries if you find the client encroaching upon them. Do not let your clients manipulate you into making their decisions for them. You are the advisor, and they are the decision maker.

Make sure you are not encouraging your clients to overstep the boundaries of a healthy attorney-client relationship. Family law practitioners have the opportunity to make a significant difference in the client’s life, but at the same time, it is absolutely imperative that you, as the lawyer, understand that you did not create this client’s problems, and you do not own them. The inability to separate your own life from your client’s is probably the biggest single reason for attorney burnout in the domestic relations area. If your temperament is such that you cannot observe these boundaries, this may not be the area of practice for you.

F. Observe and honor the grieving process of your clients. This pointer is unique to family law cases, but understanding will be very helpful in managing your practice. Experts have established that the death of a marriage results in the same stages of grieving as the death of a family member or loved one. Subject to variations in minor shades, all divorcing couples basically proceed through three successive stages:

(1) An initial shock or disbelief stage (where it may be unrealistic to expect much from your client by way of processing, gathering documents, or even moving forward);
(2) The anger stage (where you can expect your client to do some acting out and where you must be prepared to exert leadership and control of the case); and
(3) The acceptance stage (where the most productive work is done, and where the case is most likely to be successfully settled).

This is not to say that we always have the luxury to await the final acceptance stage, as we must continually be moving the case forward and preparing it for settlement or hearing. It is to say, however, that counsel must recognize that divorce cases are simply like no other, and cannot treat them like contract disputes, securities litigation, or personal injury cases. The family law client is often threatened (sometimes with the very loss of his or her children or the ability to support him or herself), unsophisticated, frightened, angry, and confused. An understanding of the emotional stages will assist the attorney in knowing when to push and when to back off, when to rely on the client to assist in the case, and when to attempt serious settlement negotiations.

G. Return your clients’ phone calls. This states the obvious. But remember, in family law cases, your client may well be waiting beside the phone, unable to work or think, until you call the client back. Your client may be waiting to
hear whether he or she will be able to have the Thanksgiving holiday with the children, whether the support check is in the mail, or whether the custody evaluator has offered up an opinion and recommendation. A bad exchange between the parents may just have happened, possibly in front of the children, and the client may feel it is imperative to speak to you. The client will certainly believe his or her problem to be the most critical of the day. Still, it is interesting to note that when clients give their attorneys bad review, or in some cases sue them, the most often listed complaint is that the attorney “didn’t even care enough about me to return my calls.” For that reason, if you are inaccessible or cannot return your calls for any reason, have your assistant return the call just to let the client know that you are temporarily unavailable, that you are aware that the client has called, and will be back in touch very shortly. Remember, it is not the particular advice you give the client that the client recalls at the conclusion of the case, but the impression you gave. Were you “available” and did you “care enough” to return that call?

H. Discovery. ORS 107.089 governs discovery a party must provide to the other party. Even if you feel you will default the opposing party, comply with the statute to avoid the default being set aside and the Judgment vacated. Explain the seriousness to the client to produce discovery and the requirement of complete disclosure. Don’t be afraid to supplement with a standard request for production for both financial and parenting and custody documentation, like emails, diaries, calendars, and medical or psychological records. Do your requests early.

Don’t forget that you can file Motions to Compel or send out Subpoenas for documentation, including requests for loan applications, employer’s records or bank records. Hire experts well in advance of trial. Depositions are expensive, but can be revealing.

I. Get the experts you need to help you prepare the case. This one should be self-explanatory. A divorce case will often require the use of an actuary (to value the pension), a real estate appraiser (to value the home and other property), a personal property appraiser (to value the furnishings), a business evaluator (to value the family business), and a child psychologist or social worker (to undertake a custody and parenting time evaluation). In some cases, counsel may need to retain an accountant to sort out the tax consequences of spousal support, give advice on the allocation of tax carry-overs, help with awards of dependency exemptions, and compute tax brackets and retirement plans. The divorce attorney is not an accountant, business valuator, mental health professional, or property appraiser, and cannot perform these functions. The attorney is the contractor of the case: counsel spots the issues, hires the experts where needed, gathers and reviews discovery, manages the client and the case, and acts as an advocate. Clearly, the failure to retain appropriate expert assistance in a divorce proceeding is a very common ground for malpractice suits, as this can result in missed or misvalued assets, serious tax errors, improperly divided pensions, inappropriate custody awards, and any other number of problems. Get the fee for the expert ahead of time from your client.

J. CYA, in writing, when the client ignores your advice. This is a corollary to the above point regarding experts, since clients may simply refuse to pay
more money to value their estate or to evaluate parenting issues. Clients may refuse to follow the advice of competent counsel regarding the division of the estate, payment of child support, or any other number of issues. They may refuse to value the business, either because they think they know what it’s worth, their spouse told them what it is worth, or they don’t care (at that time, at least). Obviously, the attorney cannot advance the fees to value the estate or hire the psychologist or social worker, nor can the attorney force the client to accept advice. The lawyer can, however, record the appropriate advice in writing, along with written confirmation that the client has chosen to ignore that advice. A simple letter stating, “I have told you to value the business and you have told me you do not wish to spend the money to do so,” could actually save the lawyer from subsequent malpractice claims when the case goes sideways.

The same principle is at work in cases where the parties want a “quicky” divorce, and neither wants to do any discovery because they “trust” one another and they “already know” what assets and debts exist. Another variation is where the lawyer is called upon to review an agreement reached in mediation, in which the lawyer did not participate, did no discovery, and was never consulted, except to review the “final document.” In such cases, a limited fee agreement may be in order. These agreements generally provide that the attorney will not conduct discovery or analyze the estate, but will review the agreement simply to determine whether it reflects the agreement that the attorney’s client believes the parties reached in mediation. Attorney’s use these sorts of agreements to address the relatively new concept of “unbundling” legal services, are becoming more and more common as couples continue to mediate their divorces, with a minimum of attorney assistance. In all events, if you, as the acting attorney, are doing anything less than full discovery or other work normally warranted in a divorce case, it is imperative that you so state, in writing, prior to allowing the client to sign the final documents.

K. Do not prepare (or review) Qualified Domestic Relations Orders (QDRO’s) unless you have the necessary training. Most divorce practitioners feel strongly about this pointer. Preparation and review of a QDRO, which is a document required to divide an ERISA qualified retirement plan [401(k)’s, Keogh’s, etc.], and other orders, such as are required to divide PERS and many other sorts of retirement plans, require an understanding of federal and state pension law. Unless you have that knowledge, you are taking a serious risk, both for yourself and for your client, to try to prepare or review such an order. Further, because this issue deals with the division of benefits that might not take place until the date of retirement, it can result in latent liability for decades after the divorce. In virtually all cases, the prudent course of action is to retain a pension or tax attorney to both prepare and review the QDRO or other orders necessary to divide the retirement. Please note that this is not an issue that can be handled by a simple letter regarding limited representation, as the retirement has to be divided, if the Judgment so provides. If you cannot prepare the order to do it (and the client certainly cannot do so), a qualified pension or tax attorney must prepare the order. The clients simply have to understand that the cost of retaining the expert to draft the order is a necessary part of the process.
L. Negotiation / Settlement / Trial. Once the attorney has reviewed documentation with the client, counsel may want to make a settlement offer. Don’t forget that advocating for your client can also include trying to settle a case to avoid your client incurring more fees in the long run. Make good use of settlement conferences with judges or mediators by writing a confidential settlement letter, so you don’t waste valuable mediation time. If the opposing party won’t agree to your terms, at least a written settlement offer could further your position for an attorney fee award.

M. Drafting the Judgment. Make up your own form of Judgment with all the scenarios written in so you don’t forget any issues. Then, for each dissolution tailor the language for your client’s fact pattern, deleting issues that do not apply. Always think about modifications and appeals down the road, and plan accordingly in your findings of fact. Make sure you address tax issues, retirement division, life insurance, and debt responsibility, as well as custody and parenting time issues. Try to construct a Judgment that timely separates the parties financially, both where debts and assets are concerned.

N. Follow through. Follow through is important. Make sure the QDRO is divided, life insurance information received, accounts divided, deeds recorded, and Satisfactions of Judgment are filed with the court before you withdraw as counsel.
WHAT DOES DOMESTIC RELATIONS LAW INCLUDE?

- Divorce
- Legal Separation
- Modifications
- Civil Unions
- Custody, Parenting Time and Child Support for Unmarried Parents
- Domestic Partnerships
- Paternity
- Grandparent or Third Party Custody and Visitation
- Adoptions
- Guardianships
- Abuse Prevention (FAPA)
- Stalking
- Premarital Agreements
- Unbundled Services
DOMESTIC RELATIONS LAW
- ORS 106 Marriage; Domestic Partnership
- ORS 107 Marital Dissolution; Annulment and Separation; FAPA
- ORS 108 Husband and Wife Relationships; Property Rights; Premarital Agreements
- ORS 109 Parent and Child Rights and Relationships
- Oregon Case Law
- OAR 137 Child Support
- UTCR 8 Domestic Relations
- Supplemental Local Rules
- Oregon Rules of Civil Procedure
- Oregon Evidence Code

OTHER RESOURCES
- OSB’s Family Law CLE (Available on the OSB’s website)
- Family Laws of Oregon, State of Oregon Legislative Counsel (www.lc.state.or.us)

FIND A MENTOR
- An attorney in your office
- OSB Mentorship Program
- County Bar Mentorship Programs
- Join the OSB Family Law Section. Subscribe to and read the OSB Family Law Listserv
- Attend Family Law CLEs
BUILD POSITIVE RELATIONSHIP WITH YOUR CLIENT

- Select your client carefully
- Listen to your client
- Be realistic and honest
- Be responsive to phone calls from your client
- Keep your client updated as to the status of the case
- Be empathetic, but maintain appropriate boundaries
- Refer your client to other professionals, where needed
- Talk about fees to help you prepare for your case
- Observe and honor the grieving process of your client
OPERATE A BUSINESS

- Explain the fee arrangement to your client at the beginning of the representation
- Sign a written fee agreement with the client
- Obtain an appropriate retainer
- Keep track of your time and bill it
- Send out regular statements to your clients
- Require clients to remain current with their bill

INITIAL CONSULTATION

- Check for conflicts
- Obtain a history
- Assess the client’s case
- Evaluate the client
- Outline a plan
- Fee agreement
- Explain the fee arrangements
- Provide fee agreement to review and sign
DIVORCE PROCESS

PETITION FOR DISSOLUTION
(ORS 107.085)
- Irreconcilable difference between the parties
- Custody
- Child Support
- Health Insurance and Uninsured Expenses
- Spousal Support
- Life Insurance
- Property Division
  - Cars
  - Houses
  - Businesses
  - Retirement Accounts
  - Other Property
- Debts
- Attorney Fees
- Name Change

DOCUMENTS TO ACCOMPANY PETITION
- Summons, including Statutory Restraining Order and Request for Hearing Re: Statutory Restraining Order
- Record for Dissolution of Marriage (Vital Stats Form)
- Notice of Filing Family Law Confidential Information Form
- Family Law Confidential Information Forms (for all parties)
- Certificate Re: Pending Child Support Proceedings and/or Existing Child Support Orders/Judgments
AUTOMATIC PROPERTY RESTRAINING ORDER
ORS 107.093
- Prohibits both parties from disposing of, hiding or selling real or personal property
- Enforceable through contempt
- Exceptions that permit the sale or access of accounts for personal necessities and attorney fees

Tip: Read it carefully. It is not as restrictive as lawyers may think. A more detailed order might be appropriate in your case.

TEMPORARY MOTIONS
- Motion for Temporary Relief Under ORS 107.095
  - Suit Fees
  - Custody of Children
  - Parenting Time
  - Child Support
  - Spousal Support
  - Use of the Family Home
  - Payments of Debts
- Temporary Protective Order of Restraint ("Status Quo") ORS 107.097
  - Prohibits each party from removing the children from the state, interfering with the present placement, hiding or secreting the children from the other parent, interfering from the other parents usual contact or changing the child's place of residence
- Emergency Custody Order ORS 107.097

FAMILY ABUSE PREVENTION ACT (FAPA)
ORS 107.700
- “Abuse” as defined by ORS 107.705
- Within 180 days of filing the Petition
- Imminent danger of further abuse

Tip: Consolidate with the dissolution case.
EXPERTS
- Maintain a list of experts. Hire experts early in your case. Experts you may need:
  - A custody and parenting time evaluator
  - A real estate appraiser
  - A commercial property appraiser
  - A personal property appraiser
  - Business appraiser
  - Actuary (value pensions)
  - Accountant
  - Therapist

DISCOVERY
- ORS 107.089 - Discovery that must be provided by litigants
- Requests for Production
- Depositions
- Subpoenas
- Motions to Compel

DIVORCE
- Settlement
  - Judicial settlement conferences
  - Private settlement conferences
  - Exchange of communications
- Trial
  - Prepare and number exhibits
  - Prepare trial notebooks
  - Draft a trial memorandum
  - Arrange for “friendly” witnesses to be present
  - Subpoena “unfriendly” witnesses
CHAPTER 8

BUSINESS TRANSACTIONS

Dina E. Alexander  
Radler White Parks & Alexander

Gregory W. Levinson  
Levinson Law LLC
I. Introduction

II. What do Business Lawyers Do?
   a. General Description – 30,000-foot view
      i. Entity selection and formation
      ii. Real estate development (purchase and sale)
      iii. Financing – equity and debt
      iv. Mergers & acquisitions
      v. Employment advice
      vi. Compensation and benefits
      vii. Securities
      viii. Intellectual property
      ix. Regulatory compliance
      x. Contract review
      xi. Succession planning
      xii. Buying and selling of business assets
      xiii. Litigation for the business
      xiv. Collections for the business
      xv. Licensing and other regulatory advice
   b. Specific Examples
      i. Real Estate
      ii. Representing Small Businesses
   c. Question/Answers

III. Frequently Drafted/Reviewed Agreements
   a. Term Sheets/Letters of Intent
   b. Purchase and Sale Agreements
      i. Real Estate
      ii. Other (Non-Real Estate Assets)
   c. Leases
      i. Real Estate
      ii. Equipment
d. Easements and licenses

e. Licensing and other regulatory documents

f. Entity Documentation
   i. Operating Agreements and other formation documents
   ii. Consent Resolutions

g. Loan Documents
   i. Promissory notes
   ii. Loan agreements
   iii. Trust deeds

h. Guaranties
   i. Environmental indemnities

j. Collateral assignments

k. Construction contracts

IV. Day in the Life
   a. Meetings
   b. Conference calls
   c. Document drafting and review
   d. Lawyer to counselor/strategic advisor
   e. Questions/Answers

V. Characteristics of a Successful Business Attorney
   a. Strategic thinker
   b. Strong advocate (written and oral)
   c. Attention to detail
   d. Passion for the work/“Fire in the belly”
   e. Questions/Answers

VI. Advantages of Practicing as a Business Attorney
   a. Common goal
   b. Collaborative
   c. Long-term relationships with clients

VII. Questions/Answers
VIII. Resources and Practice Tools:

a. Resources
   i. Bar Books
   ii. Friedman on Leases
   iii. RealDealDocs.com

b. Practice Tools
   i. Find a mentor
   ii. Attend substantive CLE
   iii. Get involved with an industry group
CHAPTER 9

CIVIL MOTION PRACTICE

Lindsey H. Hughes
Keating Jones Hughes PC

Peter D. Eidenberg
Keating Jones Hughes PC
## CIVIL MOTION PRACTICE

### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION TO CIVIL MOTIONS</td>
<td>9-1</td>
</tr>
<tr>
<td>A. Filing the Motion</td>
<td>9-1</td>
</tr>
<tr>
<td>B. Filing Fees</td>
<td>9-2</td>
</tr>
<tr>
<td>C. Multnomah County Civil Motion Panel Statement or Consensus</td>
<td>9-2</td>
</tr>
<tr>
<td>D. Obtain an Order</td>
<td>9-2</td>
</tr>
<tr>
<td>II. CHANGE OF VENUE</td>
<td>9-2</td>
</tr>
<tr>
<td>A. Motions Based on Improper Venue</td>
<td>9-2</td>
</tr>
<tr>
<td>B. Motions based on Inconvenience of Prejudice</td>
<td>9-3</td>
</tr>
<tr>
<td>III. MOTIONS FOR DEFAULT</td>
<td>9-4</td>
</tr>
<tr>
<td>IV. MOTIONS ON THE PLEADING – ORCP 21</td>
<td>9-5</td>
</tr>
<tr>
<td>A. Motions to dismiss – ORCP 21 A</td>
<td>9-5</td>
</tr>
<tr>
<td>B. Pleading Motions</td>
<td>9-7</td>
</tr>
<tr>
<td>C. Motion for Judgment on the Pleadings</td>
<td>9-8</td>
</tr>
<tr>
<td>D. Considerations for Filing Rule 21 Motions</td>
<td>9-9</td>
</tr>
<tr>
<td>E. Practice Tips for ORCP 21 Motions</td>
<td>9-9</td>
</tr>
<tr>
<td>V. MOTIONS TO AMEND AND RELATION BACK UNDER ORCP 23 C</td>
<td>9-10</td>
</tr>
<tr>
<td>A. Court Has Discretion to Allow Amendment, ORCP 23 A</td>
<td>9-10</td>
</tr>
<tr>
<td>B. Relation Back Under ORCP 23 C</td>
<td>9-11</td>
</tr>
<tr>
<td>C. Amendments to Conform to the Evidence</td>
<td>9-13</td>
</tr>
<tr>
<td>VI. POTENTIAL FOR REFILING UNDER ORS 12.220 WHEN DISMISSAL IS BASED ON PROCEDURAL DEFECTS</td>
<td>9-13</td>
</tr>
<tr>
<td>VII. DISCOVERY MOTIONS</td>
<td>9-13</td>
</tr>
<tr>
<td>A. Motions to Compel – ORCP 46</td>
<td>9-14</td>
</tr>
<tr>
<td>B. Parties are Required to Confer</td>
<td>9-14</td>
</tr>
<tr>
<td>C. Motions for Protective Orders – ORCP 36 C</td>
<td>9-14</td>
</tr>
<tr>
<td>D. eDiscovery: The Rules Have Expanded</td>
<td>9-14</td>
</tr>
<tr>
<td>1. eDiscovery: Background to the Federal Rules</td>
<td>9-14</td>
</tr>
<tr>
<td>2. eDiscovery: Following the Rules</td>
<td>9-15</td>
</tr>
<tr>
<td>3. eDiscovery: Sanctions for Spoliation</td>
<td>9-17</td>
</tr>
<tr>
<td>4. eDiscovery: Metadata</td>
<td>9-17</td>
</tr>
</tbody>
</table>
E. Motions for Discovery Sanctions – ORCP 46 B.................................. 9-18

VIII. SUMMARY JUDGMENT MOTIONS............................................... 9-18
A. ORCP 47 .......................................................................................... 9-18
B. Summary Judgment Motions to Resolve All or Portions of a Case 9-19
C. Considerations for Moving for Summary Judgment ............................ 9-20
D. Responses to Summary Judgment Motions ...................................... 9-20
E. Declarations...................................................................................... 9-22
   1. Supporting Affidavits or Declarations ................................ 9-22
   2. Striking Inadmissible Information and Statements .................. 9-22
F. Expert Declarations........................................................................ 9-23

IX. MOTIONS TO DISMISS PURSUANT TO ORCP 54 ......................... 9-25
A. Voluntary Dismissal ............................................................................ 9-25
B. Involuntary Dismissal by Court .......................................................... 9-25

X. PRETRIAL MOTIONS........................................................................... 9-25
A. Motions in Limine ............................................................................... 9-25
B. OEC 104 Hearings ................................................................................ 9-26

XI. TRIAL MOTIONS 9-10....................................................................... 9-26
A. Evidentiary Rulings............................................................................ 9-26
B. Motions Based on Misconduct ............................................................. 9-26
C. Motions Challenging Sufficiency of the Evidence – Motions to
   Dismiss and for Directed Verdict – ORCP 54 and 60 ......................... 9-27

XII. POST TRIAL MOTIONS..................................................................... 9-28
A. Motions for Judgment N.O.V. – ORCP 63 ....................................... 9-28
   1. The “any evidence” standard ...................................................... 9-28
   2. Alternative motion for new trial, ORCP 63 C .............................. 9-29
   3. Procedure, ORCP 63 D ................................................................. 9-29
B. Motions for New Trial – ORCP 64 .................................................... 9-29
   1. Grounds for New Trial ORCP 64 ................................................. 9-29
   2. Procedure, ORCP 64 D and F ......................................................... 9-31
C. Motions to Stay Enforceable Judgment Pending Determination of
   Post-Trial Motions.............................................................................. 9-31

XIII. POWERPOINT SLIDES..................................................................... 9-32
I. Introduction to Civil Motions

A. Filing

- Consider all applicable sources for rules and time computations. Oregon Rules of Civil Procedure (ORCP), Uniform Trial Court Rules (UTCR) and Supplemental Local Rules (SLR) for the county of filing. For timing, see ORCP 10 and UTCR 1.130 generally, and specific rules applicable to particular motions. E.g., ORCP 47 (summary judgment), ORCP 63 and 64 (JNOV and new trial) and UTCR 5.030 (pleading and discovery).


- Conferral is REQUIRED for most motions under ORCP 21, 23, and 36-46. UTCR 5.010. See Anderson v. State Farm Mutual Auto Ins. Co., 217 Or App 592, 595-96, 177 P3d 31 (2008) (court held defendant's violation of
conferral request in UTCR 5.010 compelled denial of its motion to dismiss; futility in conferral was no excuse). Certificate must state the parties conferred or contain facts showing good cause for not conferring.

- FILING means delivery to the clerk for filing; delivery to a judge or the judge’s assistant is not considered “filing.” Averill v. Red Lion, 118 Or App 298, 846 P2d 1203, modified, 120 Or App 232, rev den, 317 Or 271 (1993). Provide bench copies for judges, including pro tem judges.

B. Filing Fees

You must determine and submit the correct fee amount or risk the document being rejected and returned. The Oregon Judicial Department Website has information on fees and links to individual court’s websites. http://www.courts.oregon.gov/Documents/CircuitCourtFeeSchedule.pdf

C. Multnomah County Civil Motion Panel Statement of Consensus

Multnomah County judges have compiled an explanation of rulings on a variety of issues that arise in the civil cases that come before them. The Civil Motion Panel Statement of Consensus is a good reference point for motions and responses under consideration. http://courts.oregon.gov/Multnomah/docs/CivilCourt/CivilMotionPanel_CivilMotionPanelStatementOfConsensus.pdf

D. Obtain an Order

Prepare and submit an order that preserves the ruling. Unless signed in open court, an order is not considered effective until it is entered. See Strawn v. Farmers Ins. Co., 350 Or 336, 367, 258 P3d 1199 (2011), adh’d on recons, 350 Or 521 (2011), cert den, 132 S Ct 1142 (US 2012). When appropriate, follow a dispositive order with a judgment or limited judgment: an order remains subject to reconsideration and amendment until a judgment is entered.

II. Change of Venue

A. Motions Based on Improper Venue

The defense of improper venue may be waived, so challenges to proper venue must be raised as an affirmative defense or, if Rule 21 motions are first filed, raised with those motions. ORS 14.120. Motions based on convenience may be filed at any time before trial. Id.
In a wrongful death action based on negligence, the proper county for venue is where the wrongful act or acts occurred, not where the decedent died. *Howell v. Willamette Urology, P.C.*, 344 Or 124, 178 P3d 220 (2008).

The proper venue for an action against a corporation is the county in which it resides. Residence is determined by the county in which the corporation engages in “regular, sustained business activity,” has an office for transaction of business, or has an agent authorized to receive process. ORS 14.080(2). For an explanation of what constitutes “regular, sustained business activity” see *Kohring v. Ballard*, 355 Or 297, 306, 325 P3d 717 (2014).

**B. Motions Based on Inconvenience or Prejudice**

ORS 14.110 provides:

(1) The court or judge thereof may change the place of trial, on the motion of either party to an action or suit, when it appears from the affidavit of such party that the motion is not made for the purpose of delay and:

(a) That the action or suit has not been commenced in the proper county;

(b) That the judge is a party to, or directly interested in the event of the action or suit, or connected by consanguinity or affinity within the third degree, with the adverse party or those for whom the adverse party prosecutes or defends;

(c) That the convenience of witnesses and the parties would be promoted by such change; or

(d) In an action, that the judge or the inhabitants of the county are so prejudiced against the party making the motion that the party cannot expect an impartial trial before the judge or in the county, as the case may be.

(2) When the moving party in an action is a nonresident of the county, the affidavit required under this section may be made by anyone on behalf of the moving party.
ORS 14.120 limits each party to one change of the place of trial, “except for causes not in existence when the first change was allowed.”

- **Forum non convenience:** The Oregon Court of Appeals recognized the inconvenient-forum doctrine in *Espinoza v. Evergreen Helicopters, Inc.*, 359 Or 63, 94, 376 P3d 960 (2016). A defendant may obtain dismissal by demonstrating that an alternative forum is available and adequate, and that considerations of justice and convenience outweigh plaintiff’s choice of forum.

**Caution re preserving venue arguments for appeal:** The Court of Appeals has held: “the only way to challenge an allegedly erroneous non-discretionary venue decision is by mandamus.” *Miller v. Pacific Trawlers, Inc.*, 204 Or App 585, 591-92, 131 P3d 821 (2006) (Court refused to consider arguments on direct appeal regarding trial court’s refusal to change venue; held proper remedy was to pursue a writ of mandamus from the Supreme Court).

### III. Motions for Default

ORCP 69 C sets forth the requirements for a motion for default for a defendant’s non-appearance after summons and complaint are served. The declaration that accompanies the motion must establish service on the defendant, failure to appear, and confirmation that the party is neither incapacitated, a minor, nor in the military. *See* ORCP 69 C(1). If the defendant has provided written notice of intent to appear, see ORCP 69 B, the notice must also establish compliance with the ten days’ notice requirement of ORCP 69 C(1)(c).


A party seeking to set aside a default judgment must bring a motion under ORCP 71. A trial court’s decision under ORCP 71 B to set aside an earlier judgment is reviewed for abuse of discretion. *See Hoddenpyl v. Fiskum*, 281 Or App 42, 48-49, 383 P3d 432 (2016) (Court of Appeals reversed denial of motion to set aside where defendant’s ORCP 69 B letter was mailed to prior address for plaintiff’s counsel and default was taken; court found excusable neglect under the circumstances); *Union Lumber Co. v. Miller*, 360 Or 767, 782-83, 388 P3d 327 (2017) (Supreme Court held trial court did not error in concluding defendants were not entitled to relief from judgment due to excusable neglect); *cf, Reeves v. Plett*, 284 Or App 852, 395 P3d 977 (2017) (court reversed trial court’s grant of defendant’s motion to set aside where defendant failed to
demonstrate a reasonable excuse in the totality of circumstances surrounding the dereliction that led to the entry of judgment).


Failure of the complaint on which a default judgment is based to set forth the amount of damages sought does not render the default judgment void. PGE v. Ebasco Services, Inc., 353 Or 849, 860, 306 P3d 628 (2013).

IV. Motions on the Pleadings – ORCP 21

A. Motions to Dismiss – ORCP 21 A

Motions to dismiss are used by defendants to eliminate claims for relief or an entire action, or, by plaintiffs to eliminate affirmative defenses. ORCP 21 A specifies the grounds for dismissal:

- Lack of jurisdiction over the subject matter;
- Lack of jurisdiction over the person;
- There is another action pending between the same parties for the same cause;
- Plaintiff does not have legal capacity to sue;
- Insufficiency of summons or process, or insufficiency of service;
- The party asserting the claim is not the real party in interest;
- Failure to join a party under ORCP 29;
- Failure to state ultimate facts sufficient to constitute a claim; and
- The pleading shows that the action has not been commenced within the applicable statute of limitation.

Raise them or waive them

Certain defenses are waived if not raised by motion before pleading, or in the first responsive pleading. See Horton v. Western Protector Ins. Co., 217 Or App 443, 449, 176 P3d 419 (2008) (SLAPP motion to strike must be made before responsive pleading is filed).

- ORCP 21 G(1) – Lack of jurisdiction over the person, insufficiency of summons or process, insufficiency of service, another action pending


- ORCP 21 G(2) – Defense that the action has not been commenced within the time limited by statute is waived if it is neither made by motion nor included in a responsive pleading or, in limited circumstances, amendment thereof. *See Windorf v. Malco*, 276 Or App 528, 531-32, 368 P3d 60 (2016) (holding plaintiff waived her statute of limitations defense to defendant’s IIED counterclaim by failing to raise it in a motion filed before pleading or in her responsive pleading).

**Failure to state a claim – ORCP 21 A(8)**


This motion may be raised at any time in the trial court, although motions to dismiss are less favored at and after trial. *See Rowlett v. Fagan*, 358 Or 639, 647-48, 369 P3d 1132 (2016); *see Korgan v. Walsleben*, 127 Or App 625, 874 P2d 1334, modified on recons, 128 Or App 454 (1994) (noting that when defense of failure to state a claim is raised for first time on appeal, court is reluctant to base a decision on insufficiency of the pleadings when the defect could have been cured by an amendment if raised in trial court).

A motion to dismiss for failure to state a claim under ORCP 21 A(8) is limited to the allegations of the complaint. The Court of Appeals holds that such motions may not be granted on the basis of anything other than the body of the pleadings themselves. If the motion requires examination of extraneous documents, relief must be pursued via a summary judgment motion. *See Deep Photonics Corp. v. LaChapelle*, 282 Or App 533, 548, 385 P2d 1126 (2016), rev den 361 Or 425 (2017) (*citing Rogers v. Valley Bronze of Oregon, Inc.*, 178 Or App 64, 69 n 3, 35 P3d 1102 (2001)).
The Court of Appeals has held that an untimely response to a motion to dismiss is insufficient to preserve for appeal the issues raised in the response. *Bailey v. State of Oregon*, 219 Or App 286, 292-94, 182 P3d 318 (2008).

The Court of Appeals reviews a trial court's denial of a motion to amend after an ORCP 21 A dismissal for “abuse of discretion.” *Caldeen Const., LLC v. Kemp*, 248 Or App 82, 86, 273 P3d 174 (2012). It was an abuse of discretion for trial court to deny plaintiffs’ request to amend their complaint, and dismiss for failure to state a claim, when there was no indication that an amendment would have prejudiced the defendant, affected the court’s docket, nor reason to believe plaintiffs could not amend to accurately state a claim. *Id.* at 90.

**Dismissal Based on Another Action Pending**

Although ORCP 21 A(3) requires dismissal when another action is pending for the “same cause”, where the plaintiff is a defendant in another pending action, ORCP 21 A(3) does not authorize dismissal of the plaintiff's claim unless it either was required to be asserted as a counterclaim or necessarily will be adjudicated in the other action. *Federal Natl. Mortgage v. United States of America*, 279 Or App 411, 415, 380 P3d 1186 (2016).

**Dismissal Based on Statute of Limitations**

ORCP 21 A(9) permits a defendant to file a motion raising a limitations defense only when the plaintiff's pleading shows that the action is untimely; review is limited to the face of the complaint. *Kastle v. Salem Hospital*, 284 Or App 342, 344, 348, 392 P3d 374 (2017).

**B. Pleading Motions**

- **More definite and certain:** Use ORCP 21 D to “require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense, or reply is not apparent.” *See Stewart v. Kids Incorporated of Dallas, Or.*, 245 Or App 267, 272, 286, 261 P3d 1272 (2011), *rev dismissed*, 353 Or 104 (2012) (affirmed dismissal where complaint failed to allege facts to show why defendants were on reasonable notice of unreasonable risk of harm).

  *See generally Bergstrom v. Assoc. for Women’s Health of So. Ore.*, 283 Or App 601, 607-09, 388 P3d 1241 (2017) (Court of Appeals found error in trial court’s refusal to allow expert to testify on grounds testimony would
be outside of pleadings where, among other things, defendant had not moved to make pleading more definite and certain under ORCP 21 D).

- **Striking sham, frivolous or irrelevant allegations:** Use ORCP 21 E(1) to strike any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated. *See Alfieri v. Solomon*, 358 Or 383, 391-392, 404-405, 365 P3d 99 (2015) (quoting rule, and stating that mediation communications that are confidential under ORS 36.220 and inadmissible under ORS 36.222 cannot form the basis of a legal claim and thus may be struck from a complaint pursuant to ORCP 21 E).

  - A “sham” allegation appears false on the face of the pleading and may be stricken. *Rowlett v. Fagan*, 262 Or App 667, 682, 327 P3d 1 (2014), *aff’d in part, rev’d in part*, 358 Or 639 (2016); *Kashmir Corp. v. Nelson*, 37 Or App 887, 891, 588 P2d 133 (1978); *Warm Springs Forest Products Ind. v. EBI Co.*, 300 Or 617, 619 n 1, 716 P2d 740 (1986) (“Good in form but false in fact; * * * a pretense because it is not pleaded in good faith.”).

  - A “frivolous” pleading under ORCP 21 B “is one which, although true in its allegations, is totally insufficient in substance.” *See Kashmir Corp. v. Nelson*, 37 Or App 887, 892, 588 P2d 133 (1978) (*citing Andreysek v. Andrysek*, 280 Or 61, 69 n 8, 369 P2d 615 (1977)).

  - An “irrelevant” pleading pertains to matters that “are not logically or legally germane to the substance of the parties’ dispute.” *Ross and Ross*, 240 Or App 435, 440-41, 246 P3d 1179 (2011). A pleading may be stricken as either frivolous or irrelevant if it is legally insufficient. *Id.* at 440.

- **Striking redundant allegations or claims/defenses:** Use ORCP 21 E(2) to strike redundant matter from the complaint. *Laurie v. Patton Home for the Friendless*, 267 Or 221, 224, 516 P2d 76 (1973). *See also ORCP 18 A, regarding unnecessary repetition in a pleading.*

### C. Motion for Judgment on the Pleadings


D. **Considerations for Filing Rule 21 Motions**

- ORCP 12 provides for liberal construction and that courts shall “disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.”

- Will the motion completely dismiss a specific claim for relief or the entire case?

- Can the moving party truly understand the nature of the claim or defense pled?

- Does the pleading contain prejudicial or extraneous allegations?

- Whether further pleading is required to aid in discovery or in anticipation of additional motions?

E. **Practice Tips for ORCP 21 Motions:**

- **Certificate of conferral required:** The UTCR 5.010(3) certificate should specify and detail the effort to confer as well as the discussion. *Anderson v. State Farm Mutual Auto Ins. Co.*, 217 Or App 592, 595-96, 177 P3d 31 (2008) (court affirmed trial court’s denial of motion to dismiss for failure to confer, despite purported futility of conferral).

- **UTCR requirements for format and appended copy of subject pleading:** UTCR 5.020(2) requires moving parties to attach to the motion a copy of the pages of the pleadings moved against, showing the parts of the pleading to be stricken or made more definite and certain. Failure to do so will result in denial of the motion.

- **Only certain Rule 21 motions permit consideration of matters extraneous to the pleading:** If a motion to dismiss is based on defenses in ORCP 21 A(1)-(7), a party may submit declarations or other evidence in support. These motions are: lack of subject matter jurisdiction, lack of personal jurisdiction, another action pending, plaintiff
lacks legal capacity, insufficiency of summons or service, plaintiff is not real party in interest, and failure to join a party under Rule 29 (joinder of persons needed for just adjudication)

Black v. Arizala, 337 Or 250, 95 P3d 1109 (2004) (affirming that use of evidence and facts outside the scope of the complaint does not transform a motion to dismiss under ORCP 21 A(1) through (7) to a motion for summary judgment). But see, Macland v. Allen Family Trust, 207 Or App 420, 426, 142 P3d 87 (2006) (rulings under ORCP 21 A(8) and A(9) must confine themselves to the facts alleged).


V. Motions to Amend and Relation Back Under ORCP 23 C

A. Court Has Discretion to Allow Pleading Amendment, ORCP 23 A

Parties may seek to amend pleadings pursuant to ORCP 23. The trial court has reasonable latitude in construing pleadings. Leave to amend “shall be freely given when justice so requires.” ORCP 23 A.

ORCP 23 A states:

**Amendments.** A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Whenever an amended pleading is filed, it shall be served upon all parties who are not in default * * * or against whom a default previously has been entered, judgment may be rendered in accordance with the prayer of the original pleading served
upon them; and neither the amended pleading nor the process thereon need be served upon such parties in default unless the amended pleading asks for additional relief against the parties in default.

A plaintiff may amend once as a matter of right before a responsive pleading has been served. *Alfieri*, 358 Or at 412. Thus, “[e]ven after a motion under ORCP 21 is filed, a plaintiff remains free to amend its complaint once as a matter of right.” *Id.* However, a plaintiff may no longer amend as a matter of right once the court has granted a motion to dismiss or strike an entire pleading, or a motion for judgment on the pleadings is allowed. In that case, the plaintiff must seek leave of the court to amend, and the court may decide whether to allow it. *Id.*; ORCP 25 A.


**B. Relation Back Under ORCP 23 C**

When the need for amendment becomes apparent after the statute of limitations has run, consider the application of ORCP 23 C which provides:

- **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, such party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining any defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party brought in by amendment.
New allegations or claims: An amendment adding a new claim or defense against the same party or parties will relate back to the date of original filing when it arises "out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." ORCP 23 C. See Concienne v. Asante, 273 Or App 331, 359 P3d 407 (2015) (permitting relation back where predicate facts, injury and damages are the same and defendant had adequate notice of claim); Doughton v. Morrow, 255 Or App 422, 432-33, 298 P3d 578 (2013); Griffith v. Blatt, 334 Or 456, 464, 51 P3d 1256 (2002). The courts often construe ORCP 23 C liberally. But see, Hendgen v. Forest Grove, 109 Or App 177, 179, 818 P2d 966 (1991) (denying relation back for amendment to add claim of negligent infliction of emotional distress).

New parties: An amendment adding or substituting a party will be allowed to relate back to the date of original filing when the party to be added received actual notice of the action within the statute of limitations and knew or should have known, but for the mistake, it would have been named as a party to the action. ORCP 23 C; McLain v Maletis Beverage, 200 Or App 374, 115 P3d 938 (2005); see also Smith v. American Legion Post 83, 188 Or App 139, 71 P3d 136, rev den, 336 Or 60 (2003). This means actual notice within the statutory period, not including any extension for service under ORS 12.020. McLain v. Maletis Beverage, 200 Or App 374, 377-81, 115 P3d 938 (2005) (Rule 23 C requires notice within the statutory period, not service); Richlick v. Relco Equipment, Inc., 120 Or App 81, 852 P2d 240, rev den, 317 Or 605 (1993) (court held the amendment did not relate back when party had no notice of the action within the period of limitations).

The rationale for allowing a post-limitation amendment adding a new party to relate back is that a party who is notified of litigation through the original complaint, and is aware that she would have been named but for a mistake in the identity of the proper defendant, has been given the notice that the statute of limitations was intended to insure. Worthington v. Estate of Davis, 250 Or App 755, 282 P3d 895, rev den, 352 Or 565 (2012) (claim against person representative of estate); Welch v. Bancorp Management Services, 296 Or 208, 221, 675 P2d 172 (1983); Mitchell v. The Timbers, 163 Or App 312, 315, 319-20, 987 P2d 1236 (1999) (court held ORCP 23 C may be used to substitute one defendant for another or to correct the name of a defendant who was named incorrectly in the original complaint, but who knew, or reasonably should have known, that he was the entity intended to be sued). Parker v. May, 70 Or App 715, 720, 690 P2d 1125 (1984), rev den, 299 Or 31 (1985) (holding trial court had discretion under ORCP 23 A to allow an amendment with respect to the
party plaintiff after the statute of limitations had expired, and the amendment related back to the original pleadings).

C. Amendments to Conform to the Evidence

When issues not raised by the pleadings are nonetheless tried with the express or implied consent of the parties, the pleadings may be amended to conform to the proof. ORCP 23 B; see Agrons v. Strong, 250 Or App 641, 282 P3d 925 (2012); Fraker v. Benton County Sheriff’s Office, 214 Or App 473, 166 P3d 1137, opinion adh’d to on recons, 217 Or App 159 (2007).

VI. Potential for Refiling under ORS 12.220 When Dismissal Is Based on Procedural Defects

Dismissal based on a procedural ground is not necessarily fatal. When dismissal is on procedural grounds such as ineffective service or lack of jurisdiction, a plaintiff may re-file within 180 days of dismissal without being barred by the statute of limitations. The conditions to re-filing are: (1) the case was not decided on the merits but was dismissed on procedural grounds; (2) the defendant had actual notice of the action within sixty days of the original filing; (3) a new action may be commenced only once for the same claim(s); (4) all defenses that would have been available in the original action shall be available in the new action; and (5) the original action was timely filed. See Ram Technical Services, Inc. v. Koresko, 346 Or 215, 208 P3d 1950 (2009).

ORS 12.220 applies only if the original action was “‘filed with a court within the time allowed by statute.’” Hancock v. Pioneer Asphalt, Inc., 276 Or App 875, 878, 369 P3d 1188 (2016) (footnote omitted) (Court reversed summary judgment in favor of defendant against action refiled under ORS 12.220 where trial court in first action erroneously concluded issue preclusion barred plaintiff from relitigating relation back issue under ORCP 23 C).

