Learning The Ropes

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

October 30, 2019
October 31, 2019
November 1, 2019

**This seminar qualifies for
15.25 MCLE credits
(9.25 Practical Skills, 3 Introductory Access to Justice, 2 Ethics, and 1 Mental Health Substance Use Education Credits)**

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

**Oregon Convention Center
Portland, Oregon**

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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.

Name:	Bar Number:
Sponsor of CLE Activity: OSB Professional Liability Fund	
Title of CLE Activity: Learning The Ropes	Program Number: 197-57657
Date: 10/30, 31 and 1/1, 2019	Location: Oregon Convention Center, Portland, OR

■ *Activity has been accredited by the Oregon State Bar for the following credit:*	❑ **Full Credit.** *I attended the entire program and the total of authorized credits are:*	❑ **Partial Credit.** *I attended ________ hours of the program and am entitled to the following credits*:*
____ **General**	____ **General**	____ **General**
2 **Prof Resp-Ethics**	____ **Prof Resp-Ethics**	____ **Prof Resp-Ethics**
3 **Access to Justice**	____ **Access to Justice**	____ **Access to Justice**
____ **Abuse Reporting**	____ **Abuse Reporting**	____ **Abuse Reporting**
9.25 **Practical Skills**	____ **Practical Skills**	____ **Practical Skills**
____ **Pers. Mgmt/Bus. Dev.***	____ **Pers. Mgmt/Bus. Dev.***	____ **Pers. Mgmt/Bus. Dev.***
1 **Mental Health and Substance Use Education (MHSU)**		

***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 5.12 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.

Day 1 - 5.75 MCLE Credits (4.75 Practical Skills Credits and 1 Ethics Credit)
Day 2 - 6.5 MCLE Credits (3 Practical Skills Credits, 1 Ethics Credit, 1.5 Introductory Access to Justice Credits and 1 MHSU Credit)
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, October 30, 2019

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.
Matthew A. Borillo, *Professional Liability Fund Claims Attorney*

10:00 – 10:15 Break

10:15 – 11:15 Tips, Traps, and Tools for Successfully Navigating Negotiations and Professional Relationships
The Honorable Jean Kerr Maurer, *retired Circuit Court Judge, Maurer Mediation*
Richard J. Vangelisti, *Vangelisti LLC*

11:15 – 12:15 Data Security/Data Breach: What Every Lawyer Needs to Know to Protect Client Information
(1 Ethics Credit)
Rachel Edwards, *Professional Liability Fund Practice Management Advisor*
Lee Wachocki, *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 in a casual envrionment.

CHOOSE ONE OF EACH OF THESE CONCURRENT SESSIONS:

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

OR

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

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

OR

2:20 – 3:05 Business Law/Business Transactions
W. Todd Cleek
Cleek Law Office LLC
Laura E.K. Warf
Davis Wright Tremaine LLP

3:05 – 3:10 Transition

3:10 – 3:55 Civil Motion Practice
Akeem J. Williams
Lindsay Hart LLP

OR

3:10 – 3:55 Criminal Law
Thomas Freedman
Pearl Law LLC

Learning The Ropes - Day 2

Day 2 – Thursday, October 31, 2019
Day 2 qualifies for 6.5 MCLE Credits (3 Practical Skills Credits, 1 Ethics Credit, 1.5 Introductory Access to Justice Credits, and 1 Mental Health Substance Use Education Credit).

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 At the Crossroads of Ethics and Practice Management *(1 Ethics Credit and .5 Practical Skills Credit)*

Topics include trust accounting, conflicts, technology, office systems, file management, and pitfalls to be aware of.

Sheila M. Blackford, Hong Dao, Rachel M. Edwards, and Lee Wachocki
Professional Liability Fund Practice Management Advisors

10:00 – 10:15 Break

CHOOSE ONE OF TWO TRACKS:

Creating a Firm

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

Sheila M. Blackford and
Hong Dao, *Professional Liability Fund Practice Management Advisors*

11:15 – 12:15 Solo Success: Keeping a Steady Course

Why choose going solo? How choices about marketing, financials, client relations, fees, staff, and support services have led to solo success.

Michelle D. Da Rosa
Michelle D. Da Rosa LLC
Jeffry S. Hinman
Hinman Law PC
Andrew S. Lewinter
Andrew Lewinter, Attorney, P.C.
Sheila M. Blackford, moderator,
Professional Liability Fund Practice Management Advisor

OR

Joining a Firm

10:15 – 11:45 Success Tips For Lawyers Joining Firms (Part I)

Jesse Calm, Partner,
McEwen Gisvold LLP
Duke Tufty, Partner,
Northwest Alcohol Law
Jovita Wang, Partner,
Richardson Wright LLP
Traci Ray, moderator
Executive Director, Barran Liebman LLP

11:45 – 12:15 Success Tips For Lawyers Joining Firms (Part II)

Karen A. Neri, JD, MA-MCFC Candidate
OAAP Attorney Counselor
Elizabeth Elkington, Associate
Gevurtz Menashe PC