VII. Discovery Motions

In civil actions, a party may obtain discovery of non-privileged information that is relevant or calculated to lead to the discovery of admissible evidence, including the identity and location of persons having knowledge of any discoverable matter. ORCP 36 B(1). Persons who are directly and personally familiar with the events at issue may be deposed about their knowledge of those events, even if the opposing party has identified that person as someone who will testify as an expert at trial. See A.G. v. Guitron, 351 Or 465, 268 P3d 589 (2011); Gwin v. Lynn, 344 Or 65, 67, 176 P3d 1249 (2008).
A. Motions to Compel – ORCP 46

Any party may move for an order compelling discovery in accordance with his or her discovery request. ORCP 46.

B. Parties Are Required to Confer

Parties are required to confer in an effort to work out their discovery differences before filing any motion to compel under ORCP 36-46. UTCR 5.010(2).

C. Motions for Protective Orders – ORCP 36 C

A court may make any order upon motion by a party from whom discovery is sought and for good cause shown, where justice requires protection of a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Martin v. DHL Express (U.S.A.), Inc., 235 Or App 503, 234 P3d 997 (2010) (no abuse of discretion to deny discovery deposition before perpetuation given deponent's state of health).

If discovery should be limited or information should be protected, as with trade secrets or confidential research and development, the party may apply for a protective order.

D. eDiscovery: The Rules Have Evolved

1. eDiscovery: Background to the Federal Rules

Zubulake v. UBS Warburg – Judge Scheindlin, SDNY

FACTS: Claims of gender discrimination, failure to promote, and retaliation for filing an EEOC complaint. A series of five decisions were issued regarding various eDiscovery disputes. 

Zubulake I & III

ISSUE: To what extent is inaccessible ESI discoverable and who should pay for its production?

HOLDING:

- Accessible Data = stored in a “reasonably useful format.”
- Inaccessible Data = apply 7-factor proportionality test to balance the broad scope of discovery (FRCP 26(b)) with the cost-consciousness of FRCP 26(b)(2)(C).

NOTE: very fact intensive
Zubulake IV

**ISSUE:** What is a party’s duty to preserve and when is it triggered?

**HOLDING:**

- **Trigger:** “Once a party *reasonably anticipates* litigation, it must suspend its routine document retention / destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”

- **Scope:** Unique, relevant evidence that might be useful to an adversary.

Zubulake V

**ISSUE:** What are the attorney obligations, and what are the penalties for failure to comply with the rules?

**HOLDING:**

- **Duty to Monitor:** “A party’s discovery obligation does not end with the implementation of a ‘litigation hold’ – to the contrary, that’s only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents.”

- **Sanctions:** Failure to preserve relevant ESI constitutes willful spoliation, and the lost information is deemed relevant.

2. **eDiscovery: Following the Rules**

“It all starts with data management and retention. That’s where an organization needs to begin. Once you get a discovery request in litigation, you’re at the mercy of what systems were in place. At that point, it’s too late to make changes.” *Jonathan Sablone, Nixon Peabody, LLP.*

**Developments in the FRCP to Address ESI Issues**

As of December 1, 2015, the FRCP have included additional provisions designed to enhance cooperation between the parties on managing discovery of electronically stored information (“ESI”), and to elevate the importance of proportionality considerations by the court when eDiscovery disputes arise. The Rules were also amended to provide some uniformity with respect to preservation duties and spoliation sanctions. The highlights are as follows:
• FRCP 16(b)(1) – scheduling conferences with the court should be held in person, on the phone, or by more sophisticated electronic means. Scheduling conferences are no longer to be done via mail or email.

• FRCP 26(f) – requiring the parties to confer about potential issues with preservation of data, especially ESI. NOTE: Requests for Production are now allowed to be served before the Rule 26(f) Conference, but the time for response does not begin until after the Rule 26(f) Conference is complete. FRCP 26(d)(2). Early service of RFPs may help guide discussions about discovery and preservation at the parties’ Rule 26(f) Conference.

• FRCP 26(b)(1) – enhancing the importance of proportionality considerations in discovery, especially in light of increasingly voluminous ESI. The parties and the court have a collective responsibility to consider the proportionality of all discovery, and to consider proportionality in resolving discovery disputes.

• FRCP 26(b)(2)(B) – a party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost.

• FRCP 37(e) – sets forth the considerations and some potential sanctions a court may impose if it finds a party either intentionally or unintentionally failed to preserve ESI that cannot be restored or replaced through additional discovery.

Oregon ESI Rules: Current and Proposed

ORCP 43 E – Electronically stored information. A request for [ESI] may specify the form in which the information is to be produced by the responding party but, if no such specification is made, the responding party must produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form.”

NOTE: The Council on Court Procedures is recommending the ORCP include a duty to confer for eDiscovery issues. Under this recommendation, any party may request the meet and confer which must then be held within 21-days of the request. Failure to participate will be considered by the court when ruling on discovery motions. The meet and confer is intended to cover:

• The scope and cost of ESI production
• Relevant search terms
• ESI preservation issues, if any
• Privilege issues, if any
• Issues with metadata
• Any other issue either party deems relevant.

ORCP 36 C – “The court . . . may make any order which justice requires to protect a party or person from . . . undue burden or expense.” There is also a proposal being considered by the Council on Court Procedures to include a definition of “undue burden” that would impose a proportionality analysis similar to the provisions within FRCP 26(b)(2)(C).

3. eDiscovery: Sanctions for Spoliation

_Pension Committee v. Banc of America Securities: Zubulake Revisited_

“This is a case where plaintiffs failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose. As a result, there can be little doubt that some documents were destroyed.” _Judge Scheindlin_

_Spoliation Defined:_ The intentional destruction, alteration, or concealment of evidence.

When relevant documents are not produced, the courts have been historically been granted wide discretion to determine whether the non-production was justified. FRCP 37(a)(3)(A). _See also_ FRCP 37(e) for discovery violations specific to ESI.

_Possible Sanctions Include:_

• Spoliation and/or adverse inference instructions
• Personal fines against executives
• The preclusion of evidence
• Default judgment
• Awarding of cost / attorney fees / sanctions

4. eDiscovery: Metadata

_Metadata: _Information about a particular data set or document that describes how, when, and by whom it was collected, created, accessed, and modified, and how it is formatted.

_Native Format:_ Electronic documents have an associated file structure defined by the original creating application. This file
structure is the document’s native format. Sedona Conference Glossary (2005)

**Metadata and eDiscovery:**

- Not required to produce unless the discovery request specifically asks for metadata.
- Metadata may become the standard for authentication where there is a dispute over the integrity of the EMR.
- Metadata may also be used to challenge the veracity of entries into the EMR by healthcare providers.
- Systemically entered metadata may be treated by some courts as non-hearsay evidence and, therefore, admissible.

Sedona Conference Commentary on ESI Evidence & Admissibility (2008)

**E. Motions for Discovery Sanctions – ORCP 46 B**

The trial court may impose a variety of sanctions for a party’s failure to obey an order to permit or provide discovery. ORCP 46 B(1)-(3), C, D. Sanctions for the failure must be just, but may include striking pleadings, limiting proof at trial, and dismissal. ORCP 46 B(2), 46 D. See Burdette v. Miller, 243 Or App 423, 431-32, 259 P3d 976 (2011) (Court of Appeals held no abuse of discretion in striking defenses of defendant who failed repeatedly to appear for deposition or for sanction hearing).

**VIII. Summary Judgment Motions**

**A. ORCP 47**

**Testing for genuine issues of fact on all elements of claim or defense**

A summary judgment motion is a dispositive motion designed to eliminate the opponent’s case or portions of the case. A court ruling on a motion for summary judgment does not find facts but determines only whether there is a genuine issue of material fact that requires a trial. ORCP 47 C; Bonnett v. Division of State Lands, 151 Or App 143, 145-46 n 1, 949 P2d 735 (1997).

Summary judgment motions test for “triable issues,” or sufficient evidence to entitle a party to a jury determination. Jones v. General Motors Corp., 325 Or


B. Summary Judgment Motions to Resolve All or Portions of a Case

If the moving party can demonstrate there is no issue of material fact on one or more elements of a claim or defense, the moving party is entitled to summary judgment, or partial summary judgment, on all or a portion of the opponent’s case. ORCP 47 C; Perman v. C.H. Murphy/Clark-Ullman, Inc., 220 Or App 132, 138, 185 P3d 519 (2008). An absence of evidence showing a genuine issue of fact on causation in a claim for negligence, for example, would in itself support a summary judgment in favor of a moving defendant. See, e.g., Gullett v. Fred Meyer, Inc., 150 Or App 262, 266, 946 P2d 311 (1997).

By further example, partial summary judgment may be entered “on the issue of liability alone although there is a genuine issue as to the amount of damages,” ORCP 47 C, or parties may successfully eliminate one or more claims from the case without resolving the entire case. See, e.g., Hendgen v. Forest Grove Community Hospital, 98 Or App 675, 780 P2d 779 (1989) (court upheld summary judgment on medical negligence claim where plaintiff failed to counter defendant’s standard of care affidavit with opposing evidence, but reversed summary judgment on claim for emotional distress, which defendant had not moved against).
C. Considerations When Moving for Summary Judgment

Motions for summary judgment can be time consuming and expensive. Additional considerations before filing include:

- The stage of discovery
- Factual records
- Strength of legal position and likelihood of success
- Educating opponent
- Targeting all or part of the case and impact on the balance
- Timing

Although ORCP 67 B provides that a judge may render a limited judgment only upon a finding that “there is no just reason for delay,” in *Interstate Roofing, Inc. v. Springville Corp.*, 217 Or App 412, 416-17, 177 P3d 1 (2008) * * * aff’d in part, rev’d in part, 347 Or 144 (2009), the court held the judgment document need only bear the title “limited judgment” to comply with ORCP 67 B. *Id.* at 420.

D. Responses to Summary Judgment Motions

After the moving party has pointed out the lack of any genuine issue of material fact and that it is entitled to judgment as a matter of law, to avoid summary judgment the nonmoving party must produce evidence sufficient to meet a burden of production on any issue on which they would bear the ultimate burden of persuasion at trial. ORCP 47 C; *Hagler v. Coastal Farm Holdings, Inc.*, 354 Or 132, 140, 309 P3d 1073 (2013); *Greer v. Ace Hardware Corp.*, 256 Or App 132, 140, 300 P3d 202 (2013); *Weihl v. Asbestos Corporation*, 204 Or App 255, 265, 129 P3d 748 (2006), *rev den*, 342 Or 254 (2006) (applying burden-shifting rule); see also *Celotex Corp. v. Catrett*, 477 US 317, 322-26, 106 S Ct 2548, 91 L Ed 2d 265 (1986) (setting out federal summary judgment framework). Thus, the burden shifts to the nonmoving party to come forward with evidence demonstrating the existence of a material fact for trial.

When a defendant bears the burden of persuasion at trial as to a specific issue, the defendant must demonstrate with uncontroverted evidence that all reasonable factfinders would have to find in defendant’s favor. *Williams v. CBS Corp.*, 286 Or App 1, 6-7, 398 P3d 411 (2017) (court must be able to conclude that no reasonable factfinder could reject defendant’s claim that it had transferred all of its liabilities; concluding that reasonable factfinder could reject defendant’s defense, court reversed summary judgment granted in its favor). A party opposing summary judgment cannot rely on the allegations and denials in his or her pleadings to establish a question of fact. *Tiedemann*, 299 Or at 238. A party opposing summary judgment must show the existence of a factual
question on all dispositive issues framed by each of defendant’s motions. *Towe v. Sacagawea, Inc.*, 357 Or 74, 85, 347 P3d 766 (2015); *Two Two v. Fujitec America, Inc.*, 355 Or 319, 324, 325 P3d 707 (2014) (same). Uncontroverted testimony on summary judgment cannot be controverted simply by asserting that it should not be believed. *Blandino v. Fischel*, 179 Or App 185, 39 P3d 258 (2002); ORCP 47 D. In *Love v. Polk County Fire Dist.*, 209 Or App 474, 149 P3d 199 (2006), the court affirmed the trial court’s judgment in favor of the employer where the employee failed to adduce any evidence showing her complaints were objectively reasonable. In *Chapman v. Mayfield*, 358 Or 196, 220, 361 P3d 566 (2015), involving a negligence claim against a tavern keeper, court held plaintiff’s evidence was insufficient to create a triable issue of fact on foreseeability; plaintiffs “were required to show that defendant knew or should have known that overserving alcohol to [customer] would create an unreasonable risk of harm to plaintiffs of the type that they suffered.” *See Western Property Holdings LLC v. Aequitas Capital Management*, 284 Or App 316, 392 P3d 770 (2017) (court affirmed summary judgment on multiple claims, including breach of contract, breach of duties under special relationship and negligence).

ORCP 47 D requires affidavits or declarations based on personal knowledge and admissible evidence.

The party opposing summary judgment may be able to defeat it if he can show some specific fact that directly places an affiant’s credibility in doubt. *See Barnett v. Redmond Sch. Dist. 2J*, 209 Or App 724, 149 P3d 250 (2006). In *Magnuson v. Toth Corp.*, 221 Or App 262, 190 P3d 423 (2008), rev den, 345 Or 415 (2008), the court reversed a summary judgment in favor of defendant where plaintiff lacked direct evidence but, according to the court, circumstantial evidence and common sense created sufficient inference to establish causation. *See also Croce v. Hudler*, 246 Or App 649, 659-60, 267 P3d 176 (2011), adhered to as modified, 248 Or App 180, 274 P3d 858 (2012) (plaintiff’s circumstantial evidence sufficient to rebut defendant’s declaration concerning knowledge of fraud).

Also, the trial court has discretion to refuse the motion for summary judgment or to order a continuance to permit discovery and the opportunity to obtain affidavits or declarations. ORCP 47 F.
E. Declarations

1. Supporting Affidavits and Declarations.

The declaration must be based on personal knowledge and must “set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein.” ORCP 47 D; Spectra Novae, Ltd. v. Waker Associates, Inc., 140 Or App 54, 58, 914 P2d 693 (1996) (quoting the rule).

The declarant satisfies the requirement for personal knowledge when the affidavit is read as a whole, and an objectively reasonable person would understand that the statements are made from the affiant’s personal knowledge and with competence. West v. Allied Signal, Inc., 200 Or App 182, 113 P3d 983 (2005).

Because personal knowledge and admissibility are key, the rules of evidence come into play. When evidentiary challenges are raised, the court will assess the admissibility of particular evidence. See Perman v. C.H. Murphy/Clark-Ullman, Inc., 220 Or App 132, 138, 185 P3d 519 (2008) (analyzing admissibility of lay opinion under OEC 701); but see Greer v. Ace Hardware Corp., 256 Or App 132, 140-41, 300 P3d 202 (2013).

Declarations must be presented in good faith. If not, a court may order the offending party to pay the amount of reasonable expenses that the offending affidavit caused the other party to incur, and/or sanctions for contempt. ORCP 47 G; Interstate Roofing, Inc. v. Springville Corp., 221 Or App 604, 191 P3d 743 (2008) (rule authorizes only reasonable expenses that bad faith affidavits caused the party to incur).

2. Striking Inadmissible Information and Statements.

The opposing party may move to strike the entire declaration or the offending portions. Objections might include arguments that the averments are based on:

Hearsay – Hearsay statements not falling within any exception to the hearsay rule are inadmissible and should not be considered. In Perman, 220 Or App at 138, the court held that although the affidavits of plaintiff’s coworker contained hearsay reference, they were susceptible to the
inference that the coworker’s knowledge was provided by an agent of defendant, and would fall within the hearsay exception provided by OEC 801(4)(b)(D). Further, husband’s lay opinion that the gloves he used contained asbestos was admissible under OEC 701.

- Opinions – “Opinions as to liability are legal conclusions and are not the proper subject of a witness’s testimony.” Olson v. Coats, 78 Or App 368, 717 P2d 176 (1986).
- Legal conclusions – An affidavit that merely states legal conclusions is not sufficient to create a question of fact. Spectra Novae Ltd., 140 Or App 54, 59, 914 P2d 693 (1996).
- Irrelevant averments – Affidavit statements that are irrelevant should play no part in the court’s consideration.

A party must make evidentiary objections to a motion for summary judgment before the motion is decided. Otherwise, the evidence may be considered. Aylett v. Universal Frozen Foods Co., 124 Or App 146, 154, 861 P2d 375 (1993).

F. Expert Declarations.

Expert testimony may be required on specific claims, such as claims for medical or other professional negligence. See Getchell v. Mansfield, 260 Or 174, 179, 489 P2d 953 (1971) (expert testimony required to establish the standard of care in the community). See also Docken v. Ciba-Geigy, 101 Or App 252, 256, 790 P2d 45, rev den, 310 Or 195 (1990) (same). But see Chapman v. Mayfield, 358 Or 196, 218-22, 361 P2d 566 (2015) (expert testimony concerning connection between intoxication and violent behavior did not create question of fact where the expert’s statements about the risk of harm were too generalized and there was no evidence defendant tavern-owner was aware of the connection).

When a party opposing summary judgment is required to provide the opinion of an expert to establish a genuine issue of material fact, ORCP 47 E permits the party’s attorney to submit an affidavit or declaration “stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact[.]” ORCP 47 E is designed to protect the expert’s identity and opinions from disclosure before trial. Stotler v. MTD Products, Inc., 149 Or App 405, 408, 943 P2d 220 (1997); Moore v. Kaiser Permanente, 91 Or App 262, 265, 754 P2d 615, rev den, 306 Or 661 (1988).

A Rule 47 E affidavit or declaration must be made in good faith and be based on admissible facts or opinions of a qualified expert. Two Two v. Fujitec Am., Inc.,
355 Or 319, 328-29, 325 P3d 707 (2014) (if ORCP 47 E affidavit is filed in bad faith, offending party pays reasonable expenses incurred by other party as a result and may be subject to sanctions). An attorney’s affidavit in compliance with ORCP 47 E will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for denying summary judgment.

The affidavit need not specify the issues on which the expert will testify. Id. at 329; Moore v. Kaiser Permanente, 91 Or App 262, 265, 754 P2d 615 (1988) rev den, 306 Or 661 (1988). If the affidavit does not specify the issues, the trial court must presume that the expert would testify on every issue on which summary judgment is sought. Two Two, 355 Or at 330; Stotler, 149 Or App at 409. ORCP 47 C requires the court to view the attorney affidavit in the light most favorable to the nonmoving party. Two Two, 355 Or at 330-31 (Court held that plaintiffs’ affidavit stating that an expert would support their claims that defendant “was negligent in [its] service and maintenance” of the elevator indicated that the expert would not only testify to the standard of care, but also to all elements of a negligence claim, including causation).

However, if an attorney affidavit asserts that an expert will address specific issues raised in the motion for summary judgment, the affidavit will defeat summary judgment only as to the specified issues; other evidence must be produced to defeat summary judgment on the remaining issues raised in the motion. Two Two, 355 Or at 330; see also Moore, 91 Or App at 265; Piskorski v. Ron Tonkin Toyota, Inc., 179 Or App 713, 41 P3d 1088 (2002), which provides a good example of utilizing an attorney affidavit that says too much, with the impact of limiting permissible considerations in response to summary judgment. But see Lavoie v. Power Auto, Inc., 259 Or App 90, 312 P3d 601 (2013) (involving the question of whether the attorney affidavit must address defendant’s affirmative defense in order to survive summary judgment).

IX. Motions to Dismiss Pursuant to ORCP 54

A. Voluntary Dismissal

A plaintiff may dismiss a case voluntarily by filing a notice of dismissal and serving it on defendant not less than five days before trial. A pending counterclaim will prevent voluntary dismissal. ORCP 54 A(2). However, a defendant’s pending motion for summary judgment will not prevent a plaintiff from obtaining a voluntary dismissal without prejudice as long as plaintiff files notice of voluntary dismissal before the court has entered an order and judgment on the summary judgment motion. Ramirez v. Northwest Renal Clinic, 262 Or App 317, 321, 324 P3d 581 (2014). Alternatively, the parties may stipulate to dismissal.

B. Involuntary Dismissal by Court

A court may order dismissal upon motion by a party for failure to comply with the rules of civil procedure or any order of court. ORCP 54 B(1). Dismissal may also be entered based on insufficiency of evidence in an action tried to the court, ORCP 54 B(2), or for failure to prosecute. ORCP 54 B(3); Venture Properties, Inc. v. Parker, 223 Or App 321, 336-37, 195 P3d 470 (2008).

X. Pretrial Motions

A. Motions in Limine

Challenges to the admissibility of evidence that you know your opponent will try to introduce may be heard in a motion in limine filed before the commencement of trial. See, e.g., Warren v. Imperia, 252 Or App 272, 287 P3d 1128 (2012); Sanderson v. Mark, 155 Or App 166, 176, 962 P2d 786 (1998) (disqualification of witness). A motion in limine “provides a legal procedure to flush out problems to be encountered during the trial, before a jury is contaminated with the evidence. The Oregon Supreme Court explains that an objection to evidence, with a motion to tell the jury to disregard it, is a poor alternative. The old cliche, ‘you can’t unring a bell,’ still applies.” State v. Foster, 296 Or 174, 182, 674 P2d 587 (1983).

Some examples of subjects for motions in limine include:

- Insurance
- Workers’ compensation
- Remarriage
Other bad acts
Prejudicial or inflammatory evidence
Residence of party and/or lawyers
Alienage
Prior legal actions.

B. OEC 104 Hearings

A party may request a rule 104 hearing to obtain pre-trial rulings on competency or on admissibility of evidence that has questionable relevancy or is prejudicial. In *State v. O'Key*, 321 Or 285, 307 n 29, 899 P2d 663 (1995), the court stated that the validity of scientific evidence “should be addressed by the court in a separate OEC 104(1) hearing.”

*See Kennedy v. Eden Advanced Pest Technologies*, 222 Or App 431, 193 P3d 1030 (2008) (Court of Appeals reversed trial court ruling following OEC 104 hearing that excluded testimony of plaintiff’s expert on grounds that expert’s diagnosis and reasoning were not supported by valid science; court held testimony was admissible). For other cases on the admissibility of scientific evidence, see *Hall v. Baxter Healthcare, Corp.*, 947 F Supp 1387 (1996); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469 (1993); *Kumho Tire Co. v. Carmichael*, 526 US 137, 119 S Ct 1167, 143 L Ed 2d 238 (1999).

If a party seeks a ruling on admissibility before trial, but fails to make an offer of proof, or the court reserves its ruling without making one, nothing has been preserved for appeal. To preserve the issue for later review, the offering party should make an offer of proof and obtain a court ruling. *See State v. Foster*, 296 Or 174, 674 P2d 587 (1983).

XI. Trial Motions

A. Evidentiary Rulings

At trial, parties must promptly move to strike any inadmissible testimony. OEC 103(1)(a).

When evidence is excluded, the party offering it must state the reason(s) the evidence is admissible and make an offer of proof. Otherwise, unless the substance of the evidence was made known to the court or is apparent from the context within which questions were asked, the error is not preserved.

B. Motions Based on Misconduct
When an attorney perceives alleged misconduct or impropriety by a party, counsel, the court or a juror that may form the basis for mistrial, he or she must decide whether to move for mistrial and, if so, must bring the matter to the court’s attention immediately. Grounds for mistrial are waived unless the aggrieved party makes a prompt motion at the time the objectionable event occurs.

C. Motions Challenging Sufficiency of the Evidence – Motions to Dismiss and for Directed Verdict – ORCP 54 and 60

When trial is to the court, a party must move for dismissal pursuant to ORCP 54 B based on the insufficiency of the evidence before the court’s decision if she wants to raise the sufficiency of the evidence on appeal. ORCP 54 B(2); Edward D. Jones & Co. v. Mishler, 161 Or App 544, 564, 983 P2d 1086 (1999).

A court considering an ORCP 54 B(2) motion is required to consider whether the evidence it had received supported the claim that the parties had litigated. In other words, in ruling on a motion for judgment of dismissal, the court’s assessment is not constrained by the opponent’s pleading. Dayton v. Jordan, 280 Or App 236, 247, 381 P3d 1041 (2016).

When trial is to a jury, a party challenging the sufficiency of the evidence on a claim or defense may bring a motion for directed verdict pursuant to ORCP 60. A directed verdict based on insufficiency of the evidence is appropriate when there is a complete absence of proof of an essential issue or if there is no conflict in the evidence and it is susceptible of only one construction. Boynton-Burns v. University of Oregon, 197 Or App 373, 379, 105 P3d 893 (2005). The “any evidence” standard applies to motions for a directed verdict with respect to punitive damages, even though the underlying claim requires a clear and convincing evidentiary standard. Hamlin v. Hampton Lumber Mills, Inc., 222 Or App 230, 237, 193 P3d 46 (2008), modified, 227 Or App 165 (2009), rev’d on other grounds, 349 Or 526 (2011).

Appellate courts review the denial of a motion for directed verdict for any evidence to support the verdict in plaintiff’s favor, construing all reasonable inferences from the evidence in favor of plaintiffs. American Fed. Teachers v. Oregon Taxpayers United, 345 Or 1, 189 P3d 9 (2008). The verdict will not be set aside unless the court can affirmatively say there is no evidence from which the jury could have found the facts necessary to support the verdict. Currier v. Washman, LLC, 276 Or App 93, 97, 366 P3d 811 (2016) (citing Brown v. JC Penney Co., 297 Or 695, 705, 688 P2d 811 (1984)).

Distinguish a motion to strike testimony of an expert based on legal insufficiency, which should be made contemporaneously with the offending testimony rather than at the end of the case-in-chief. *See generally*, *Miller v. Pacific Trawlers, Inc.*, 204 Or App 585, 595, 131 P3d 821 (2006) (Court held motion to strike at end of case was not timely and, therefore, assignment of error on appeal would not be considered); *Banaitis v. Mitsubishi Bank., Ltd.*, 129 Or app 371, 390, 879 P2d 1288 (1994), *rev dismissed*, 321 Or 511 (1995) (“A motion to strike is untimely, unless it is made as soon as the ground for the motion [is] disclosed.”).

**XII. Post-Trial Motions**

**A. Motions for Judgment Notwithstanding the Verdict (JNOV) – ORCP 63**

The moving party must move for a directed verdict “or its equivalent” at the close of all the evidence before that party may move post-trial for JNOV. ORCP 63 A. *Wieber v. FedEx Ground Package Sys., Inc.*, 231 Or App 469, 478, 220 P3d 68 (2009), *rev den*, 349 Or 664 (2011); *Hamilton v. Lane County*, 204 Or App 147, 152, 129 P3d 235 (2006). An equivalent motion may include a motion to strike or a motion to withdraw an issue from the jury's consideration. A defendant that moves for a directed verdict after the plaintiff's case must renew it at the close of all the evidence in order to preserve its challenge. *Iron Horse Eng’g Co. v. Northwest Rubber Extruders, Inc.*, 193 Or App 402, 89 P3d 1249, *rev den* 337 Or 657 (2004).

1. **The “Any Evidence” Standard.**

A motion for JNOV will be granted only if the nonmoving party has presented no evidence to support the verdict. In other words, if there is any evidence to support each element of the claim, a motion for JNOV will be denied.
2. Alternative Motion for New Trial, ORCP 63 C.

If a party moves for JNOV and fails to join an alternative motion for a new trial, any new trial motion shall be deemed waived. This waiver applies to any right to a new trial, either on the court’s own motion or on appeal, for any issue addressed in the motion for judgment n.o.v. Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, 322 Or 406, 908 P2d 300 (1995), opinion modified on reh’g, 325 Or 46 (1997); see Hamilton v. Lane County, 204 Or App 147, 153, 129 P3d 235 (2006) (Court held defendant waived a new trial remedy when it failed to move for new trial in the alternative to its motion for judgment notwithstanding the verdict).

If, on the other hand, the moving party joins an alternative motion for a new trial with the motion for judgment notwithstanding the verdict, the motion for JNOV will take precedence. The trial court will rule on the motion for new trial even if it grants the motion for JNOV. ORCP 63 C.

3. Procedure, ORCP 63 D.

A motion for JNOV must be filed not later than 10 days after entry of the judgment, unless the trial court allows an extension. ORCP 63 D(1). And, beware, the motion must be “determined” within 55 days after entry of the judgment to be set aside or it “shall conclusively be deemed denied.” This requires that the order must be entered in the docket before the expiration of the 55 days. See McCollum v. K-Mart Corp., 347 Or 707, 711, 226 P3d 703 (2010) (new trial motion).

ORCP 63 D(2) provides that a timely post-trial motion for JNOV may be filed even after a notice of appeal by another party, but within the 10-day period allowed by ORCP 63 D(1). If the motion is filed after a notice of appeal, the Court of Appeals must be served with the motion and notified of the trial court’s order within seven days.

B. Motions for New Trial - ORCP 64

1. Grounds for New Trial

A judgment may be set aside and a new trial granted following a jury trial on the motion under ORCP 64 of any party “aggrieved for any of the following causes materially affecting the substantial rights of such party”:

B(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of
discretion, by which such party was prevented from having fair trial.

B(2) Misconduct of the jury or prevailing party.

B(3) Accident or surprise which ordinary prudence could not have guarded against.

B(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

B(5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B(6) Error in law occurring at the trial and objected to or excepted to by the party making the application.


The moving party must specify the grounds for new trial plainly. The court will not consider any ground not so stated. Some grounds for new trial require support by declaration, setting forth the facts upon which the motion is based. If the ground is “newly discovered evidence, the affidavits or declarations of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction.” ORCP 64 D.

A motion brought under ORCP 64 B(5), that the evidence is insufficient to justify the verdict or other decision, or that is against the law, requires a prior motion for a directed verdict, or, in the case of a bench trial, a motion to dismiss under ORCP 54 B(2). Migis v. AutoZone, Inc., 282 Or App 774, 808, 387 P3d 381 (2016), adh’d to in part on recons, 286 Or App 357 (2017).

The grounds for new trial following a trial to the court mirror those supporting a new trial after a jury verdict. ORCP 64 C. The court is permitted to reopen the record on sufficient showing, to take additional
testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

2. **Procedure, ORCP 64 D and F**

Like a motion for JNOV, a motion for new trial must be filed no later than 10 days after entry of the judgment, unless the trial court allows an extension. ORCP 64 F(1). And, again, the motion must be “determined” within 55 days after entry of the judgment to be set aside or it “shall conclusively be deemed denied.” An order not signed in open court must be formally entered in the court register to be “determined” under this rule. *McCollum v. K-Mart Corp.*, 347 Or 707, 712-13, 226 P3d 703 (2010) (vacating the Court of Appeals decision, the Oregon Supreme Court held that a letter opinion filed and entered into the court register is not an order). Additionally, it is essential that the order (if not signed in open court) be formally entered into the court register within the 55 day period. *Id.* at 713. For example, although the trial court in *McCollum* signed and filed an order (separate from the letter opinion) within the 55 day requirement, the order was not entered in the court register until 59 days after the entry of judgment; thus, plaintiff’s motion for new trial was conclusively denied as a matter of law. *Id.*

ORCP 64 F(2), permits a motion for new trial even after a notice of appeal has been filed.

C. **Motions to Stay Enforceable Judgment Pending Determination of Post-Trial Motions**

A motion to stay enforcement of a judgment may be required pending resolution of post-trial motions. “[T]he filing of motions for a new trial and for judgment notwithstanding the verdict have no effect on the enforceability of a judgment.” *Thompson v. Tlat, Inc.*, 205 Or App 518, 522, 134 P3d 1099 (2006) (footnote omitted; applying rules of statutory construction, court distinguished between appealability and enforceability of final judgment pending determination of motions for new trial and JNOV). Thus, if you want to stay enforcement efforts, bring the request for a stay to the court’s attention as expeditiously as possible.
CIVIL MOTION PRACTICE:
The Road to Trial

Shaping Your Case

The Rules Provide the Roadmap

Oregon State Court:
- Oregon Rules of Civil Procedure
- Uniform Trial Court Rules
- Supplemental Local Rules

Federal Court:
- Federal Rules of Civil Procedure
- Local Rules

Requirements for Filing

- Conferral
  Pleading motions, amendments, discovery
- Local rules
  May have specific requirements
- Delivery to the Clerk
- Timelines matter!
Venue Motions

Is Venue Proper?
(ORS Chapter 14)

* Where cause of action arises or property is located.
* Where a defendant resides or conducts business.

Motion based on improper venue must be the first appearance, but other venue motions may be filed any time before trial.

Change of Judge

Basis for disqualification?

ORS 14.250: Belief by party or counsel that judge is prejudiced or impartial
ORS 14.260 & 14.270: time for filing depends on population
* Affidavits must state motion is made in good faith and not for the purpose of delay

Motions for Default

ORCP 69
Available for defendant’s failure to appear
* 10 days notice of intent to take default required to be filed and served by a plaintiff who has received written notice of representation and intent to appear by counsel for defendant.
* Order for default requires declaration showing facts of service and non-appearance.
* Clerk or court may allow order.
Default Orders

ORCP 69 E(3)
Motor vehicle cases have additional requirements
* Must notify insurer 30 days before applying for default, if plaintiff knows or could learn identity of insurer from Dept. of Transportation records.

Default Judgments

ORCP 69 B(1)
* By court or clerk, in some instances
  or
ORCP 69 B(2)
* By application to the court, with declaration showing defaulted party is not minor or incapacitated, and declaration defaulted party not in military service.

Pleading Motions (ORCP 21):
Will the Motion Help?

* Motions limited to face of the pleading?
* Re-pleading available/helpful?
* Effect a dismissal?
* Eliminate prejudicial or extraneous allegations?
* Educate (Opposing counsel! The judge!)

Conferral required for most Rule 21 motions. UTCR 5.010(1)
Pleading Motions – ORCP 21

ORCP 21 G(1) & (2)
Raise or waive the following grounds:
- Lack of jurisdiction
- Insufficiency of service
- Another action pending
- Plaintiff lacks capacity
- Plaintiff not real party in interest
- Statute of limitations

Failure to State a Claim

ORCP 21 A(8)
Motion to dismiss for failure to state ultimate facts sufficient to constitute a claim.

Testing the sufficiency of the allegations
The court assumes truth of all well-pleaded allegations and draws inferences in favor of the non-moving party.

Refining the Opposition’s Pleading

- Make more definite and certain, ORCP 21 D
- Striking sham, frivolous or irrelevant allegations, ORCP 21 E
- Striking redundant allegations or claims or defenses, ORCP 21 E(2)
Motions to Amend

ORCP 23 A

* A party is allowed one amendment before a responsive pleading is filed.

* Then, amendment allowed only by stipulation or discretionary court order.

Relation Back to Avoid Limitations

ORCP 23 C
Claim arises out of same conduct, transaction or occurrence

Additional requirements for changing or adding a party:
The new party must have had notice and was aware s/he would have been named but for mistake

Discovery Motions

Motions to Compel, ORCP 46
Motions for Protective Orders, ORCP 36 C
Motions to Quash
Motions for Sanctions, ORCP 46 B
Summary Judgment Motions

**ORCP 47**
Dispositive motions

**Testing for genuine issues of fact**

- All or part of any claim or defense
- Entire claim or defense
- Single element
- Damages and items of damage

MSJ Considerations

- Timing
- Stage of discovery
- Strength of legal position
- Expense
- Impact on balance of case
- Educating opponent

MSJ Responses Required

- Non-moving party cannot rely on allegations and denials in pleadings.
- Non-moving party must produce evidence sufficient to meet burden of production on any issue on which they bear burden at trial.
- Response must be based on admissible evidence.
MSJ Declarations/Affidavits

**ORCP 47 D**
Requirements
- Personal knowledge
- Set forth facts admissible in evidence
- Show competence to testify
- Good faith

Opponent may challenge admissibility in motion to strike

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MSJ Expert Affidavits

**ORCP 47 E**
Allows for the use of attorney declarations or affidavits when expert testimony is required

“[A]n unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact **.”

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Motions to Dismiss, ORCP 54

**ORCP 54 A**
Voluntary dismissal

**ORCP 54 B**
Dismissal by court order on motion and order for:
- Failure to comply with rule or court order
- Insufficient evidence at trial
- Failure to prosecute
Pretrial Motions

- Motions to bifurcate
- Motions to exclude witnesses
- Motions in limine
  Challenges to admissibility of evidence or anticipated arguments.
- OEC 104 Hearings
  Testing competency or admissibility, for relevance or prejudice.

Common Trial Motions

- Evidentiary rulings and motions to strike
- Motions raising misconduct issues
- Motions for mistrial
- Motions re sufficiency of evidence
- Preservation!

KJH
CHAPTER 10

CRIMINAL LAW

Ryan J. Anfuso
Anfuso Law PC
CRIMINAL LAW OUTLINE:

What is criminal law?

Prosecutors

1. Federal, State, County, and Municipal
2. Salary paid by the government
3. Represents the people

Defense Attorney

1. Public defenders, consortium/contract, and private lawyers
2. Salary paid by either the government or individual clients
   - No pay parity – oftentimes prosecutors will make more money than their public defender counterpart
3. Represents individuals charged with crimes

Choose a style that fits you.

1. A person who prefers legal research and writing would probably enjoy appellate work whereas a person who is quick on their feet and enjoys being in the courtroom may enjoy trial level work.

Why become a criminal defense attorney?

1. There is never a dull moment.
2. You will constantly be presented with situations that will surprise and even shock you.
3. You get to work with real people who have real problems that you can help them solve.
4. You get to be your own boss.
5. You can go to court and actually try cases in front of juries.

What are the drawbacks to criminal defense practice?

1. High stress, high stakes – it’s pretty heavy stuff.
2. No room for error when you are dealing with someone’s liberty.
3. You will constantly be presented with situations that will surprise and even shock you.
4. You are your own boss.
5. Your clients will have real problems – apart from the criminal charges they are facing.

How to become a (competent) criminal defense attorney

1. Mentorship, practice, practice, practice
2. Watch other lawyers try cases
3. Work for a public defense organization either as a lawyer or as a law student
4. Work for a private criminal defense attorney
5. Work as a prosecutor
6. PLF and OSB resources

The life of a criminal case in the public record:

1. Police respond to an incident
2. Police either do nothing, make an arrest, issue a citation, or refer the case to the prosecutors office for review
3. Prosecutor reviews the case to determine what if any crime(s) has/have been committed
4. Prosecutor issues case at arraignment or brings the case to grand jury

5. Client appears at arraignment (unless misdemeanor and waiver) and is formally charged
   a. Felony cases may get a preliminary hearing after arraignment if not indicted

6. Pre-trial conference(s)
   a. Settlement conference – in some jurisdictions and for major cases

7. Resolution
   a. Dismissal
   b. Plea
   c. Trial

8. Sentencing (if conviction)

9. Appeal (if requested by either side)

Getting clients.

1. Initial interviews

2. Fee agreement/fixed v. retainer

Your hired, now what?

1. What is the charge/charges?

2. What is the maximum/minimum penalty?

3. What does the statue say?

4. What does the jury instruction say?

5. What pretrial motions can/should you file?

6. What are the potential defenses?
7. What does the case law say on any of the above?

Practical Tips:

2. Don't over promise.
3. Be honest.
4. Be prepared.
5. Protect your reputation.
7. Know your cases better than anyone else in the room.
8. LISTEN TO YOUR CLIENTS
Chapter 11

THE FUNDAMENTALS OF PRACTICE MANAGEMENT

TABLE OF CONTENTS

To view these chapter materials and the additional resources below on or before November 1, go to www.osbplf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After November 1, select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

PLF Practice Aids available at www.osbplf.org > Practice Management > Forms

Calendaring and File Tickling- Information
https://www.osbplf.org/assets/forms/pdfs/Calendaring%20and%20File%20Tickling%20Info.pdf

Conflict of Interest Systems- Procedures

Engagement Letter
https://www.osbplf.org/assets/forms/pdfs/ENGAGEMENT%20LETTER.pdf

Retainer Fee Agreement
https://www.osbplf.org/assets/forms/pdfs/RETAINER%20AGREEMENT.pdf

Client Status Report

File Retention and Destruction Guidelines

Checklist for Scanning Client Files
https://www.osbplf.org/assets/forms/pdfs/Checklist%20for%20Scanning%20Client%20Files.pdf
Removing Metadata
https://www.osbplf.org/assets/forms/pdfs//Removing%20Metadata.pdf

Unwanted Data: How to Properly Destroy Data in Hardware

Office Sharing Guidelines

Contract Lawyer Checklist

Contract Project Letter of Understanding

The Of Counsel Relationship
https://www.osbplf.org/assets/in_briefs_issues/The%20Of%20Counsel%20Relationship%20IN%20BRIEF%202011.pdf

Checklist for Departing Lawyers
https://www.osbplf.org/assets/forms/pdfs//Checklist%20for%20Departing%20Lawyers.pdf

Articles- Departing a Firm
https://www.osbplf.org/assets/forms/pdfs//Articles%20Departing%20a%20Firm.pdf
The Fundamentals of Practice Management

Practice Management Advisors:
Sheila Blackford
Hong Dao
Rachel Edwards
Jennifer Meisberger

Topics
1. Trust Accounting
2. Calendaring
3. Conflicts
4. File Management
5. Safe Use of Technology
6. Common Pitfalls

Trust Accounting
The proper mindset
A lawyer should hold property of others with the care required of a professional fiduciary.