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 Increasing Access to Justice through Trauma Informed Lawyering *(1 Introductory Access to Justice Credit)*

Ali Schneider, *Meadowlark Immigration, PC*

3:45 – 4:45 Cultivating Lawyer Well-Being and Asking for Help *(1 Mental Health and Substance Use Education Credit)*

Shari R. Gregory, LCSW, JD, *Oregon Attorney Assistance Program Assistant Director/Attorney Counselor*
Karen A. Neri, JD, MA-MCFC Candidate, *Oregon Attorney Assistance Program 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*

Learning The Ropes - Day 3

Day 3 – Friday, November 1, 2019

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 Ramón A. Pagán, *Washington County Circuit Court Judge*
The Honorable Ulanda L. Watkins, *Clackamas County Circuit Court Judge*

9:30 – 10:00 Alternative Dispute Resolution – Mandated and Voluntary
Court-mandated arbitration/mediation and other alternative dispute resolution options.
Lisa Almasy Miller, *Miller Arbitration*

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.
Jake Cornett, *Executive Director, Disability Rights Oregon*
The Honorable Ted E. Grove, *Columbia County Circuit Court Judge*
Jared D. Hager, *Assistant U.S. Attorney, District of Oregon, Civil Division*
Bill Spiry, *Spiry Law LLC*
Miranda Summer, *Summer Family Law LLC*
Barbara S. Fishleder, moderator, *PLF Director of Personal and Practice Management Assistance/ Oregon Attorney Assistance Program Executive Director*

REGISTRATION FORM

Learning The Ropes

SPONSORED BY THE OREGON STATE BAR PROFESSIONAL LIABILITY FUND AND THE OREGON STATE BAR NEW LAWYERS DIVISION

Oregon Convention Center, Portland, Oregon

Your $75 registration fee entitles you to attend the full program and receive an electronic version of the materials. If you would like printed materials, your registration fee is $95. **Register and pay online at www.osbplf.org by following these steps:** 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. 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).

Or, return this registration form and a $75 or $95 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 October 30 and October 31. For information about accommodations for persons with disabilities, please call DeAnna Z. Shields at 503-639-6911 or 1-800-452-1639.

Please indicate which days you plan to attend and your registration fee choice.

- ☐ October 30, 2019 – 8:30 a.m. - 3:55 p.m.
- ☐ October 31, 2019 – 8:30 a.m. - 4:45 p.m.
- ☐ November 1, 2019 – 8:30 a.m. - 11:45 a.m.
- ☐ I would like vegan lunches. (PLEASE NOTE: the vegan lunch is also gluten free.)
- ☐ $75 - registration with electronic materials **OR**
- ☐ $95 - registration with printed materials

Name: ______________________ Bar No.: ______________

Firm Name: ______________________ Phone No.: ______________

Address: ______________________ City/State/Zip: ______________

Email: ______________________________________

Areas of law you are most interested in for the roundtable luncheon on October 31.
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	___Immigration	

REGISTRATION DEADLINE – October 21, 2019

Space Is Limited – Register Early!

(No refunds will be issued for cancellations after October 21, 2019.)

SEMINAR FACULTY

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 BA from Mills College and her JD with Tax Law Concentration from University of the Pacific, McGeorge School of Law. A member of the Oregon State Bar since 2000, she is the former Editor-in-Chief of Law Practice, the magazine published by the American Bar Association Law Practice Management Division. She is a Fellow of the American Bar Foundation, a member of the ABA Women Rainmaker's and of the ABA Law Practice Division Publications Board. She is a member of the OSB Public Service Advisory Committee.

Ms. Blackford has been a Practice Management Advisor for the Oregon State Bar Professional Liability Fund since 2005. She has been an adjunct professor of Law Practice Management at Lewis & Clark Law School and at the School of Law at University of Oregon. A former sole practitioner, she provides confidential practice management assistance to Oregon attorneys to reduce their risk of malpractice claims and ethics complaints. Besides her legal experience, she has over 10 years of teaching and marketing experience.

She is the author of Trust Accounting in One Hour for Lawyers, the co-author of Paperless in One Hour for Lawyers, and a contributing author to the Flying Solo, 5th Edition all published by the ABA Law Practice Management Division. She is also a contributing author to the Fee Agreement Compendium published by the Oregon State Bar and to the law practice management handbooks published by the PLF. Her articles frequently appear in legal publications, including the Oregon State Bar Bulletin, In Brief, Law Practice Magazine and Law Practice TODAY, and LTN Law Technology News. She is a frequent speaker about practice management for law-related organizations, including the Professional Liability Fund, the Oregon State Bar, the American Bar Association, the American Law Institute and the Upper Law Society of

Canada. In addition to her own blog Just Oregon Lawyers and twitter feed @sheilablackford, she writes for the PLF's inPractice blog and tweets technology and practice management tips on the PLF Twitter feed.

Matthew A. Borrillo received his J.D. from the University of Denver. He is a claims attorney at the Professional Liability Fund since 2002. Before his current position, Matt's practice was in the areas of criminal law, insurance defense, and legal and medical malpractice defense. Outside of the law, Matt spends his time on art and with his wife and three children.

Adrian L. Brown received her J.D. from Lewis and Clark Law School in 2000, and began her legal career as an Air Force Judge Advocate General Officer (JAG) in the United States Air Force, handling a range of criminal and civil cases for almost seven years. Since 2008, as an Assistant United States Attorney, Adrian handles a variety of civil cases including affirmative civil rights enforcement, as well as representing federal agencies in U.S. District Court. Her civil rights docket has included cases involving the Americans with Disabilities Act (ADA), the Fair Housing Act (FHA), the Uniformed Services Employment and Reemployment Act (USERRA), and the Violent Crime Control and Law Enforcement Act. Adrian also serves on the U.S. Attorney's community outreach team. In that capacity, her efforts have included ongoing engagement with a range of stakeholders regarding the education, prevention, and reporting of discrimination of vulnerable populations.

Melissa Bushnick received her J.D. from University of Illinois College of Law. Melissa practices at Lindsay Hart where she specializes in civil litigation defense with a focus on professional malpractice, representation before health professional licensing boards, and general liability defense. Before joining Lindsay Hart, Melissa was an associate attorney at Brisbee and Stockton, LLC, where her practice focused on representing hospitals, physicians, nurses, veterinarians, and lawyers in litigation matters and before professional licensing boards, as well as representation of a local school district and general insurance defense. Melissa is a member of the Multnomah Bar Association, Oregon Women Lawyers, Oregon Association of Defense Counsel and the Chicago Bar Association.

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.

W. Todd Cleek received his J.D. from Willamette University College of Law. He currently is the owner of Cleek Law Office LLC, where he focuses his practice on facilitating the purchase and sales of businesses, entity formation, licensing, estate planning, and real estate. Prior to opening his own practice; Todd spent many years practicing law in Portland firms large and small. He serves on the board of Multnomah Bar Association, Mt. Hood Habitat for Humanity, Venture Portland, Dove Lewis Animal Hospital, and the Division Clinton Business Association.

Jake Cornett is the executive director of Disability Rights Oregon. He brings to this role deep experience in federal policymaking, coalition-building, and management. He has worked on the federal level to advance and uphold the rights of people with disabilities through legislative advocacy and funding Protection and Advocacy agencies. He has served as the Senate's top staff member on disability policy. As Senior Advisor to U.S. Senator Patty Murray on the Committee on Health, Education, Labor and Pensions, he directed the Democrat's work on protecting the rights of people with disabilities across the areas of education, healthcare, and employment. His responsibilities encompassed all legislation, executive branch oversight, nominees, and political strategy on disability policy.

His recent achievements on behalf of people with disabilities include: his efforts to build coalitions to support repealing section 14(c) of the Fair Labor Standards Act so that employers can no longer pay workers with disabilities a wage lower than the federal and state minimum wage; his push back against legislation that would weaken the Americans with Disabilities Act by restricting a person's ability to enforce their rights to be free from disability discrimination; and his work to defend Medicaid and the Affordable Care Act from being repealed or cut.

Michelle Da Rosa received her J.D. from Willamette University College of Law She from has been working for almost a decade in complex areas of real estate law. After graduation, she worked for more than six years as a real estate attorney at Stoel Rives LLP, before deciding to found her own real estate boutique, The Law Office of Michelle D. Da Rosa. Her firm specializes in real estate transactions and contracts for buying, selling, leasing, and financing real property of all kinds, from aircraft hangars to agricultural and vineyard land, from industrial parks to vacation resorts and marinas, from rooftops to mineral estates.

Ms. Da Rosa is committed to the cause of affordable housing and believes everyone should have a safe, decent place to live. In addition to her law practice, she serves on the board of directors for Habitat for Humanity Portland/Metro East.

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.

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 25 years. Nicole developed a passion for access to justice through her family law work at Oregon Legal Services in 1995. She continues to support 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.

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.

Elizabeth Elkington received her J.D. from Willamette Law School. She as an associate attorney at Gevurtz Menashe, where her practice focuses on all aspects of family law. Prior to joining Gevurtz Menashe she was a judicial law clerk for Judge Patricia McGuire of the Multnomah County Circuit Court. Ms. Elkington is a member of the Multnomah Bar Association and Oregon Women Lawyers and a board member of Allies In Change.

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 and was in private practice specializing in insurance and workers' compensation defense. She is on the board of directors of the Oregon Lawyer Assistance Foundation.

Thomas Freedman received his J.D. from Fordham Law School in New York, New York. He has been in private practice in Portland since 2008 focusing on criminal defense and related practice areas. He defends people accused of crimes from misdemeanors to murders, in both state and federal court. In 2018, he was lead counsel on a four-week trial involving Portland bar robberies, which resulted in the most acquittals in one case in Oregon history. Before returning to Portland, he practiced commercial litigation and intellectual property law in Manhattan.