Not your property
Client’s or third party’s property
Lawyer’s property

Money must be kept in one or more trust account
IOLTA: Interest On Lawyer Trust Account
Only for money that cannot earn net interest
Other trust accounts:

Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyer Trust Account:

Where unearned money belongs

Duty of safekeeping client property
No commingling funds

Don’t spend what you don’t have

Provide clear accounting to your client

- Explain billing procedures
- Send regular period billing statements
- Explain handling of trust account in written fee agreement
Watch out for Earned-on-Receipt

- Does NOT go into trust account
- Must have written signed agreement

Trust account recordkeeping

- Keep client ledger cards and trust account journal
- Maintain subaccount records for each client
- Keep a “paper” trail
- Do three-way reconciliation
- Keep for 5 years

Clients able to earn net interest

- Don’t put in IOLTA trust account
- Open separate interest bearing trust account
- Evaluate using 6 factors in ORPC 1.15-2(d)

5 years after
2. The expected duration of the deposit
3. The rate of interest at the financial institution
4. The cost of establishing and administering a separate interest bearing lawyer trust account
5. The capability of the financial institution and the lawyer to calculate and pay income
6. Any other circumstances that affect the ability of the client’s funds to earn net return

Review your IOLTA account at reasonable intervals

Don’t lose track of your clients
- Promptly return trust balances to respective clients
- Unclaimed trust funds have special procedures
- Funds abandoned after 2 years
- Report to Department of State Lands
- Remit funds to Oregon State Bar
Calendaring

Calendaring System

Efficient and reliable system to docket dates and tickle files

Docketing

- Deadlines and all important dates
- Reminders of upcoming deadlines
- Final reminders
- Follow-up reminders
- Final reviews
Tickling: Recurring reminders to retrieve and review files in anticipation of work needing to be done

An attorney has a new client with a statute of limitations that runs out in 6 months. How should the lawyer docket this deadline?

a. Write it on the flap of the file and put it away in the filing cabinet in the back room.
b. Put the intake sheet with the deadline in the attorney's "to-do" stack on the desk.
c. Give the intake sheet to the paralegal with no further instruction.
d. Docket the hearing on the calendar immediately after opening the file.

Good calendaring system:
- Immediate and automatic entry of dates
- Double-checking of all entries
- Sufficient lead time to complete tasks
- Follow-up
- Back-up, duplicate, or synchronize main calendar
What to Calendar?

- Deadlines
- Client-imposed deadlines
- Self-imposed deadlines
- Court appearances
- Appointments
- Administrative tasks
- Time to complete work
- Out of the office (attorneys & staff)

Considerations

1. Computerized or paper
2. Long-range and short-range
3. Self-imposed deadlines
4. Syncing
5. Color-coding

Practice

- Use intake sheets
- Process incoming documents
- Capture deadlines in email
- Synchronize calendars
- Make the calendar accessible
Conflicts

The Golden Rules

1. Establish a reliable system
2. Capture all parties
3. Know how to use the system
4. Know when to run a conflict check

Rule #1: Establish a Reliable System

Manual System  Software System
Premise-Based Software

PC/Windows
- Amicus Attorney
- HoudiniESQ
- PracticeMaster
- ProLaw

MacOS
- Daylite (business management)
- TimeNet Law
- LawStream
- Legal Suite

http://www.americanbar.org

Cloud-Based Software

- Clio
- Rocket Matter
- MyCase
- CosmoLex

And more...

Rule #2: Capture All Parties

- Clients
- Adverse Parties
- Related Parties
- Declined Clients
- Prospects
- Pro Bono Clients
- Firm Members
Rule #3:  
Know How to Use Your System

- William, Bill, or Willy?
- Elizabeth or Liz?
- Former Names
- SSN or TIN
- DOB
- 123 ABC Street

Rule #4:  
Know When to Run a Conflict Check

- At first contact
- When the file is opened
- Whenever a new party enters the case
Screen & Prepare

Screen incoming lawyers
Prepare outgoing lawyers
Keep your own conflict list

Practice

- Circulate ‘New Matter’ List weekly
- Update your system at closing
- Be aware of consent requirements
- Avoid business deals with clients

True or False?

An associate sat in on a meeting with a client and the managing partner and gained knowledge of confidential information. The associate was neither the attorney on the case nor did she do any work on it while employed at the firm. That associate should include this client in her conflict list.
File Management

Documentation | Retention | Resources

Basic Documents
- Intake Form
- Engagement Letter
- Fee Agreement
- Correspondence
- Pleadings, Memos, etc.
- Closing
Additional Detail
- Record Conflict Check
- Non-Engagement Letter
- Fee Agreement
  - Any modification?
  - Any division?
- Contract Assignment
- Disengagement

Retention

Multiple Choice
Most client files should be kept a minimum of:
- [ ] 2 years
- [ ] 5 years
- [ ] 10 years
- [ ] Indefinitely
Most files = retain at least 10 years
Some files = retain > 10 years
Original wills | Contracts | Cases involving minors

See our File Retention and Destruction Guidelines

What is the client file?

Resources

Samples & Forms
- Request for Conflict Search
- Sample Engagement & Disengagement Letters
- Sample Fee Agreements
- Client Status Report
- Checklist for Scanning Client Files
- See also BarBooks

www.osbpif.org > Practice Management > Forms
Comments, track changes, versions and ink annotations
☑ Document properties and personal information
☑ Header, footer and watermarks
☑ Hidden texts
☑ Document server properties

<table>
<thead>
<tr>
<th>Property</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Size</td>
<td>21.662</td>
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<tr>
<td>Pages</td>
<td>3</td>
</tr>
<tr>
<td>Words</td>
<td>940</td>
</tr>
<tr>
<td>Total Editing Time</td>
<td>575 Minutes</td>
</tr>
<tr>
<td>Title</td>
<td>Add a title</td>
</tr>
<tr>
<td>Comments</td>
<td>Add comments</td>
</tr>
</tbody>
</table>

**Related Dates**
- Last Modified: 6/30/2017 2:00 PM
- Created: 6/15/2017 1:55 PM
- Last Printed: 6/30/2017 11:36 AM

**Related People**
- Author: Heng, Hao
- Last Modified By: Heng, Hao

**Related Documents**
- Open File Location
- Show all Properties

---

Prevent inadvertent disclosure
Limit nature of metadata
Limit scope of metadata

---

Find and Remove

---

Find and Remove

---

Find and Remove

---

Find and Remove

---

Find and Remove

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Find and Remove

---

Find and Remove
Security Concerns

Is data encrypted?
Who has access?
Where are servers located?

Take reasonable steps:
- Ensure storage company will reliably secure client data
- Keep information confidential
1. Vet the vendors; and
2. Review terms of service and user agreements

Hardware and Data Destruction

True or False?
Deleting a file on your computer and then emptying the recycle bin will permanently erase that file.
Options to completely destroy data:
1. Use specialized software to overwrite data
2. Physically destroy the hard drive

Software

<table>
<thead>
<tr>
<th>Data Destruction</th>
<th>File Shredder</th>
</tr>
</thead>
<tbody>
<tr>
<td>• DBAN (Darik’s Boot and Nuke)</td>
<td>• zDelete</td>
</tr>
<tr>
<td>• CBL Data Shredder</td>
<td>• Eraser</td>
</tr>
<tr>
<td>• HDDErase</td>
<td>• Freeraser</td>
</tr>
<tr>
<td>• KillDisk</td>
<td>• File Shredder</td>
</tr>
<tr>
<td>• MHDD</td>
<td>• Secure Eraser</td>
</tr>
</tbody>
</table>

Use if you want to recycle, refurbish or donate computer
Use if you want to keep computer but permanently delete unwanted files

Do it yourself
Bring it to a professional
Electronic Recycling Facility
Common Pitfalls

Office Sharing | Contract Lawyer | Of Counsel | Departing a Firm

Have a Plan

- Separate phone lines
- Reception and mail
- Copies, faxes, and print jobs
- Signage, letterhead, and advertising
- Agreements
- Beware shared employees

OSB Formal Opinion 2005-50
• Be clear about the relationship
• Run a conflict of interest search before accepting assignment
• Use a contract lawyer agreement to clarify important issues
• Surcharge to client
Continuing professional relationship

Conflicts

Other issues

Liability

Use written “of counsel” agreement

Have two letterhead versions

Departing a Firm
• Consider whether withdrawal is appropriate
• Decide when and how clients will be notified
• Associate v. partner departure

Continuing Communication

Email | Voicemail | Mail

Practice Tip!:
• Develop a plan prior to giving notice
• Be professional and courteous
• Be flexible
• Take conflicts list with you
CHAPTER 12

CREATING A FIRM

OPENING A LAW PRACTICE: PLANNING FOR SUCCESS AS A SOLO OR SMALL FIRM

Elizabeth J. Inayoshi
  Law Office of EJ Inayoshi LLC
Cassie Peters
  Cassie Peters Legal + Consulting, LLC
Michael G. Romano
  Romano Law, PC
Rachel M. Edwards, moderator
  Professional Liability Fund
  Practice Management Advisor
Jennifer L. Meisberger, moderator
  Professional Liability Fund
  Practice Management Advisor
C h a p t e r  1 2

OPENING A LAW PRACTICE: PLANNING FOR SUCCESS AS A SOLO OR SMALL FIRM

TABLE OF CONTENTS

PowerPoint Slides ................................................................................................................................................................................ 12-1

To view these chapter materials and the additional resources below on or before November 1, go to www.osbplf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After November 1, select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

PLF Practice Aids available at www.osbplf.org > Practice Management > Forms

Business Essentials: Tips for the Small Firm and Sole Practitioner
https://www.osbplf.org/assets/forms/pdfs//Business%20Essentials.pdf

Checklist for Opening a Law Office

Business Plan Outline

Start-Up Budget
https://www.osbplf.org/assets/forms/pdfs//Start-Up%20Budget.pdf

Monthly Budget
https://www.osbplf.org/assets/forms/pdfs//Monthly%20Budget.pdf

PLF Publications available at www.osbplf.org > Practice Management > Publications
OPENING A LAW PRACTICE
Planning for Success as a Solo or Small Firm

Elizabeth J. Inayoshi | Law Office of EJ Inayoshi LLC
Cassie Peters | Cassie Peters Legal + Consulting LLC
Michael G. Romano | Romano Law PC
Rachel Edwards | Professional Liability Fund
Jennifer L. Meisberger | Professional Liability Fund

NUTS AND BOLTS

• Entity Formation
• Location & Workspace
• Equipping the Office
• Business Planning
• Budgeting
• Marketing

Plus: Tips from the Trenches

ENTITY FORMATION
Visit Our Site
View Our CLE

LOCATION & WORKSPACE

FINDING A LOCATION

Various Options
• Downtown
• Suburbs
• Non-metro
• Virtual
• Home
CHOOSING A WORKSPACE

Shared
• Office Share
• Executive Suite
• Conference Room

Home
• Residence
• Coffee Shop?

Virtual
• Anywhere

www.osbpif.org > Practice Management > Oregon Lawyers' Conference Room

EQUIPPING THE OFFICE

TOOLS

Call
• Business Phone
• Landline, mobile, VOIP
• Virtual Receptionist

Print
• All-in-One, Copier, Scanner
• Fax or eFax
• Shredder

Surf
• Desktop, VPN
• Laptop or Tablet
Don’t Forget

- Supplies
- Furniture

Systems

- Software
- Security, Anti-Malware
- Word Processing
- Dictation / Adaptive
- Calendaring & Docketing
- Time & Billing
- Practice Management
STORAGE
Cloud vs. Traditional

AUTOMATION

STAFF
• Support Staff
• Reception
• Bookkeeping
BUSINESS PLANNING

VISION & STRATEGIES
• WHO are you?
• WHAT problems do you want to solve?
• WHERE are your services needed?
• HOW do you reach those clients?

CONSIDERATIONS WHEN CHOOSING A PRACTICE AREA
• Personality
• Experience
• Interests
• Lifestyle (current & desired)
• $$$
MEASURE PROGRESS
Assess & Evolve
• Stop Doing
• Do Less
• Start Doing
• Do More

BUDGETING

IT COSTS HOW MUCH?! Operating Costs
## MANDATORY

<table>
<thead>
<tr>
<th>Fixed</th>
<th>Variable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yearly</td>
<td>One Time</td>
</tr>
<tr>
<td>Bar Dues</td>
<td>Furniture &amp; Equipment</td>
</tr>
<tr>
<td>Malpractice Premiums</td>
<td>Yearly</td>
</tr>
<tr>
<td>Business License(s)</td>
<td>Marketing, Business Cards</td>
</tr>
<tr>
<td>Entity Registration</td>
<td>Quarterly</td>
</tr>
<tr>
<td>Business Insurance</td>
<td>Taxes</td>
</tr>
<tr>
<td>Monthly</td>
<td></td>
</tr>
<tr>
<td>Banking Fees</td>
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</table>

## DISCRETIONARY

<table>
<thead>
<tr>
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<th>Variable</th>
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</thead>
<tbody>
<tr>
<td>Yearly</td>
<td>Yearly</td>
</tr>
<tr>
<td>Marketing</td>
<td>Organization Dues / Memberships</td>
</tr>
<tr>
<td>Website</td>
<td>Monthly</td>
</tr>
<tr>
<td>Monthly</td>
<td></td>
</tr>
<tr>
<td>Rent</td>
<td></td>
</tr>
<tr>
<td>Paid Research (Lexis, Westlaw, etc.)</td>
<td>Support Staff</td>
</tr>
<tr>
<td></td>
<td>Accountant / Bookkeeper</td>
</tr>
<tr>
<td></td>
<td>Credit Card Processing</td>
</tr>
</tbody>
</table>

## TIME WORKED VS. TIME BILLED

<table>
<thead>
<tr>
<th>Time Worked</th>
<th>Time Billed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minus:</td>
<td>Can you include:</td>
</tr>
<tr>
<td>Vacation</td>
<td>Time acquiring minimal competency?</td>
</tr>
<tr>
<td>Holidays</td>
<td>Administrative tasks?</td>
</tr>
<tr>
<td>CLEs</td>
<td>Time managing the practice?</td>
</tr>
<tr>
<td>Sick Time</td>
<td></td>
</tr>
</tbody>
</table>
SETTING YOUR FEES

How much do you need?

- Operating costs +
- Desired take-home pay +
- 50% over take-home for taxes.

How much can you charge?

- Review the Bar Economic Survey
- Consider area of practice, years of experience, and geographic location
- Think about variability of specific types of work
- Be aware: you may not bill all your hours

MARKETING

BUILDING A WEBSITE
WEBSITE FEATURES

- Interaction
- Payment Portal
- Inquiry Form
- Chat
- Photos
- Videos
- Resources
- Blog
- SEO

BEYOND THE WEB

- The Bar Bulletin
- Newsletters
- County Bar Associations
- Professional Groups
- Community Ads
- Movie Theaters
- Billboards
- TV / Radio

NETWORKING

- Bar Associations
- OSB Sections
- Specialty Bars
FINDING CLIENTS

- Lawyer Referral Service
- Contract Lawyering
- Referrals from Clients & Colleagues
- Volunteering

TIPS FROM THE TRENCHES

IF I KNEW THEN…

- You need mentors – law school does not teach the practice of law
- Amount of time spent managing practice vs. practicing law
- Risks of contingency practice
- Difference between solo and isolation
- You cannot bill all the time you work
- Need to adapt to change (in the law and the profession)
- How to plan ahead for myself and my clients
JOINING A FIRM

SUCCESS TIPS FOR LAWYERS JOINING FIRMS (PART I)

Jesse Calm  
McEwen Gisvold LLP

Vamshi Reddy  
Lane Powell PC

Duke Tufty  
Northwest Alcohol Law LLC

Traci Ray, moderator  
Barran Liebman LLP
Learning the Ropes 2017
Success Tips for Lawyers Joining Firms (Part I)

The Top 10 List – Things You Need to Do to Be a Successful Associate

*** Text your questions throughout the presentation to moderator Traci Ray, Executive Director at Barran Liebman LLP: (971) 404-7651

1. Do good work.
   - This is the minimum.
   - A “draft” document is a myth. Every “draft” finished should be polished and complete.
   - Ask questions. The more direction you get from the partner, the higher quality the work product and the more efficient you will be.
   - Make yourself available.

2. Perspective—be client focused.
   - Everyone is your client—associates, partners, and the firm’s actual clients.
   - Be client focused and put yourself in their shoes—what would they want?

3. Understand that law is a business.
   - Understand the finances.
   - Add value.
   - Manage your time.

4. Communication skills / take responsibility for mistakes.
   - Adapt your style to your client’s, your staff, and the partner-in-charge.
   - Mistakes are expected, but inform the partner-in-charge as soon as possible.

5. Have a plan and set goals.
   - Set short-term and long-term goals that are measurable.
   - Make sure your goals are realistic (equity vs. nonequity partners; myth vs. fact).
   - Put those goals down on paper in a career development plan.
   - Revisit the plan regularly with someone who will hold you accountable.
   - One of your goals should be to build a book of business.

6. Build relationships.
   - Clients can come from anywhere.
   - Follow your passions.
   - Think of rainmaking as a team activity.
   - Don’t forget internal / existing clients.
   - Seek out champions and mentors; they are different roles.
7. **Work well with staff.**
   - Learn how to delegate.
   - Support staff talk to one another and between firms.
   - The support staff will know more than you do. Accept it and get over any attorney vs. legal assistant hierarchical misconceptions.
   - Set your boundaries with the support staff.

8. **Understand the culture and politics of the firm.**
   - Pay attention to and understand the firm culture—whether as a potential applicant or as an associate already working there—and remember that culture may vary substantially between practice groups.
   - Be yourself while also being professional and in touch with the firm’s culture.
   - Seek mentors within the firm to help you understand the firm’s culture and navigate its political landscape.

9. **Take care of yourself.**
   - Drink water and get sleep.
   - Find ways to combine personal health and professional development.
   - Don’t feel guilty about spending a little time or money on self-care.

10. **See Number One.**

Jesse Calm       Vamshi Reddy
    *McEwen Gisvold LLP*       *Lane Powell PC*

Traci Ray       Duke Tufty
    *Barran Liebman LLP*       *Northwest Alcohol Law LLC*

**Success Tips for Lawyers Joining Firms (Part I)**

**Additional Resources**

American Bar Association:
   - Young Lawyers Division: [http://www.americanbar.org/groups/young_lawyers.html](http://www.americanbar.org/groups/young_lawyers.html)
   - Publications: [http://www.americanbar.org/groups/young_lawyers/publications.html](http://www.americanbar.org/groups/young_lawyers/publications.html)


Multnomah Bar Association:
   - Multnomah Lawyer newsletter: [https://mbabar.org/resources/publications.html](https://mbabar.org/resources/publications.html)
   - Young Lawyers Section: [www.mbabar.org/YLS](http://www.mbabar.org/YLS)
   - YLS Listserv: [https://mbabar.org/yls/yls-listserv.html](https://mbabar.org/yls/yls-listserv.html)

Oregon Attorney Assistance Program: [www.oaap.org](http://www.oaap.org)
JOINING A FIRM

SUCCESS TIPS FOR LAWYERS JOINING FIRMS (PART II)

Garrett Garfield
Holland & Knight

Bryan Welch
Oregon Attorney Assistance Program
Attorney Counselor
Chapter 14
SUCCESS TIPS FOR LAWYERS
JOINING FIRMS (PART II)

TABLE OF CONTENTS

Networking for Introverts, In Sight March 2010 ............................................................. 14-1
Introvert’s Survival Guide for Networking Events, In Sight September 2012 .............. 14-4
Tips for Lawyers Joining Firms .......................................................................................... 14-6
Networking is to business what exercise is to health: while everyone agrees it’s essential, it is something that people frequently avoid, are uncomfortable with, or feel that they can’t do well – if at all!

Many people say, “Networking comes naturally to outgoing, chatty types, but not me. I’m quiet, and I feel anxious in large gatherings or meeting new people. I’ll never be able to walk up to strangers and start talking about myself.” If you find yourself agreeing with all or part of that statement, don’t feel like you’ll never be able to enjoy the benefits of networking. Follow a few of these suggestions, and with a small effort you may be surprised at the results.

Learn That You’re Not Alone!

While some people embody Will Rogers’ philosophy that “A stranger is just a friend I haven’t met yet,” the rest of us experience varying degrees of unease when meeting new people. One step to conquering anxiety is to realize that other people might also be uncomfortable and to take ourselves less seriously. Don’t feel that you have to apologize for taking up someone’s time. Ideally, you’ll be listening more than you are talking, and most people like to talk about their work or their interests.

If your networking goal is career-related, remember that most successful people got help along the way. You are giving people an opportunity to feel good by helping you – even if it’s only for a 20-minute informational interview. Everyone begins his or her journey at the starting line.

Start Small

Don’t wear yourself out when you begin your networking. Set a modest, achievable goal, like going to a local group that meets monthly. (Often these meetings include helpful self-introductions.) The next month, you might decide to chat with one or two people.

If that seems too daunting, practice on familiar territory: talk to your friends and family members. You may be surprised at the contacts they have or what you learn when you strike up a conversation about their backgrounds and interests.

If you still feel intimidated about starting a conversation with someone you don’t know, recruit a friend to attend an event with you. If he or she is more outgoing, have your friend introduce you to a few people, and then try meeting some others on your own. If your friend is more reserved, circulate independently for 20 minutes, and then regroup. Either way, the buddy system can initially be more comfortable than striking out on your own, and having someone around for support makes it more likely that you’ll stick to your goal.

Work From Your Strengths

At times you won’t be in your comfort zone, but always be aware of your particular strengths. Many people who are uncomfortable in large gatherings do well when talking with one person. Shy people frequently learn that one way to avoid talking about themselves is to ask other people questions. Approach people who are standing alone – they might be feeling awkward, too!
Break the ice by asking a simple question, like “Where did you get your coffee? I didn’t see any when I came in,” or comment on the surroundings: “This is a great room – I’ve never been in this building before.” Simple comments can lead to a longer conversation.

Practice networking skills at events you enjoy. You’ll be more motivated to attend, and it will be easier to talk with people about the topic.

**Tried-and-True Techniques**

You may have received some of the best advice about meeting new people on your first day of grade school: get there early, stand up straight, look people in the eye, and have a purpose.

Dale Carnegie, who authored the classic *How to Make Friends and Influence People*, provided these timeless tips: Don’t forget to smile – it helps you relax and puts other people at ease. Keep your business cards handy, and ask others for their cards. Make a note of how you met the person and his or her area of interest, so you can follow up effectively. Use the person’s name in conversation. It makes the conversation more personal, and it helps you remember them.

**Be Prepared!**

Experienced athletes warm up and prepare before their events, and the same drill applies to networking. Have a few conversational icebreakers in your repertoire before attending a meeting or event. These should be simple questions that require more than a “yes” or “no” answer. “What kind of work do you do?” “How did you get into that field?” “What do you like most about your job (or your area of practice)?” “What do you find most challenging?” “What would make your job easier?” “What would you change if you could?” are all good conversation starters.

These types of open-ended questions are also the basis of a great informational interview, with a few additions. At the end of an informational interview, always thank the person for spending time to talk with you and ask if he or she can suggest anyone else who might be helpful for you to meet. If so, ask permission to use the interviewee’s name when you introduce yourself to his or her contact.

Before entering into the networking arena, hone your “elevator speech” – a catchy, one-minute introduction. Here’s a suggested formula for a memorable elevator speech: I/We + Help + (Target Market) + (Benefit). For example, “I help companies protect and defend their intellectual property assets.” If you’re not among other lawyers, make your introduction easy for a non-lawyer to follow: “I’m a criminal defense attorney who represents people accused of a DUI.” Use natural language, and practice it until it becomes second nature. In time, you can add one more element: what makes you unique.

Be prepared with responses for questions that might not have a simple answer, particularly if you are in a career transition. If you’re currently out of work, consider whether you want to share that information with new contacts up front. It can be helpful to have your network of existing contacts know that you are actively looking for work, but you might not want to lead with that when meeting someone for the first time. If you are currently employed but looking at other opportunities, have a response ready for the person who says, “Hey, what are you doing here? You’re not looking to leave your firm, are you?”

**If All Else Fails . . .**

If you try some of these suggestions and feel like you’ll never be comfortable with networking, don’t give up! Try a structured networking group that helps its members to build business through word-of-mouth referrals. (Be mindful of ethics rules prohibiting lawyers from giving or receiving reciprocal referrals. Also be aware of the ethics rules governing personal follow-up on referrals.) Don’t forget your college and law school alumni associations, which provide access to preexisting connections as well as networking groups based on ethnicity, gender, or special interests.

E-mail can be a good supplement to in-person “meet and greet,” allowing you to get in touch with lawyers who were mentioned in the news or who authored articles on a specific topic. Meeting someone for coffee can frequently be more productive than mingling at a cocktail party or large dinner event. Don’t neglect the world of social networking sites, either. Try LinkedIn (www.LinkedIn.com) for direct business networking, and consider starting a blog or using Twitter (www.twitter.com) as a marketing tool.

**Finally**

Analyze your results: Which techniques worked for you? Which ones were unproductive? Remember
to pace yourself. Getting out of your comfort zone can be challenging, but long-term success is attained by gradual changes over time. Doing too much too soon can lead to burnout.

Remember to follow up with the people you meet. The key to successful networking isn’t merely making a lot of contacts; it is developing those contacts into mutually beneficial relationships that will provide rewards over a career lifetime.

Meloney C. Crawford
OAAP Attorney Counselor

Four Great Books on Networking


**INTROVERT’S SURVIVAL GUIDE FOR NETWORKING EVENTS**

I’ll admit it – networking is one of my least favorite parts of my job. I wish everyone just knew who I was, thought I was fabulous, and that my phone was ringing off the hook with more business than I can handle. Unfortunately, that’s not the case. So every week I attend two to four networking events – even though casual chit-chat with strangers over mini appetizers is not necessarily my favorite way to spend an evening.

**As an Introvert, You’re in Good Company**

Despite the fact that I’m a professional public speaker, I’m a big introvert. I dislike attending most events that involve large crowds because they make me feel claustrophobic. I am uncomfortable at events that are so crowded that you have to yell to be heard by the person next to you. When business groups try to entice me by telling me over 1,500 people will attend their event, I cringe. I take comfort from reminding myself that I’m not the only person who feels this way.

As a business owner, it’s important to make connections within my community. Here are some of the lessons I’ve learned that help me navigate networking events as an introvert.

1. **If the event room is loud and crowded, head for the hallway.** You will find your fellow introverts there, enjoying their space and speaking at a normal volume for conversation.

2. **If the event has an educational component, go to it.** It will give you a smaller group to start with and a basis for starting conversations.

3. **Go to events for business professionals, not just for lawyers.** Lawyer groups can lead to referrals, but business groups will put you directly in front of potential clients.

4. **Attend groups and events that interest you. When you’re comfortable, you’ll be more effective at networking.** When you go to events that interest you, you’ll be more likely to meet people who are like-minded and more likely to hire you.

5. **Don’t be afraid to branch out beyond the traditional networking events.** Some networking groups do more unusual things like go-carts instead of happy hours. You can also network at sci-fi conventions, hiking groups, and book clubs.

6. **Go to lunch and breakfast events.** You might be more comfortable talking to people over a meal with your hands occupied with silverware. These events tend to be smaller, too.

7. **Give yourself permission to leave early.** It’s okay to set a goal for the number of contacts you want to make and leave once you achieve it.

If you’re ever uncomfortable at an event and you want to leave, it’s okay. You can always say you have another event to attend. No one has to know that the appointment is with your family, a book, or your pillow.

**Ruth Carter**

**The Carter Law Firm**

The author’s weekly blogs can be read...
Success Tips for Lawyers Joining Firms

Bryan Welch, OAAP Attorney Counselor

A. Finding Your Niche

1. OAAP Attorney Counselors assist many lawyers and law students with job and career issues each year.

In a typical year, one-third of the lawyers requesting assistance from the OAAP do so for job and career issues. These lawyers represent a broad spectrum of the legal profession:

- New admittees, uncertain where they fit in the profession, searching for their first law job;
- Experienced lawyers evaluating whether to switch practice areas, firms, or transition out of private practice;
- Lawyers who want to balance their work, family and personal life more effectively;
- Lawyers who have recently been terminated;
- Lawyers transitioning back to legal practice after working in other fields or after taking a leave from practice to focus on health issues or their families;
- Lawyers who are looking for work that is more suited to their skills, interests, values, and personal preferences, and
- Lawyers starting to consider retirement.

The OAAP has several resources to offer lawyers wrestling with job and career issues.

- OAAP Attorney Counselors are available to meet individually with lawyers to discuss their circumstances, brainstorm alternatives and strategies, and refer to private career resources when appropriate.
- We offer a Career Satisfaction Workshop several times each year in Portland and annually in Salem and Eugene. The workshop meets one evening per week for six consecutive weeks. This workshop is designed to help lawyers begin or continue a self-assessment process to identify their work-related preferences, preferred skills, interests, and values. The workshop also addresses job search skills and strategies.
- We have a weekly Lawyer in Transition support group that meets at our offices in downtown Portland.
- We sponsor career-related seminars each year that are available on CD and DVD.

If you are interested in accessing one of the job / career related resources at the OAAP, please contact the OAAP at 503-226-1057/1-800-321-6227 or via our website at www.oaap.org.
B. Building Resiliency in the Practice of Law

1. **Stress Hardiness:** Whether you experience the practice of law as challenging and demanding, as opposed to stressful and threatening, will be primarily determined by the attitudes and expectations you bring with you to this experience. What we know is that individuals who prove to be more resilient and stress hardy share the following core attitudes and approaches:

   - **Challenge vs. threat:** Stress hardy individuals:
     - See life’s changes, pressures, setbacks, and problems as challenges and opportunities to grow and develop from rather than reacting to them as threats.
     - Believe they can grow from both positive and negative life experiences.
     - Accept the idea that change is a positive, normal characteristic of life.

   - **Commitment vs. alienation:** Stress hardy individuals:
     - Find meaning and purpose in their lives and the work they do and are fully involved in what they are doing despite stressful changes and challenges they may be facing.
     - Don’t aim for perfection; they give activities their best effort and have a curiosity about what they are doing instead of a feeling of detachment or isolation.

   - **Control vs. powerlessness:** Stress hardy individuals:
     - Have an “internal locus of control” and so tend to perceive themselves as “in charge” and “responsible” for the outcomes of their lives. (Those who experience unhealthy emotional states and engage in harmful behaviors have an “external locus of control,” believing that outcomes of their actions are contingent on events outside their personal control.)
     - Attempt to find ways to influence the outcome of stressful changes, rather than seeing themselves as victims or lapsing into passivity.
     - Tend not to be “blamers” and “complainers” and feel in control of their destiny and direction in life.
     - Develop a strong belief in their ability to manage the resources in their lives effectively instead of feelings of powerlessness.
     - Have a realistic perspective on changing the things they can and accepting the things they cannot.

2. Research has consistently shown that individuals who focus their energy and attention on personal growth, developing and maintaining relationships with others, helping others, and contributing to their community are significantly happier and more satisfied with their lives than individuals who focus primarily on external rewards (economic affluence, recognition, power, prestige).
C. The Resiliency Quiz  (By Nan Henderson, MSW)

Part One:

People bounce back from tragedy, trauma, risks, and stress by having the following “protective” conditions in their lives. The more times you answer yes below, the greater the chances you can bounce back from your life’s challenges and problems more positively and effectively.

Answer yes or no to the following statements. Celebrate your “yes” answers and decide how you can change your “no” answers to “yes.” You can also answer “sometimes” if that is more accurate than just “yes” or “no.”

1. Caring and Support
   ____ I have several people in my life who give me unconditional love, nonjudgmental listening, and who I know are “there for me.”
   ____ I am involved in a work, faith or other group where I feel cared for and valued.
   ____ I treat myself with kindness and compassion, and take time to take care of myself (including eating in a healthy way and getting enough sleep and exercise).

2. Expectations for Success
   ____ I have several people in my life who let me know they believe in my ability to succeed.
   ____ I get the message “You can succeed,” at my work.
   ____ I believe in myself most of the time, and generally give myself positive messages about my ability to accomplish my goals – even when I encounter difficulties.

3. Opportunities for Meaningful Participation
   ____ My voice (opinion) and choice (what I want) is heard and valued in close personal relationships.
   ____ My opinions and ideas are listened to and respected at my work.
   ____ I volunteer to help others or a cause in my community or faith organization.

4. Positive Bonds
   ____ I am involved in one or more positive after-work hobbies or activities.
   ____ I participate in one or more groups (such as a club, faith community…) outside of work.
   ____ I feel “close to” most people at my work.

5. Clear and Consistent Boundaries
Most of my relationships with friends and family members have clear, healthy boundaries (which include mutual respect, personal autonomy, and each person in the relationship both giving and receiving).

I experience clear, consistent expectations and rules at my work.

I set and maintain healthy boundaries for myself by standing up for myself, not letting others take advantage of me, and saying “no” when I need to.

6. Life Skills

I have (and use) good listening, honest communication, and healthy conflict resolution skills.

I have the training and skills I need to do my job well.

I know how to set a goal and take the steps to achieve it.

Part Two:

People also successfully overcome life difficulties by drawing upon internal qualities that research has shown are particularly helpful when encountering a crisis, major stressor, or trauma.

The list on the following page can be thought of as a “personal resiliency builder” menu. No one has everything on this list. When “the going gets tough,” you probably have three or four of these qualities that you use most naturally and most often.

It is helpful to know which are your primary resiliency builders, how have you used them in the past, and how can you use them to overcome the present challenges in your life.

You can help yourself or help others become more resilient by reflecting on these questions:

1. When faced with a crisis or major life difficulty, which do you use most often?
2. How can you strengthen your individual resiliency builders?
3. Can you use them now in problems or challenges you are facing?
4. Is there one or two that you think you should add to your personal repertoire?

Communicating the Resiliency Attitude: “What is right with you is more powerful than anything wrong with you.”
Personal Resiliency Builders

(Individual Qualities that Facilitate Resiliency)

Put a + by the top three or four resiliency builders you use most often. Ask yourself how you have used these in the past or currently use them. Think of how you can best apply these resiliency builders to current life problems, crises, or stressors.

(Optional) You can also put a * by one or two resiliency builders you think you should add to your personal repertoire.

___ Relationships – Sociability/ability to be a friend/ability to form positive relationships

___ Service – Giving of yourself to help other people, animals, organizations, and/or social causes

___ Humor – Having and using a good sense of humor

___ Inner Direction – Basing choices/decisions on internal evaluation, personal values, and preferences

___ Perceptiveness – Insightful understanding of people and situations

___ Independence – “Adaptive” distancing from unhealthy people and situations/autonomy

___ Positive View of Personal Future – Optimism; expecting a positive future

___ Flexibility – Adjusting to change; bending as necessary to positively cope with situations

___ Love of Learning – Capacity for and positive connection to learning

___ Self-Motivation – Internal initiative and positive motivation from within

___ Competence – Being “good at something”/personal competence

___ Self-worth – Feeling of self-worth and self-confidence

___ Spirituality – Personal faith in something greater then oneself

___ Perseverance – Keeping on despite difficulty; not giving up

___ Creativity – Expressing yourself through artistic endeavor; or through other means of creativity
EMPLOYMENT LAW AND CONSCIENTIOUS COMMUNICATION

Clarence M. Belnavis
Fisher & Phillips, LLP
Employment law OVERVIEW and Conscientious Communication

PLF – Learning the Ropes

Presented By:
Clarence M. Belnavis
November 2, 2017

First Impressions
Do we have an inherit/implicit bias?
If yes, where does that bias come from?

Thanksgiving Dinner
• Who gets to sit at the big (adult) table?
• Who is expected to cook?
• Who decides what shows to watch?
• Who sets the menu?
• What are the unwritten / unsaid family dynamics going on?
Do You Have Any Inherent Biases

- Describe my background
  - Education
  - Family background
  - National origin
  - Marital status
  - Legal experience
  - Disabilities if any
  - Sexual orientation
  - Religion
- Why did you reach your conclusions?

You’re in Charge . . . .

- Partner announces that he needs someone with more grey hair on the case to assist him
- Client indicates to a female associate that she would like a different more aggressive attorney
- Hispanic client wants a diverse attorney to work on his files
- Why were these individuals requested?

Lost In Translation

- What are the different ways people use to communicate?
- What are the methods used today to communicate?
- How does social media and texting impact what we say and how we say it?
How To Address Your Biases

• How could a bias impact someone’s access to legal representation or treatment in the judicial process?

• What steps should you take to make sure that a personal bias does not impact your interaction with a client or other legal professional?

How To Address Your Biases

• Recognize that we have biases that result from our backgrounds and personal experiences

• Try to understand or appreciate the cultural differences that may exist between you and others

• Appreciate that the same set of facts can be interpreted in different ways

• Be clear in your communications

• Make decisions based on the facts as you understand them

So You Want To Be An Employment Lawyer

Most disputes in the workplace result from poor communication.

How things are said really matters.
Let's See What You Know

- What is . . .
- FLSA?
- OWPBA?
- OFLA?
- ADA?
- NLRB?

Characteristics Necessary to Practice Employment Law

**PATIENCE!**

Clients call you when they are in crisis situations

Not Overly Sensitive

- Discrimination
- Harassment
- Theft
- Deceit
- Injured Workers
- Medical Leave
- Termination
What is Labor & Employment Law?

All issues related to the employer-employee relationship - hiring through firing.

EEOC’s Top 10 Employment Charges - 2016:

- Retaliation: 42,018 (45.9%)
- Race: 32,309 (35.3%)
- Disability: 28,073 (30.7%)
- Sex: 26,934 (35.3%)
- Age: 20,857 (22.8%)
- National Origin: 9,840 (10.8%)
- Religion: 3,825 (4.2%)
- Color: 3,102 (3.4%)
- Equal Pay Act: 1,075 (1.2%)
- Genetic Information Non-Discrimination Act: 238 (.3%)

Note: The percentages add up to more than 100 because some charges had multiple claims.

Employment Litigation

<table>
<thead>
<tr>
<th>Agency</th>
<th>Civil Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Oregon Bureau of Labor and Industries (BOLI)</td>
<td>• County Circuit Courts</td>
</tr>
<tr>
<td>• Equal Employment Opportunity Commission (EEOC)</td>
<td>• U.S. District Court for the District of Oregon (USDC)</td>
</tr>
</tbody>
</table>

Most administrative matters go through BOLI.

The preferences for most defense counsel are for civil matters to go through the USDC.
Two Basic Types of Work Places:

Unionized & Non-unionized

Non-Union Environment

- **General Rule** - “At-Will” Employment
  - Employer is free to fire the employee at any time, for any reason
  - Employee is free to quit, at any time for any reason

- **Exceptions** have emerged
  - Through legislative action
  - Through court decisions
  - Key is to avoid an “implied” contract
  - Make no promises about longevity and job security

The Employment Relationship

*It is illegal to fire someone because of a protected status such as:*

- Sex (including pregnancy)
- Disability
- National Origin
- Military Service
- Race/Color
- Age
- Religion
- Sexual Orientation
- Marital Status
The Employment Relationship

It is illegal to fire someone due to:

- Employee’s union activity or sympathy
- Employee has filed a worker’s comp claim
- Employee’s FMLA/OFLA Leave
- A reason that violates public policy
  - Obeying a subpoena
  - Testifying truthfully

Wage and Hour H.O.T. Issues

Exemptions Under the FLSA

- "Exempt": Not Subject to One or More FLSA Requirements
- Some apply only to the overtime requirements, some apply to the minimum-wage and overtime requirements
- Default rule: Everybody is non-exempt, unless an exemption clearly applies
- New rules affect most “white collar” exemptions from minimum-wage and overtime

Wage Payment Upon Termination

- Involuntary Termination - Next Business Day
- 48 Hours’ Notice - Upon Termination
- Quit Without Notice - Within Five Business Days
Paid Sick Leave: Oregon

- **Covered Employers and Covered Employees:** The law requires all employers (except federal government) with employees in Oregon to provide sick leave to qualified employees. All employees who work in Oregon are covered, including full-time, part-time, temporary, and seasonal workers. There are a few limited exceptions to coverage.

- **How it applies:**
  - Portland Employers:
    - 6+ employees = paid leave
    - <6 employees = unpaid leave
  - Employers Everywhere Else:
    - 10+ employees = paid leave
    - <10 employees = unpaid leave

Paid Sick Leave: Leave Required in OR

- At a minimum, employers must provide employees with up to 40 hours of sick leave per year. Employees must be able to take leave in one-hour increments and use leave to cover all or part of a shift.

- **Undue Hardship Exception:** In very limited circumstances, employers can require employees to use leave in four-hour increments, but also must provide at least 56 hours of leave per year.