The Honorable Ted E. Grove received his J.D. from Lewis & Clark Law School. He began his legal career at St. Andrews Legal Clinic and then spent 14 years in private practice. He was appointed to the Columbia County Circuit Court in 1995.

Kyra M. Hazilla 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 as an attorney counselor. Her counseling experience includes crisis intervention; drug, alcohol, and substance use counseling; mental health counseling; and working with victims of sexual assault and domestic violence. She provides individual counseling and facilitates groups on trauma; building resilience; mindfulness; parenting; depression; anxiety and other mental health conditions; career transitions; recovery; and support for trans law professionals. Ms. Hazilla was raised by a family member in recovery. She has direct experience participating in Al-Anon for children and attending 12-step and other recovery meetings as a support person. She is the 2009 recipient of the OSB Juvenile Section Advocacy Award.

Jeffry Hinman received his J.D. from University of Oregon School of Law. Mr. Hinman was an assistant district attorney for Lane County until he entered private practice in 2012. He currently has his own

practice, Hinman Law P.C. His practice covers representing businesses on a wide variety of matters, civil litigation, and estate disputes and is located in Bend, Oregon.

Andrew S. Lewinter received his J.D. from Georgia State University College of Law. Following law school, he was Legal Counsel for the National Labor Relations Board (NLRB) in Washington, D.C., where he helped draft NLRB decisions and guide labor law and policy. He currently has a solo practice, Andrew Lewinter, Attorney, P.C., where he represents employees in claims of sexual harassment, sexual orientation harassment, and harassment based on other protected characteristics, such as race and age. Mr. Lewinter litigates claims of discrimination for use of the Federal Family and Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA), as well as retaliation for complaining about wage and hour violations and use of the workers' compensation system. Mr. Lewinter also represents employees in whistleblowing litigation.

Mr. Lewinter was a symphony musician for fourteen years prior to becoming an employment attorney and labor attorney. While a musician, he actively participated in collective bargaining and representation of employees as chair of the musicians' representative committee. That experience nurtured a strong belief in unionism and the rights of employees, and eventually inspired him to become a labor and employment attorney. Mr. Lewinter's work experience prior to becoming an employment lawyer gave him a practical understanding of the dynamic of the workplace; his work as a labor attorney at the NLRB provided legal knowledge to apply to that background.

The Honorable Jean Maurer received her J.D. from Santa Clara University Law School. She was appointed to the bench by Governor John Kitzhaber in 1996. She was the first woman to serve as Presiding Judge in Multnomah County Circuit Court, a position she held from 2008-2012.

She began her legal career in 1974 as a prosecutor in the Marion County and Multnomah County District Attorneys' Offices. In 1980, she joined a small law firm in Portland handling the firm's criminal defense and a variety of civil trial and appellate matters. She returned to the the Multnomah County District Attorney's office in 1988 for eight years as a Senior District Attorney.

She has served as a director on the Multnomah Bar Association Board, as President of the Oregon Circuit Court Judges Association, and as President of the Gus Solomon Inn of Court. She has been a member of Oregon Women Lawyers for many years, currently sits on the Board of Classroom Law Project, and was an adjunct professor with Lewis and Clark Law School for six years during her tenure on the bench. She has served on various local and state bar and judicial committees. She is a frequent speaker at CLE's on a variety of topics. She is a past recipient of the Oregon Women Lawyers Justice Betty Roberts Award, the Classroom Law Project Legal Citizen Award, and the Multnomah County Bar Association Award of Merit.

She opened her full time mediation practice after retiring from the bench in 2016 after twenty years as a Circuit Court Judge. Her practice is similar to the cases over which she presided as a judge and includes, among others, wrongful death, personal injury, premises liability, medical negligence, legal malpractice, construction defect, product liability, employment discrimination, wrongful termination, domestic relations, contract disputes, estate litigation, sexual assault cases, and securities litigation.

Lisa Almasy Miller received her J.D. from Santa Clara University School of Law. Since 2009 she has had her own mediation/arbitration firm of Miller Arbitration. She is a Pro Tem judge and a Reference judge for the Clackamas County Circuit Court. Prior to opening her own firm she was a partner at Dwyer & Miller where she focused on civil litigation, family law, mediation, and arbitration. She has served on many boards and committees of legal organizations including Clackamas County Bar Association, Oregon Lawyer

Assistance Foundation, and the OSB Professional Liability Fund. She also is a volunteer for SMART and SOLVE.

Karen A. Neri is working towards her MA in Marriage, Couple, and Family Counseling, a degree that will prepare her for attaining dual licensure as a professional counselor and marriage and family therapist. Her work at the OAAP includes individual counseling and co-facilitating groups. Prior to joining the OAAP as an attorney counselor in 2018, she practiced law in California, litigating primarily family law and personal injury cases.

The Honorable Ramón Pagán received his J.D. from Fordham Law School. He was born in the Bronx and grew up outside New York City. In law school, he worked for the Brooklyn District Attorney's Office, and then-Circuit Court Judge Sonia Sotomayor. After law school, he was a staff attorney at the United States Court of Appeals for the Second Circuit. In private practice, Judge Pagán worked in Title VII employment matters, criminal defense, and personal injury matters in New York City. Judge Pagán came to Oregon in 2011. He worked as an associate with Janet Hoffman and Associates, LLP, and then on his own as a criminal defense attorney. He was appointed to the Washington County bench in 2016 and is currently the Family Team Chief for Washington County.

Jane Paulson received her J.D. from the University of Virginia School of Law and is a partner at Paulson Coletti Trial Attorneys PC, where she practices plaintiff's personal injury, medical malpractice and product liability. She received her law degree from the University of Virginia and clerked for the Honorable James M. Burns (U.S. District Court, District of Oregon). Jane served on the Oregon Trial Lawyers' Association Board 1995-2006 (President 2004-2005). She was the first female President of the Oregon Chapter of American Board of Trial Advocates (2015-2016) and has been listed in Best Lawyers in America for personal injury and medical malpractice cases since 2006 ((Best Lawyer of The Year for Medical Malpractice Plaintiffs Portland Oregon 2020 and Best Lawyer of The Year Personal Injury Litigation Plaintiffs Portland 2018) and is listed in the Top 10 Oregon Super Lawyers. She is a Fellow of the American College of Trial Lawyers. She served on the Habitat for Humanity Portland/Metro East Board, the Campaign for Equal Justice and the board of PSU's Center for Women's Leadership. She is the 2015 recipient of Oregon Women Lawyers' Justice Betty Roberts Award (recognizing an individual who has made an outstanding contribution to promoting women in the legal profession and in the community) and the 2017 recipient of the Multnomah Bar Association's Professionalism Award (for the highest ethical standards and exemplary conduct in the practice of law).

Shari R. Pearlman is a graduate of Wurzweiler School of Social Work (MSW) and Rutgers School of Law (JD). She received her Certificate of Business Management from Portland State University and her license in clinical social work (LCSW). 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. Pearlman 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.

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 solution-oriented mentality to guide the firm's management, marketing, attorney development, and administration. She oversees the firm's speaking engagements and coordinates all firm events and seminars. Additionally, Traci manages the firm's community involvement, public relations, charitable giving, brand awareness, and advertising. She also supports the firm's business goals with strategic planning and effective communication.

Admitted to practice in Oregon, Traci is the Co-Chair for Dress for Success Oregon, serves as the President for the Oregon Women Lawyers Foundation Board, instructs at Portland Community College, and is a member of the Legal Marketing Association, and the Association of Legal Administrators. She is chair-elect of the ABA's Law Practice Division, and is the MBA Delegate to the American Bar Association House of Delegates. Most recently, Traci was named to the Portland Business Journal's "Forty Under 40" list as a leading executive. Traci earned her B.S. from Arizona State University and her J.D. from the University of Oregon School of Law, where she received the 2015 Oregon Law Outstanding Young Alumnus Award for her work within the legal profession and community.

Ali Schneider received her J.D, from New York Law School and has been serving immigrant communities through legal services and trauma-informed care since 2008. She worked with Catholic Charities Oregon - Immigration Legal Services (ILS) as an attorney and legal volunteer coordinator. At ILS she served low income clients in family based and humanitarian cases. Her expertise is in working with survivors of trauma, especially domestic violence and sexual assault. Ms. Schneider has developed and given trainings to attorneys, law students, and advocates on Immigration Law and Trauma Informed Care. She is the co-founder of Meadowlark Immigration PC.

Bill Spiry received his J.D. from the University of Oregon School of Law. He has a solo practice in Eugene, Oregon, and principle areas of practice include civil rights with emphasis in plaintiff side employment and disability rights, estate services, and elder care services. He also provides consultation services for businesses and public agencies on topics including fair employment practices, providing reasonable accommodation, service/companion animals, and public access.

Bill has been blind for most of his adult life and more recently was diagnosed with ADHD. He has explored and applied various assistive technologies and strategies to overcome the limitations of his disabilities, both in his professional and personal life. Bill has also "been driving" guide dogs for mobility since 1992 and his current partner is a big black lab named "Ardal from Guide Dogs for the Blind."

Bill is a Rotarian, active in various community organizations, and enjoys the outdoors with his partner Jenn and his adult children whenever he can. Bill is also an accomplished singer, harmonica player, and an up and coming Blues musician. His blues duo "Dusky Blues" was recently selected in a regional blues competition to compete in the 36th annual International Blues Challenge in Memphis, TN, in late January 2020.