Paid Sick Leave: Reasons for Use

- **When can sick leave be used:**
  - Employee’s own illness or medical care, including preventative medical care and mild illnesses
  - A family member’s illness or medical care;
  - Any reason covered by OFLA;
  - Public health emergencies, including business or school closures or employer’s exclusion of employee from workplace for health reasons;
  - Domestic violence, sexual assault, or stalking issues.
Paid Sick Leave: Accruing Leave

• Accrual Method 1: Earning 1 hour every 30 hours worked
  • Employees must be allowed to carry over up to 40 hours of
    accrued and unused leave per year.
  • Employers can cap leave usage at 40 hours per year.
  • Employers can cap accrual to no more than 80 hours.
• Accrual Method 2: Frontloading 40 hours of leave
  • No carry-over requirement – any unused hours of leave at the
    end of the year can be forfeited.

Pay Equity: General Provisions

• Oregon’s new “Equal Pay Law” will explicitly prohibit
  employers from paying people less based not only on gender,
  but also on race, color, religion, sexual orientation, national
  origin, marital status, disability, or age.
• Seek the salary history of an applicant before an offer of
  employment is made.
• Screen out applicants on the basis of current or past
  compensation.
• Determine compensation for a position based on current or
  past compensation of a prospective employee.

Pay Equity: Employer’s Obligations

• Once the law takes effect, you must ensure that wage levels
  for comparable work are equivalent no matter the employee’s
  protected class status.
• If you identify problematic pay issues, you are prohibited from
  cutting someone else’s pay in order to even things out; you
  must take active steps to remedy the gap.
Pay Equity: Effective Dates

- As of October 6, 2017
  - Do not ask or use salary history
  - Do not determine salary offer based on candidate’s current or past compensation
- The remainder of this law goes into effect on January 1, 2019.

Secured Schedule

- Oregon is the first state to enforce a predictive scheduling law.
- Who does it apply to:
  - Employers in retail, hospitality, or food services industries that have at least 500 employees worldwide.
  - Nonexempt employees of these employers.
- Law requires:
  - Good faith estimate of work schedule.
  - Advance notice of work schedule (7 days).
  - Right to rest between shifts.
  - Compensation for work schedule changes.

What Is Illegal Discrimination?

Treating an employee differently because of a protected category
SEXUAL HARASSMENT

Define Harassment

• Unwelcome sexual advances, requests for sexual favors, or conduct of a sexual nature (verbal, physical, or visual), that is directed toward an individual because of gender.
• It can also include conduct that is not sexual in nature but is gender-related. Sexual harassment includes the harassment of the same or of the opposite sex.

Hostile Working Environment

• Where offensive, unwelcome, severe, or pervasive conduct creates intolerable working conditions
Is complimenting someone on their appearance sexual harassment?

Is it sexual harassment to ask an employee out on a date?

Key Statutory Provision:
The National Labor Relations Act ("NLRA")
The Application of the NLRA is overseen by the National Labor Relations Board:
- Five Board Members
- Power to Adjudicate Disputes
- General Counsel
- Investigates
- Prosecutes Violations
Unions

• The NLRA only applies to "employees" and not managers, supervisors, independent contractors, etc.

**NOTE:** Who is and who is not an "employee" is an evolving issue.

Unions

• Employees have the right to self-organize, form, join or assist labor unions and the right to engage in concerted activity for "mutual aid or protection."
• Applies to union or non-unionized workplaces

Unions

**Some Types of Activities:**
• Organizing
• Contract Negotiation
• Strikes
Unions HOT Issue

**NLRB’s Increased Focus on Non-Union Workplaces**
- Confidentiality (wages/discipline/investigations)
- Electronic Communications
- Complaint Policies
- Class Action Waivers
- Dress Codes
- Access Rules
- Social Media Restrictions
- At-will Disclaimers
- Workplace Recording/Photography

Future of the focus unclear under Trump

Unions HOT Issue

**NLRB Protections**
- If employees are discussing terms and/or conditions of employment, e.g. wages, discipline may be inappropriate in certain circumstances, as the employees may be engaging in protected activity

Unions HOT Issue

**Other “Protected Concerted Activities”**
- Sharing information about wages
- Complaining about policies or managers
- Displaying union-related insignias/logos
- Expressing union support
- Attempting to organize a union
- Otherwise discussing employment terms
CHAPTER 16

RECOGNIZING AND REPRESENTING CLIENTS WITH MENTAL HEALTH IMPAIRMENTS

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Assistant Director/Attorney Counselor

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Attorney Counselor

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Chapter 16

Recognizing and Representing Clients with Mental Health Impairments

Table of Contents

Recognizing and Representing Clients with Mental Health and Substance Use Impairments ................................................................. 16-1

OAAP Brochure .................................................................................. 16-13
Recognizing and Representing Clients with Mental Health and Substance Use Impairments

I. Introduction:
Many of the issues that people choose to hire a lawyer to assist them with are highly stressful and anxiety provoking (e.g., divorce, custody, criminal charges, personal injuries, bankruptcy, immigration, employment disputes, etc.).

A. A vital part of successful client representation and case handling requires that we be alert to, and responsive to, our clients’ mental and behavioral health conditions, including:
   • Being generally familiar with common signs of mental health impairments and substance use disorders;
   • Being able to appropriately:
     o Appreciate the difference between normal litigation-stress symptoms and other, more serious mental health disorders;
     o Work with clients who are abusing/addicted to alcohol or drugs;
     o Helping clients, both with and without significant mental health impairments, cope with the stresses of their case;
     o Maintain our own health and well-being as lawyers trying to do the best for our clients.

B. Statistics: It is likely that you will encounter clients with mental health disorders in your practice:
   • In the United States, more than half of adults (57.4 %) will experience a mental health disorder in their lifetime
   • Approximately 60% of adults needing mental healthcare services do not obtain it; the reasons include:
     o Stigma associated with mental health disorders
     o Unaware they need professional help or unaware that effective help is available
     o Lack of resources for or access to professional mental health services
   • Individuals often suffer from more than one mental health disorder simultaneously, or both mental and substance use disorders.
   • Some common mental health disorders include:

<table>
<thead>
<tr>
<th>Type of mental disorder</th>
<th>Annual % of U.S. adults</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anxiety disorders</td>
<td>19.1%</td>
</tr>
<tr>
<td>Major depressive disorder</td>
<td>6.8%</td>
</tr>
<tr>
<td>Substance use disorder</td>
<td>8.0%</td>
</tr>
<tr>
<td>Bipolar disorders</td>
<td>2.8%</td>
</tr>
<tr>
<td>Eating disorders</td>
<td>2.1%</td>
</tr>
<tr>
<td>Schizophrenia</td>
<td>.45%</td>
</tr>
<tr>
<td>Any mental disorder</td>
<td>19.6%</td>
</tr>
</tbody>
</table>
• Statistics re: substance use:

<table>
<thead>
<tr>
<th>Substance</th>
<th>Adult Population Reporting Use Last 30 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marijuana</td>
<td>7.6% (18,048,000)</td>
</tr>
<tr>
<td>Cocaine</td>
<td>0.6% (1,505,000)</td>
</tr>
<tr>
<td>Inhalants</td>
<td>0.2% (375,000)</td>
</tr>
<tr>
<td>Hallucinogens</td>
<td>0.5% (1,179,000)</td>
</tr>
<tr>
<td>Heroin</td>
<td>0.1% (277,000)</td>
</tr>
<tr>
<td>Non-medical use of</td>
<td></td>
</tr>
<tr>
<td>Prescription drugs</td>
<td>2.5% (5,935,000)</td>
</tr>
</tbody>
</table>

Alcohol

<table>
<thead>
<tr>
<th>Alcohol</th>
<th>Adult Population Reporting Use Last 30 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Binge Drinking (5 or more drinks same occasion last 30 days)</td>
<td>24.6% (58,500,000)</td>
</tr>
<tr>
<td>Heavy Drinking (5 or more drinks 5 or more times last 30 days)</td>
<td>6.8% (16,200,000)</td>
</tr>
</tbody>
</table>

Further, an estimated 20.3 million adults aged 18 or older in 2013 had substance use disorder in the past year, which translates to 8.5 percent of adults. Of those, only approximately 10% received treatment. (Source: SAMHSA, National Survey on Drug Use and Health (NSDUH), 2013).

II. Recognizing Signs Substance Abuse or Other Mental Health Issues

A. Red Flags Unique to Substance Use:

• Trust your instincts

• Continuation of problematic behaviors despite adverse consequences.
  o Legal problems (e.g., DUIs).
  o Social or interpersonal problems (e.g., domestic troubles).
  o High risk behavior (e.g., driving at high speeds; driving drunk).
  o Neglecting major responsibilities at work, school, home.
  o Reports of concern expressed by family, friends, or clients.

• Difficulty in controlling, or inability to control, substance use.
  o Taking the substance in larger amounts or for longer periods than intended.
  o Persistent desire or unsuccessful attempts to cut down or stop using.

• Withdrawal and Tolerance. High tolerance (having to drink/use more to achieve desired effect); signs of withdrawal in the absence of the substance (e.g., tremors, anxiety, nausea, lethargy, etc.).
B. Red Flags: Substance Use or Mental Health

- Isolation and/or reclusive behavior – especially if there is no family/support system.
- Paralysis (by anxiety, fear, insecurity, etc.) in handling work/personal responsibilities.
  - Having difficulty making contact.
  - No response to calls, emails, texts, etc.
  - Telephone message box full.
  - Mail not picked up or opened.
  - Excessively passive behavior - especially when inaction may have significant consequences.
- The confused, disorganized person:
  - Difficulty understanding, following instructions.
  - Confused thinking.
  - Missed appointments; failure to follow through.
  - Unresponsiveness, unable to reach.
- Weak excuses for unavailability or inappropriate conduct.
- Extreme anxiety over their case, or performing tasks related to their case.
- Decline in personal hygiene or appearance.
- Decline in cognitive functioning.
  - Significant memory problems.
  - Difficulty understanding issues.
- Inappropriate/bizarre behavior.
  - Paranoid, exaggerated suspicion, or sense of persecution.
  - Phone calls, emails, texts at odd hours (e.g., 2 a.m.).
- Stressful Personal or Family Situations.
  - Known/suspected financial difficulties or bankruptcy.
  - Pending or potential domestic/relationship problems.
  - Pending or potential criminal charges.
  - Personal or family history of emotional or behavioral disorders.
  - Significantly ill parent, spouse, child, close friend, etc.
- The hostile/distrustful person:
  - Excessive fear or paranoia; clearly delusional beliefs.
  - Grossly exaggerated anger.
  - Unusually low capacity tolerating frustration; highly emotionally reactive
  - Extreme highs and lows in mood
  - Difficulty responding to and bouncing back from adverse events-often brought on by or triggered by their case
- The excessive needy/demanding person.
- Talk or behavior suggesting intent to harm self, loss of hope, or desire to no longer be alive.
C. Substance use related cognitive impairments can persist for weeks or months after substance use has stopped, depending on the amount and length of use; or, can be permanent.

D. CAGE Screen for Substance Use Disorders: Yes answers to two or more of the following indicates a need for further screening and assessment.

Cutting Down: Have you tried to cut down or quit drinking/drug use?

Annoyance: Has anyone annoyed you by suggesting that you quit or cut down?

Guilt: Have you ever felt guilty about your drinking/drug use?

Eye-Opener: Have you ever needed a drink or a drug to “get started” in the morning?

III. Stress and Mental Health

A. Mental Health Impairment As A Response To Stress/Threat.
   • Stress can “flip our lids” and cause our prefrontal cortex to go “off-line” and limit our response flexibility.
     ▪ Prefrontal Cortex functions: body regulation, attuned communication, emotional balance, response flexibility, empathy, insight, fear-extinction, intuition and morality.
   • Fight/Flight/Freeze: Our activated sympathetic nervous system takes prefrontal cortex functions off-line by design because our response to threat has to be fast and instinctual to survive – we don’t have time to analyze.
   • Anxiety disorder and PTSD can be seen as fight/flight/freeze locked in the “on” position.
   • Stress can exacerbate existing substance use or mental health impairments.
   • People can struggle with symptoms but not meet criteria for diagnosis.

B. Stress can cause mental health or physical health issues. (Stress-diathesis model: this theory purports that an individual’s biological vulnerabilities, or predispositions, to particular psychological disorders can be triggered by stressful life events.)

IV. Assisting Clients with Mental Health or Substance Use Impairments

A. Comments, Tips and Reminders For Helping A Potentially Impaired Client
   • You do not have to be a mental health expert to assist an impaired client.
   • In most cases, if you have concerns about a potentially impaired client, there are likely others who have similar concerns.
   • In most cases, people who emotionally implode or get into serious personal trouble were previously known by others to be struggling; many of the signs of a problem have existed for some time and have been observed by others.
   • Doing something is generally better than doing nothing
     o Personal contact (phone or in-person) is generally better than emails & texts.
     o Emails & texts are generally better than no contact.
• People who are struggling are often unwilling to seek assistance; they are embarrassed, do not want to impose on others, or are in denial.

B. Having a Conversation with a Potentially Impaired Client

• When the potentially impaired person is someone you do not feel comfortable dealing with directly, look for alternatives (e.g., OAAP).

• Avoid “ganging-up.” Especially for an initial conversation, having a private conversation with one or two people present who can express concern, and can discuss behaviors they have observed, is usually more helpful.

• Focus on behaviors that you have observed. Avoid second-hand reports if possible.

• Compassion & candor can go together; be direct (“I’m really concerned about you. You seem to be really struggling with _____________. Can I help you?”).

• Be prepared to encounter ambivalence, denial, rationalization, justification and blame.
  o Listening to a client deny what to you is an obvious problem can be very frustrating. Continuing to focus the conversation on specific observed problems (e.g. missed appointments, unanswered phone calls) rather than arguing can be helpful.
  o If your client’s problem is substance use, they may want to make a change, but are also likely getting some benefit from the behavior (“checking-out”, anxiety relief, etc.). They may rationalize or justify their behavior while at the same time acknowledging a problem on some level. Try to talk to the part of them that wants to change or recognizes the problem.

• Have a plan in case your client is ready to get help – a phone number to call or a person to talk to. (“Here is a number for someone who can help...can we make the call right now?”).

C. Listen Well. If you do talk with a distressed client, be willing to listen and acknowledge the client’s distress.

• Listen non-judgmentally:
  o Attempt to listen respectfully and attempt to refrain from expressing any negative reactions you are having to the person’s impairment or what they have done.
  o Be patient, even when the person may not be communicating well, is repetitive, or is speaking more slowly and less clearly than a typically functioning person.
  o Express genuine empathy whenever possible.

• Avoid confrontations unless necessary to prevent self-harm.

• Attempt to confirm persons are understanding/tracking what you are communicating to them.

D. Action and referral

• Suggest assessment by specialist
• Suggest private counseling or treatment (inpatient or outpatient)
• Suggest support groups (AA, NA, Women for Sobriety, Smart Recovery, Alcoholics Victorious, etc.) for substance use.
V. Self-Harm, Depression, and Substance Abuse

A. Depression & substance abuse place individuals at increased risk of suicide

- Expressions of suicidal thoughts or behaviors should always be taken seriously
- QPR (Question, Persuade, Refer) – Suicide prevention training
  https://www.qprinstitute.com/

B. Potential Warning Signs

- Thinking or talking about things like:
  - Wanting to die
  - Feeling hopeless or having no reason to live
  - Feeling trapped or in unbearable pain
  - Feeling like a burden to others and/or that others would be better off without them

- Behaviors suggestive of suicidal intent:
  - Increased use of alcohol or drugs
  - Being anxious, agitated, or reckless
  - Withdrawing from usual activities
  - Isolation from others
  - Showing rage or talking about seeking revenge
  - Displaying extreme mood swings
  - Giving away prized possessions and other personal belongings or putting affairs in order

- Has the person made a suicide attempt in the past? A previous attempt is a risk factor that a person is more likely to try again or complete suicide.

C. Recommended response: You need to ask the person the following questions:

- Are you having thoughts of suicide? / Are you thinking about killing yourself?
  - If the person answers yes, you need to ask these three questions:
    - Have you decided how you would kill yourself?
    - Have you decided when you would do it?
    - Have you taken any steps to secure the things you would need to carry out your plan?

D. How to help.

- If possible do not leave them alone if they have a plan and a means to carry it out.
- Urge the person to seek help.
- Call the person’s doctor/therapist.
- Emergency room or 911.
• Help the person eliminate access to firearms or other means, including unsupervised access to medications.
  o Utilize support system if possible.
  o Call the OAAP for resources: (503) 226-1057
  o Multnomah County Crisis Line (503) 988-4888
  o National Hotline: 1-800-273-TALK (8255)
    ▪ Toll-free number
    ▪ Available 24 hours a day, every day

VI. Helping Impaired Clients Make It Through Their Case

A. When appropriate, learn client’s medical and mental health history at intake and whether they are taking prescription medication for a mental health and trauma issues, substance use issues, his/her ability to read, and, whether they have had head injuries or other physical health issues that can impair their ability to function well.
  • Get a release to talk with mental health providers/doctors/court, if necessary
  • Urge clients to continue medications and treatment
  • When appropriate, have your client professionally evaluated

B. Strategies, suggestions and reminders
  • Establish/clarify your role as their lawyer
  • Develop rapport and trust through active listening and follow through
  • Clarify and respect boundaries
  • Help client analyze and understand his/her case
  • Provide possible approaches, case strategies
  • Give advice on the consequences of potential action/inaction
  • Client decides the course of action to be taken on his/her case but you can positively influence their choices if you develop trust and understanding of them

C. Managing client’s expectations; thoroughly explain:
  • Service intended
  • Time
  • Costs
  • Anticipated results
  • Immediately advise client when circumstances change
  • Keep your staff in the loop

D. Obtain case postponements if clients are too impaired to go forward

E. Consult with others!

VII. How to Stay Healthy When Working with Clients with Mental Health Impairments

A. Stay healthy while representing clients with mental health challenges by knowing your limits and establishing healthy boundaries/communication
• Clearly define your role and limits to your representation, using tools like engagement letter/agreement.
• Pro-active communication can alleviate some of your clients’ anxieties and keep you from being inundated with extra phone calls and emails.
• Debrief with others if your client poses particular personal challenges.

B. Some Final Tips
• OSB & PLF ... have many valuable resources
• When in doubt ... Consult!
• Contact the Oregon Attorney Assistance Program: 503-226-1057; 1-800-321-OAAP (6227); www.oaap.org
Appendix

A. Signs and symptoms of some common mental health disorders

Anxiety

- Psychological
  - Prolonged debilitating anxiety or worry
  - Prolonged disruption of sleep (inability to fall asleep/stay asleep)
  - Difficulty focusing, concentrating, tracking
  - Difficulty self-regulating emotions (crying, irritability, anger, restlessness)
  - Paralyzed from taking action in their own self interest

- Physical (Client’s fight, flight or freeze response is locked in the on position)
  - Cardiovascular: pounding heart, chest pain, rapid heartbeat, flushing
  - Respiratory: hyperventilation, shortness of breath
  - Neurological: dizziness, numbness
  - Gastrointestinal: choking, dry mouth, stomach pains, nausea, vomiting, diarrhea
  - Musculoskeletal: muscle aches and pains (especially neck, shoulders, and back), restlessness, tremors and shaking, inability to relax.
  - Panic attacks: The sudden onset of intense apprehension, fearfulness or terror and the above listed physical symptoms (shortness of breath, heart palpitations, chest pains, choking or smothering sensations and/or fear of “going crazy” or losing control).

- Behavioral
  - Avoidance of situations
  - Obsessive or compulsive behavior
  - Distress in social situations
  - Phobic behavior

Depression

- Prolonged and debilitating feelings of sadness, hopelessness, worthlessness, despair
- Loss of interest in activities once enjoyable
- Difficulty focusing, concentrating, tracking
- Feeling worthless or feeling guilty though not really at fault
- Changes in:
  - Energy (agitation or lethargy)
  - Sleep Habits (insomnia or sleeping too much)
  - Eating (eating too much or too little; losing or gaining weight)
- Paralyzed from taking action in their own self interest
- Recurrent thoughts of death, wishing to be dead or suicide
Mania
- Persistently Elevated Mood: Elated, Euphoric, Expansive
- Grandiosity, Inflated Self Esteem
- Hyper-talkative
- Racing thoughts- flight of ideas
- Decreased need for sleep, distractible
- Hyper sexuality, irresponsible spending
- Impaired judgment/decision-making
- ultimately will result in a delusional break from reality in 75% of manic individuals
- Danger to self & others

Acute traumatic stress
- Nightmares
- Constantly on guard (hyper-vigilance)
- Jumpy/paralyzed in fear
- Reliving the event and not being able to move forward
- Changes in mood
- If symptoms continue for longer than 3 months, diagnosed as post traumatic stress disorder

More common Personality Disorders
- Antisocial personality disorder is a pattern of disregard for, and violation of, the rights of others.
- Borderline personality disorder is a pattern of instability in interpersonal relationships, self-image, and affect, and, marked impulsivity.
- Dependent personality disorder is a pattern of submissive and clinging behavior related to an excessive need to be taken care of.
- Histrionic personality disorder is a pattern of excessive emotionality and attention seeking.
- Narcissistic personality disorder is a pattern of grandiosity, need for admiration, and lack of empathy.
- Obsessive-compulsive personality disorder is a pattern of preoccupation with orderliness, perfection and control.
- Paranoid personality disorder is a pattern of distrust and suspiciousness such that other’s motives are interpreted as malevolent.

B. Signs and symptoms of mild cognitive impairment (MCI)
- Short-term memory problems
  - Repeats questions frequently
  - Forgets what is discussed within a short period of time
  - Cannot remember events of the past few days
  - Forgets upcoming events such as appointments/social engagements
- Language/communications problems
- Difficulty finding words frequently
- Trouble staying on topic; losing train of thought
- Disorganized
- Unusual/bizarre statements or reasoning

- Comprehension problems
  - Difficulty repeating concepts
  - Repeating questions

- Demonstrates a lack of mental flexibility
  - Difficulty adjusting to changes
  - Difficulty comparing alternatives
  - Increasingly overwhelmed by making decisions

- Calculation/financial management problems

- Disorientation
  - Having trouble navigating familiar environments
  - Getting lost
  - Confused about day/time/year

- Becoming more impulsive or showing increasingly poor judgment

C. Drug specific physical and behavioral signs/symptoms:

- **Alcohol**: Odor of alcohol; redness or flushing in face; clumsiness; difficulty walking; slurred speech; sleepiness; poor judgment; dilated pupils;

- **Marijuana**: Glassy, red eyes; loud talking and inappropriate laughter; a sweet burnt scent; loss of interest, motivation; weight gain or loss

- **Depressants/Downers**: (sedatives and anti-anxiety medication) seem drunk as if from alcohol but without the associated odor of alcohol; difficulty concentrating; short-term memory loss; clumsiness; poor judgment; slurred speech; sleepiness and contracted pupils

- **Stimulants/Uppers**: Hyperactivity, excessive talking; euphoria; restlessness, irritability, agitation; anxiety; may go long periods of time without eating or sleeping followed by depression or excessive sleeping at odd times; dilated pupils; weight loss; dry mouth and nose

- **Opiates/Opioids**: Confusion; poor coordination; sleeping at unusual times; sweating; vomiting; coughing and sniffing; twitching; loss of appetite; constipation, low blood pressure, decreased breathing rate contracted pupils; no response of pupils to light; with heroin use, needle marks

- **Hallucinogens**: Dilated pupils; bizarre and irrational behavior including paranoia, aggression, hallucinations; mood swings; detachment from people; absorption with self or other objects; slurred speech; confusion

- **Inhalants**: (Glues, aerosols, and vapors) watery eyes; impaired vision, memory and thought; secretions from the nose or rashes around the nose and mouth; headaches and nausea; appearance of intoxication; drowsiness; poor muscle control; changes in appetite; anxiety; irritability; an unusual number of spray cans in the trash
• Other behavioral signs in general:
  o Drop in functioning/ effectiveness at work or school
  o Difficulty in paying attention; forgetfulness
  o Loss of interest or increased conflicts with family and friends
  o Lack of motivation, energy, “I don’t care attitude
  o Excessive need for privacy; unreachable
  o Secretive or suspicious behavior
  o Accidents
  o Possession of drug paraphernalia
  o Dishonesty; stealing money or objects
  o Change in personal grooming habits

References


Mental Health Association of Maryland, Missouri Department of Mental Health, and National Council for Behavioral Health (2013) Mental Health First Aid USA, Revised First Edition


THE OAAP OFFERS HELP FOR...

- Problem alcohol, drug, and/or substance use
- Recovery support
- Burnout and stress management
- Career transition and satisfaction
- Depression, anxiety, and other mental health issues
- Compulsive disorders including gambling, sex, and Internet addiction
- Procrastination
- Relationship issues
- Retirement planning
- Time management

ARE THERE ANY COSTS?

All of our services are free, except for a nominal fee charged for some workshops and seminars. If additional professional help is needed, we can serve as a referral resource.

HOW DO I RECEIVE ASSISTANCE?

Call or email us. We are here to help.

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WHAT IS THE OREGON ATTORNEY ASSISTANCE PROGRAM?

The Oregon Attorney Assistance Program (OAAP) is a confidential service funded by the Professional Liability Fund for all Oregon lawyers and judges. We provide assistance with and referral for problem alcohol, drug, and/or other substance use; stress management; time management; career transition; compulsive disorders (including problem gambling); relationships; depression; anxiety; and other issues that affect the ability of a lawyer or judge to function effectively. The OAAP is also available to Oregon law students.

OAAP attorney counselors are lawyers and professionally trained counselors. As a result, we are able to establish a unique rapport with members of the legal community.

COMpletely CONFIDENTIAL

All communications with the OAAP are completely confidential and will not affect your standing with the Professional Liability Fund or the Oregon State Bar. No information will be disclosed to any person, agency, or organization outside the OAAP without the consent of the lawyer or judge accessing the program. Contacts with us are kept strictly confidential pursuant to ORS 9.568, PLF Policies 6.150 - 6.300, OSB Bylaw Article 24, ORPC 8.3(c)(3), Oregon Code of Judicial Conduct 3.11 and Judicial Code of Conduct for United States Judges Canon 3B(5). The only exceptions are: 1) to avert a serious, imminent threat to your health or safety or that of another person and 2) to comply with legal obligations such as ORS 419B.010 and ORS 124.060 (child abuse and elder abuse).

OAAP Attorney Counselors

Shari R. Gregory, LCSW, JD, is the assistant director and an attorney counselor at the Oregon Attorney Assistance Program. She is a graduate of Wurzweiler School of Social Work (MSW 1987) and Rutgers School of Law (JD 1992). Ms. Gregory received her Certificate of Business Management from Portland State University (2003) and her license in clinical social work (LCSW 2010). She is experienced in career and life transition counseling; relationship counseling; mental health and trauma counseling; crisis intervention; stress management; organizational challenges; and alcohol/drug and addiction counseling. She worked as a criminal defense attorney prior to coming to the OAAP in 1999.

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Douglas S. Querin, JD, LPC, CADC I, is a graduate of the University of Oregon School of Law (JD) and George Fox University (MA in Counseling). He was in the private practice of law as a trial lawyer in state and federal courts for over 25 years. In recovery since 2002, Mr. Querin joined the OAAP staff in 2006. He is a Licensed Professional Counselor (LPC) and a Certified Alcohol and Drug Counselor (CADC I). Mr. Querin is experienced in mental health counseling; alcohol and drug counseling; stress/anxiety management; lawyer work-life balance; and relationship counseling. He is the 2008 and 2013 recipient of the Oregon Counseling Association’s Distinguished Service Award and a former member of the Oregon Board of Licensed Professional Counselors and Therapists (2013-16).

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Kyra M. Hazilla, JD, LCSW, is a 2006 graduate of the University of Michigan Law School (JD) and School of Social Work (MSW). She was a public defender practicing juvenile law for most of her legal career and also worked as a contract attorney in the areas of personal injury law and civil rights law before joining the OAAP staff in 2014. Her counseling experience includes crisis intervention; working with victims of sexual assault; drug, alcohol, and substance use counseling; mental health counseling; and helping domestic violence survivors and their children. Ms. Hazilla was raised by a family member in recovery.

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Bryan R. Welch, JD, CADC I, is a graduate of Northwestern School of Law at Lewis and Clark College (JD 2003) and a Certified Alcohol and Drug Counselor (CADC I). Prior to joining the OAAP staff in 2015, he was in the private practice of law for 12 years, primarily in family law and family mediation. In addition to his work at the OAAP, his experience includes providing drug and alcohol counseling services for a court-mandated DUII treatment program and for a local nonprofit working with people impacted by homelessness, poverty, and addiction. He has been in recovery since 2001, and has been actively involved in the recovery community, including the OAAP, since 2001.

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CHAPTER 17

PRACTICE TIPS FOR AVOIDING ETHICS TRAPS

Mark Johnson Roberts
Oregon State Bar Deputy General Counsel
Linn D. Davis
Oregon State Bar Assistant General Counsel and
Client Assistance Office Attorney
Chapter 17

Practice Tips for Avoiding Ethics Traps

Table of Contents

Presentation Outline ................................................................. 17-1

To view these chapter materials and the additional resources below on or before November 1, go to www.osbplf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After November 1, select Past CLE select Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

Statement of Professionalism
Oregon State Bar Disciplinary Process
OSB 2016 Client Assistance Office Annual Report
OSB 2015 Disciplinary Counsel’s Office Annual Report
Moving on: Duties Beyond the RPC’s When Changing Law Firms, OSB Bulletin June 2013
May We Help You?, OSB Bulletin, June 2010
Revealing Bits and Bytes, OSB Bulletin, June 2012
Ethics Issues Arising in Fee Agreements, Fee Agreement Compendium, 2007
The Transformation: When Fee Disputes Become Ethical Misconduct, OSB Bulletin December 2008
Fee Dispute Resolution Program, updated 2016 OSB brochure
Formal Opinion No. 2005-90 Attorney Liens
Should You Ever Sue a Client? (And Alternatives if You Don’t) OSB Bulletin, June 2011
Avoiding Conflicts and Retaining Clients: Don’t Forget to Shut the Screen Door, OSB Bulletin June 2016
Formal Opinion No. 2006-176 Conflicts of Interest: Lawyers Functioning in Multiple Roles in Client Real Estate Transaction
Conflicts of Interest: Lawyer Functioning in Multiple Roles in Client’s Real Estate Transaction, Formal op 2006-176 (revised 2015)
Former Client Conflicts: Differences Without (Much) Distinction, OSB Bulletin, October 2006
I. Ethics Rules vs. Statement of Professionalism
   A. The Oregon Rules of Professional Conduct
      i. The “floor” for conduct
   B. Statement of Professionalism (Handout)
      i. Aspirational goals
      ii. Handout – “Enjoy your time in prison.”

II. Overview of OSB Discipline Process
    A. Handout – Oregon State Bar Disciplinary Process
    B. Client Assistance Office
       i. Screens complaints
    C. General Counsel
       i. “Appeal” of CAO
    D. Office of Disciplinary Counsel
    E. State Professional Responsibility Board
       i. Performs grand jury function
    F. Disciplinary Board
       i. Conducts trials
    G. Supreme Court
    H. Handout – 2016 CAO Annual Report
    I. Handout – 2015 DCO Annual Report

III. Changing Firms
    A. What to tell your soon to be former firm
    B. What to tell your clients
    C. Solicitation of clients
    D. Conflicts issues
    E. Handout – Seeking New Horizons, Aug/Sept 2012
    F. Handout – Moving On, June 2013

V. Role of General Counsel
   A. Ethics calls—Bar Bylaw 19.102
      i. Ethics “assistance” and “reactions” regarding your own prospective conduct
      ii. Not confidential and not privileged
iii. No attorney-client relationship

B. Advisory opinions, formal and informal—Bar Bylaw 19.103
   i. Request must be in writing
   ii. General Counsel opinion within three days
   iii. Complex questions may go to the Legal Ethics Committee and the BOG
   iv. Provides mitigation of disciplinary charges per RPC 8.6

C. Handout – *May We Help You?,* June 2010

VI. Fee Agreements
   A. Types of fee arrangements
      i. Hourly
      ii. Contingent
      iii. Fixed-fee
   B. Accepting payments from third parties
   C. Referral fees (between lawyers)
   D. Chapter for handout – “Ethics Issues Arising in Fee Agreements” from the *Fee Agreement Compendium* (2007)

VII. Fee Disputes
   A. What is a reasonable fee?
      i. Excessive and unreasonable fees
      ii. Illegal fees
   B. OSB Fee Dispute Resolution program—Bar Bylaws Article 22; OSB Fee Dispute Resolution Rules
   C. Article for handout – *When Fee Disputes Become Ethical Misconduct,* December 2008
   D. Handout – *Fee Dispute Resolution Program* (2016 updated OSB brochure)

VI. Fee Collection
   A. Attorney liens
   C. Filing a lawsuit
   D. Handout – *Should You Ever Sue a Client?,* June 2011
VIII. Conflicts Issues

A. Current client conflicts—RPC 1.7
B. Lawyer self-interest conflicts—RPC 1.8
   i. Business ventures
   ii. Sexual relations
C. Former client conflicts—RPC 1.9
D. Imputed Conflicts and Screening
E. Article for Handout – *Avoiding Conflicts and Retaining Clients: Don’t Forget to Shut the Screen Door* (June 2016)
G. Handout – *Former Client Conflicts: Differences Without (Much) Distinction*, October 2006
Chapter 17

Practice Tips for Avoiding Ethics Traps

Resources

Statement of Professionalism

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Formal Opinion No. 2005-90 Attorney Liens

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Formal Opinion No. 2006-176 Conflicts of Interest: Lawyers Functioning in Multiple Roles in Client Real Estate Transaction (revised 2015)

Former Client Conflicts: Differences Without (Much) Distinction, OSB Bulletin, October 2006
As lawyers, we belong to a profession that serves our clients and the public good. As officers of the court, we aspire to a professional standard of conduct that goes beyond merely complying with the ethical rules. Professionalism is the courage to care about and act for the benefit of our clients, our peers, our careers, and the public good. Because we are committed to professionalism, we will conduct ourselves in a way consistent with the following principles in dealing with our clients, opposing parties, opposing counsel, the courts, and the public.

- I will promote the integrity of the profession and the legal system.
- I will work to ensure access to justice for all segments of society.
- I will avoid all forms of unlawful or unethical discrimination.
- I will protect and improve the image of the legal profession in the eyes of the public.
- I will support a diverse bench and bar.
- I will promote respect for the courts.
- I will support the education of the public about the legal system.
- I will work to achieve my client’s goals, while at the same time maintain my professional ability to give independent legal advice to my client.
- I will always advise my clients of the costs and potential benefits or risks of any considered legal position or course of action.
- I will communicate fully and openly with my client, and use written fee agreements with my clients.
- I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party.
- I will always be prepared for any proceeding in which I am representing my client.
- I will be courteous and respectful to my clients, to adverse litigants and adverse counsel, and to the court.
- I will only pursue positions and litigation that have merit.
- I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.
- I will support pro bono activities.
March 8, 2017

Two Rivers Correctional Institute
82911 Beach Access Road
Umatilla, OR 97882

Re: Consultation Fee of $125

Dear Mr.

Given that you are a convicted sex offender, pervert and miscreant, it is difficult to see how you could conceivably have any moral or intellectual high ground upon which to accuse anybody of anything. Maybe that is why you are spending a substantial part of the rest of your life in prison.

First, and foremost, you are an idiot. For what it is worth, I spent over a half an hour with your mother discussing your legal problem. I normally bill at $250 an hour. So I earned my money. Nevertheless, I felt absolutely terrible for your elderly mother having such an abysmal failure and a despicable moral idiot for a son. For the $125 I charged her, you are simply not worth dealing with. I communicated this response to the Oregon State Bar after you made a frivolous ethical complaint. On January 9, 2017, I had already refunded your mother $125, simply because you and your case where not worth my time to deal with. Again, I felt absolutely terrible for your mother having to put up with trash like you for offspring.

Enjoy your time in prison.
OREGON STATE BAR DISCIPLINARY PROCESS

Appeal to OSB General Counsel

Inquiries/Complaints

OSB Client Assistance Office

Resolved by Client Assistance Office

Local Professional Responsibility Committee Investigation

State Professional Responsibility Board

Failed Diversion

Dismissal

Diversion

Prosecute

If Review Requested by Complainant

Letter of Admonition

If Rejected by Lawyer

If Lawyer or SPRB Appeals

Guilty

Disciplinary Board Trial Panel

Not Guilty

If SPRB Appeals

Oregon Supreme Court

Appendix
2016
Annual Report
Client Assistance Office
January 1, 2016 to December 31, 2016
Report to the Oregon Supreme Court

Linn D. Davis
CAO Manager
Assistant General Counsel

Troy J. Wood
Assistant General Counsel

Daniel P. Atkinson
Assistant General Counsel

Karen Graham
Intake Coordinator

Jennifer Mount
Intake Specialist
2016 Annual Report of the Oregon State Bar
Client Assistance Office

TABLE OF CONTENTS

I. OVERVIEW ............................................................................................................................... 1

II. CAO OPERATION IN 2016 ................................................................................................... 1

III. CAO STATISTICAL INFORMATION

   Table 1: Source of Complaint ............................................................................................. 4

   Table 2: Primary Subject of Complaint ............................................................................. 4

   Table 3: Type of Matter ....................................................................................................... 5

   Table 4: Size of Firm ............................................................................................................. 6

   Table 5: Disposition (Result) ............................................................................................... 7

   Table 6: Disposition (Time) .................................................................................................. 8

IV. EXAMPLES OF CAO EFFORTS TO RESOLVE PROBLEMS ............................................ 8

V. CONCLUSION ......................................................................................................................... 9
I. OVERVIEW

Beginning August 1, 2003, the Client Assistance Office (CAO) has conducted the initial review of all concerns raised about members of the Oregon State Bar (Bar). This report is the fourteenth review of the operations of the CAO and covers those operations from January 1, 2016, through December 31, 2016. During that period, CAO logged 2,027 matters. Hundreds of additional callers received assistance that was not formally logged. Consistent with prior years, clients submitted the largest number of complaints. The most common complaints involved concerns that a lawyer was not communicating or acting diligently. Most complaints arose from criminal or family law matters.

CAO resolved 1,938 logged matters in 2016, referring 283 to Disciplinary Counsel for further evaluation and dismissing 1,180. In the remaining matters, CAO provided information, referred the contact to an appropriate program, or assisted the parties to resolve the concerns raised.

When CAO dismisses a complaint, it provides the complainant with a written explanation of the basis for the dismissal and notifies the complainant of the ability to request review by the Bar’s General Counsel. In most cases, complainants did not request review. In 2016, about 98% of the CAO dismissals reviewed by General Counsel were affirmed.

II. CAO OPERATION IN 2016

The Supreme Court established CAO in 2003 as an office separate from the Bar’s Disciplinary Counsel. CAO reports to the Bar’s General Counsel. In 2016, CAO consisted for most of the year of three staff attorneys and two non-attorney support staff. One CAO attorney transferred to Disciplinary Counsel’s Office, resulting in a period of reduced staffing until that attorney was replaced. One CAO staff attorney also serves as CAO manager.

Pursuant to BR 2.5(a), to the extent possible and as resources permit, CAO responds to all inquiries and complaints from the public concerning the conduct of attorneys. CAO accepts complaints in writing, by telephone, email, fax, or in person. As permitted by BR 2.5(a), CAO requires that any complaint that warrants a response from a lawyer must be put in writing (or given equivalent concrete form), in order to accurately document the complainant’s concerns and give the responding lawyer adequate notice of them. CAO provides reasonable
accommodation to those who are unable to communicate in writing.

CAO logs all written inquiries and complaints into an electronic database. CAO typically handles ten to thirty telephone calls from the public each day. A great number of these telephone calls are not logged due to the volume of contacts and limited staff resources, even though the callers receive substantive assistance of the type described below. Inquiries and complaints logged into the database are assigned matter numbers. In 2016, CAO logged 2,027 matters. 564 of the matters were classified as inquiries; approximately 244 of those were logged matters handled by telephone.

Attorney and non-attorney staff handle inquiries and unlogged telephone calls by providing information to assist the public to resolve concerns about legal services. Inquiries do not require active intervention or further assistance from CAO. The majority of inquiries involve questions regarding: (1) standards governing lawyer conduct; (2) reasonable client expectations; (3) means for addressing issues with a lawyer such as a fee dispute or a perceived lack of communications; (4) obligations of a lawyer upon termination of employment; (5) the jurisdiction of the bar; and (6) the process of making a complaint to the bar. Inquirers may also seek legal advice or other assistance that CAO is unable to provide. If possible, CAO staff refers inquirers to resources within or outside the bar that might be able to offer assistance to the inquirer.

The remaining 1,463 new matters required active assistance by CAO attorneys to resolve or investigate complaints, pursuant to BR 2.5(b). In practice, the investigation of complaints involves collecting information from the complainant and seeking a response from an attorney to those concerns which may implicate misconduct. CAO provides all information submitted by each party to a complaint to the other party or parties, who may be asked to comment upon it. CAO may also seek information from additional sources, such as court records or non-party witnesses.