Miranda Summer received her J.D. from the University of Oregon School of Law. Upon graduation she practiced workers' compensation litigation at a well-established law firm in the Portland Metro area. She was appointed as an Administrative Law Judge (ALJ) for the State of Oregon in 2010 and presided over hundreds of cases involving issues ranging from unemployment to child support. In 2011, she returned to private practice, with a firm focused exclusively on family law. In addition to her many professional

accomplishments and comprehensive experience with family law, Miranda is committed to giving back and staying involved in her community. She has served as a member of various committees and associations including the Oregon State Board of Education, the Oregon State Bar Diversity and Inclusion Committee and the Human Rights Advisory Commission for the City of Beaverton. She also serves as a pro tem judge in Washington County Circuit Court and the City of Beaverton Municipal Court.

Duke Tufty received his J.D. from Lewis and Clark Law School. Duke is a partner at Northwest Alcohol Law in 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.

Richard Vangelisti received his J.D. from Southern Methodist University Law School. He is a full time mediator based in Portland, Oregon. Prior to starting his mediation practice in 2018, he had practiced law for 22 years. He has mediation experience in matters involving personal injury, insurance, civil rights, professional negligence, intentional torts, employment, and business. Richard has mediation training from the National Judicial College and the United States District Court for the District of Oregon as well as negotiation training from the Harvard Law School Program on Negotiation. He has tried cases involving trade secrets, employment, wrongful death, landlord and retail premises liability, motor vehicle, bicycle, pedestrian, insurance, civil rights, medical care, and long term care.

Richard is a former President of the Multnomah Bar Association and the Oregon Chapter of the Federal Bar Association. He also is a former Chair of the Oregon Bench-Bar Joint Commission on Professionalism and Co-Chair of the Ninth Circuit Lawyer Representatives of Oregon to the Ninth Circuit Judicial Conference. After graduating from Southern Methodist University Law School in 1995, where he was Editor-in-Chief of the SMU Law Review, he served as a law clerk to the then Chief Judge Richard A. Schell of the United States District Court for the Eastern District of Texas. Thereafter, Richard was an associate with Fulbright & Jaworski LLP (Dallas, TX) and then Stoel Rives LLP (Portland, OR) until 2003, when he began a fifteen-year career as a plaintiff's lawyer. Richard is licensed to practice law in Texas, Oregon and Washington

Jovita T. Wang received her J.D. from University of Washington School of Law. She has been in private practice since 2010 and is a partner at Richardson Wright LLP where her practice focuses on complex business disputes, professional liability, and employment law. Ms. Wang is on the board of directors of the Multnomah Bar Association (MBA) and a former member of the board of directors of the MBA Young Lawyers Section and former president of Oregon Asian Pacific American Bar Association. She serves as the OSB Young Lawyer delegate to the American Bar Association House of Delegates. Ms. Wang has been recognized as a Super Lawyer Rising Star from 2014-2019.

Laura Warf received her J.D. from Lewis and Clark Law School. She has been in private practice since 2012 at Davis Wright Tremaine. Her practice focuses on providing transactional advice and strategy to food and beverage brands and restaurants at all stages of growth and development – from startups to large national brands. She represents primarily wineries, breweries, consumer brands, and restaurants (as well as investors in these industries) in mergers and acquisitions transactions and strategic growth investments, as well as with supply chain matters and trademark and copyright licensing. She has been selected as a Rising Star by Oregon Super Lawyers for 2018.

The Honorable Ulanda L. Watkins received her J.D. from Northwestern School of Law. She was appointed to the bench July of 2017 and elected November 2018. Judge Watkins had 21 years of litigation experience with over 100 jury trials before she took the bench. She spent her first 15 years of practice defending individuals charged with crimes, advising local non-profits, and representing plaintiffs' who had been harmed by the negligence of others with a special emphasis on plaintiffs' with a criminal history. Immediately preceding her appointment, she was the managing attorney for the staff counsel office of a major insurance carrier.

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.

LEARNING THE ROPES

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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 Assistance/Oregon Attorney Assistance Program Executive Director

Welcome to

Learning The Ropes

presented by the Professional Liability Fund

October 30, 31, and November 1, 2019

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

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.

- No deductible
- No underwriting
- Prior acts coverage
- Broad Coverage: Defense; Repair; Deposition defense

Professional Liability Fund

THE PLF IS UNIQUE

- The PLF has a board of 9 members – 7 attorneys and two public members appointed by the Board of Governors.
- 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 a significant loss or many claims against one lawyer or a number of lawyers.

Professional Liability Fund

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 at least malpractice coverage, access to high quality resources and support when other factors affect ability to practice.

Professional Liability Fund

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
- $3,300 per year
  - Discounts for 1st year: 40% ($1,980)
  - Discounts for 2nd and 3rd years: 20% ($2,640)

WHO DOES (AND DOES NOT) HAVE COVERAGE

- Private Practice, principal office in Oregon
  - If principal office is in Vancouver but your practice is 100% Oregon, you do not have PLF coverage
- Law Clerks (supervised attorney) do not have to have PLF Coverage.
  - May not give advice to clients or otherwise hold yourself as a lawyer
- Employed exclusively as in-house counsel, government lawyer, in a non law-related field, employed by Legal Aid and other non-profit entities who have alternative insurance
- Unemployed

COMMON EXCLUSIONS TO COVERAGE

- Purpose is to cover practice of law
- Common Exclusions Include:
  - Wrongful conduct
  - Punitive Damages, sanctions and certain fee awards
  - Business transactions with clients
  - Losses arising out of the business side of practice of law
    - Lost or stolen client funds or documents/property
    - Mishandling of client funds
  - Defense of ethics complaints

PLF EXCESS INSURANCE

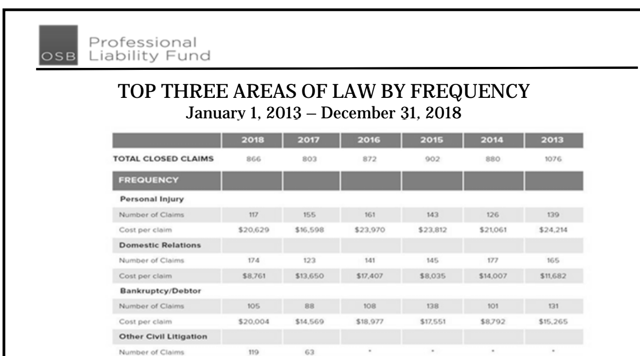
- Independent from Primary Program and totally self-supporting
- Largest Excess carrier in Oregon
- Covers over 710 firms / 2300 attorneys
- Limits from $700,000 to $9,700,000
- No gap between Primary and Excess
- Cyber Liability coverage
  - Excluded at Primary

WHY EXCESS IS A GOOD IDEA

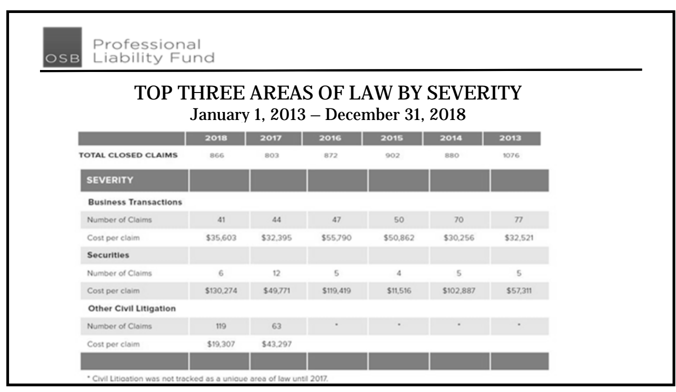
- PLF Primary limits have remained at $300,000 for 15 years
  - For most practices – this is not adequate coverage
- Excess rates are reasonably priced

OSB Professional Liability Fund

TOP THREE AREAS OF LAW BY FREQUENCY
January 1, 2013 – December 31, 2018



	2018	2017	2016	2015	2014	2013
TOTAL CLOSED CLAIMS	866	803	872	902	880	1076
FREQUENCY						
Personal Injury						
Number of Claims	117	155	161	143	126	139
Cost per claim	$20,629	$16,598	$23,970	$23,812	$21,061	$24,214
Domestic Relations						
Number of Claims	174	123	141	145	177	165
Cost per claim	$8,761	$13,650	$17,407	$8,035	$14,007	$11,682
Bankruptcy/Debtor						
Number of Claims	105	88	108	138	101	131
Cost per claim	$20,004	$14,569	$18,977	$17,551	$8,792	$15,265
Other Civil Litigation						
Number of Claims	119	63	*	*	*	*
Cost per claim	$19,307	$43,297				