CAO staff attorneys dispose of complaints with administrative assistance from the non-attorney staff. BR 2.5(b) authorizes the following dispositions:

(1) If CAO determines that, even if true, a complaint does not allege misconduct, the complaint is dismissed with

1 "Misconduct" means any conduct which may subject an attorney to discipline under the Bar Act or the rules of professional conduct adopted by the Supreme Court. BR 1.1(s).
written notice to the complainant and to the attorney named in the complaint;

(2) If CAO determines that there is sufficient evidence to support a reasonable belief that misconduct may have occurred, the Complaint is referred to Disciplinary Counsel. Otherwise, the Complaint is dismissed with written notice to the complainant and the attorney;

(3) At the request of the complainant, CAO may also contact an attorney and attempt to resolve the complainant’s concerns. The provision of such assistance does not preclude a referral to Disciplinary Counsel.

CAO continues to speedily and accurately resolve inquiries and complaints. In 2016, CAO resolved more than 56% of logged matters within 30 days or less. Almost 95% were resolved within 180 days. (Table 6.)

In 2016, CAO referred 283 matters to Disciplinary Counsel for further evaluation. (Table 5.) Although BR 2.5 does not require it, when a complaint is referred to Disciplinary Counsel, CAO provides the complainant and subject attorney with written notice of the referral. A confidential memo regarding the basis for the referral is transmitted to Disciplinary Counsel with the file.

In 2016, CAO dismissed 1,180 complaints, with a written explanation to the complainant and the subject attorney. (Table 5.) The explanation included information about the ability to request review of the dismissal by General Counsel.

Pursuant to BR 2.5(c), a dismissal by CAO is subject to review by General Counsel upon written request by the complainant. General Counsel’s decision is final. In 2016, more than 98% of CAO dismissals were affirmed on review.

To help ensure consistency and quality of review, CAO staff meets on a weekly basis to review cases and procedures. CAO staff lawyers also contribute to the Bar’s efforts to assist lawyers to meet their professional responsibilities by contributing to bar publications, speaking at continuing education presentations and responding to General Counsel Ethics Helpline calls.
III. CAO STATISTICAL INFORMATION

Between January 1, 2016, and December 31, 2016, CAO kept statistics regarding the following aspects of matters received.

Most matters originated from clients inquiring or complaining about their own attorneys. (Table 1).

Table 1: SOURCE OF COMPLAINT OR INQUIRY

<table>
<thead>
<tr>
<th>Source of Complaint or Inquiry</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client</td>
<td>898</td>
<td>46.22%</td>
</tr>
<tr>
<td>Opposing Party</td>
<td>366</td>
<td>18.84%</td>
</tr>
<tr>
<td>General Assistance/Unknown</td>
<td>347</td>
<td>17.87%</td>
</tr>
<tr>
<td>Third Party</td>
<td>265</td>
<td>13.64%</td>
</tr>
<tr>
<td>Opposing Counsel</td>
<td>64</td>
<td>2.78%</td>
</tr>
<tr>
<td>Judge</td>
<td>5</td>
<td>0.26%</td>
</tr>
<tr>
<td>Self</td>
<td>4</td>
<td>0.21%</td>
</tr>
<tr>
<td>CAO</td>
<td>3</td>
<td>0.15%</td>
</tr>
<tr>
<td>DCO</td>
<td>1</td>
<td>0.05%</td>
</tr>
</tbody>
</table>

Most complaints concerned a perceived lack of adequate competence, diligence, or communication. (Table 2). CAO staff contributes to efforts to educate lawyers about these issues and other subjects of complaints through bar publications, continuing legal education programs, and other contacts with our membership.

Table 2: PRIMARY SUBJECT OF COMPLAINT OR INQUIRY

<table>
<thead>
<tr>
<th>Primary Subject of Complaint or Inquiry</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competence or Diligence</td>
<td>256</td>
<td>13.19%</td>
</tr>
<tr>
<td>General Information Inquiry</td>
<td>229</td>
<td>11.79%</td>
</tr>
<tr>
<td>Communication</td>
<td>214</td>
<td>11.02%</td>
</tr>
<tr>
<td>Dishonesty or Misrepresentation</td>
<td>201</td>
<td>10.35%</td>
</tr>
<tr>
<td>Other/Miscellaneous</td>
<td>109</td>
<td>5.61%</td>
</tr>
<tr>
<td>General Client Assistance</td>
<td>99</td>
<td>5.10%</td>
</tr>
<tr>
<td>Outside of Legal Bounds</td>
<td>94</td>
<td>4.84%</td>
</tr>
<tr>
<td>Fee Dispute – Excessive/illegal Fees</td>
<td>92</td>
<td>4.74%</td>
</tr>
<tr>
<td>Return Client File</td>
<td>86</td>
<td>4.43%</td>
</tr>
<tr>
<td>Improper Conduct of a Prosecutor</td>
<td>78</td>
<td>4.02%</td>
</tr>
<tr>
<td>Conduct Prejudicial to Justice</td>
<td>59</td>
<td>3.04%</td>
</tr>
<tr>
<td>Preserving/Accounting for Funds/Property</td>
<td>54</td>
<td>2.78%</td>
</tr>
<tr>
<td>Improper Withdrawal</td>
<td>43</td>
<td>2.21%</td>
</tr>
<tr>
<td>Malpractice</td>
<td>41</td>
<td>2.11%</td>
</tr>
<tr>
<td>Client Conflict – Current</td>
<td>29</td>
<td>1.49%</td>
</tr>
</tbody>
</table>
Table 2: PRIMARY SUBJECT OF COMPLAINT OR INQUIRY
(continued)

<table>
<thead>
<tr>
<th>Primary Subject of Complaint or Inquiry</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disclosing Confidences/Secrets</td>
<td>29</td>
<td>1.49%</td>
</tr>
<tr>
<td>Client Conflict – Former</td>
<td>28</td>
<td>1.44%</td>
</tr>
<tr>
<td>Rude Behavior</td>
<td>27</td>
<td>1.39%</td>
</tr>
<tr>
<td>Legal Advice</td>
<td>25</td>
<td>1.29%</td>
</tr>
<tr>
<td>Judicial Fitness Commission</td>
<td>23</td>
<td>1.18%</td>
</tr>
<tr>
<td>Quality of Services</td>
<td>21</td>
<td>1.08%</td>
</tr>
<tr>
<td>Criminal Conduct</td>
<td>18</td>
<td>0.93%</td>
</tr>
<tr>
<td>Unauthorized Practice of Law</td>
<td>18</td>
<td>0.93%</td>
</tr>
<tr>
<td>Contact with Represented Party</td>
<td>15</td>
<td>0.77%</td>
</tr>
<tr>
<td>Ex Parte Communication</td>
<td>6</td>
<td>0.31%</td>
</tr>
<tr>
<td>Improperly Threatening Criminal Prosecution</td>
<td>6</td>
<td>0.31%</td>
</tr>
<tr>
<td>Trial Conduct</td>
<td>6</td>
<td>0.31%</td>
</tr>
<tr>
<td>Conflict – Self-Interest</td>
<td>4</td>
<td>0.21%</td>
</tr>
<tr>
<td>Failure to Cooperate with OSB</td>
<td>4</td>
<td>0.21%</td>
</tr>
<tr>
<td>Lawyer Debts</td>
<td>4</td>
<td>0.21%</td>
</tr>
<tr>
<td>Sexual Relations with a Client</td>
<td>3</td>
<td>0.16%</td>
</tr>
<tr>
<td>Business Relationship with Client</td>
<td>2</td>
<td>0.10%</td>
</tr>
<tr>
<td>Problem Re Firm Names/Letterhead</td>
<td>2</td>
<td>0.10%</td>
</tr>
<tr>
<td>False or Misleading Advertising</td>
<td>1</td>
<td>0.05%</td>
</tr>
</tbody>
</table>

CAO statistics show year after year that criminal law practice is most likely to generate a complaint, with domestic relations as the area of practice next most likely to generate a complaint. Together, criminal law and domestic relations matters account for over half of all complaints received. (Table 3.)

Table 3: TYPE OF MATTER GIVING RISE TO THE COMPLAINT OR INQUIRY

<table>
<thead>
<tr>
<th>Type of Matter</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal</td>
<td>677</td>
<td>38.21%</td>
</tr>
<tr>
<td>Domestic Relations</td>
<td>259</td>
<td>14.62%</td>
</tr>
<tr>
<td>Litigation</td>
<td>110</td>
<td>6.21%</td>
</tr>
<tr>
<td>Civil Dispute</td>
<td>109</td>
<td>6.15%</td>
</tr>
<tr>
<td>Personal Injury</td>
<td>73</td>
<td>4.12%</td>
</tr>
<tr>
<td>Probate</td>
<td>59</td>
<td>3.33%</td>
</tr>
<tr>
<td>Landlord/Tenant</td>
<td>42</td>
<td>2.37%</td>
</tr>
<tr>
<td>Estate Planning</td>
<td>38</td>
<td>2.14%</td>
</tr>
<tr>
<td>Debt Collection</td>
<td>31</td>
<td>1.75%</td>
</tr>
<tr>
<td>Real Estate</td>
<td>31</td>
<td>1.75%</td>
</tr>
<tr>
<td>Business</td>
<td>30</td>
<td>1.69%</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>26</td>
<td>1.47%</td>
</tr>
<tr>
<td>Guardianship/Conservatorship</td>
<td>21</td>
<td>1.19%</td>
</tr>
<tr>
<td>Workers Compensation</td>
<td>21</td>
<td>1.19%</td>
</tr>
<tr>
<td>Immigration</td>
<td>17</td>
<td>0.96%</td>
</tr>
</tbody>
</table>

OSB CLIENT ASSISTANCE OFFICE 2016 ANNUAL REPORT
Table 3: TYPE OF MATTER GIVING RISE TO THE COMPLAINT OR INQUIRY

(continued)

<table>
<thead>
<tr>
<th>Type of Matter</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juvenile</td>
<td>17</td>
<td>0.96%</td>
</tr>
<tr>
<td>Social Security</td>
<td>13</td>
<td>0.73%</td>
</tr>
<tr>
<td>Arbitration</td>
<td>11</td>
<td>0.62%</td>
</tr>
<tr>
<td>Elder Law</td>
<td>8</td>
<td>0.45%</td>
</tr>
<tr>
<td>Land Use</td>
<td>5</td>
<td>0.28%</td>
</tr>
<tr>
<td>Labor</td>
<td>4</td>
<td>0.23%</td>
</tr>
<tr>
<td>Adoption</td>
<td>3</td>
<td>0.17%</td>
</tr>
<tr>
<td>Advertising</td>
<td>2</td>
<td>0.11%</td>
</tr>
<tr>
<td>Tax</td>
<td>2</td>
<td>0.11%</td>
</tr>
<tr>
<td>Other or Unknown</td>
<td>162</td>
<td>9.15%</td>
</tr>
</tbody>
</table>

The Bar’s Board of Governors asked CAO to track information that might show whether a correlation exists between the size of a lawyer’s law firm and the number of complaints received by CAO. (Table 4.) The statistics show that just over 67% of complaints concerned solo practitioners, who make up about 55% of the active membership. Firms with 2-5 lawyers receive a proportion of complaints roughly in accord with their share of the membership. Larger firms receive a diminishing proportion of complaints relative to their representation in the active membership.

Table 4: SIZE OF FIRM OF THE LAWYER SUBJECT OF COMPLAINT OR INQUIRY

<table>
<thead>
<tr>
<th>Firm Size</th>
<th>Percent of Active Oregon Members²</th>
<th>Number of Complaints</th>
<th>Percent of Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solo</td>
<td>54.9%</td>
<td>1306</td>
<td>67.25%</td>
</tr>
<tr>
<td>2-5</td>
<td>14.5%</td>
<td>262</td>
<td>13.49%</td>
</tr>
<tr>
<td>6-10</td>
<td>8.9%</td>
<td>135</td>
<td>6.95%</td>
</tr>
<tr>
<td>11-25</td>
<td>11.2%</td>
<td>124</td>
<td>6.39%</td>
</tr>
<tr>
<td>26-100</td>
<td>8.9%</td>
<td>114</td>
<td>5.87%</td>
</tr>
<tr>
<td>&gt; 100</td>
<td>1.7%</td>
<td>1</td>
<td>0.05%</td>
</tr>
</tbody>
</table>

The number of dispositions was significantly higher in 2016 than 2015, with over 200 more dispositions recorded. Not only did CAO resolve more cases, but more of these resolutions required a determination on the merits of a complaint, reflected in an increased proportion of dismissals and referrals to Disciplinary Counsel over 2015. As in prior years, most inquiries and complaints were resolved without

² Using July 2017 membership data.
referral to Disciplinary Counsel. (Table 5.) All dispositions may be accompanied by referrals to other appropriate bar services or public bodies. Referrals are separately recorded only where referral was the sole element of the disposition.

Table 5: DISPOSITION OF COMPLAINT OR INQUIRY (RESULT)

<table>
<thead>
<tr>
<th>Disposition</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissed</td>
<td>1180</td>
<td>60.9%</td>
</tr>
<tr>
<td>Information Provided</td>
<td>412</td>
<td>21.3%</td>
</tr>
<tr>
<td>Referred to Disciplinary Counsel</td>
<td>283</td>
<td>14.6%</td>
</tr>
<tr>
<td>Resolved by CAO</td>
<td>27</td>
<td>1.4%</td>
</tr>
<tr>
<td>Advised to File OSB Complaint</td>
<td>15</td>
<td>0.8%</td>
</tr>
<tr>
<td>Referred to Unlawful Practice of Law Committee Only</td>
<td>5</td>
<td>0.3%</td>
</tr>
<tr>
<td>Referred to OSB Lawyer Referral Service Only</td>
<td>4</td>
<td>0.2%</td>
</tr>
<tr>
<td>Referred to Professional Liability Fund Only</td>
<td>4</td>
<td>0.2%</td>
</tr>
<tr>
<td>Referred to Fee Arbitration Only</td>
<td>4</td>
<td>0.2%</td>
</tr>
<tr>
<td>Referred to Client Security Fund Only</td>
<td>1</td>
<td>0.05%</td>
</tr>
<tr>
<td>Referred to Oregon Public Defense Services Only</td>
<td>1</td>
<td>0.05%</td>
</tr>
</tbody>
</table>

Statistics for 2016 show that CAO staff promptly resolved most matters. (Table 6.) About 38% of inquiries and complaints are disposed of within two weeks and over 50% within 30 days. While the speed of dispositions is reduced from 2015, as noted above, significantly more matters were both received and resolved. Few matters remain unresolved after 180 days. As noted above, these statistics do not include significant resources expended by CAO staff each day responding to public inquiries seeking information about lawyers' ethical obligations, the Oregon State Bar or its programs, and miscellaneous other questions.

In cases where, after reviewing an inquiry or complaint, CAO requests additional information from the complainant or a written response from a lawyer, the disposition time increases significantly. In most instances, the complainant or lawyer is given 21 days to respond. Further correspondence sometimes follows as the complainant replies and CAO attempts to collect specific information from the complainant or subject attorney to determine whether there is an issue that warrants a referral to Disciplinary Counsel.

By conducting this review process, CAO serves several valuable purposes. First, it obtains for the complainant a response to the complainant's concerns about a subject lawyer's conduct, while at the same time affording the subject lawyer a forum to respond. Second, it weeds out complaints that are not supported by sufficient evidence of possible misconduct.
Finally, it performs initial investigation and analysis that can assist Disciplinary Counsel in more quickly evaluating those cases where misconduct may have occurred. The average disposition time for all matters is 36 days, which is in line with most prior years, but an increase over 2014 (29 days).

Table 6: DISPOSITION (TIME)

<table>
<thead>
<tr>
<th>Disposition Time</th>
<th>Number</th>
<th>Percent</th>
<th>Avg. Time (Days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Same Day</td>
<td>275</td>
<td>14.2%</td>
<td>0</td>
</tr>
<tr>
<td>1-2 Days</td>
<td>163</td>
<td>8.4%</td>
<td>2</td>
</tr>
<tr>
<td>3-6 Days</td>
<td>310</td>
<td>16.0%</td>
<td>5</td>
</tr>
<tr>
<td>7-14 Days</td>
<td>229</td>
<td>11.8%</td>
<td>9</td>
</tr>
<tr>
<td>15-30 Days</td>
<td>114</td>
<td>5.9%</td>
<td>23</td>
</tr>
<tr>
<td>31-60 Days</td>
<td>212</td>
<td>10.9%</td>
<td>44</td>
</tr>
<tr>
<td>61-180 Days</td>
<td>505</td>
<td>26.1%</td>
<td>111</td>
</tr>
<tr>
<td>Over 6 months</td>
<td>126</td>
<td>6.5%</td>
<td>254</td>
</tr>
</tbody>
</table>

Average: 54 days

IV. EXAMPLES OF CAO EFFORTS TO RESOLVE PROBLEMS

CAO staff may, with the permission of the person who has contacted the bar, attempt to resolve the concerns raised. CAO intervention can help resolve concerns before the threshold of misconduct is crossed, or reduce the extent of misconduct that occurs. CAO's efforts to resolve problems may involve explaining a lawyer's ethical obligations to a client or encouraging a lawyer to be mindful of complying with them. The most frequent examples of CAO success involve addressing lawyer-client communication and client property issues. CAO may also refer lawyers to OAAP, PLF or other resources that can assist to mitigate or avoid misconduct. CAO also attempts to early identify and refer to Disciplinary Counsel those instances where information from multiple complainants suggests a lawyer may be engaged in widespread or grave misconduct that requires quick attention to avoid further harm. Finally, as assistants to the Bar's General Counsel, CAO lawyers handle calls from lawyers seeking advice to comply with their ethical obligations and avoid misconduct. Ethics advice calls are not included within the statistics compiled for this report.
V. CONCLUSION

The CAO program is working to quickly assess whether disciplinary investigation is warranted. CAO performs a valuable function in quickly responding to public questions and concerns and preserving disciplinary resources for appropriate matters. CAO staff will continue to monitor program measures and outcomes and seek improvements.

Respectfully submitted,

Linn D. Davis
CAO Manager and Assistant General Counsel
Oregon State Bar
Client Assistance Office
16037 SW Upper Boones Ferry Rd, Tigard, Oregon 97224
(503) 620-0222 or (800) 452-8260
Oregon State Bar

2015 Disciplinary Counsel's Office

Annual Report

March 2016

Dawn M. Evans
Disciplinary Counsel
# TABLE OF CONTENTS

I. INTRODUCTION ............................................................................................................................... 1

II. DISCIPLINARY COUNSEL’S OFFICE ........................................................................................... 1

III. STATE PROFESSIONAL RESPONSIBILITY BOARD ................................................................................. 1

IV. SYSTEM OVERVIEW .......................................................................................................................... 2
   A. Complaints Received .......................................................................................................................... 2
   B. SPRB ................................................................................................................................................. 3
   C. Special Local Investigators ............................................................................................................... 4
   D. Formal Proceedings .......................................................................................................................... 4
   E. Dispositions Short of Trial ............................................................................................................... 5
   F. Appellate Review ............................................................................................................................. 5
   G. Contested Admissions/Contested Reinstatements ........................................................................ 6

V. DISPOSITIONS ..................................................................................................................................... 7

VI. SUMMARY OF CASELOAD ............................................................................................................... 8

VII. STAFFING/FUNDING ....................................................................................................................... 8

VIII. OTHER DEVELOPMENTS ................................................................................................................. 9
   A. Ethics School .................................................................................................................................... 9
   B. Trust Account Overdraft Notification Program ............................................................................. 9
   C. Public Records .............................................................................................................................. 10
   D. *Pro Hac Vice* Admission and Arbitration Registration ............................................................... 10
   E. Custodianships ............................................................................................................................... 11
   F. Continuing Legal Education Programs .......................................................................................... 11
   G. Disciplinary System Review Committee ...................................................................................... 11

IX. CONCLUSION .................................................................................................................................. 11

APPENDIX A ................................................................................................................................... 12

APPENDIX B ................................................................................................................................... 13

APPENDIX C ....................................................................................................................................... 14-18

APPENDIX D ................................................................................................................................... 19
I. INTRODUCTION

This is the Annual Report of the Oregon State Bar Disciplinary Counsel's Office for 2015. The report provides an overview of Oregon's lawyer discipline system, an analysis of the caseload and dispositions in 2015, and a discussion of significant developments over the last year.

II. DISCIPLINARY COUNCIL'S OFFICE

The Disciplinary Counsel's Office (DCO, a term hereafter referring to either the office as a whole or a lawyer employed within the office) provides professional staffing for Oregon's lawyer discipline system with 8 lawyers, an office manager, an investigator/litigation assistant, a paralegal, 2 legal secretaries, a diversion and probation coordinator/legal secretary, a public records coordinator, and a regulatory services coordinator. In addition to its work in support of the State Professional Responsibility Board (SPRB), DCO has involvement in both contested reinstatement and admission applications, and responds to public records requests pertaining to records maintained within the discipline system.

III. STATE PROFESSIONAL RESPONSIBILITY BOARD

The DCO's principal responsibility is to serve as counsel to the State Professional Responsibility Board (SPRB), the body to which the investigative and prosecutorial functions within the discipline system are delegated by statute and court rule. The SPRB seeks to determine whether misconduct has occurred, while operating within the procedural framework of the Bar Rules of Procedure (the BRs). The SPRB is a ten-member board of unpaid volunteers, consisting of one lawyer each from Board of Governors (BOG) Regions 1 through 4, 6, and 7, two lawyers from Region 5, and two public members.

The SPRB met 13 times in 2015. Combining in-person and teleconference meetings, the SPRB considered approximately 229 case-specific agenda items during the year. In addition, the SPRB has, upon occasion, discussed policy matters pertaining to its functioning and interaction with participants in Oregon's lawyer discipline system. During 2015, current and past SPRB members participated in an examination of the disciplinary procedural rules conducted in response to a report issued by an American Bar Association Center for Professional Responsibility team, which had performed an onsite study in June of 2014 and issued its report in January of 2015.

The bar was fortunate to have the following individuals on the SPRB in 2015:

- Whitney Patrick Boise (Portland) — Chairperson
- Ankur Hasmukh Doshi (Portland)
- Nathaline J. Frener (Eugene) — Public Member
- Dr. Randy Green (Salem) — Public Member
- Blair Henningsgaard (Astoria)
- E. Bradley Litchfield (Eugene)
- Justin N. Rosas (Medford)
- Elaine D. Smith-Koop (Salem)
Richard Weill (Troutdale)
Valerie Wright (Bend)

The terms of Whitney Patrick Boise and Richard Weill expired at the end of 2015. The new appointments for 2016 are Carolyn Alexander (Portland) and Heather Bowman (Portland). E. Bradley Litchfield is the SPRB Chairperson for 2016.

IV. SYSTEM OVERVIEW
A. Complaints Received

The bar’s Client Assistance Office (CAO) handles the intake of all oral and written inquiries and complaints about lawyer conduct. Only when the CAO finds that there is sufficient evidence to support a reasonable belief that misconduct may have occurred is a matter referred to DCO for investigation. See BR 2.5.

The table below reflects the number of files opened by DCO in recent years, including the 302 files opened in 2015.

<table>
<thead>
<tr>
<th>Month</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>20</td>
<td>49</td>
<td>21</td>
<td>31</td>
<td>19</td>
</tr>
<tr>
<td>February</td>
<td>36</td>
<td>27</td>
<td>23</td>
<td>25</td>
<td>28</td>
</tr>
<tr>
<td>March</td>
<td>25</td>
<td>39</td>
<td>30</td>
<td>45</td>
<td>22</td>
</tr>
<tr>
<td>April</td>
<td>42</td>
<td>38</td>
<td>43</td>
<td>47</td>
<td>17</td>
</tr>
<tr>
<td>May</td>
<td>146*</td>
<td>20</td>
<td>37</td>
<td>24</td>
<td>24</td>
</tr>
<tr>
<td>June</td>
<td>20</td>
<td>40</td>
<td>31</td>
<td>24</td>
<td>31</td>
</tr>
<tr>
<td>July</td>
<td>28</td>
<td>22</td>
<td>30</td>
<td>44</td>
<td>27</td>
</tr>
<tr>
<td>August</td>
<td>23</td>
<td>35</td>
<td>36</td>
<td>21</td>
<td>29</td>
</tr>
<tr>
<td>September</td>
<td>29</td>
<td>22</td>
<td>27</td>
<td>24</td>
<td>21</td>
</tr>
<tr>
<td>October</td>
<td>23</td>
<td>23</td>
<td>26</td>
<td>25</td>
<td>39</td>
</tr>
<tr>
<td>November</td>
<td>27</td>
<td>18</td>
<td>26</td>
<td>19</td>
<td>25</td>
</tr>
<tr>
<td>December</td>
<td>40</td>
<td>26</td>
<td>19</td>
<td>23</td>
<td>20</td>
</tr>
<tr>
<td>TOTAL</td>
<td>459</td>
<td>359</td>
<td>349</td>
<td>352</td>
<td>302</td>
</tr>
</tbody>
</table>

*Includes IOLTA compliance matters.
†Effective in 2012, failing to file an annual IOLTA compliance report is a statutory, not disciplinary, requirement. This accounts for the reduction in files opened beginning in 2012.

Of the 302 files opened in 2015, 196 were referrals from the Client Assistance Office and 62 were trust account overdraft notices from financial institutions that came directly to DCO. Another 44 matters were opened by DCO on its own initiative, which includes matters arising out of a lawyer’s discipline in another jurisdiction where licensed and a lawyer’s conviction.

For 2015, statistical information regarding complainant type and complaint subject matter is found in Appendix A to this report. Similar information for 2014 is found in Appendix B for comparison purposes.
Every complaint DCO received in 2015 was acknowledged in writing by staff, analyzed and investigated to varying degrees depending on the nature of the allegations. As warranted, staff corresponded with the complainant and the responding attorney and obtained relevant information from other sources in order to garner sufficient information upon which to base a decision to dismiss or recommend further action to the SPRB.

Since November 2013, DCO has had the ability to seek the administrative suspension of any lawyer who fails without good cause to timely respond to requests for information or records. BR 7.1. Thirteen (13) lawyers were administratively suspended in 2015 pursuant to this rule.

If, after investigation, staff determines that probable cause does not exist to believe that misconduct occurred, the matter is dismissed by DCO. BR 2.6(b). Complainants may appeal a DCO dismissal to the SPRB. The SPRB considered 5 such appeals in 2015, affirming dismissal in all 5 cases.

When DCO determines from an investigation that there is probable cause of misconduct by a lawyer, the matter is referred to the SPRB for review and action. Each matter is presented to the SPRB by means of a complaint summary (factual review, ethics analysis and recommendation) prepared by staff. Each file also is made available to the SPRB. In 2015, the SPRB reviewed 164 of these probable cause investigations. The following section describes that process of review in more detail.

B. SPRB

The SPRB reviews, considers, and votes upon each matter referred to it by DCO, determining whether probable cause of an ethics violation exists. Options available to the SPRB include dismissal if there is no probable cause of misconduct; referral of a matter back to DCO for additional investigation; issuing a letter of admonition if a violation has occurred but is not of a serious nature; offering a remedial diversion program to the lawyer; authorizing a formal disciplinary proceeding in which allegations of professional misconduct are litigated; or referring the lawyer to the State Lawyers Assistance Committee (SLAC). A lawyer who is offered a letter of admonition may reject the letter, in which case the Rules of Procedure require the matter to proceed to a formal disciplinary proceeding. Rejections of an offer of a letter of admonition are rare.

A lawyer who is notified that a formal disciplinary proceeding will be instituted against him or her may request that the SPRB reconsider that decision. In order for the SPRB to reconsider the matter, the request must be supported by new evidence not previously available that would have clearly affected the SPRB’s decision, or legal authority not previously known to the SPRB which establishes that the decision to prosecute is incorrect.

In 2015, the SPRB made probable cause decisions on 164* matters investigated by DCO. Action taken by the SPRB in recent years and in 2015 is summarized in the following table:
### Action Taken by SPRB

<table>
<thead>
<tr>
<th>Year</th>
<th>Pros.</th>
<th>Admon. Offered</th>
<th>Admon. Accepted</th>
<th>Dismissed</th>
<th>Diversion</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>98</td>
<td>34</td>
<td>34</td>
<td>46</td>
<td>4</td>
</tr>
<tr>
<td>2012</td>
<td>90</td>
<td>47</td>
<td>46†</td>
<td>73</td>
<td>7</td>
</tr>
<tr>
<td>2013</td>
<td>86</td>
<td>20</td>
<td>20</td>
<td>43</td>
<td>13</td>
</tr>
<tr>
<td>2014</td>
<td>105</td>
<td>19</td>
<td>19</td>
<td>40</td>
<td>17</td>
</tr>
<tr>
<td>2015</td>
<td>83</td>
<td>39</td>
<td>39</td>
<td>34</td>
<td>7</td>
</tr>
</tbody>
</table>

† One matter was tabled, and returned for reconsideration in January of 2016.

Note that the figures for prosecutions reflect the number of complaints that were authorized for prosecution, not necessarily the number of lawyers being prosecuted. One lawyer may be the subject of numerous complaints that are consolidated into one disciplinary proceeding.

In addition to the normal complaint review process, the SPRB also is responsible for making recommendations to the Supreme Court on matters of urgency including temporary and immediate suspensions of lawyers who have abandoned their practices, are suffering under some disability, have been convicted of certain crimes, or have been disciplined in another jurisdiction subjecting them to reciprocal discipline in Oregon. The SPRB reviewed 4 such matters in 2015.

### C. Special Local Investigators

During 2015, all complaints were investigated in-house by DCO. Historically, such investigation was conducted by Local Professional Responsibility Committees (LPRCs), geographically-based committees of volunteer lawyers. More recently LPRCs were assigned to investigate when respondent attorneys were unresponsive to DCO inquiries. Since the inception of BR 7.1 (discussed above), usage of LPRCs for nonresponding respondent attorneys has curtailed. In the event there is DCO recognition that a locally-available special expertise would assist an in-depth field investigation, a local investigator from an LPRC can be appointed on an individual, as needed, basis. No matters were referred to special local investigators in 2015.

### D. Formal Proceedings

(1) Prosecution Function

After the SPRB authorizes formal proceedings in a given matter, DCO drafts a formal complaint that is filed with the Disciplinary Board Clerk and served upon the respondent attorney. On occasion, a volunteer bar counsel selected from a panel of lawyers appointed by the BOG is asked to serve as co-counsel.

Discovery methods in disciplinary proceedings are similar to those in civil litigation. Requests for admission, requests for production, and depositions are common. Disputes over discovery are resolved by the trial panel chairperson assigned to a particular case. Mediation is available on a voluntary basis.
Pre-hearing conferences to narrow the issues and to explore settlement are available at the request of either party. Such conferences are held before a member of the Disciplinary Board who is not a member of the trial panel in that case.

(2) Adjudicative Function

Members of the Disciplinary Board (DB), appointed by the Supreme Court, sit in panels of three (two lawyers, one non-lawyer), with one lawyer serving as chair, and are selected for each disciplinary case by a regional chairperson. The panel chair rules on all pretrial matters and is responsible for bringing each case to hearing within a specific time frame established by the rules.

After hearing, the panel is required to render its decision within 28 days (subject to time extensions), making findings of fact, conclusions of law and a disposition. Panels rely on the ABA Standards for Imposing Lawyer Sanctions and Oregon case law in determining appropriate sanctions when misconduct has been found.

Seven (7) disciplinary cases were tried in 2015. Some were single-day hearings; others were multi-day hearings; still others were the result of a default, which in some cases included testimony directed toward the sanction sought.

E. Dispositions Short of Trial

Most disciplinary proceedings authorized by the SPRB are resolved short of trial with a negotiated outcome in the form of a stipulation or, in a few instances, by the respondent attorney’s resignation.

In circumstances in which there is no dispute over material fact and the DCO and the respondent attorney agree on the violations committed and the appropriate sanction, a stipulation setting forth the terms of the agreement, including factual recitations, rule violations, and the agreed-upon sanction is drafted. The terms of a stipulation are approved by the SPRB or its chairperson on behalf of the bar. Once that approval is obtained, judicial approval is required from the state and regional chair of the DB in cases where sanctions do not exceed a 6-month suspension, or from the Supreme Court for cases involving greater sanctions.

Form B resignation (a resignation that takes place while disciplinary matters are under investigation) does not require an admission of guilt by an accused lawyer but, because charges are pending, is functionally equivalent to a disbarment, in that the lawyer is not eligible for reinstatement in the future. Three (3) lawyers submitted Form B resignations in 2015, thereby eliminating the need for further prosecution in those cases. While a resignation ends a formal proceeding, it is often obtained only after a substantial amount of investigation, discovery and trial preparation.

F. Appellate Review

The Oregon Supreme Court does not automatically review discipline cases. Trial panel decisions, even those imposing disbarment, are final unless either the bar
or the respondent lawyer seeks supreme court review. The SPRB on behalf of the bar decides whether to seek supreme court review or to cross-appeal.

Appellate review by the supreme court is mandatory if timely requested by a party.

When there is an appeal, DCO prepares the record for submission to the supreme court, drafts and files the bar’s briefs, and presents oral argument before the supreme court. In 2015, the supreme court rendered 3 discipline opinions in contested cases. The supreme court also approved 7 stipulations for discipline, imposed reciprocal discipline in 2 cases, suspended 1 lawyer following notice of a felony conviction, suspended 2 lawyers on an interim basis while disciplinary proceedings were pending, and transferred 1 lawyer to involuntary inactive status.

A noteworthy opinion in 2015 was In re Herman, 357 Or 273 (2015), which discusses the application of RPC 8.4(a)(3) to a circumstance where a lawyer, acting both as an experienced business person and as an attorney in managing several corporations, engaged in conduct involving dishonesty and misrepresentation that reflected adversely on his fitness to practice law.

Regarding the disciplinary system overall, 52 disciplinary proceedings were concluded in 2015: 11 by decision in a contested case (including one dismissal); 35 by stipulation; 3 by Form B resignation; 2 by reciprocal discipline order; and 1 by transfer to involuntary inactive status.

G. Contested Admissions/Contested Reinstatements

DCO represents the Board of Bar Examiners (BBX) in briefing and arguing before the Oregon Supreme Court those cases in which the BBX has made an adverse admissions recommendation regarding an applicant and the applicant pursues supreme court review. The investigation and hearing that precede an admissions recommendation is handled by the BBX with the support and assistance of bar admissions staff under a procedure different from that applicable to lawyer discipline cases.

When a lawyer seeks reinstatement from either an administrative or a disciplinary suspension, DCO is responsible for processing and investigating all applications. Recommendations are then made to either the bar’s executive director or the BOG, at the request of the executive director. Many reinstatements are approved without any further level of review. For reinstatement applicants who have had significant, prior disciplinary problems or have been away from active membership status for more than five years, the BOG makes a recommendation to the supreme court. In cases when the BOG recommends against reinstatement of an applicant, the supreme court may refer the matter to the DB for a hearing before a three member panel (much like a lawyer discipline matter), or may direct that a hearing take place before a special master appointed by the supreme court. DCO has the same responsibilities for prosecuting these contested cases as with disciplinary matters and handles the appeal of these cases, which is automatic, before the supreme court.
V. DISPOSITIONS

Attached as Appendix C is a list of disciplinary dispositions from 2015. The following table summarizes dispositions in recent years:

<table>
<thead>
<tr>
<th>Sanction Type</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disbarment</td>
<td>5</td>
<td>2</td>
<td>6</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Form B Resignation</td>
<td>7</td>
<td>13</td>
<td>4</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Suspension</td>
<td>19</td>
<td>20</td>
<td>21</td>
<td>19</td>
<td>18</td>
</tr>
<tr>
<td>Suspension stayed/probation</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>12</td>
<td>12</td>
</tr>
<tr>
<td>Reprimand</td>
<td>15</td>
<td>17</td>
<td>14</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Involuntary inactive Transfer</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTAL Lawyer Sanctions</strong></td>
<td><strong>47</strong></td>
<td><strong>55</strong></td>
<td><strong>48</strong></td>
<td><strong>48</strong></td>
<td><strong>50</strong></td>
</tr>
<tr>
<td>Dismissals after Adjudication</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Dismissed as moot</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Diversion</td>
<td>4</td>
<td>6</td>
<td>4</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Admonitions</td>
<td>34</td>
<td>46</td>
<td>20</td>
<td>20</td>
<td>39</td>
</tr>
</tbody>
</table>

In conjunction with a stayed suspension and, at times, as a condition of admission or reinstatement, a period of probation will be imposed upon a lawyer. DCO was monitoring 19 lawyers on probation at the end of 2015, along with 13 lawyers in diversion. Most probations and diversions require some periodic reporting by the lawyer. Some require more active monitoring by a probation supervisor, typically another lawyer in the probationer's community or a member of SLAC.

The types of conduct for which a disciplinary sanction was imposed in 2015, or a Form B resignation was submitted, varied widely. The following table identifies the misconduct most often implicated in those proceedings that were concluded by decision, stipulation, order, or resignation in 2015:

<table>
<thead>
<tr>
<th>Type of misconduct</th>
<th>% of cases in which type of misconduct was present</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inadequate client communication</td>
<td>34%</td>
</tr>
<tr>
<td>Neglect of legal matter</td>
<td>32%</td>
</tr>
<tr>
<td>Dishonesty or misrepresentation</td>
<td>28%</td>
</tr>
<tr>
<td>Failure to return property or funds</td>
<td>25%</td>
</tr>
<tr>
<td>Conduct prejudicial to justice</td>
<td>25%</td>
</tr>
<tr>
<td>Failure to respond to OSB</td>
<td>23%</td>
</tr>
<tr>
<td>Improper withdrawal</td>
<td>19%</td>
</tr>
<tr>
<td>Other</td>
<td>16%</td>
</tr>
<tr>
<td>Inadequate accounting records</td>
<td>15%</td>
</tr>
<tr>
<td>Multiple client conflicts</td>
<td>13%</td>
</tr>
<tr>
<td>Criminal conduct</td>
<td>13%</td>
</tr>
</tbody>
</table>
### Type of misconduct (cont'd) | % of cases in which type of misconduct was present
--- | ---
Excessive or illegal fees | 13%
Trust account violation | 11%
Incompetence | 8%
Disclosing confidential information | 6%
Unauthorized practice | 4%
Improper communication | 4%
Advertising | 4%

### VI. SUMMARY OF CASELOAD

A summary of the pending caseload in Disciplinary Counsel’s Office at the end of 2015 follows:

- Investigations pending: 170
- Pending special local investigations: 0
- Pending formal proceedings: 77*
- Probation/diversion matters: 32
- Contested admission/contested reinstatement matters: 0
- **TOTAL**: 279

*Reflects no. of lawyers; no. of complaints is greater.

In addition to disciplinary matters, DCO processed and investigated 206 reinstatement applications in 2015 (which includes those pertaining to BR 8.1, 8.2, 8.3, 8.4, and 8.5); processed approximately 818 membership status changes (inactive and active pro bono transfers and voluntary resignations); issued 1079 certificates of good standing; and responded to 1,421 public record requests during the year.

### VII. STAFFING/FUNDING

In 2015, DCO employed sixteen staff members (15.9 FTE). The lawyers work in two-person teams, with one lawyer reviewing and investigating complaints, determining to dismiss or recommend further action and, where possible, seeking a negotiated resolution. The other lawyer handles formal proceedings from filing through settlement or trial. The investigator, the paralegal, and the diversion and probation coordinator/legal secretary work with all of the lawyers, as needed. The secretarial support staff each work with several lawyers. The office manager oversees the support staff, coordinates SPRB agendas and meetings, manages all aspects of recordkeeping and statistical reporting, monitors office expenditures, and provides support to the Disciplinary Counsel. The regulatory services coordinator interfaces primarily with members seeking reinstatement. The public records coordinator responds to records requests from lawyers and members of the public pertaining to disciplinary records. Staff members at the end of 2015 included:
Dawn M. Evans, *Disciplinary Counsel and Director of Regulatory Services*
Amber Bevacqua-Lynott, *Chief Assistant Disciplinary Counsel and Deputy Director of Regulatory Services*
R. Lynn Haynes, *Discipline and Regulatory Services Office Manager*
Angela W. Bennett, *Assistant Disciplinary Counsel*
Lynn Bey-Roode, *Discipline Investigator/Litigation Assistant*
Brandi Norris, *Regulatory Services Coordinator*
Sergio Hernandez, *Public Records Coordinator*
Nik Chourey, *Assistant Disciplinary Counsel*
Susan R. Cournoyer, *Assistant Disciplinary Counsel*
Karen L. Duncan, *Diversion and Probation Coordinator/Discipline Legal Secretary*
Martha M. Hicks, *Assistant Disciplinary Counsel*
Kellie F. Johnson, *Assistant Disciplinary Counsel*
Jerri King, *Discipline Legal Secretary*
Angela McCracken, *Discipline Legal Secretary*
Theodore Reuter, *Assistant Disciplinary Counsel*
Emily Schwartz, *Discipline Paralegal*

DCO is funded out of the bar’s general fund. Revenue is limited (roughly $93,035 for 2015) and comes from cost bill collections, reinstatement fees, fees paid for good standing certificates and *pro hac vice* admissions, and photocopying charges for public records.

Expenses for 2015 were $1,939,396 with an additional $354,474 assessed as a support services (overhead) charge. Of the actual program expenses, 91.7% consisted of salaries and benefits. An additional 2.6% of the expense budget went to out-of-pocket expenses for court reporters, witness fees, investigative expenses, and related items. General and administrative expenses such as copying charges, postage, telephone and staff travel expense accounted for 3.9% of the expense budget.

**VIII. OTHER DEVELOPMENTS**

**A. Ethics School**

Lawyers who have been reprimanded or suspended are required to attend a one day course of study presented by the bar on topics of legal ethics, professional responsibility, and law office management. Two such programs were offered in 2015, one in May and one in November. Presenters included CAO and DCO staff, as well as staff from the Oregon Attorney Assistance Program. A total of 51 persons attended ethics school in 2015.

**B. Trust Account Overdraft Notification Program**

The Oregon State Bar has a Trust Account Overdraft Notification Program, pursuant to ORS 9.132 and RPC 1.15 2. Under the program, lawyers are required to maintain their trust accounts in financial institutions that have agreed to notify the bar of any overdraft on such accounts. Approximately 65 banks have entered into notification agreements with the bar.
For each overdraft notice received, DCO requests a written explanation and supporting documentation from the lawyer and makes follow-up inquiries as necessary. Many overdrafts are the result of bank error and, once confirmed as such, are dismissed by staff. If circumstances causing an overdraft suggest an ethics violation, the matter is referred to the SPRB. A minor violation leading to an overdraft with no prior similar conduct typically results in a letter of admonition issued to the lawyer. In some instances, the lawyer may agree to participate in a diversion program, which will typically require education about the ethical management of a trust account and monitoring of the lawyer's trust account management during the term of the diversion. More serious or ongoing violations may result in formal disciplinary action. In 2015, the bar received notice of 138 trust account overdrafts, resulting in the investigation of 62 lawyers. A summary of the disposition of trust account overdrafts received in 2015 is as follows:

<table>
<thead>
<tr>
<th>2015 Trust Account Overdrafts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissed by staff</td>
</tr>
<tr>
<td>Dismissed by SPRB</td>
</tr>
<tr>
<td>Closed by admonition letter</td>
</tr>
<tr>
<td>Diversion agreement</td>
</tr>
<tr>
<td>Formal charges authorized</td>
</tr>
<tr>
<td>Pending (as of 1/2016)</td>
</tr>
<tr>
<td>Total Received During 2015</td>
</tr>
</tbody>
</table>

C. Public Records

In Oregon, lawyer discipline files are public records with very limited exceptions. DCO responds to (on average) more than 120 public records requests each month. These requests come from members of the public who inquire into a lawyer’s background or from other bar members who have a need to examine these records.

Disciplinary history data is stored electronically such that many disciplinary record inquiries can be answered without a manual review of a lawyer’s file. A significant number of requests, however, require the scheduling of appointments for file review.

DCO has document management and retention policies. Ethics complaints dismissed for lack of probable cause more than ten (10) years ago are destroyed. Retained records have been scanned and are maintained in electronic format, thereby reducing the bar’s physical file storage needs.

D. Pro Hac Vice Admission and Arbitration Registration

Uniform Trial Court Rule 3.170 (UTCR) provides that all applications by out-of-state lawyers for admission in a single case in Oregon (pro hac vice admission) must first be filed with the Oregon State Bar, along with a fee of $500 (in 2015). DCO is responsible for reviewing each application and supporting documents
(good standing certificate, evidence of professional liability coverage, etc.) for compliance with the UTCR. The filing fees collected, after a nominal administrative fee is deducted, are used to help fund legal service programs in Oregon.

In 2015, the bar received and processed 501 pro hac vice applications, collecting $260,750 for legal services.

In addition, RPC 5.5(e) requires out of state lawyers who intend to participate in an Oregon arbitration to pay a fee and file a certificate with the bar similar to that required for pro hac vice admission. DCO administers this process, as well.

E. Custodianships
ORS 9.705, et seq., provides a mechanism by which the bar may petition a circuit court for the appointment of a custodian to take over the law practice of a lawyer who has abandoned the practice or otherwise is incapable of carrying on. DCO sought custodianship in connection with the winding down of one lawyer’s practice during 2015.

F. Continuing Legal Education Programs
Throughout 2015, DCO participated in numerous CLE programs dealing with ethics and professional responsibility issues. Staff spoke to law school classes, local bar associations, Oregon State Bar section meetings, specialty bar organizations, and general CLE audiences.

G. Disciplinary System Review Committee
During 2015, DCO assisted in the provision of staff support to the work of the Disciplinary System Review Committee (“DSRC”), an ad hoc committee appointed by the bar’s president in November of 2014. The DSRC was charged with studying a report issued by the American Bar Association’s Standing Committee on Professional Discipline in January 2015, as a result of a study of Oregon’s attorney discipline system in 2014, and making recommendations to the BOG regarding implementation of the ABA proposals. The DSRC met most months of 2015 before issuing a report in December. The BOG will review the DSRC’s recommendations in March of 2016.

IX. CONCLUSION
In 2015, the Oregon State Bar remained committed to maintaining a system of lawyer regulation that fairly but effectively enforces the disciplinary rules governing Oregon lawyers. Many dedicated individuals, both volunteers and staff, contributed significantly toward that goal throughout the year.

Respectfully submitted,

Dawn M. Evans
Disciplinary Counsel
## APPENDIX A - 2015

### COMPLAINANT TYPE

<table>
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<th>NUMBER</th>
<th>PERCENTAGE</th>
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<tr>
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<tr>
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<tr>
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<tr>
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### COMPLAINT SUBJECT MATTER

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# OSB DISPOSITION LIST

## 2015

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<th>Date of Action</th>
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<th>ORS Summary</th>
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<td>SCt</td>
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<td>DB</td>
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<td>3/16/2015</td>
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**APPENDIX C-1**
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<td>SC/DB</td>
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<td>Bulletin Summary</td>
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<td>11/12/2015</td>
<td>11/12/2015</td>
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<td>January 2016</td>
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<td>14-81</td>
<td>Julie A. KRULL SC 5063623</td>
<td>Form B resignation</td>
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<td>SCt</td>
<td>11/12/2015</td>
<td>11/12/2015</td>
<td>1.1, 1.3, 1.4(a)(1), 1.5(a), 1.5(c)(3), 1.15-1(c), 1.15-1(d), 1.16(d), 8.1(a)(2), 8.4(a)(3)</td>
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<td>14-30</td>
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<td>11/9/2015</td>
<td>12/1/2015</td>
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<td>13-30</td>
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<td>-</td>
<td>DB</td>
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<td>60-day suspension</td>
<td>Stip</td>
<td>DB</td>
<td>11/16/2015</td>
<td>12/1/2015</td>
<td>1.1, 3.3(a), 8.4(a)(3)</td>
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</tr>
<tr>
<td>14-26</td>
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<td>120-day suspension, all but 30 days stayed, 2-year probation</td>
<td>Stip</td>
<td>DB</td>
<td>11/18/2015</td>
<td>12/14/2015</td>
<td>1.3, 1.4(a), 1.4(b), 1.15-1(a), 1.15-1(c), 1.15-1(d), 1.16(a)(2), 1.16(d), 8.1(a)(2)</td>
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<td>15-103</td>
<td>Michael James BUROKER 29 DB Rptr</td>
<td>Reprimand</td>
<td>Stip</td>
<td>DB</td>
<td>12/2/2015</td>
<td>12/2/2015</td>
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<td>X</td>
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<td>15-134</td>
<td>Jonah MORNINGSTAR</td>
<td>BR 7.1 suspension</td>
<td>-</td>
<td>DB</td>
<td>12/2/2015</td>
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<td>67</td>
<td>James F. LITTLE SC S063417</td>
<td>BR 3.2 transfer to Inactive status</td>
<td>–</td>
<td>SCT</td>
<td>12/2/2015</td>
<td>12/2/2015</td>
<td>NA</td>
<td></td>
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<td>68</td>
<td>Edward T. LeCLaire</td>
<td>BR 7.1 suspension</td>
<td>–</td>
<td>DB</td>
<td>12/7/2015</td>
<td>12/7/2015</td>
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<td></td>
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<td>69</td>
<td>John P. ECKREM</td>
<td>BR 7.1 suspension</td>
<td>–</td>
<td>DB</td>
<td>12/7/2015</td>
<td>12/7/2015</td>
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<td>–</td>
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<td>12/7/2015</td>
<td>12/7/2015</td>
<td>NA</td>
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<td>71</td>
<td>William Bryan PORTER 29 DB Rptr</td>
<td>Reprimand</td>
<td>Stip</td>
<td>DB</td>
<td>12/7/2015</td>
<td>12/7/2015</td>
<td>8.4(a)(4) X</td>
<td></td>
</tr>
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<td>72</td>
<td>Dirk D. SHARP SC S063548</td>
<td>1-year suspension</td>
<td>RD</td>
<td>SCT</td>
<td>12/10/2015</td>
<td>12/10/2015</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>73</td>
<td>Jonah MORNINGSTAR</td>
<td>BR 7.1 suspension</td>
<td>–</td>
<td>DB</td>
<td>12/10/2015</td>
<td>12/10/2015</td>
<td>NA</td>
<td></td>
</tr>
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<td>74</td>
<td>Kathleen Y. RINKS</td>
<td>BR 7.1 suspension</td>
<td>–</td>
<td>DB</td>
<td>12/14/2015</td>
<td>12/14/2015</td>
<td>NA</td>
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<td>75</td>
<td>David Stanley AMAN SC S063647 29 DB Rptr</td>
<td>1-year suspension, all but 6 months stayed, 2-year probation</td>
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<td>SCT</td>
<td>1/1/2016</td>
<td>1/1/2016</td>
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<td>Mary E. LANDERS</td>
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<td>DB</td>
<td>12/21/2015</td>
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<td>Jonah MORNINGSTAR</td>
<td>BR 7.1 suspension</td>
<td>–</td>
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<td>12/30/2015</td>
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<td>79</td>
<td>Mary E. LANDERS</td>
<td>Probation revoked-30-day suspension</td>
<td>–</td>
<td>DB</td>
<td>1/9/2016</td>
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Once upon a time, it was common for a lawyer to begin practice, be promoted to partner and retire at the same firm. Today, such a career trajectory is becoming exceedingly rare. Instead, lawyers are constantly seeking new horizons.

High lawyer mobility is a reality of modern legal practice.¹ In 2000, the American Bar Foundation began following a nationally representative cohort of newly-admitted lawyers. The resulting study, titled “After the JD,” found that within three years of starting practice, more than one-third of the cohort had changed jobs at least once (not counting judicial clerkships), and 18 percent had moved twice.² Between the cohort’s third and seventh years of practice, well over half of the lawyers changed jobs at least once again.³
So, you might ask, what does any of this have to do with lawyer ethics? The answer is simple: every time a lawyer leaves a firm or employer, that move triggers numerous ethical duties. Complying with those obligations in the midst of transition can be a challenge for the unwary. The best approach is for lawyers to educate themselves at the outset to avoid common traps and mistakes.

How Should You Break the News?

Congratulations. You have a job offer from a new firm. In the initial throws of elation, you want to share the good news with your current clients, and ask them to take their work to your new firm. Can you do so?

Beware. Depending on the nature and status of the lawyer’s work, the lawyer’s fiduciary duty to a client may require the lawyer to provide advance notification of a job change, so that the client can decide whether to stay with the prior firm, move with the lawyer or explore other alternatives. See OSB Formal Ethics Op No 2005-26 (discussing a lawyer’s fiduciary duty generally).

Even so, lawyers often owe duties to their current firm, which may arise out of the contractual, fiduciary or agency relationships between the lawyer and the current firm. Violating these duties can spell trouble. When a lawyer attempts to take clients away from the lawyer’s current firm while still being compensated by that firm, he or she may violate duties owed to the current firm. OSB Formal Op No 2005-70; see also ABA Formal Ethics Op No 99-414 (1999). Violation of those duties may result in the departing lawyer being subject not only to financial liability to the former firm, but also discipline. OSB Formal Op No 2005-70.

It is also important to be honest with colleagues during the transition. Departing lawyers might be tempted to deny rumors of a pending move. Exercise restraint. Even though it might spur an awkward conversation, lawyers cannot lie to others at their firm about their employment status or intentions. RPC 8.4(a)(3); see In re Smith, 315 Or 260, 264 (1992) and In re Murdock, 328 Or 18, 25 (1998).

Once a lawyer has informed his or her current firm of the move, both the lawyer and the current firm have a duty to inform the lawyer’s current clients of the anticipated departure. The fact that a lawyer who is performing significant work for a client is about to leave is information that must be shared to “keep a client reasonably informed about the status of a matter” and “permit the client to make informed decisions regarding the representation.” RPC 1.4.

Who Gets the Client File?

You have been managing several cases at your law firm. Now that you have plans to leave to go to a new firm, you feel certain you are the only lawyer who can represent the client going forward. Can you take those files with you to your new firm?

Before a departing lawyer packs up any boxes, or downloads client files to an external hard drive, the lawyer should seek direction from the client. As explained in OSB Formal Op No 2005-70, only the client can decide which lawyer or firm will continue representing the client.

Often the smoothest approach to determine who will continue the representation is for a departing lawyer and the former firm to send a joint letter to departing lawyer’s current clients outlining the anticipated move, and asking the client for direction. See ABA Formal Ethics Op No 99-141 (1999). Until the client makes a choice, the former firm has a duty to preserve client files and other client property. RPC 1.15-1(a) and (d). Both the former firm and the departing lawyer share a fiduciary duty to the client. See ABA Formal Ethics Op No 99-141 (1999).

If the client elects to transition to the new firm, subject to any valid lien rights it may have, the former firm must promptly send all client files and property to the new firm. RPC 1.16(d); OSB Formal Op No 2005-60; see also OSB Formal Op No 2005-90 (addressing attorney fee liens); and 2005-125 (discussing who pays photocopy expenses). Although the former firm may request written authorization from a client before sending out client materials to the new firm, it cannot require the client to physically come to the former firm’s office to retrieve the materials if the client directs that materials be sent elsewhere. OSB Formal Op No 2005-60.

If a client elects either to remain with the former firm or to hire a completely new lawyer, the departing lawyer must comply with RPC 1.16 by giving the client advance notice that he or she will be ceasing the representation, moving the court to withdraw from the representation if required by RPC 1.16(c), and taking reasonable steps to protect the client’s interests as required by RPC 1.16(d). For a departing lawyer, reasonable steps to protect the client’s interests may include informing the client or new lawyer of the status of the case and any pending issues or deadlines.

If neither the departing lawyer nor the former firm wants to continue representation of the client, both must consider whether withdrawal is allowed under RPC 1.16.
Can You Solicit Work From Your Former Clients?

Now that you are no longer at your prior firm, you want to make a few calls to your contacts, to let them know about your new practice, and to offer your assistance with legal matters. Whom can you call?

RPC 7.3(a) allows lawyers to make live or in-person contact to solicit work from anyone with whom they have a family, close personal or prior professional relationship, as well as any other lawyer. See OSB Formal Ethics Op No 2005-70. Accordingly, calling or having an in-person conversation with former clients, in-house counsel, other lawyers, social friends and family about a new practice is permitted. In addition, RPC 7.3(b) allows lawyers to solicit any person in writing, including former firm clients with whom the departing lawyer did not have a professional relationship.

Of course, lawyers may not solicit work from prospective clients the rules define as especially vulnerable or prospective clients who have asked not to be solicited. RPC 7.3(b)(1)-(2). Nor may any solicitations involve coercion, duress or harassment. RPC 7.3(b)(3).

To comply with the rules, lawyers should ensure that all written solicitations, including emails, are properly marked as advertisements, and include the lawyer's name and firm address. RPC 7.3(c); RPC 7.1(b)-(c).

When Do Conflicts Stick With You?

You are excited about taking on a new case at your new firm, when you recognize the name of a party. The party was a client at your former firm. Do you have a conflict?

Maybe. A lawyer has a conflict of interest if the prospective client's interests are materially adverse to those of the lawyer's former firm's client, the new case is the same or substantially related matter as the matter handled by the former firm, and the newly associated lawyer has confidential information about the former firm's client or case. See OSB Formal Op No 2005-128.

Specifically, RPC 1.9(b) provides:

A lawyer shall not knowingly represent a person in the same or substantially related matter, in which the firm with which the lawyer formally was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

If there is no adversity, the matters are not the same or substantially related, or the lawyer has no confidential information about the former firm's client, RPC 1.9(b) will not prevent the new representation. OSB Formal Op No 2005-120. It is important to note, however, that lawyers transitioning from private practice to work as a government employee or public official, or vice versa, are bound by a different set of conflict rules. RPC 1.11; OSB Formal Op No 2005-120.

Often lawyers transitioning from a larger firm have absolutely no recollection of or knowledge about certain former firm clients. Even so, it is best to do some due diligence before proceeding. For instance, the lawyer may want to double check old billing records to make sure the lawyer did not work on a small piece of the matter, or perhaps check with an old colleague to confirm the lawyer did not gain information about the prior case (without revealing the potential new representation). When it comes to determining the existence of a conflict, all facts that a lawyer knows or "by the exercise of reasonable care should have known will be attributed to the lawyer." RPC 1.0(h).

Even if a lawyer has a conflict under RPC 1.9(b), it can often be resolved by obtaining the informed consent, confirmed in writing, of all affected prospective clients and former clients. RPC 1.9(b)(2); see also RPC 1.0(g) (defining informed consent). If the conflict cannot be resolved through informed consent, the new firm may be able to accept the representation if the new lawyer is properly screened pursuant to RPC 1.10(c). See OSB Formal Op No 2005-120.

Other Resources for Lawyers in Transition

If you are considering changing jobs, or are in the process of doing so, you likely have many concerns in addition to complying with the Rules of Professional Conduct.

The Professional Liability Fund, at (800) 452-1639, can advise lawyers regarding insurance coverage issues, and its practice management advisers have a plethora of useful checklists and handouts that can help lawyers navigate the practical aspects of a transition. In addition, the Oregon Attorney Assistance Program, at (800) 321-OAAP, provides free and confidential assistance to lawyers dealing with the challenges and stress of transition.

Endnote


ABOUT THE AUTHOR

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— return to top
— return to Table of Contents
Managing Your Practice

Moving On:

Duties Beyond the RPCs When Changing Law Firms

By Mark J. Fucile

Last year, the Bar Counsel column did an excellent summary of the ethical duties under the Rules of Professional Conduct when lawyers change firms. Amber Hollister's column focused on the leading Oregon and ABA ethics opinions and emphasized the absolutely critical importance for both the "old" and "new" firms to protect clients when the lawyers involved are moving from one to the other. The column, like the ethics opinions cited, addressed such key professional responsibilities as the duty to notify clients of an impending departure and the transition of files from one firm to another.

When lawyers are either moving to another firm or starting their own, however, other important areas in the broader "law of lawyering" beyond the RPCs also come into play. In this column, we'll look at three. First, lawyers owe fiduciary duties to their old firms even when they are planning and in the process of taking their exit. Second, contractual duties frequently define the advance notice a departing lawyer must provide to the old firm and often govern the division of assets and liabilities in the event of a firm dissolution or split. Third, statutory duties, too, apply to the division of assets and liabilities in the event of a firm demise or split and address an old firm's lien rights over matters that follow a departing lawyer to a new firm. With all three, the law in these other areas very much complements the bedrock professional responsibilities the August/September 2012 Bar Counsel column cataloged so well.

Fiduciary Duties

Oregon has long held that law firm lawyers have fiduciary duties to their firms. In In re Pennington, 220 Or 343, 348 P2d 774 (1960), for example, the Oregon Supreme Court disbarred a law firm lawyer for diverting fees from his partnership to himself. In re Murdock, 328 Or 18, 968 P2d 1270 (1998), is a more recent example with similar facts and the same result.

When transitioning from one firm to another, fiduciary duties typically arise in three principal contexts.

First, when planning a departure, lawyers are not generally required to disclose their intentions — such as speaking with another firm or looking for office space — until they are ready to move. But, to state the obvious, lawyers cannot lie to conceal their plans or "preemptively" solicit clients before telling their own firms. In In re Busby, 317 Or 213, 866 P2d 156 (1993), for example, the Oregon Supreme Court suspended a lawyer who had misled his firm about collections he had underreported to assemble funds for opening his own firm. Similarly, in In re Smith, 315 Or 260, 843 P2d 449 (1992), the Oregon Supreme Court suspended a lawyer who diverted clients to his new firm before he told his old firm that he was leaving.

Second, even lawyers who have announced their departure still owe fiduciary duties to their old firm while they remain on the payroll. As the leading ABA ethics opinion on the subject puts it, "[T]he departing lawyer must not disparage the lawyer's former firm." Although the same ABA opinion permits a departing lawyer to supply detailed competitive information about a new firm (such as rates and resources) if the client asks, this awkward period of having "one foot in and one foot out" often counsels making the transition from announcement to exit as short as reasonably possible. By contrast, once a lawyer has actually left the old firm, the ABA opinion concludes that the lawyer is generally both free to contact clients directly and to engage in open-ended discussions with the clients about the lawyer's new firm.
Third, when a firm is dissolving, partners (or shareholders) continue to owe fiduciary duties while their old firm is being wound up. Platt v. Henderson, 227 Or 212, 231-32, 361 P2d 73 (1961), states this general principle in the law firm setting and Oswald v. Leckey, 280 Or 761, 572 P2d 1316 (1977), provides an apt illustration (albeit in the analogous context of an accounting firm). In Oswald, the state supreme court found that a partner in a dissolving firm had improperly written down accounts receivable due from clients as an inducement for those clients to move with him to his new practice.

Contractual Duties

Contractual duties typically come into play in two key areas during law firm departures: advance notice provisions for departing partners or shareholders, and partner or shareholder agreements that address the division of firm assets and liabilities upon dissolutions or splits.

Many firms have notice provisions in their partner or shareholder agreements that require a fixed period of advance notice before a partner or shareholder leaves the firm. Many of these provisions are linked to various financial penalties if not followed. RPC 5.6(a), however, prohibits partnership, shareholder or other agreements that restrict "the right of a lawyer to practice after termination of the relationship." Oregon's rule is patterned on its ABA Model Rule counterpart and follows from former Oregon DR 2-106(A). Although not address[ing] notice periods directly, the Oregon Court of Appeals held similar provisions unenforceable as against public policy when they included geographic restrictions (Gray v. Martin, 63 Or App 173, 663 P2d 1285 (1983)) or financial penalties for departing lawyers taking clients with them (Hagen v. O'Connell, Goyak & Ball, P.C., 68 Or App 700, 683 P2d 563 (1984)). Although "reasonable" notice provisions may be justified to ensure that clients are protected when firm lawyers depart, what is reasonable in any given circumstance can turn on whether it is truly the client's interest that is being protected or simply a thinly disguised restriction on the right to practice in violation of RPC 5.6(a). It is also worth noting that, notwithstanding even a valid notice provision, a lawyer might logically conclude that it is in the lawyer's overall economic interest to breach the contract and sustain any resulting financial penalty. Under OSB Formal Ethics Opinion 2005-92 (2005), a lawyer may generally advise and assist a client in breaching a contract and the same logic would apply to a lawyer's own decision to breach a contractual notice period.

Partnership and shareholder agreements are the principal touchstone courts look to in dividing firm assets and liabilities in the event of law firm dissolutions or other splits and may generally include provisions addressing collection and division of accounts receivable and contingent fee agreements (subject to RPC 5.6(a)). In Gray v. Martin, for example, the Court of Appeals looked primarily to a firm's partnership agreement in determining the extent to which a departing partner had to share a contingent fee collected later with his old firm. With a firm lawyer who is not a partner or shareholder and who is not otherwise subject to an enforceable written agreement, a new firm's right to share contingent fees collected after the lawyer departs normally turns on the firm's lien rights (discussed in the next section) and the associated contract theory of quantum meruit with the measure of recovery (if any) based on the extent to which the old firm contributed value to the ultimate recovery. Hay v. Erwin, 244 Or 488, 419 P2d 32 (1966), and Robinowitz v. Pozzi, 127 Or App 464, 872 P2d 993 (1994), for example, both rely on quantum meruit in, respectively, awarding and denying fees following termination of contingent fee agreements.

Statutory Duties

Dissolutions or splits can also invoke statutory law governing partnerships or professional corporations, particularly in the area of post-departure collections. As noted earlier and as illustrated by Gray v. Martin, courts in those situations typically rely principally on the partnership or shareholder agreement involved as the best expression of the intent of the parties. If the partnership or shareholder agreement is silent or ambiguous on a particular issue, however, courts in the alternative will look to governing statutory law. In Platt v. Henderson, for example, the Oregon Supreme Court relied primarily on the then-current version of the partnership act in concluding in the context of an accounting that a departing lawyer must share revenues collected for work that was essentially done when he left his former firm and that he was not entitled to special compensation above his statutory share for completing other unfinished business of the former firm. When the departing lawyer is not a partner or shareholder, a firm may also have a statutory lien for fees where a client with a contingent fee terminates the agreement and follows a lawyer to a new firm. ORS 87.445 creates a "charging lien" for fees — at least to the extent that the old firm's work contributed to the recovery.

Summing Up

appropriately, the RPCs focus on ethical duties to clients when the lawyers involved are in transition. At the same time, fiduciary, contractual and statutory duties can come into equally sharp focus when lawyers are severing their professional bonds with one firm and moving to another.

Endnotes


4. In a similar vein, the Oregon Supreme Court disciplined a lawyer in In re Unrein, 323 Or 285, 917 P2d 1022 (1996), for improperly representing her status on unemployment compensation forms when moving between jobs.

5. RPC 5.6(a) exempts "an agreement concerning benefits upon retirement." RPC 1.17(h), in turn, exempts restrictions in connection with the sale of a law practice.
7. Comment 8 to ABA Model Rule 1.5, upon which Oregon’s corresponding RPC is now patterned, notes that the “fee split” requirements of Model Rule 1.5(e) do “not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.”


9. With the recent run of law firm bankruptcies nationally, it is sometimes a bankruptcy trustee who is trying to use state partnership or corporate law to “follow the money” for the benefit of creditors. See, e.g., Geron v. Robinson & Cole LLP, 476 BR 732 (SDNY 2012).

10. For more on attorney liens, see Mark J. Fucile, “Attorney Liens in Oregon: Tool or Trap?” 29 Oregon State Bar Litigation Journal 22 (Spring 2010).

ABOUT THE AUTHOR
Mark J. Fucile of Fucile & Reising handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments in the Pacific Northwest. He is a past member of the OSB Legal Ethics Committee and past chair of the Washington State Bar Rules of Professional Conduct Committee. Reach him at (503) 224-4895 and Mark@frllp.com.

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Bar Counsel:

May We Help You?

*Ethics Advice Made Easy*

*By Sylvia Stevens*

One of the principal responsibilities of the OSB general counsel's office is the provision of ethics assistance to members. By far most of our assistance is provided over the telephone or by e-mail. While we don't have precise records, a fair estimate is that the general counsel and the deputy general counsel respond to an average of 80-90 telephone calls and 10-12 e-mail inquiries each week.¹

Originally, ethics guidance was limited to written formal opinions drafted by the Legal Ethics Committee and issued by the Board of Governors. (The LEC occasionally issued unpublished informal opinions on issues deemed relevant to only a small segment of the bar.) The process was thoughtful and deliberative but of limited practical value to a lawyer who was facing an immediate question.

¹ https://www.osbar.org/publications/bulletin/10jun/barcounsel.html
about the propriety of his or her conduct. Less formal written advice was available from the bar's general counsel as far back as the 1970s, but it was typically limited to pointing the inquirer to available authorities. The process could take several days because both the question and the response were in writing. Since the early 1990s, in response to members' desire for more timely assistance, the general counsel's office has increasingly offered informal guidance by telephone and, most recently, by e-mail. Over the years, the number of requests for formal opinions has slowed to a trickle, while the demand for quick informal advice has steadily increased.

We cannot and do not tell lawyers how to proceed in a particular situation, and reliance on our advice is not a defense to a charge of misconduct. RPC 5.2(a) states clearly that a lawyer is bound by the Rules of Professional Conduct "notwithstanding that the lawyer acted at the direction of another person." Moreover, "[j]ust as favorable advice by the bar's general counsel does not provide a defense to disciplinary violations, (citation omitted) such advice does not estop the bar from charging violations with respect to conduct undertaken after obtaining the advice of the bar's general counsel." In re Brandt/Griffin, 331 Or 113 (2000).

At the same time, reliance on a written opinion, whether a formal opinion issued by the Board of Governors, or an informal opinion of the general counsel or deputy general counsel, can be a factor when a lawyer is subsequently accused of misconduct. Oregon RPC 8.6 provides that the disciplinary board or the state supreme court may consider a lawyer's good faith effort to comply with a written opinion in assessing the lawyer's good faith effort to comply with the rules of professional conduct; it may also be a basis for mitigating any sanction imposed if the lawyer is found to have violated a rule.

Our goal in providing ethics guidance is to help callers understand whether their situation implicates one or more RPCs, identify applicable authorities and then guide the lawyer through the analysis of whether the proposed conduct is compliant with the rules. We try to provide a quick, practical reaction to the issue presented. A request for a written response will be answered generally within three business days. We try to return telephone calls the same day or within 24 hours.

And we don't just "make this stuff up," as one wag suggested. Our responses are based on a variety of familiar sources including the Oregon RPCs, decisions of the disciplinary board and Oregon Supreme Court, OSB Formal Ethics Opinions, ABA Formal Opinions and the ABA Model Rule and Comment. Our guidance is also often informed by our experience with how the bar has dealt with complaints arising out of similar situations. The general counsel's office lawyers meet regularly with the client assistance office and disciplinary counsel's staff to make sure our interpretations of the rules are consistent.

We do not give advice about substantive law or procedure, but we recognize that context is often crucial to identifying, analyzing and resolving questions under the RPCs. We draw on our own practice experience and that of other attorney staff. Between the general counsel's office, the CAO and the disciplinary counsel's office, the bar has 13 lawyers with a broad range of private and government practice experience. We also learn a lot from the lawyers we talk to. Many calls we get don't implicate the RPCs; when appropriate, we will refer a caller to other sources including the PLF, the courts or the bar's Lawyer-to-Lawyer program.

Our ethics advice is intended to help lawyers conform their own prospective conduct to the obligations of the RPCs, and we generally do not comment on the propriety of what we know is past conduct of the caller or another lawyer. We occasionally have inquiries from lawyers on both sides of a pending matter who want our office to resolve a disputed issue. Typically, one lawyer accuses the other of acting contrary to a rule, so the other lawyer calls to confirm the propriety of his or her conduct. Then the first lawyer calls to verify (or challenge) the advice we have given the other lawyer. Fortunately, those are infrequent situations. Callers who want to know whether another lawyer has acted improperly generally understand when we say that we can't assess the conduct without giving the other lawyer a chance to explain. Even when a lawyer inquires whether he or she has a duty to report another lawyer's misconduct, we couch our comments about the other lawyer's conduct in terms of "if the facts you assert are true, then..."

The provision of ethics assistance by the general counsel's office is governed by OSB Bylaw 19.102, which provides, in part, that "ethics questions and responses are not confidential and communications with general counsel's office are not privileged. No attorney-client relationship is intended or created by such communications with the bar." At the same time, RPC 1.6(b)(3) permits a lawyer to disclose information otherwise protected under the rule "to secure legal advice about the lawyer's compliance with these rules." That language was taken from ABA Model Rule 1.6, Comment [9], which makes it clear that a lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's professional conduct under the rules. Because there is no confidential relationship between an inquiring lawyer and the OSB, we encourage callers to present their questions hypothetically or without using names of clients where revealing their identity would violate the lawyer's duty under RPC 1.6. We also take anonymous calls, although reaching us without leaving a message is often difficult.

Based on informal feedback, we think we are doing a good job in this area, even with the limitations mentioned herein. We would like to know more, however, and invite you to participate in a brief online survey. Please go to

https://www.osbar.org/publications/bulletin/10jun/barcounsel.html

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https://www.surveymonkey.com/s/NFNQXQ3. Survey results will be reported in a subsequent column.

Endnotes

1. Lawyers in the client assistance office and disciplinary counsel’s office also respond to calls on occasion, either because the caller specifically sought out their advice or as back-up to general counsel’s office.

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CHAPTER 1

Ethics Issues Arising in Fee Agreements

*Sylvia E. Stevens*

Introduction

- Clearly Excessive Fees
- Illegal Fees
- Contingent Fee Agreements
- Fixed Fees
- Fee-Splitting and Referral Fees
- Security for Fees
- Attorney's Liens
- Noncash or "In Kind" Payments
- Payment by Third Parties
- Withdrawal from Representation

Conclusion

Introduction

Misunderstandings between lawyer and client about fee arrangements are a frequent cause not only of fee disputes but also of malpractice claims and disciplinary complaints. Although not required by the rules of professional conduct in most circumstances, a written fee agreement can be a valuable tool for avoiding such problems. Ideally, the written agreement
will be a clear and comprehensive expression of (1) how fees will be calculated, (2) the costs and expenses for which the client will be responsible, (3) when payment is due, (4) the lawyer's options in the event the client does not meet the fee obligations, and (5) how fee disputes will be resolved. See generally In re Potts/Trammel/Hannon, 301 Or 57, 74 n 8, 718 P2d 1363 (1986). A written agreement also should provide for periodic adjustments in the lawyer's hourly rate, because the client must consent to modification of the fee agreement. See Brad Tellam, Increasing Hourly Rates, 52 OSB BULLETIN 33 (July 1992). Fee agreements should be clearly drafted because ambiguous fee agreements will be construed against the lawyer. See OSB Formal Ethics Op. No. 2005-124.

Chapter 3 of THE ETHICAL OREGON LAWYER (Oregon CLE 2006) discusses at length the many ethical implications of fee agreements, and it is recommended reading for all lawyers. This chapter does not duplicate that discussion, but highlights a few areas about which the Oregon State Bar General Counsel's Office receives frequent inquiry. In addition to THE ETHICAL OREGON LAWYER, the OREGON FORMAL ETHICS OPINIONS (Oregon State Bar 2005 & Supp 2007) is a helpful resource on many fee issues. Also, the OSB General Counsel's Office offers guidance about specific situations, in response to either telephone or written inquiry. See Conclusion below.


Clearly Excessive Fees

The overarching ethical rule regarding fees is Oregon RPC 1.5(a), which prohibits a lawyer from contracting for, charging, or collecting a “clearly excessive fee or a clearly excessive amount for expenses.” A fee is clearly excessive when a lawyer of “ordinary prudence” would have a firm conviction, after review of all the circumstances, that the fee exceeds a reasonable amount. Eight nonexclusive factors to consider in determining the reasonableness of a fee are set forth in Oregon RPC 1.5(b):

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the nature and length of the professional relationship with the client;
(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Because Oregon RPC 1.5(a) prohibits entering into, charging, or collecting an excessive fee, the lawyer must review both the fee agreement and the actual charges at the inception of the engagement, at the time of billing, and again at the time of payment. A fee that appears reasonable at the beginning of a matter may turn out to be excessive if the case develops differently than anticipated. Particular caution should be exercised in the case of contingent and so-called nonrefundable fixed-fee arrangements. See In re Gastineau, 317 Or 545, 551, 857 P2d 136 (1993) ("excessiveness of the fee may be determined after the services have been rendered, as well as at the time the employment began").

Fees have been held to be excessive for many reasons, but the most common are that the lawyer charged for work not performed, In re Barber, 322 Or 194, 208–210, 904 P2d 620 (1995), or charged for services that benefited the lawyer rather than the client, In re Paulson, 335 Or 436, 441, 71 P3d 60 (2003).

**Illegal Fees**

Oregon RPC 1.5(a) also prohibits a lawyer from entering into an agreement for, charging or collecting an "illegal" fee. A fee is illegal if it is contrary to statute or similar regulation. See In re Hockett, 303 Or 150, 160–162, 734 P2d 877 (1987) (interpreting scope of term illegal in former DR 7-102(A)(7)); In re Alistatt, 321 Or 324, 331, 897 P2d 1164 (1995) (accepting fees from probate estate without prior court approval); In re Sasser, 299 Or 570, 574, 704 P2d 506 (1985) (charging a fee in workers' compensation case without prior approval of referee or board).

Other examples of illegal fees include fees in Social Security cases that exceed the statutory limitation or do not comply with the requirement of prior administrative approval, 42 USC §406(a)(2), and fees in class action cases that do not comply with the requirement of prior court approval, ORCP 32 N. A fee will also be illegal if it violates the prohibition in Oregon RPC 1.5(c) against contingent fees in certain cases, discussed in *Contingent Fee Agreements* below.
CHAPTER 1 / ETHICS ISSUES

Contingent Fee Agreements

Contingent fees are permitted in all but two situations: (1) defense of criminal charges and (2) domestic relations cases when the fee is contingent on securing a divorce or on the amount of child or spousal support or property settlement obtained. Oregon RPC 1.5(c). That rule, however, does not prohibit a contingent fee to collect past-due support or unpaid property settlement judgments. See OSB Formal Ethics Op. No. 2005-13.

In personal injury, death, or property damage cases, the contingent fee must be in writing and must otherwise comply with ORS 20.340. The agreement must be in “plain and simple language reasonably believed to be understandable by the plaintiff.” ORS 20.340(1)(a). The agreement must permit the client to rescind it within 24 hours after signing, on giving written notice to the lawyer. ORS 20.340(1)(c). Before the agreement is signed, the lawyer must provide the client with an explanation of the terms and conditions in a form substantially identical to the Oregon State Bar’s Model Explanation of Contingent Fee Agreement. ORS 20.340(1)(b). See chapter 8 for a form of contingent fee agreement and the model explanation.

Fixed Fees

A “fixed” or “flat” fee is a fixed dollar amount charged for a specified service. Although the fixed fee may be based in part on the lawyer’s estimate of the amount of time that the representation will require, the fixed fee does not depend on the number of hours the lawyer spends on the matter. Often a fixed fee is paid at the beginning of the representation before any legal service has been provided.

As a general rule, fees are not earned until services have been performed. In the case of a fixed fee for a specified service, the fee is not considered earned until the specified service is fully completed, unless the lawyer and client agree in writing that the fee is “earned upon receipt” by the lawyer. In re Fadeley, 342 Or 403, 409–410, 153 P3d 682 (2007) (citing In re Biggs, 318 Or 281, 293, 864 P2d 1310 (1994)). In the absence of a written agreement making the fee earned upon receipt, the fixed fee is deemed to be earned only when the matter is completed, and the fee must be deposited into the lawyer’s trust account and held there until the legal services are completed.

Fixed fees often are referred to as “nonrefundable.” In the sense that the client owes the entire agreed fee if the lawyer completes the agreed services, that is a correct statement. However, fixed fees are also subject to the “reasonable fee” standard of Oregon RPC 1.5(a). If the representation terminates before the lawyer has completed the agreed services, some portion
of the fee has not been earned. Retention of an unearned fee constitutes charging an excessive fee in violation of RPC 1.5(a). *In re Fadeeley*, 342 Or at 411 (citing *In re Gastineau*, 317 Or 545, 551, 857 P2d 136 (1993)). See also OSB Formal Ethics Op. No. 2005-151.

**Fee-Splitting and Referral Fees**

Lawyers are barred by statute and by the rules of professional conduct from sharing fees with nonlawyers. The statutory prohibition, ORS 9.505, applies only to personal injury and death cases. The prohibition in Oregon RPC 5.4(a) applies to any matter, although it provides an exception for payments in connection with a lawyer's death or retirement, purchase of a practice, law firm compensation plans, and court-ordered fees shared with nonprofit organizations. Furthermore, Oregon RPC 5.4(d) specifically prohibits lawyers from accepting compensation for referring a client to a nonlawyer, other than gifts in the ordinary course of social or business hospitality.

A division of fees between lawyers not in the same firm is not subject to those limitations. ORS 9.515 specifically provides that ORS 9.505 does not prohibit the referral of claims between lawyers or the division of fees for "legal services with another lawyer consistent with the rules of professional conduct." Oregon RPC 1.5(d), in turn, permits a division of fees between lawyers not in the same firm if

1. the client gives informed consent to the fact that there will be a division of fees, and
2. the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

Oregon RPC 1.5(d) clearly allows a division of fees when a lawyer, with the client's consent, consults or associates with co-counsel in the representation. The rule is less clear on the propriety of paying or accepting "pure" referral fees when the referring lawyer will not take an active part in handling the case.

Oregon's approach is the minority position among jurisdictions. Unlike the corollary ABA Model Rule of Professional Conduct 1.5(e) and the analogous rule in most jurisdictions, Oregon RPC 1.5(d) does not require that the fee division between lawyers be proportionate to the services rendered or the responsibility assumed by each. See *In re Potts/Trammel/Hannon*, 301 Or 57, 67 n 4, 718 P2d 1363 (1986). See also chapter 12. However, the language of Oregon RPC 1.5(d) suggests that each lawyer must perform some service for the client. (Many commentators suggest that the referring lawyer provides a service in making the referral in the sense that the referring lawyer
CHAPTER 1 / ETHICS ISSUES

analyzes the client's problem and selects an appropriate lawyer qualified to handle it.)

Security for Fees

Although Oregon RPC 1.8(i) generally prohibits a lawyer from acquiring a proprietary interest in a client's case, a lawyer may ask for and obtain a consensual lien or security interest in client property to secure payment of fees.

If the security interest is in property other than that which is the subject of the representation, compliance with Oregon RPC 1.8(a) is required. See, e.g., Comment [16] to ABA Model Rule 1.8. Even when the security interest is in the property that is the subject of the representation, if the security interest is acquired after the lawyer-client relationship has been established, the client's informed consent may be required. The transaction is no longer at arm's length and may constitute a business transaction with a client within the meaning of Oregon RPC 1.8(a). The personal interest conflict prohibition of Oregon RPC 1.7(a)(2) may also apply.

The client's informed consent is required whenever the lawyer and the client are entering into a business transaction in which their interests are adverse and the client expects the lawyer to protect the client's interests in the matter. Oregon RPC 1.8(a). The creation of the security interest in client property is, arguably, a business transaction, and plainly is a matter in which the lawyer and the client have conflicting interests. See Hawk v. State Bar of California, 754 P2d 1096, 1101-1102 (Cal 1988) (lawyer was disciplined for failing to make required disclosures and observe other safeguards for client when taking note and trust deed to secure fees).

A lawyer is also prohibited from proceeding in a matter when there is a substantial risk that the lawyer's own interests may materially limit the lawyer's representation of the client, unless the client gives informed consent, confirmed in writing. Oregon RPC 1.7(a)(2), (b).

NOTE: Informed consent denotes agreement by the client to a course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When the informed consent is required to be confirmed in writing, the lawyer must also recommend that the client seek independent legal advice to determine if consent should be given. Oregon RPC 1.0(g).
Even when a lien or security interest is taken properly, the lawyer’s obligation not to prejudice the client may require that the security interest or consensual lien be subordinated to the client’s rights in the property if the client is without means to pay the fees but has urgent need for clear title to the collateral. See OSB Formal Ethics Op. No. 2005-90 and discussion at Attorney’s Liens below.

**Attorney’s Liens**

An attorney has a lien for compensation whether specially agreed upon or implied, upon all papers, personal property and money of the client in the possession of the attorney for services rendered to the client. The attorney may retain the papers, personal property and money until the lien created by this section, and the claim based thereon, is satisfied, and the attorney may apply the money retained to the satisfaction of the lien and claim.

ORS 87.430.

The lien arises automatically whenever a debt arises and the lawyer has possession of client property; no filing or other notice is required in order to claim the attorney’s lien. A procedure by which the client can post a bond and discharge the lien is set forth in ORS 87.435 and 87.440. Also, ORS 9.370 provides a means for protecting the attorney’s lien while allowing delivery of client papers and money. The existence of an attorney lien is recognized in Oregon RPC 1.16(d), which requires a lawyer, upon termination of a representation, to surrender papers and property “to which the client is entitled,” while providing that the lawyer “may retain papers, personal property and money of the client to the extent permitted by other law.”

The most common questions about attorney’s liens involve retention of a client’s file after the lawyer’s representation has ended. If the client’s matter is resolved, the lawyer’s retaining the file may not be of great importance to the client. If the case is unfinished, however, the client’s need for the file may be urgent. If the client has the means to pay the lawyer but chooses neither to pay nor to post a bond, then the lawyer may hold the file until payment is received. If, on the other hand, the client is without means to pay and will be prejudiced without the file, then the attorney’s lien must subordinate to the fiduciary duty that the lawyer owes to the client. See OSB Formal Ethics Op. No. 2005-90.

The attorney’s lien also attaches to funds that the lawyer is holding for the client. Notwithstanding the language in ORS 87.430 that suggests a lawyer may apply liened funds to the satisfaction of the claimed fees, if the lawyer knows that the fee is disputed, the lawyer must follow the provisions
of Oregon RPC 1.15-1(e) and retain the disputed funds in trust until the dispute is resolved. Funds in excess of what the lawyer claims is owed must be delivered promptly to the client. Oregon RPC 1.15-1(e). See OSB Formal Ethics Op. No. 2005-149.

**Noncash or “In Kind” Payments**

The rules of professional conduct do not require that a lawyer accept only cash as compensation for legal services. In recent years it has become increasingly common for lawyers to accept stock in a client company as fees. “In kind” payments, like cash payments, are subject to the “not clearly excessive” standard of Oregon RPC 1.5(a). If the client does not have independent counsel to structure the transaction, the self-interest that arises when a lawyer anticipates becoming an owner of the client corporation will require informed consent of the client to the lawyer’s representation in the transaction. Oregon RPC 1.7(a)(2). Accepting stock in a client corporation other than at the beginning of the representation will also constitute a business transaction with a client, requiring compliance with RPC 1.8(a).

**Payment by Third Parties**

Often the party paying the fees for legal services is not the client, but a family member, friend, or prepaid legal service plan. Such arrangements are permitted by Oregon RPC 1.8(f)(1) as long as the client gives informed consent. The lawyer may not permit the party paying the fee to interfere “with the lawyer’s independence of professional judgment or with the client-lawyer relationship.” Oregon RPC 1.8(f)(2).

If billing statements are sent directly to the party paying the fee (in addition to or in lieu of the client), the lawyer also must ensure that no information relating to the representation of the client is inadvertently revealed in the billing statements unless the client has consented to the disclosure. Oregon RPC 1.6. See OSB Formal Ethics Op. No. 2005-157.

The fee agreement should specify to whom any prepaid but unearned fee is to be refunded when the representation is concluded. Otherwise, the lawyer may be caught between competing claims of the client and the third-party payor. A lawyer must deliver funds requested by a client “which the client is entitled to receive.” Oregon RPC 1.15-1(d). If the client is not entitled to the funds, the lawyer may be civilly liable to the payor for conversion or otherwise. See Sylvia E. Stevens, *Money Troubles*, 61 OSB BULLETIN 29 (Nov 2000).
Withdrawal from Representation

A lawyer may withdraw from representing a client when the client, after reasonable warning from the lawyer, substantially fails to fulfill an obligation to the lawyer regarding the lawyer's services. Oregon RPC 1.16(b)(5). In addition, Oregon RPC 1.16(b)(1) allows a lawyer to withdraw for any or no reason when it can be accomplished without material adverse effect on the client's interests. A lawyer may also withdraw when continuing the representation will constitute an unreasonable financial burden on the lawyer. Oregon RPC 1.6(b)(6). A lawyer who withdraws from representation must take steps to the extent reasonably practicable to protect the client's interests, and must refund any part of an advance payment of fees or expenses that have not been earned or incurred. Oregon RPC 1.16(d). The lawyer also, upon request, must account to the client for all funds and other property of the client held by the lawyer and, subject to the lawyer's right to claim an attorney's lien, return such property on the client's demand. Oregon RPC 1.15-1(d).

Conclusion

Ethics issues relating to fees and fee agreements turn on the facts of each situation. This discussion of some typical areas of concern is only a brief overview of the issues to consider. Lawyers are encouraged to become familiar with applicable rules of professional conduct and other authorities, and to use written fee agreements in all cases. A lawyer who is unsure about how to proceed in a particular situation may telephone the Oregon State Bar General Counsel's Office for ethics advice, or submit a written request to General Counsel's Office or to the Legal Ethics Committee.

PRACTICE TIP: For consultation by telephone, call the General Counsel's Office at 503-620-0222 (toll-free in Oregon, 1-800-452-8260), extension 359.

Written requests should be mailed to General Counsel, Oregon State Bar, PO Box 1689, Lake Oswego, OR 97035-0889.
By the time this column is published, the Oregon State Bar Fee Arbitration Program will have received approximately 120 requests for arbitration for 2008. This represents a 25 percent increase from the average number of requests in years past. Confusion and misunderstandings over fee arrangements are an obvious source of many of these arbitrations. Because fee disputes often go hand in hand with a general dissatisfaction with the quality of representation or results obtained, they also commonly trigger malpractice claims and complaints of ethical misconduct. In the last year, the bar's Client Assistance Office received approximately 120 complaints where a fee dispute was identified as the primary complaint.
Much has been written about the ethical requirements of fee arrangements. What remains a mystery to many lawyers, however, is when a mere dispute over the reasonableness of fees becomes a matter of ethical misconduct.

Clearly Excessive Fees
The general rule regarding lawyer fees can be found in Oregon RPC 1.5(a), which prohibits lawyers from contracting for, charging, or collecting an illegal or clearly excessive fee. A fee is clearly excessive when a lawyer of ordinary prudence would have a firm conviction that the fee is in excess of a reasonable fee. RPC 1.5(b). In determining the reasonableness of a fee, lawyers should start by reviewing the eight nonexclusive factors listed at RPC 1.5(b):

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.

Assessing the reasonableness of the fee must be done not only at the outset of the lawyer-client relationship, but at the time of billing, and again at the time of payment, as circumstances may change that could impact the reasonableness of the fee. See, e.g., In re Gastineau, 317 Or 545, 551 (1993) ("excessiveness of the fee may be determined after the services have been rendered, as well as at the time the employment began"). Gastineau involved a fixed fee arrangement, that is, an agreement that a fixed dollar amount be paid for a specified service. Lawyers often refer to fixed fees as nonrefundable. However, if the representation ends before the lawyer has completed the agreed upon services, some portion of the fee has not been earned, and therefore must be refunded, notwithstanding the lawyer’s characterization of the fee as "nonrefundable." Id. See also OSB Formal Ethics Op 2005-151.

The amount that must be refunded when a flat fee has not been fully earned depends not on the hours that the lawyer expended on the matter, but on the portion of the work that remains uncompleted, in relation to the whole of the representation. Computing the amount earned based on hours expended would deny the client the benefit of the flat-fee arrangement, and therefore result in a clearly excessive fee. In re Balocca, 342 Or 279, 292 (2007).

Perhaps the most common "clearly excessive fee" is charging the client more than the originally agreed upon rate. See, e.g., In re Yacob, 318 Or 10 (1993); In re Kerrigan, 271 Or 1 (1975). Lawyers may not unilaterally increase their hourly rate or charge interest without their client’s consent. OSB Formal Ethics Op 2005-97. Thus, if your firm makes periodic adjustments to the lawyers’ hourly rates, this information must either be included in a written agreement or the clients must otherwise consent to the modification prior to the adjustment being made. See Tellam, "Increasing Hourly Rates," 52 OSB Bulletin 33 (July 1992).

A breakdown in the lawyer-client relationship often precipitates the lawyer charging clearly excessive fees. Client questions lawyer, implies that lawyer’s services were less than stellar and asks for a reduction in the recent bill. Lawyer responds with a lengthy and indignant defense of lawyer’s work, notifies the client that he will be withdrawing from further representation and then promptly rebills the client, adding charges for responding to client’s insults and for drafting a motion to withdraw.

Whether lawyers may charge for preparing and presenting a motion to withdraw has yet to be directly addressed in Oregon. The North Carolina State Bar recently determined that it is improper for a lawyer to charge a client for time spent withdrawing from the case, except in the unusual circumstance where the withdrawal advances the client’s objectives. 2007 Formal Ethics Opinion 8. In Oregon, charging for services that solely benefit the lawyer, rather than the client, has been held to be a clearly excessive fee. See In re Paulson, 335 Or 436 (2003). Thus, lawyers should not charge clients for time spent responding to or negotiating a billing...
dispute or for time spent responding to an ethics complaint. See In re Benett, 331 Or 270 (2000); In re Klahn, 14 DB Rptr 65 (2000); OSB Formal Ethics Op 2005-78. Under the analysis of these cases, preparing and presenting a motion to withdraw could also be considered a service that solely benefits the lawyer, depending on the circumstances. Therefore, Oregon lawyers should think carefully before deciding to charge for such work.

Illegal Fees
Illegal lawyer fees are easier to identify because they are, quite simply, those that are prohibited by law. For example, charging a fee in a workers’ compensation case when the fee has not been approved by the referee or board is an "illegal fee." In re Sessor, 299 Or 570 (1985). Similarly, charging fees in certain bankruptcy cases without prior court approval and accepting fees from a probate estate when the fees have not been approved by the court are both considered illegal fees. See In re Montgomery, 16 DB Rptr 139 (2002) and In re Altstatt, 321 Or 324 (1995).

A Panacea?
With limited exception, the Oregon Rules of Professional Conduct do not explicitly require that fee agreements be in writing. However, many misunderstandings over fees could be avoided with a well crafted written fee agreement or engagement letter. Further, Oregon RPC 1.4(b) does require that lawyers explain matters to clients "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Expected fees and costs for the representation are matters that should be explained in advance to clients so that they can make informed decisions about how to proceed with their cases. When the explanation is given in writing, there is less room for confusion.

Providing clients with an outlet for airing their grievances about fees can also help to avoid frivolous disciplinary and malpractice complaints. The Fee Arbitration Program provides one such outlet that is relatively inexpensive and speedy. The OSB Fee Arbitration Program is voluntary at present. In most cases, it is the client who initiates the process. And unfortunately, in most cases, it is the lawyer who refuses to participate, leaving the client frustrated and grasping for other means to obtain some remedy. Contacting the OSB Client Assistance Office and/or the Professional Liability Fund is often the next step for these clients. Participating in fee arbitration certainly does not insulate lawyers against ethics complaints or malpractice claims. However, it can save lawyers considerable time in dealing with those complaints that turn out to be frivolous.

Lawyers frequently ask whether they are allowed to include a provision in their fee agreement that requires clients to arbitrate fee disputes. The answer is unequivocally yes. Lawyers may not enter into an agreement with a client that limits the rights of the client to file or pursue an ethics complaint against the lawyer. Oregon RPC 1.8(h)(4). And agreements with clients that settle malpractice claims or that require arbitration of such claims may only be made with the client's informed consent, confirmed in writing, RPC 1.8(h)(2) & (3). However, the rules of professional conduct do not impose similar limitations or qualifications on provisions that require the client to arbitrate fee disputes. So for those lawyers who were thinking about adding a fee arbitration provision to their fee agreements, go for it!

Endnotes
1. Resources include the Oregon State Bar Fee Agreement Compendium (2007), and The Ethical Oregon Lawyer (Oregon CLE 2006).

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Fee Dispute Resolution Program

The OSB Fee Dispute Resolution program offers clients and lawyers a voluntary, out-of-court method for resolution of disputes over fees that is informal, quick, confidential, and inexpensive.

This brief synopsis of the dispute resolution process is not intended to answer all the questions you may have about the program. You should also read the fee dispute resolution rules. You may wish to hire an attorney to help you decide what to do.

INTRODUCTION

If you have a dispute with your attorney over the fee you have been charged in a case, the Oregon State Bar has a program that might be able to help you. Since 1976, the bar has operated the Fee Arbitration Program, which is available to resolve fee disputes between Oregon attorneys and their clients, Oregon clients with out-of-state attorneys, and between attorney members of the Oregon State Bar over how to apportion a fee.

In 2015 the Oregon State Bar added a fee mediation option, and the program was renamed the Fee Dispute Resolution Program.

WHAT IS FEE ARBITRATION?

Fee arbitration is a private method for resolving disputes about the reasonableness of attorneys’ fees. Fee Arbitration is a binding process. Volunteer arbitrators listen to both sides and then make a decision and issue an award and money award.

WHAT IS FEE MEDIATION?

Fee mediation is a nonbinding process in which parties work with a neutral third party mediator to seek a mutually agreeable outcome. Mediators do not represent any party and are not judges. Their role is to manage the process through which parties resolve their conflict, not to decide how the conflict should be resolved. They do this by assuring the fairness of the mediation process, facilitating communication, and maintaining the balance of power between the parties. The parties can choose to resolve their dispute, or not.

DISPUTES SUBJECT

Any fee dispute involving an Oregon attorney and a client, an Oregon client with an out-of-state attorney; or attorneys who are members of the Oregon State Bar.

There are two exceptions, the bar may decline disputes involving $250 or less and the bar may not over rule an order or judgment signed by the court awarding attorney fees.
FILING FEE
The person requesting arbitration and or mediation must pay a filing fee of $75. However, if you cannot afford to pay the fee, the bar may grant you a waiver. (Call the bar to ask for a waiver application.)

REQUESTING FEE ARBITRATION OR MEDIATION
Either the lawyer or the client may request fee arbitration or fee mediation by contacting the Oregon State Bar for forms and information, or you can go to the website www.osbar.org. The person requesting the arbitration files a “Petition for Dispute Resolution” and signs an “Agreement to Arbitrate” or an “Agreement to Mediate”. The “Petition for Dispute Resolution” is a statement of the amount in dispute and an explanation of the nature of the dispute. The “Agreement to Arbitrate” or “Agreement to Mediate” is the parties’ agreement to abide by the arbitrator’s decision or the settlement reached by the parties.

ASSIGNMENT TO ARBITRATION HEARING OR MEDIATION SESSION
One mediator will be assigned to a case no matter how much money is in dispute. The mediator is chosen from a list of volunteers in the judicial district where the attorney whose fees are in dispute has his or her principal office.

The number of arbitrators assigned to hear a case depends on how much money is in dispute. If the amount is less than $10,000, one lawyer arbitrator will decide the case. Otherwise, if the amount in dispute is greater than $10,000, three arbitrators are selected for the panel, two lawyers and one non-lawyer. The arbitrators are chosen from a list of volunteers in the judicial district where the attorney whose fees are in dispute has his or her principal office.

You may object to the appointment of an arbitrator or mediator by contacting Cassandra Dyke at mailto:cdyke@osbar.org.

ARBITRATION HEARING
An arbitration hearing is scheduled by the sole arbitrator or by the chair of a three-person panel; except with leave of OSB General Counsel, the hearing will be scheduled within 60 days of the appointment of the arbitrator or the arbitration panel. The parties to the arbitration will be given at least 10 days advance notice of the hearing. The arbitrator or the chair of the panel conducts the hearing and decides what testimony and documents may be used as evidence.

You must come to the hearing unless all parties agree in advance to submit evidence in writing. In that case, the panel’s decision will be based on the written material. With the approval of the arbitrator or mediator one or both parties may appear by telephone.

Arbitration hearings are generally informal and legal representation is not required. However, either party may be represented in the arbitration proceeding, at the party’s sole expense.

If a party fails to attend the hearing, the dispute will be decided by the arbitrator or panel based upon available information.
MEDIATION SESSION
Once the parties sign an Agreement to Mediate and indicate they wish to mediate, they are asked about their availability for mediation. Based on the information provided and the mediator’s schedule, the mediator will set the date and location for the mediation. You should respond promptly to any requests from the mediator regarding your availability on specific dates.

The mediation will typically be held within 60 days after the mediator is appointed. If you intend to be represented by a lawyer at the mediation, let the mediator know so that your lawyer’s schedule can be taken into consideration.

Mediation sessions are usually held in the office of the mediator, but other locations, such as the Oregon State Bar office or the local courthouse, may be used.

CONFIDENTIALITY
Arbitration is confidential. Hearings are only open to the people involved in the dispute and not to the public. Records are not disclosed to anyone except on the agreement of all parties, except that the arbitrators must inform the bar of any evidence of ethical misconduct by a lawyer. ORPC 8.3.

Mediation is confidential. Records of the mediation will not be disclosed to anyone except with the agreement of all parties, except that mediators must inform the bar of any evidence of ethical misconduct by a lawyer ORPC 8.3.

MEDIATION SETTLEMENT AGREEMENT
The mediator can memorialize your settlement agreement in a mediation settlement agreement. Mediators will recommend that each party seek independent legal advice before signing a mediation settlement agreement. Mediators cannot provide you legal advice about whether it is a good idea to enter into a settlement agreement. If parties do not resolve their case in mediation, they can still pursue resolution through arbitration.

If the parties choose to resolve their dispute with a written settlement agreement, that agreement is enforceable in the same manner as any other written contract.

ARBITRATION DECISION
The arbitrator or arbitration panel makes its decision within 30 days after the close of the hearing and issues a written award. The arbitrator or the panel may decide that an attorney should refund fees already collected, should collect a reduced fee, or that the fees are reasonable under the circumstances.

The decision of the fee arbitration panel is binding upon the parties. However, when good cause exists, General Counsel may direct the arbitrators to correct or modify an award that contains a mathematical calculation error, is not in proper form, is indefinite, or needs clarification.

Either party may seek to have the award confirmed by the court and entered as a judgment as provided in ORS 36.600 to 36.740.

Either party may petition the court to vacate the award as provided in ORS 36.705 within 20 days of being served with a petition to confirm the award. There are limited grounds for vacating an award. The bar cannot assist in this phase of the process; parties who need help are encouraged to consult an attorney of their choice.
FURTHER QUESTIONS
The Oregon State Bar will answer any additional questions you might have about the fee arbitration program. To ask those questions or to obtain forms, please call the Oregon State Bar at (503) 620-0222, ext. 334 in Portland or toll-free in Oregon at (800) 452-8260, ext. 334.

FREQUENTLY ASKED QUESTIONS

Who can use the Oregon State Bar Fee Dispute Resolution?
Oregon attorneys and a client, Oregon clients with out-of-state attorneys; or Attorneys who are members of the Oregon State Bar.

Who may file a Petition for Dispute Resolution?
The attorney or the client.

How much does the fee dispute resolution cost?
The person who files the Petition pays a filing fee of $75.

If an attorney does not agree to arbitrate or mediate the dispute, do I automatically win?
No. Fee arbitration and mediation are voluntary. Both sides must agree to participate.

What can I do if the attorney refuses to participate in the arbitration or mediation?
You may exercise your traditional civil remedies. If you have questions about your options, you should consult an attorney for advice.

What can I do if I change my mind after the attorney and I have signed the Agreement to Arbitrate or Agreement to Mediate?
The Fee Dispute Program Administrator, upon notice of one party not wanting to continue with the arbitration or mediation, shall dismiss the case. However, the Agreement to Arbitrate and Agreement to Mediate are contracts. If one party refuses to arbitrate or mediate after signing the Agreement to Arbitrate or the Agreement to Mediate, the other party may seek a judicial order compelling the arbitration or mediation, pursuant to ORS Chapter 36. There is no refund of the filing fee even if all parties agree to cancel the arbitration.

Does the arbitrator, arbitration panel, or mediator have to be from the BOG district in which the attorney maintains his or her office?
Generally, yes. However, An Arbitrator, Arbitration Panel, or Mediator from another BOG district will be appointed if there are insufficient eligible arbitrators or mediators in the attorney’s district. Parties may also agree to a single Arbitrator if a panel would normally hear the dispute.
**Who sits on Fee Dispute Panels?**

An Arbitration Panel is made up of attorneys and non-attorneys from each BOG district who volunteer their time to serve as arbitrators.

Mediators are from each BOG district. They are attorneys who volunteer their time to serve as mediators.

**Do I have to attend the arbitration hearing or mediation sessions?**

Yes, unless you and the attorney agree to have the dispute decided upon written statements that are submitted. With the consent of the arbitrator, you may be able to participate by telephone.

**What is the hearing like?**

Arbitration hearings are informal, and there are no special rules governing the presentation of your position. You should bring any documentation that you believe would be helpful and relevant.

You may also bring witnesses who have knowledge of the circumstances. Additional information about preparing for the hearing will be provided when the hearing has been scheduled.

Mediation sessions are informal, and there are no special rules governing the presentation of your position. The Mediator will communicate with you and then with the attorney and help facilitate a settlement.

**Do I have to be represented by an attorney at the hearing?**

No. You may hire an attorney to represent you at the hearing, but it is not necessary. You are responsible for the expense of hiring an attorney, it will not be reimbursed even if you are successful in the arbitration.

**What can I do if I disagree with the decision of the arbitrator(s)?**

The arbitration award is binding on both parties, except for the judicial relief remedies provided in ORS 36.600 to 36.740. You should talk to an attorney if you need help obtaining and enforcing the judgment.

**Special Needs**

If you have a disability for which you need accommodation in the dispute resolution process, or if you need to receive printed materials in a different format, please contact Cassandra Dyke at (503) 431-6334 or (800) 452-8260 ext. 334, or (503) 620-0333, ext. 416 (TDD/TTY).
FORMAL OPINION NO 2005-90
Client Property:
Attorney Liens

Facts:

Lawyer A represents Client A in litigation. Lawyer B represents Client B in litigation.

Lawyer A is fired by Client A shortly before trial and is granted leave to withdraw as counsel of record. Lawyer B seeks leave to withdraw for nonpayment of fees, and leave is granted. Both Client A and Client B hire other counsel to protect their interests, and their respective cases continue.

Both Lawyer A and Lawyer B are owed substantial fees by their clients and both have in their possession documents and information of critical importance to their clients’ cases, which the clients cannot practically duplicate or replace.

Questions:

1. May Lawyer A retain client documents or information until all past-due fees are paid?
2. May Lawyer B retain client documents or information until all past-due fees are paid?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.
Discussion:

Oregon RPC 1.16(a)(3) requires a lawyer to withdraw if the lawyer “is discharged.” Oregon RPC 1.16(b)(5) permits the lawyer to withdraw if

the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

See also OSB Formal Ethics Op No 2005-1.

In either case, the terms and conditions of withdrawal are governed by Oregon RPC 1.16(c) and (d):

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

See, e.g., In re Biggs, 318 Or 281, 864 P2d 1310 (1994) (lawyer ceased practicing law without taking steps necessary to avoid prejudice to existing clients); In re Devers, 317 Or 261, 855 P2d 617 (1993) (lawyer disciplined for failing to deliver to client all papers to which client was entitled); In re McKnight, 9 DB Rptr 17 (1995) (lawyer disciplined for failure to refund unearned portion of retainer promptly on withdrawal from employment); In re Passannante, 16 DB Rptr 310 (2002) (lawyer who ceased working on client’s legal matter without notice to client and without returning file to client effectively withdrew in violation of former DR 2-110(A)(2)); In re Covert, 16 DB Rptr 87 (2002) (lawyer violated former DR 7-110 by withdrawing from bankruptcy representation without obtaining bankruptcy court’s permission).

2016 Revision
On the facts as presented, the requirements of Oregon RPC 1.16(c) have been met, and the portion of Oregon RPC 1.16(d) relating to refunding any unearned advance payments does not apply. Thus, it is only necessary to consider the application of the remaining portion of Oregon RPC 1.16(d) relating to return of client documents or property. See also Oregon RPC 1.15-1(d).¹

ORS 87.430 creates an attorney’s possessory lien on client papers and property, and ORS 87.435 and ORS 87.440 provide a procedure by which a client may file a surety bond and obtain discharge of the lien.² If the lien is otherwise valid and if the client has sufficient resources to pay the lawyer what is due but chooses neither to make payment nor to file a bond, the lawyer may lawfully withhold the client’s materials. If, however, the client does not have sufficient resources to pay the lawyer in full and if surrender of the materials is necessary to avoid foreseeable prejudice to the client, the attorney lien must yield to the fiduciary duty that the lawyer owes to the client on payment of whatever amount the client can afford to pay. Compare Thomas G. Fischer, Annotation, Attorney’s Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct, 69 ALR4th 974 (1989) (supple-

¹ Oregon RPC 1.15-1(d) provides in pertinent part:

   (d) . . . Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive and, upon request by the client . . ., shall promptly render a full accounting regarding such property.

² See also ORS 87.445 to 87.490, regarding liens on actions and judgments. With respect to the difference between “retaining” and “charging” liens, see Lee v. Lee, 5 Or App 74, 482 P2d 745 (1971). We do not believe that the existence of ORS 9.360 and ORS 9.370, which provide a procedure in which clients can obtain a court ruling requiring the return of their papers or property, compels the conclusion that it necessarily is ethical for lawyers to retain client papers or property until a court so orders. Cf. In re Arbuckle, 308 Or 135, 139, 775 P2d 832 (1989) (disciplining lawyer who had not “attempted to justify his failure to return the property by any claim of privilege or right”). Among other things, there will be clients whose very lack of resources or abilities will render this remedy unavailable.
Formal Opinion No 2005-90


Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see The Ethical Oregon Lawyer § 3.4-11 (addressing withdrawal or discharge in fee agreement), § 3.5-1(a) to § 3.5-1(b) (security for payment of fees), § 3.5-6(c) (payments upon discharge or withdrawal), § 4.1 to § 4-2-2(d) (withdrawal), § 4.3 (mandatory withdrawal), § 4.3-3 (discharge by the client), § 4.4 to § 4.4-3 (permissive withdrawal), § 12.3-7(b) (payment of attorney fees from lawyer’s trust account), § 12.4-1 to § 12.4-2 (client property) (OSB Legal Pubs 2015); Restatement (Third) of the Law Governing Lawyers §§ 17, 31-33, 40, 43-46 (2000) (supplemented periodically); and ABA Model RPC 1.15–1.16.

2016 Revision
A simple fact of practice life in recent years for almost all lawyers is that some clients haven't paid their bills. At some point in the collection process, many lawyers wonder whether they should sue a delinquent — and by then likely former — client for the amount owed. The reasons are understandable: you might have done a great job and the client agreed without qualification to the financial terms of your representation. At the same time, lawyers are uniquely vulnerable to tactics by delinquent former clients that, at minimum, diminish the economic value of almost any receivable.

Although the old saw "never say never" applies to collection suits against former clients, the ones that make economic sense are few and far between. In this column, we'll first survey common tactics that delinquent clients use to let the economic air out of collection cases. We'll then turn to steps you can take before, during and after a representation to protect your hard work without suing former clients.

Collection Counterclaims
It's not news that clients sued for fees often counterclaim for malpractice.

Bruce Schafer, director of claims for the Professional Liability Fund, puts it this way in his chapter on legal malpractice in The Ethical Oregon Lawyer:

A lawyer who sues a client for fees runs a great risk of being sued for legal malpractice in the same suit. Whether or not the retaliation suit or counterclaim is meritorious, the lawyer may regret having ever initiated the fee-collection action against the client.

(2006 rev ed. at 15-19.)
In the past decade, counterclaims in collection cases have grown increasingly sophisticated.

The "old" standard was a simple negligence claim. It undermined the worth of the work involved, made the economic return less certain and provided the former client with settlement leverage.

A newer and more complex variant is to combine an allegation of negligence with an asserted conflict on the part of the firm seeking to collect a bill. In Kidney Association of Oregon v. Ferguson, 315 Or 135, 144, 843 P2d 442 (1992), the Oregon Supreme Court held that an unwaived conflict under the professional rules equates to a breach of the fiduciary duty of loyalty. The Oregon Supreme Court's position is by no means unique, with, for example, its counterparts in Washington (Erika v. Denver, 824 P2d 1207 (Wash 1992)) and Idaho (Blough v. Wellman, 974 P2d 70 (Idaho 1999)) reaching the same conclusion. The practical significance is that a disloyal agent may not be entitled to some or all fees — including those already collected under the companion remedy of "disgorgement." On this point, the Supreme Court in Kidney Association (315 Or at 144) noted: "When a court reduces or denies attorney fees as a consequence of a lawyer's breach of fiduciary duty, it is a reflection of the limited value that a client receives from the services of an unfaithful lawyer." A knowledgeable former client (or at least one with a knowledgeable lawyer), therefore, may not just use a supposed conflict as a "shield" but also a "sword" to argue for the return of fees already paid.

Still more inventive forms of legal attack include claims for unlawful debt collection practices (see, e.g., Hendrick v. Spear, 138 Or App 53, 907 P2d 1123 (1995)), failure to satisfy contractual prerequisites (see, e.g., Varner v. Eves, 164 Or App 66, 990 P2d 357 (1999)), and asserted statutory deficiencies (see, e.g., Bechler v. Macaluso, No. CV 08-3059-CL, 2010 WL 2034635 (D Or May 14, 2010) (unpublished)).

A counterclaim for malpractice or breach of fiduciary duty usually requires the delinquent client to hire a lawyer. For financially hard pressed clients, a bar complaint offers a less expensive way to retaliate against a lawyer. Although the bar's web site reminds potential complainants that pure fee disputes are not within its regulatory jurisdiction, many clients today are savvy enough to craft a bar complaint that — at least on the surface — casts issues in a way that appear to fall within the bar's regulatory purview. Many clients today are also savvy enough to understand that responding to a bar complaint will invariably inflict an economic cost on a lawyer, knowing that ORS 9.537(1) affords a complainant absolute immunity from civil suit for filing even a baseless bar complaint. In short, a bar complaint can be what the military calls an "asymmetrical" attack: cheap for the delinquent client while effectively undermining the economics of the lawyer's collection effort on at least small to medium size bills.

**Alternatives to Litigation**

Lawyers can take steps at each stage in a representation to increase the probability of payment or at least minimize the risk of being left with a large receivable.

At the beginning of a representation, there are several tools available to enhance the prospect of payment.

First, lawyers are permitted to obtain "replenishable" advance fee deposits. Rather than a static fund that simply diminishes as work is done and fees are earned, replenishable advance fee deposits require the client to maintain an agreed minimum in trust that will be used to satisfy the lawyer's final bill. It is the legal equivalent of a landlord obtaining the last month's rent up front.

Second, lawyers have long been allowed to accept credit card payments. OSB Formal Ethics Opinion 2005-172 discusses the logistics of credit card payments from the lawyer's perspective in detail. Credit cards shift the risk of nonpayment to the card issuer rather than the service provider.

Third, in appropriate cases, fixed fees paid in advance offer an assurance of payment for work that is reasonably predictable. OSB Formal Ethics Opinion 2005-151 addresses proper documentation of fixed fee agreements and appropriate handling of client funds in the fixed fee setting.

Fourth, although not an everyday occurrence, lawyers are permitted to take security for payment of fees. Lawyers who do will want to carefully document the agreement. Welsh v. Case, 180 Or App 370, 43 P3d 445 (2002), discusses security for fees extensively in the collection context.

During a representation, lawyers can take three additional steps to manage receivables.

First, lawyers need to remain attentive to the business side of their relationship. Keeping clients informed of upcoming major case events assists them in budgeting for significant expenses and reduces "sticker shock" when bills come due.

Second, lawyers should consider including an additional "trial deposit" in the original fee agreement that is payable three to six months before trial so that sufficient funds are reserved for that very significant expense. Because such deposits are included in the original agreement, they should not typically fall within the additional disclosure required for modifications of existing fee agreements.
Third, if you determine that you should withdraw for nonpayment, do it sooner rather than later. Although nonpayment is definitely a proper reason for withdrawal, courts don’t necessarily have to permit withdrawal if the lawyer waits until the eve of trial (see, e.g., In re Ryan, No. 08-6250-HO, 2008 WL 4775108 (D Or Oct 31, 2008) (unpublished)).

Even after a representation has concluded, lawyers still have options short of the courthouse. ORS 87.445 creates a potentially powerful collection tool in the form of a “charging” lien:

An attorney has a lien upon actions, suits and proceedings after the commencement thereof, and judgments, decrees, orders and awards entered therein in the client’s favor and the proceeds thereof to the extent of fees and compensation specially agreed upon with the client, or if there is no agreement, for the reasonable value of the services of the attorney.

Charging liens have great practical import for at least a prevailing party’s lawyer in the event of either a judgment or settlement short of a judgment. Under ORS 87.475(2-3), a judgment is not fully satisfied until the lawyer’s lien is paid. With settlements that may simply result in a dismissal order, the Oregon Supreme Court in Potter v. Schlesser Company, Inc., 335 Or 209, 63 P3d 1172 (2003), held that liens on settlement proceeds are “charges on the action” itself and are enforceable against either the prevailing or the settling party.

Summing Up
Chasing delinquent accounts is always difficult. Chasing them through litigation, however, exposes lawyers to unique risks that may quickly sour the economics involved. The alternatives aren’t perfect and involve both careful planning and equally careful monitoring. But, they generally won’t make a bad situation even worse.

ABOUT THE AUTHOR
Mark J. Fucile handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the OSB’s Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB’s Ethical Oregon Lawyer and the WSBA’s Legal Ethics Deskbook. He can be reached at (503) 224-4895 and Mark@frllp.com.

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Avoiding Conflicts and Retaining Clients

Don't Forget to Shut the Screen Door

By Amber Hollister

Screening for conflicts is an important tool in every lawyer's ethical toolbox. After all, a screen may offer a firm a chance to preserve a long-standing client relationship or to bring in new business, despite the existence of a conflict. But in the press of day-to-day practice, how screens work—and when they can resolve conflicts—may seem a mystery.

This article outlines when screens can and cannot be used to resolve conflicts, the key features of an effective screen and what can happen when screens fail.

The Specter of Imputed Conflicts

While there are numerous advantages to working in a firm, including the ability to freely share client confidences with colleagues, this close relationship means that in most instances one lawyer's conflicts are imputed to all of the other lawyers in a firm.

Generally, all current and former client conflicts are imputed among members of a firm. RPC 1.10(a) and RPC 1.8(k); see also RPC 1.0(d) (defining firm). Self-interest conflicts and conflicts based on family relationships between lawyers are not imputed to other members of a firm as long as the conflict “does not present a significant risk of materially limiting the representation of the client by the remaining lawyers of the firm.” RPC 1.10(a); see generally OSB Formal Ethics Op No 2005-120 (rev 2015) (discussing screening).

A correctly employed screen may preserve a client representation that otherwise might be lost because of an imputed conflict.

No “One Size Fits All” Screens

At its core, a screen (also known as an “ethical wall”) is a device that enables lawyers to prevent conflicts from being imputed among the members of a firm. In theory, a screen can prevent a lawyer who is personally disqualified from inadvertently obtaining or sharing confidential information with other members of a firm or otherwise influencing the firm's representation of the client.

What type of screen a firm must impose depends on the circumstances. Rule 1.0(n) defines screened to mean “the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.”

The rule makes clear that the screen must happen in time to prevent the personally disqualified lawyer from participating in the matter or obtaining information related to the representation of the client. The screen must be in place as soon as practicable after a lawyer knows or should have known through the exercise of reasonable diligence that the conflict exists. RPC 1.0(h) (defining knowledge in the context of conflicts analysis); see also Comment (10) to ABA Model Rule 1.0.

The definition of screened does not, however, outline specific procedures that a firm must put in place. Instead, lawyers are left to determine what is “reasonably adequate under the circumstances” in any given matter. Thus, the rule recognizes that what screening method is “reasonable” may change depending on what is at stake for the client and the nature of the representation.

At the very least, the disqualified lawyer should explicitly acknowledge the duty not to communicate about the matter with others in the firm and should agree to take steps to avoid gaining confidential information about the screened matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the disqualified lawyer has been screened and instructed to take appropriate precautions to protect client confidences. See Comment (9) to ABA Model Rule 1.0.

Depending on the circumstances, it may be necessary to do more to protect client confidentiality. The firm should consider what steps are necessary to effectuate a screen in light of the scope of the representation, the nature of the representation, the type of confidential information in the firm’s possession, the risks of disclosure, and the number of lawyers involved in the representation. For instance, Comment (9) to the ABA Model Rule 1.0 suggests the following steps may also be appropriate:

- Asking the disqualified lawyer to agree in writing to "avoid any communication with other firm personnel and any
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Hiring the Right Client

Many lawyers can tell a story about consulting with a client they did not want to represent just days before an adverse party they wanted to represent walked in the door. At worst, this can be a frustrating experience that results in lost business. At best, careful intake and screening procedures can enable firms to retain the clients they want, even if successive consultations occur.

A person who consults with a lawyer about possible representation is a prospective client. Rule 1.18(a). Rule 1.18 further provides that lawyers owe a duty of confidentiality to prospective clients, and in some circumstances a prior consultation about the possibility of legal representation can create a conflict. Specifically, a lawyer is prohibited from representing "a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful" to the prospective client in the matter, unless the rule provides an exception. RPC 1.18(c).

The two exceptions available are informed consent and screening with notice to the prospective client. RPC 1.18(d). To take advantage of the screening option, the lawyer who consulted with the prospective client must have taken "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client." RPC 1.18(d)(1). A firm can seek to limit lawyers' exposure to disqualifying information by implementing intake contact with any firm files or other information, including information in electronic form, relating to the matter; • Circulating "written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter"; • Denying "access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter"; and • Making "periodic reminders of the screen to the screened lawyer and all other firm personnel."

Securities Claims & Investment Disputes

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procedures for consultations. In addition, the disqualified lawyer must be “timely screened from any participation in the matter” and “written notice must be given promptly to the prospective client.” RPC 1.18(d)(2)-(3). Obviously, to effectuate a timely screen, the firm must recognize the conflict soon after being contacted by the second client. Screening will not be an option if the firm fails to recognize the conflict caused by the prospective client consultation when it knew or should have known of the existence of the conflict.

When a New Lawyer Joins the Firm

In today’s fluid legal market, lawyers join and leave firms with frequency. These shifts can create conflicts headaches. On a positive note, conflicts created when a new lawyer joins a firm may be mitigated by screening the new lawyer from the firm’s representation of existing clients.

Rule 1.10(c) provides that when a new lawyer joins a firm, the new lawyer’s former client conflicts will be imputed to the whole firm unless the new lawyer is screened from current matters on which the new lawyer is personally disqualified and “written notice of the screening procedures employed is promptly given to any affected former client.”

The rules allow firms the opportunity to recognize potential opportunities for screening before a new lawyer even arrives for the first day of work. Rule 1.6(b)(6) allows lawyers to share limited information regarding the identity of the client and adverse parties, as well as the nature of the legal services provided “to detect and resolve conflicts of interest” in advance as long as “the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients.”

Screening for Current Client Conflicts

Savvy lawyers will recognize that Rule 1.10(c) only allows screening of former client conflicts under Rule 1.9. A screen cannot resolve a current client conflict under Rule 1.7. Instead, when a conflict arises under RPC 1.7, a firm must consider whether it is possible to resolve the conflict by obtaining informed consent from all affected clients as outlined in Rule 1.7(b).

In some instances, a client may be persuaded to provide informed consent to a
current client conflict after being assured that the firm will put an effective screening mechanism in place. Such a voluntary screen is permissible as long as the other requirements of Rule 1.7(b) are met.

Screens Gone Awry

What happens if a firm attempts to screen a lawyer but the screen fails? When a screen fails, the release of information related to the representation of a client to a personally disqualified lawyer will typically mean the conflict is again imputed to the other members of the firm. Such an outcome may have serious consequences, including the disqualification of a firm or potential malpractice exposure.

And by the way, just because a screen works in Oregon does not mean it will be effective elsewhere. Lawyers who practice in federal courts or other states should be aware that Oregon’s screening rules are some of the most liberal in the nation. A screen that is valid under the Oregon Rules of Professional Conduct may not hold up to judicial scrutiny in other jurisdictions.

Despite these risks, there is little doubt that screens are a useful tool when employed in a timely and thoughtful manner. To reap the full benefit of screening, lawyers must take the time to implement intake procedures and to understand when and how to implement a screen before a conflict arises.

Amber Hollister is general counsel for the Oregon State Bar.

Endnotes

1. Special imputation and screening rules apply to government attorneys, third-party neutrals and legislators. Those situations fall outside the scope of this article. Interested lawyers should review RPC 1.10(e), 1.11, 1.12 and Oregon Code of Judicial Conduct Rule 3.10A(1)-(2), as well as OSB Formal Ethics Opinions Nos. 2005-120 and 2005-114.

2. Prior versions of the rules contained detailed screening procedures to be implemented when a new lawyer joined a firm. The former rules required affidavits regarding screening procedures to be served on a new lawyer’s old and new firms. See Oregon Disciplinary Rule 5-105(a) and former RPC 1.10(c) (prior to its amendment, effective Jan. 1, 2014, contained specific screening procedures).

3. See RPC 8.5(b) (choice of law); Reading Int’l, Inc. v. Malulani Grp., Ltd., 814 F.3d 1046 (9th Cir. 2016) (applying Hawaii’s restrictive conflict rules and finding screen did not prevent imputation of conflict).
FORMAL OPINION NO 2006-176
[REVISED 2015]
Conflicts of Interest:
Lawyer Functioning in Multiple Roles in
Client’s Real Estate Transaction

Facts:

Client informs Lawyer that Client would like to buy or sell real estate. Lawyer is willing to represent Client in the transaction and does not represent any other party in the transaction. Lawyer would, however, like to act not only as Lawyer, but also as a real estate agent or broker and as a mortgage broker or loan officer in the transaction.

Question:

May Lawyer serve in all three capacities?

Conclusion:

Yes, qualified.

Discussion:

1. Potential Limitations of Substantive Law.

This Committee is authorized to construe statutes and regulations pertaining directly to lawyers, but not to construe substantive law generally. We therefore begin with the observation that if this joint combination of roles is prohibited by substantive law pertaining to real estate agents or brokers, mortgage brokers, or loan officers, Lawyer could not play multiple roles. Similarly, Lawyer would be obligated to meet in full any licensing, insurance, disclosure, or other obligations imposed by the substantive law pertaining to these lines of business. In the discussion that follows, therefore, we assume that there are no such requirements or, alternatively, that Lawyer will meet all such requirements.
Formal Opinion No 2006-176

2.  **Lawyer-Client Conflicts of Interest.**

These facts present the potential for conflicts of interest between Client and Lawyer. Oregon RPC 1.7 states, in part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) . . . .

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(4) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(5) each affected client gives informed consent, confirmed in writing.

Lawyer’s other business interests in the real estate transaction could give rise to a conflict under Oregon RPC 1.7(a)(2) because there is a significant risk that these other roles might interfere with Lawyer’s representation of Client. This would be true whether Lawyer plays the nonlawyer roles as the owner or co-owner of a nonlaw business or as an employee or independent contractor for such a business. Considering an Oregon lawyer’s efforts to fulfill his function as both a lawyer and a realtor, the Oregon Supreme Court said:

... contrary to the accused’s argument, the [lawyer’s] interest in acquiring a share of the sales commission is not identical to a lawyer’s interest in recovering a contingency fee. A lawyer will recover a contingency fee only if the client succeeds in the matter on which the lawyer provides legal representation. In contrast, the [lawyer’s] ability
to recover a sales commission did not turn on whether he advanced [his client’s] legal interests in the transaction. Indeed, an insistence on protecting [his client’s] legal interests could have prevented a sale from closing that, from a broker’s perspective, may have made business sense. Therein, we think, lies the problem in the accused’s serving as both [his client’s] broker and lawyer. In advancing his client’s business interests as a broker, the accused may have discounted risks that, as a lawyer, he should counsel his client to avoid or at least be aware of.1

_In re Spencer_, 355 Or 679, 691, 330 P3d 538 (2014).

It follows that if Lawyer undertakes multiple roles resulting in a conflict, Lawyer must comply with each of the requirements of Oregon RPC 1.7(b).2 Before we turn to the requirements of Oregon RPC 1.7(b), however, we note that since Lawyer will be doing business with Client in Lawyer’s additional roles, it is also necessary to consider the conflict-of-interest limitations in Oregon RPC 1.8(a):

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessor, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed

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1 This Ethics Opinion has been revised following the court’s opinion, _Spencer_, 355 Or at 697, in which the court rejected the suggestion that simultaneously acting as attorney, real estate broker, and mortgage broker would, _per se_, constitute a current conflict of interest. The court said:

If, as other jurisdictions have held, additional aspects of a real estate transaction (on which the Bar does not rely here) can result in a current conflict under RPC 1.7(a)(2), careful lawyers who seek to serve as both a client’s legal advisor and broker in the same real estate transaction would be advised to satisfy the advice and consent requirements of both RPC 1.8(a) and RPC 1.7(b). See ABA Model Rules, Rule 1.8, comment [3] (recognizing that the same transaction can implicate both rules and require that both consent requirements be satisfied).

2 As noted above, we have assumed that multiple roles are legally permissible under applicable substantive law and thus need not consider Oregon RPC 1.7(b)(2). And since it is assumed that Lawyer represents Client and only Client, we need not consider Oregon RPC 1.7(b)(3).
Formal Opinion No 2006-176

and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

There is significant overlap between Oregon RPC 1.7(b) and Oregon RPC 1.8(a). For example, both rules would apply whether Lawyer plays the nonlawyer role (or roles) as the owner or co-owner of a nonlaw business or as an employee or independent contractor for such a business. In addition, both rules require Lawyer to obtain Client’s informed consent\(^3\) and to confirm that consent in a contemporaneous writing.\(^4\) See Oregon RPC 1.7(b)(4), Oregon RPC 1.8(a)(3).\(^5\) The

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3 Oregon RPC 1.0(g) provides:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

4 Oregon RPC 1.0(b) provides:

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

5 For prior formal opinions citing to both Oregon RPC 1.7(a) and Oregon RPC 1.8(a), see OSB Formal Ethics Op No 2005-10 (in addition to lawyer’s private practice, lawyer also owns a real estate firm and a title insurance company that
informed consent requirements under Oregon RPC 1.8(a)(3) are more stringent, however:

- It is not enough that Lawyer confirm Client’s waiver by a writing sent by Lawyer, as would be the case under Oregon RPC 1.7. Lawyer must also receive Client’s informed consent “in a writing signed by the client.”

- Lawyer’s writing must clearly and conspicuously set forth each of the essential terms of each aspect of Lawyer’s business relations with Client and the role that Lawyer will play in each such regard, as well as the role that Lawyer will play as Client’s Lawyer. This would include, for example, the fees that Lawyer or others would earn in each capacity and the circumstances under which each such fee would be payable (e.g., only upon closing or without regard to closing). It would also include a clear explanation of any limitation of liability provisions that might exist regarding Lawyer’s other roles.6

- In addition to recommending that Client consult independent counsel, Lawyer must expressly inform Client in writing that such consultation is desirable and must make sure that Client has a reasonable opportunity to secure the advice of such counsel.

- Communications between Lawyer and Client as part of their lawyer-client relationship are subject to Lawyer’s duties of confidentiality under Oregon RPC 1.6. Communications between Lawyer and Client in other capacities would not be subject to Oregon RPC 1.67, and Lawyer must explain to Client why this occasionally do business with lawyer’s clients) and OSB Formal Ethics Op No 2005-28 (discussing conflict of interest in representing both sides in adoption).

6 For cases and ethics opinions discussing the general level of disclosure requirements when lawyers do business with clients, see, for example, OSB Formal Ethics Op No 2005-32.

7 Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the
distinction is potentially significant. This explanation must be given whether Lawyer’s multiple roles are carried out from a single office or from physically distinct offices.

disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer’s compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm.

Two requirements remain to be discussed. One requirement is that the terms of the business aspects of the transactions between Lawyer and Client be “fair and reasonable” pursuant to Oregon RPC 1.8(a)(1). We assume that this requirement will be met if Client would be unable to obtain the same services from another under more favorable terms. Whether, or to what extent, the “fair and reasonable” requirement could be met if there were other available suppliers at materially lower cost is a subject on which this Committee cannot define any bright-line rule. Other jurisdictions have been more inclined to approve Lawyers’ business relations with Clients when the Client is relatively sophisticated. See, e.g., Atl. Richfield Co. v. Sybert, 51 Md App 74, 441 A2d 1079 (1982), aff’d, 295 Md 347, 456 A2d 20 (1983) (lawyers who acted as realty brokers for sophisticated corporate seller were not barred from recovering real estate commission); McCray v. Weinberg, 4 Mass App Ct 13, 340 NE2d 518 (1976) (declining to set aside foreclosure of lawyer’s mortgage loan, one of a series, to knowledgeable and experienced client).

The other requirement is that Lawyer must “reasonably believe that [Lawyer] will be able to provide competent and diligent representation to” Client under Oregon RPC 1.7(b)(1). This means not only that Lawyer must have the subjective belief that Lawyer can do so, but also that Lawyer’s belief must be objectively reasonable under the circumstances. See, e.g., Restatement (Third) of the Law Governing Lawyers § 126, comment e (2000) (supplemented periodically). Other state bar ethics committees have split on whether such an objectively reasonable belief can exist if, for example, a Lawyer wishes to act both as legal counsel to and insurance agent for a Client, or as legal counsel to

asserting privilege and nature of testimony offered are both within ambit of privilege); OEC 104(1).

9 The explanation about privilege and confidentiality issues might, for example, include a discussion about the effect that a lack of confidentiality could have on an opposing party’s ability to call Lawyer as a witness in any subsequent litigation and thus on Lawyer’s ability to represent Client in that litigation in light of the lawyer-witness rule, Oregon RPC 3.7.
and securities broker for a Client.\textsuperscript{10} We cannot say that it will always be unreasonable for a Lawyer to conclude that the Lawyer can provide competent and diligent legal advice to a Client while also fulfilling other roles. We note, however, that there will be times when the Lawyer’s conflicting obligations and interests will preclude such roles. \textit{Cf. In re Phelps}, 306 Or 508, 510 n 1, 760 P2d 1331 (1988) (lawyer cannot be both counsel to a party in a transaction and escrow for that transaction); OSB Formal Ethics Op No 2005-55 (rev 2014) (same).

3. \textit{Additional Caveats and Concluding Remarks.}

Given these numerous and delicate potential issues, one might fairly conclude that multidisciplinary practice means having multiple opportunities to be disciplined. \textit{See generally In re Phillips}, 338 Or 125, 107 P3d 615 (2005) (36-month suspension for violation of multiple provisions in former Code of Professional Responsibility in connection with program to help insurance agents sell insurance products to lawyer’s estate planning clients and share in resulting commissions). Nevertheless, it will sometimes, but not always, be permissible for Lawyer to play these multiple roles. The answer will depend on factors including the fairness and reasonableness of the multiple roles, whether it is objectively reasonable to believe that Lawyer can provide competent and diligent representation while playing multiple roles, and whether Lawyer can and does obtain Client’s informed consent in a writing signed by the Client. Before concluding this opinion, however, we note three caveats:

- If someone other than Client were to pay Lawyer for the provision of legal services to Client, Lawyer would also have to comply with Oregon RPC 1.8(f).\textsuperscript{11}

\textsuperscript{10} \textit{See}, e.g., Cal Formal Ethics Op No 1995-140 (lawyer as insurance broker); NYSBA Formal Ethics Op No 2002-752 (lawyer may not provide real estate brokerage services in the same transaction as legal services); NYSBA Formal Ethics Op No 2005-784 (lawyer also acting in entertainment management role).

\textsuperscript{11} Oregon RPC 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;
• If Lawyer were to endeavor to use Lawyer’s role as real estate broker or agent, or mortgage broker or loan officer, to obtain clients for Lawyer’s practice of law, Lawyer would have to comply with applicable advertising and solicitation requirements in Oregon RPC 7.1 *et seq*.*

• Lawyers covered by the Oregon State Bar Professional Liability Fund who do not wish to risk losing potentially available legal malpractice coverage should contact the PLF about exclusions that may apply.

Approved by the Board of Governors, September 2015.

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(2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and

(3) information related to the representation of a client is protected as required by Rule 1.6.

For an ethics opinion discussing this rule, see OSB Formal Ethics Op No 2005-30 (legal fees paid by insurer).

12 For the present text and prior formal ethics opinions addressing these requirements, see OSB Formal Ethics Op No 2005-106 (lawyer who purchases tax advice business may not use that business to engage directly or indirectly in improper solicitation of legal clients); OSB Formal Ethics Op No 2005-101 (rev 2015) (lawyer and psychologist may market a joint “Family Mediation Center”); and OSB Formal Ethics Op No 2005-108 (rev 2015) (lawyer may advertise family mediation service in marriage and family therapy section of Yellow Pages).
Bar Counsel

Former Client Conflicts: Differences without (much) distinction
By Helen Hierschbiel

The most frequent ethics questions we get in the OSB General Counsel's Office involve conflicts of interest. Now that the Oregon Rules of Professional Conduct are approaching the two-year anniversary, and the Oregon Formal Ethics Opinions have been revised to conform to and interpret the new rules, it seems like a good time to devote a column or two to the "new" conflict of interest rules, dry as the topic may seem.

Analyzing whether a conflict exists is a very fact-specific inquiry that can quickly become frustrating and bewildering. The keys to the successful analysis of a conflict question are to keep your eye on the rules and remember that those rules are founded on lawyers' duties of loyalty and confidentiality.

THE WAY WE WERE

Probably the biggest change that came with the Oregon Rules of Professional Conduct was to the conflict of interest rules. At first blush, the former-client conflict rule RPC 1.9 appears to bear little resemblance to its counterpart DR 5-105(C) in the former Code of Professional Responsibility. The two most important differences are the substitution of "substantially related" for "significantly related" and the elimination of the actual/likely conflict paradigm.

Under former DR 5-105(C), a lawyer who had represented a client in a matter was prohibited from representing a new client in the same or a "significantly related matter" when the interests of the former and current client were in actual or likely conflict unless the lawyer obtained consent from both clients after full disclosure. Matters that were significantly related were divided into two categories: matter-specific conflicts and information-specific conflicts.

Matter-specific conflicts were those situations where representation of the new client would or would likely inflict damage on the old client in connection with the matter on which the lawyer had represented the old client. See former DR 5-105(C)(1). Information-specific conflicts were those in which the lawyer had obtained confidences and secrets from the former client, the use of which in the subsequent matter would or would likely inflict damage on the former client. See former DR 5-105(C)(2). See also, In re Brandness, 299 Or 420, 702 P2d 1098 (1985) (explaining the matter-specific and information-specific former-client conflict categories).

THE WAY THINGS ARE

Oregon RPC 1.9(a) says that a lawyer who has represented a client in a matter is prohibited from representing a new client in the same or a "substantially related matter" where the interests of the current and former client are materially adverse to each other unless the lawyer obtains informed consent, confirmed in writing, from each affected client.
The first step in the conflict analysis under the new rules is still determining whether there truly is a former client. This question involves deciding both whether a relationship was ever established in the first place and, if so, whether the relationship has been terminated. Even if no relationship was established, the lawyer may still have duties to the person as a "prospective client" under RPC 1.18.

Assuming that there was a former lawyer-client relationship, the second step in the conflict analysis is to determine whether the interests of the current and former clients are materially adverse. (While the former-client conflict rule has dispensed with the terms "actual" and "likely" conflict, the definition of an actual conflict survives in RPC 1.7(b).) No guidance is provided either in RPC 1.9 itself or in the comments to the ABA Model Rules regarding what constitutes "material adversity". An evaluation of the case law, however, indicates that the focus of courts' inquiry in other jurisdictions is the degree to which the current representation may actually result in legal, financial or other identifiable detriment to the client. See ABA/BNA Lawyers' Manual on Professional Conduct 5:220-221 (2002).

After determining that the interests of the current and former client are materially adverse, the final question under RPC 1.9(a) is whether the matters are the same or "substantially related." The prohibition against "side-switching" in the same matter is intuitive and is the topic of little discussion by commentators. By contrast, the "substantial relationship" test is the most often scrutinized by courts ruling on conflict issues and is more often than not the deciding factor in motions to disqualify. The drafters and others who have studied the rule, including the OSB Legal Ethics Committee, do not believe there is a meaningful distinction between the former Code phrase "significantly related" and the Oregon RPC phrase "substantially related." See, e.g., OSB Formal Op. No. 2005-11. However, unlike its predecessor, RPC 1.9 does not, at the time of this writing, contain a definition of "substantially related." Furthermore, courts in other jurisdictions have not always applied the "substantial relationship" test consistently. See ABA/BNA Lawyers' Manual on Professional Conduct 5:221-231 (2002).

Some guidance may be found in Comment (3) to the ABA Model Rule 1.9 which says:

"Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

This language suggests that the principal focus in the former client conflict prohibition is the use of information learned in the prior representation. A secondary focus of the substantial relationship test derives from the duty of client loyalty and ensures that lawyers do not turn on their clients after a representation ends. The duty of loyalty to former clients is not unlimited, however, and RPC 1.9 prohibits a new representation only if it will involve the lawyer attacking or undercutting her own work for the former client, regardless of whether there will be any use of the former client's confidential information. Any worthwhile evaluation must look to the specific facts, circumstances, legal theories, strategies, and nature and scope of the lawyers' involvement in the former representation.1

Interestingly, this definition reflects the strictures of RPC 1.7(a)(2), which also must be considered in evaluating a former-client conflict. That rule provides in relevant part that a conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a former client." As stated at the outset of this article, lawyers' responsibilities to former clients include the duty of confidentiality, which means guarding their confidences and secrets.2 The responsibilities to current clients include zealously advancing their objectives. Thus, if disclosing the former client's confidences is necessary to properly advance the new client's objectives, a conflict would exist under this rule.

THE WAY OUT

Despite the analytical hurdles they pose, former-client conflicts are never an absolute bar to a subsequent representation; they can always be waived with informed consent, confirmed in writing, of the affected parties. Informed consent is defined under Oregon RPC 1.0(g) as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." This rule is a bit more explicit than the old rule regarding the explanation that needs to be given to the parties. If consent needs to be confirmed in writing, then the writing must include a recommendation that the client seek independent legal advice to determine whether consent should be given. See also, Peter R. Jarvis, Mark J. Fucile & Bradley F. Tellam, "Waiving Discipline Away: The Effective Use of Disclosure and Consent Letters," 62 OSB Bulletin 69 (June 2002).

BACK TO THE FUTURE

On recommendation of the Legal Ethics Committee, the Oregon State Bar Board of Governors has proposed, and the House of Delegates has approved, a definition of "substantially related" that essentially combines the language of former DR 5-105(C)(1) and

language from Comment (3) to ABA Model Rule 1.9. The proposal will be submitted to the Supreme Court for adoption. Regardless of whether a definition of "substantially related" is ultimately adopted, existing ethics opinions and case law in other jurisdictions offer helpful guidance. In the end, they all come to the same result as was reached under the old disciplinary rules.

Endnotes
1. To see how the OSB Legal Ethics Committee has applied RPC 1.9, see OSB Formal Ethics Op Nos 2005-17 (former client conflict use of confidential information), 2005-62 (representation of original and successor personal representatives), 2005-110 (former client as adverse witness in current litigation), 2005-120 (former client conflicts when lawyer is former prosecutor or judge), 2005-128 (former client conflict when lawyer changes firms), 2005-148 (former client conflict in representing one spouse in dissolution after joint estate planning), and 2005-174 (former client conflict in public defender organization).

2. While RPC 1.6 refers to protecting "information relating to the representation," that phrase is defined in RPC 1.0(f) the same as "confidences" and "secrets" under former DR 4-101.

3. The proposed RPC 1.9(d) reads: "For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter."

ABOUT THE AUTHOR
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— return to top
— return to Table of Contents
CHAPTER 18

COURTROOM DO’S AND DON’TS

The Honorable Edward J. Jones  
*Multnomah County Circuit Court*

The Honorable Adrienne C. Nelson  
*Multnomah County Circuit Court*
Chapter 18

Courtroom Do’s and Don’ts

Table of Contents

PRESENTATION OUTLINE ................................................................. 18-1
COURTROOM ETIQUETTE ............................................................... 18-2
DO’S AND DON’TS ........................................................................... 18-4
TRIAL TIPS ....................................................................................... 18-5

To view these chapter materials and the additional resources below on or before November 1, go to www.osbplf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After November 1, select Past CLE select Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

Civil Discovery: Working Backwards to Get Ahead by Michael H. Simon

The following resources can be found at www.osbplf.org, select Practice Aids and Forms, then Litigation.

Tips from the Bench by Judge R.P. Jones
   Pretrial Planning
   The Trial Notebook
   The Trial Memorandum
   Opening Statement
   Objections
   Use of Depositions at Trial
   Closing Argument
   Jury Instructions
   Final Procedures
TOPIC OUTLINE FOR JUDGE JONES/JUDGE NELSON
PRESENTATION ON
COURTROOM DO’S AND DON’TS

1. Avoid a trial if at all possible
2. Good facts beat good lawyers
3. Start early, work backwards; think about the verdict and jury instructions first
4. Get all the documents; knowing their contents is critical to winning the case
5. Organize the presentation of your evidence to match the jury instructions
6. Be mindful of the first impressions you and your client will make
7. Present your case in voir dire, opening is too late
8. Help the jurors who can’t hear what you have to say take themselves off the case.
9. Don’t talk about the burden of proof, talk about proving your case
10. Make the “bad facts” into “good facts”
11. Speak in positive rather than negative terms
12. Don’t be afraid to commit to the facts you need to have to win
13. Avoid legal terms and complex language
14. Introduce a witness with useful background facts
15. Make sure your witnesses review and understand the documents
16. Use “looping” to exploit good testimony
17. Don’t argue with witnesses, argue to the jury
18. Some facts are more revealing than others
19. Limit objections to critical situations
20. Take notes: 1) testimony 2) promises made and received, 3) closing arguments
21. Use your closing to prepare “your” jurors for the jury room debates
22. A compelling narrative needs both facts and emotional content
23. Make sure the jury knows what you want from them.
It is important for lawyers to know that how they behave in a courtroom has a direct impact on the outcome of their case, as well as their reputation, client development and overall career. While there are many unknowns when it comes to trying your case, using good courtroom etiquette and technique will benefit both your and your clients.

When appearing in court, lawyers who follow these twenty-five rules will optimize their cases:

1. Make sure that you familiarize yourself with the specific requirements of the judge before whom you will appear. If the judge has a webpage with information about his or her preferences, make you study it. Learn the judge’s rules and follow them (even if other lawyers do not).
2. Be on time for all court appearances. This advice extends to your client and your witnesses.
3. Do not expect the judge to “just know” - it is your job to educate the judge. Know the rules – civil procedure, evidence and local. Never guess – have the appropriate citation/case law to back up critical rulings and always know the basis for your objection.
4. When using technology, test it in the courtroom before the proceeding begins. 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.
5. Behave with courtesy towards everyone, including the judge’s staff, in/outside the courtroom at all times.
6. Remember you are never offstage if you are within sight or hearing distance of any juror.
7. Remain formal in all interactions. Refer to the judge as “Your Honor” at all times.
8. Turn off your Smartphone and do not send text messages and/or email messages while court is in session, especially if you are addressing the court.
9. Rise (you and your client) when the judge and jury enter and leave the courtroom.
10. Stand when speaking to the judge, making an objection or argument, or questioning a witness.
11. Ask permission to approach a witness, move around the courtroom, or publish exhibits to the jury.
12. Use demonstrative exhibits to assist jurors understanding of the evidence.
13. Accurately estimate how much time your case will take and stick to it except in for extraordinary and/or unforeseen circumstances.
14. Limit the use of cumulative evidence, including calling too many witnesses (lay or expert) to say the same thing, or arguing evidentiary issues in cases with a jury. When making an offer of proof that you know will draw an objection, be prepared to argue your point expeditiously. Remember jurors do not like to wait for long periods of time in the jury room and do not want their time wasted. Neither does the court.
15. Take time to listen to what is being said in court during jury selection and the evidence portion of trial and adjust as needed.

16. 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 coincide with a jury break.

17. Objections should be succinct. Speaking objections are never appropriate during a jury trial.

18. Do not show anything but professionalism to opposing counsel and witnesses in front of the judge and jury. Remember rudeness is not valued or rewarded before a judge or jury.

19. Direct all concerns or remarks to the bench and never to opposing counsel.

20. Always remain professional (what you say, how you look, and how you interact with others) when you disagree with the judge’s ruling on an objection or motion. Make a record in a professional manner, be respectful at all times, let it go and move on. There is never a reason to behave in a way that will leave a bad impression with the judge, the courtroom staff, or opposing counsel because you will interact with them again and often sooner than you think.

21. Be genuine and polite at all times while being yourself. It will not work to be someone you are not.

22. Be prepared and meet deadlines. Use a trial notebook.

23. 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.

24. Do not engage in an ex parte discussion with the judge. Talking about topics not involving the case is acceptable.

25. If you use a microphone, make sure it is off when court is not in session and/or leave it with the courtroom staff. You do not want to have a “hot mike” incident that can affect the outcome of your court proceeding.
JUDGE MAURER’S DO’S AND DON’TS

I. PROFESSIONALISM
* Be courteous.
* Be brief.
* Be timely.
* Confer and follow through on your commitments.
* Empathize with the position of opposing counsel, the court and other players in system.
* Introduce yourself to the court staff and treat them with the utmost respect.
  Courtroom clerk
  Judicial Assistant
  (These folks are like members of our family.)
  Corrections deputies
* Advise court if you have resolved your case and will not need the hearing.
* Strike from your written and oral arguments all disparaging remarks.
* Never interrupt. Stand up instead. Make your arguments to the judge, never to opposing counsel. Make all of your arguments before the judge rules, not afterward. (Do not make comments “for the record” after the judge rules.
* Be aware that the microphones feed into the judge’s chambers.

II. PREPAREDNESS
* Serve your opponent and the judge with copies of all court documents.
* Have a notebook or something else that will keep you organized.
* Bring your calendar with you to court.
* Cite to best case, no string cites. Use Oregon cases if possible.
* Have your witnesses ready to go. Go over their testimony beforehand.
* Have a notebook with your exhibits marked and ready to go and give a copy to the judge. Confer with opposing counsel and stipulate to as many exhibits as possible.
* Work Backward: Pull out the jury verdict and jury instructions early in case. Fit your evidence and arguments into the verdict and instructions.

III. SENTATION
* Speak slowly, loudly, clearly. Courtrooms have terrible accoustics.
* Stand up, sit up. Be mindful of your facial expressions.
* State your name for the record every time.
* Tell the judge what you want before you give background of your case.
* Learn the stages of a trial:
  Jury selection. Do not use it to condition the jury. Know what jurors you want.
  Opening Statement: Roadmap, not argument.
  Witness presentation: Get to the point. Do not interrupt your witness.
  Use cross sparingly unless you are very skilled. No “why” questions.
  (DV case: you are defending and want to establish that the witness is exaggerating injury. No “well, if injuries so bad, why didn’t call police?”
  Closing Argument: Succinct, using jury instructions and verdict form.
* State “objection” and cite the ground on which you rely. NO speaking objections. Use infrequently.
* No expression of your personal opinion.
* Use exhibits effectively, but do not show them to jury before they have been received.
* Do not use a trial technique just because someone else has. Watch good lawyers.
* Watch the jurors! They are permitted to ask questions now.
LITIGATION TIPS
from
Judge Edward Jones

Always start with what you want and why you should get it, don’t sneak up on your issues with great stealth.

All cases are about people; identify who made the bad choices and why.

Don’t be afraid to ask for help, lawyers love to take a minute to tell you how smart they are.

Start with the verdict form; then use the jury instructions to plan your case.

Concede the points you can’t win.

Appear to get along with opposing counsel.

Use early “free questions” to establish credibility.

Don’t use a list of questions, use a list of answers.

Listen to the witness; don’t just move on to the next question, use part of each answer to set up the next question.

Use loops and anchors to highlight the good stuff.

When you change topics, use a bridge.

In argument, if you hear yourself saying something for the third time, sit down.

In response or rebuttal, argue your own case, don’t let your opponent define the issues.

Have a great dismount.
CHAPTER 19

ALTERNATIVE DISPUTE RESOLUTION – MANDATED AND VOLUNTARY

Xin Xu
The Law Office of Xin Xu
Chapter 19

ALTERNATIVE DISPUTE RESOLUTION

TABLE OF CONTENTS

I. OUTLINE .............................................................................................................................. 19-1

II. TOP TEN TIPS FOR PREPARING CLIENTS FOR ARBITRATION ............................... 19-3

III. TIPS FOR SELECTING AN ARBITRATOR ................................................................. 19-5

To view these chapter materials and the additional resources below on or before November 1, go to www.osbpf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After November 1, select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

Guide to Oregon Court Arbitration Law and Rules.

Arbitration and Mediation (Oregon CLE 1996 & Supp 2008) Available at BarBooks
https://www.osbar.org/legalpubs/barbooks.html
ALTERNATIVE DISPUTE RESOLUTION
MANDATORY AND VOLUNTARY

1. Alternative Dispute Resolution (ADR)
   a. What is ADR?
   b. Types of ADR
      i. Arbitration
      ii. Mediation
      iii. Others
         1. Judicial Settlement Conferences
         2. Reference Judge

2. Arbitration
   a. What is arbitration?
   b. Mandatory- Court Annexed
      i. Sources
         1. ORS 36.400 to 36.425
         2. UTCR Chapter 13
         3. SLR Chapter 13
      ii. Applies to:
         1. Civil cases where only monetary relief is sought and amount is less than $50k exclusive of attorney fees, costs and disbursements;
         2. Domestic relation cases where the only contested issue is division or disposition of property.
      iii. Notable deadlines:
         1. Motion for exemption from mandatory arbitration must be filed within 14 days from assignment to arbitration.
         2. Arbitration hearing must take place:
            a. Between 14 to 49 days from assignment unless otherwise provided in the SLR;
            b. Within 91 days from assignment in Multnomah County; Check SLR for different counties
         3. Prehearing statement of proof due at least 14 days before arbitration.
   c. Mandatory – by Contract
      i. Common in insurance, real estate, construction, and employment contracts.
   d. Voluntary
      i. When to choose arbitration over litigation
3. **Mediation**
   a. What is mediation?
   b. Court-annexed mediation programs
   c. Voluntary mediation
      i. Civil cases
      ii. Domestic relations cases
      iii. Employment
      iv. Probate

4. **Other ADR options**
   a. Judicial Settlement conference
   b. Reference Judge

5. **Tips on avoiding malpractice in arbitration and mediation**

6. **Resources**
TOP TEN TIPS FOR PREPARING CLIENTS FOR ARBITRATION

1. Take the time to explain to your client what to expect in arbitration. Remember that this is probably the first time the client has ever been through something like this. In the client’s mind, arbitration is akin to going to court. What is routine for the lawyer, is nerve-wracking for the client. Nervous, edgy clients tend to make mistakes while testifying. This may adversely impact their credibility. You want your client to be able to make their very best “appearance” as a witness.

2. Take the time to go over the complaint (or answer) allegations with your client. All too often, clients have no idea what their lawyers alleged on their behalf. They get very confused when they are asked on cross-examination: “Isn’t it a fact you are alleging…?” Your client should know what “their” position is before the hearing. (By going over the allegations ahead of time, you might even discover that your position varies from your client’s.)

3. Be sure your client has a copy of his/her deposition prior to the hearing and has reviewed it. Explain how the deposition is likely to be used by the other side’s lawyer. Prepare them for any inconsistencies in their testimony that you expect to be elicited by opposing counsel.

4. If you represent a client in a personal injury action, go over their medical records with them ahead of time. Be sure to point out the “problem” issues in the records that you expect to be elicited by opposing counsel.

5. Arrive at the hearing at least ten minutes ahead of time. Give your client the opportunity to settle in and get used to the surroundings before the hearing starts. If you arrive late or right when the hearing is scheduled to begin, you have not only inconvenienced the arbitrator but you have also flustered your client right from the start. Remember, you want your client to be able to make their very best “appearance” as a witness.

6. Give some thought to how you position your client at the hearing. Your client’s back should not be turned to the arbitrator.

7. Instruct your client to direct their testimony to the arbitrator as much as possible. Eye contact is important for establishing credibility.

8. Be sure your client understands that engaging in a verbal battle with opposing counsel during cross-examination will not inure to their benefit.
9. Advise your client to stop testifying if opposing counsel raises an objection. Explain that the arbitrator will make a ruling and the client will be advised as to whether s/he can complete their response.

10. Inform your client that the arbitrator may ask him/her questions. Explain that an evasive response given to a question propounded by the arbitrator is a major faux pas.
There are a lot of advertisements these days in the Bar publications about full-time neutrals. Many of these folks are lawyers disenchanted with litigation, billable hour requirements, client disloyalty, large firm politics, etc. Many are former judges who have presided over trials and settlement conferences and assume their knowledge and skills are directly transferable to presiding over arbitrations. The options are numerous. So, how does one decide on a particular arbitrator?

- **Experience**: The experience of your arbitrator does count! By this I mean not only that your arbitrator has experience as an arbitrator and knows the procedural and evidentiary rules that apply to arbitrations, but also that that person has experience and knowledge in the type of case being presented. Years ago, I was handling a personal injury case that went to arbitration. The arbitrator had been picked off a list of arbitrators issued by the Court. Supposedly that person knew tort law. However, when the arbitrator asked for an explanation of what was meant by “comparative negligence” I knew I was in trouble. Remember that the arbitration may be a substitute for your client’s “day in court.” The client needs to feel confident that the arbitrator understands the law pertaining to their case.

- **Demeanor**: Over the years I have represented many people who have told me in no uncertain terms that they will not go to Court; others have undoubtedly felt that way but have not admitted it openly; still others will go to Court if all other options fail. Regardless of your client’s feelings about litigation, two things are certain – they want to be treated with respect and feel that the process was fair. It is therefore important to pick an arbitrator whom you believe will address those needs appropriately. Be sure to pick an arbitrator who will (1) listen carefully; (2) be respectful; (3) remain objective; and (4) have the presence and confidence to assure your client the justice system is working for them.

- **Results**: The purpose of “alternative dispute resolution” is to get a case resolved to avoid the cost (financial and emotional) of going to Court. Chances are your client is not particularly eager to go to Court and would like to get their case resolved. Your client probably has no interest in incurring the cost of both arbitration and trial. You therefore want to select an arbitrator who can get the job done. Check with your colleagues about an arbitrator’s reputation; don’t, however, base your decision to use (or not use) a particular arbitrator because of one person’s reaction to one result with that arbitrator. Keep in mind that the result may have been the right result based on the facts of the case, including the credibility of the parties involved.
BRIDGING THE DISABILITY GAP

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Chapter 20

BRIDGING THE DISABILITY GAP – MAKING YOUR WORKPLACE MORE ACCESSIBLE, IMPROVING YOUR COMMUNICATION WITH CLIENTS AND COLLEAGUES

TABLE OF CONTENTS

I. BRIDGING THE ADA GAP OUTLINE.............................................................................................. 20-1

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Additional Resources


The Biggest Hurdle for Lawyers with Disabilities: Preconceptions http://www.abajournal.com/magazine/article/the_biggest_hurdle_for_lawyers_with_disabilities_preconceptions

DISABILITY POLICY: A “NEW PARADIGM”

- Disability considered as a natural and normal part of the human experience.
- Rather than focusing on “fixing” the individual, it takes actions to “fix” or modify the natural, constructed, cultural, and social environment.
- It acts to eliminate attitudinal and institutional barriers that preclude persons with disabilities from participating fully in society’s mainstream.


GOALS OF DISABILITY POLICY IN THE ADA

- Equality of Opportunity
- Full Participation—Empowering Individuals and Families
- Independent Living
- Economic Self-Sufficiency

WHO IS PROTECTED BY THE ADA?

A qualified individual with a disability. An individual with a disability is a person who:

- has a physical or mental impairment that substantially limits one or more major life activities;
- has a record of such an impairment; or
- is regarded as having such an impairment.

A qualified individual with a disability is a person who

- With or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services,
- Meets the essential eligibility requirements for the receipt of services or participation in programs or activities.
Examples of *major life activities* from ORS 659A.104:

Caring for oneself; Performing manual tasks; Seeing; Hearing; Eating; Sleeping; Walking; Standing; Lifting; Bending; Speaking; Breathing; Learning; Reading; Concentrating; Thinking; Communicating; Working; Socializing; Sitting; Reaching; Interacting with others; Employment; Ambulation; Transportation; Operation of a major bodily function, including: Functions of the immune system; Normal cell growth; and Digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions; and Ability to acquire, rent or maintain property.

**ADA TITLE III – PUBLIC ACCOMMODATIONS**

- Governs a “facility” operated by a private entity whose operations affect commerce, including an “office of an accountant or lawyer.” 28 CFR Sec. 36.104(6)
- Prohibits discrimination based on disability against individual or class of individuals in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations by any person who owns, leases (or leases to), or operates a place of public accommodation.
- Prohibits the denial of opportunity to participate in or benefit from services, affording an opportunity that is unequal to that afforded others, or providing services that are different or separate from those provided others unless necessary to be as effective as others.
- Services shall be afforded in “the most integrated setting appropriate to the needs of the individual”
- If separate programs are provided, individual shall not be denied opportunity to participate in those that are not separate
- Administrative methods may not have effect of discriminating or perpetuate discrimination
- May not discriminate on basis of association
- Prohibits discriminatory eligibility criteria unless necessary
- Prohibits failure to make *reasonable modifications* unless entity can demonstrate *fundamental alteration*
- Prohibits failure to provide *auxiliary aids and services* unless *fundamental alteration*
- Must remove architectural barriers in existing facilities where removal is *readily achievable*
- If not barrier removal is not readily achievable, must provide service through alternative method
- Must design and construct facilities for first occupancy that are accessible unless *structurally impracticable*
- Must make alterations that, to the *maximum extent feasible*, are accessible
- In barrier removal, prioritize access from public sidewalks, parking or public transportation, access to goods and service available to the public, access to restroom facilities.
Auxiliary Aids and Services

Public Accommodation must provide AA&S to assure equal treatment unless the public accommodation can demonstrate a fundamental alteration or undue burden (significant difficulty or expense)

Examples: Qualified interpreters, Qualified readers, Equipment or devices.

ELEVATORS

ORS 447.247: Elevators are required in all shopping centers and malls, offices of health care providers, government buildings, commercial facilities, private entities and places of public accommodation covered by Title III of the ADA that have more than one floor level and more than 3,000 square feet in ground area or that are more than 20 feet in height.

COMMUNICATION

Communications with applicants, participants, and members of the public must be equally effective.

Appropriate auxiliary aids and services must be provided giving primary consideration to request of the individual. Should consider Video Relay Service, Telecommunication devices for the deaf (TTD), Telephone emergency services (911), accessible information and signage.

Attorneys must provide sign language interpreters when necessary to provide effective communication, which is the case when the client uses sign language as his or her primary means of communication. When an interpreter is required, the lawyer should provide a qualified interpreter. Family members, friends, and close associates are not qualified interpreters in most cases, and generally should not be used to interpret.

One form of alternate format is to provide written materials on the agency’s website. The website itself must be accessible. These sites provide information on making websites accessible: ww.section508.gov, www.washington.edu/accessit, www.w3.org/wai, http://webaim.org/intro/.

RESOURCES

USDOJ Home Page: http://www.ada.gov/


The Court ADA Coordinator: Each county court has a designated ADA Coordinator. The ADA Coordinator is responsible for coordinating the court’s compliance efforts. Having a designated ADA Coordinator ensures that members of the public can identify a person who is familiar with the requirements of the ADA. The ADA Coordinator’s name, office address and number (TTY and voice) must be made public.

Northwest ADA Center http://nwadacenter.org/