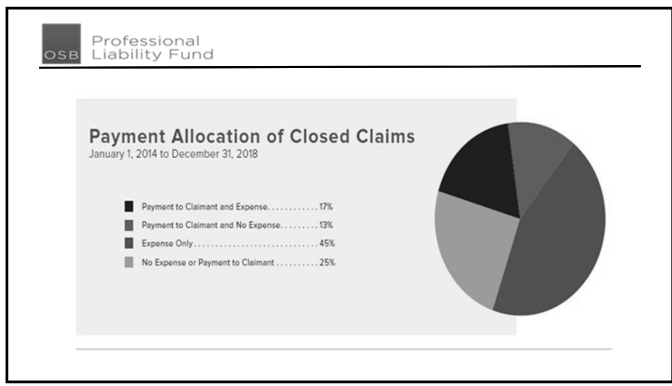


OSB Professional Liability Fund

TOP THREE AREAS OF LAW BY SEVERITY
January 1, 2013 – December 31, 2018

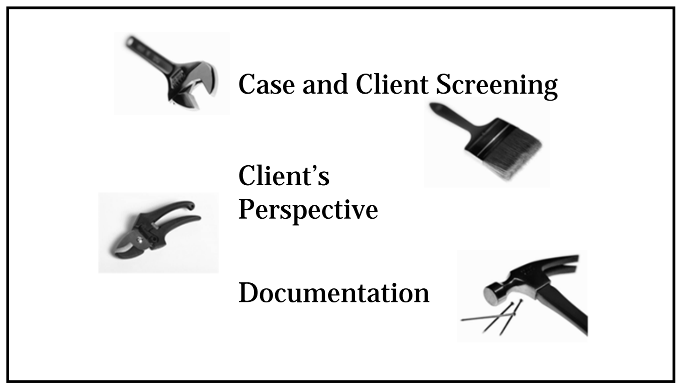
	2018	2017	2016	2015	2014	2013
TOTAL CLOSED CLAIMS	866	803	872	902	880	1076
SEVERITY						
Business Transactions						
Number of Claims	41	44	47	50	70	77
Cost per claim	$35,603	$32,395	$55,790	$50,862	$30,256	$32,521
Securities						
Number of Claims	6	12	5	4	5	5
Cost per claim	$130,274	$49,771	$119,419	$11,516	$102,887	$57,311
Other Civil Litigation						
Number of Claims	119	63	*	*	*	*
Cost per claim	$19,307	$43,297				

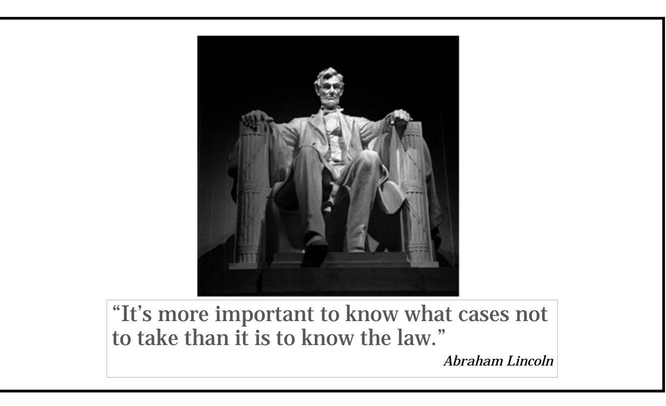
* Civil Litigation was not tracked as a unique area of law until 2017.

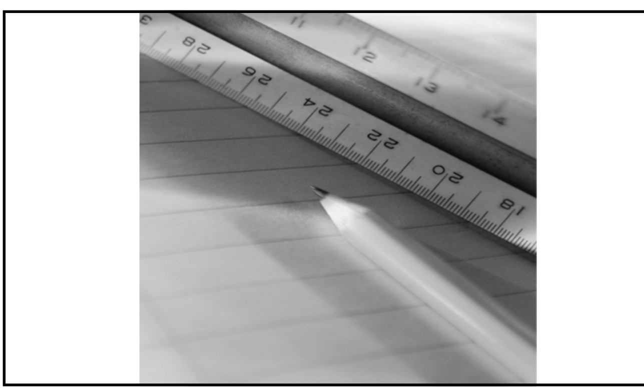


OSB Professional Liability Fund

Tips for Developing
a Successful Practice and
Avoiding Malpractice







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"

CASE ACCEPTANCE CRITERIA

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?

CASE ACCEPTANCE CRITERIA

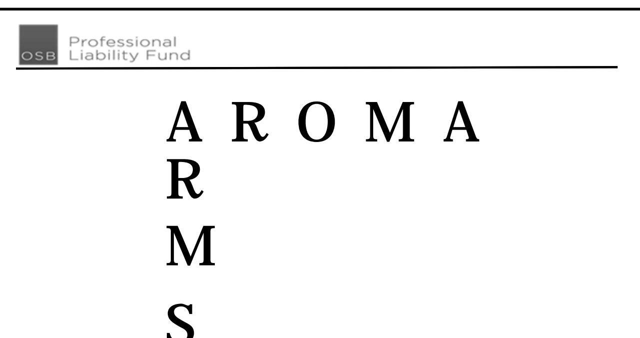
3. ECONOMICS

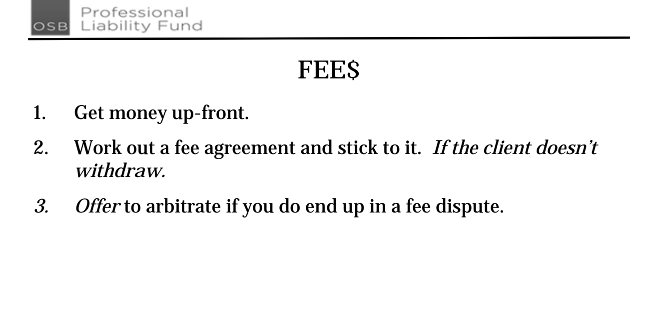
- Do you have adequate staff?
- Does the client understand the cost?
- Can you afford to take the case?
- Voluntary vs. involuntary *pro bono*

Professional Liability Fund

"F" WORDS/CASE AND CLIENT SCREENING

F ast
Fees
Finances
Friends
Flattery
Fantastic
Frown
F ilters
F_____

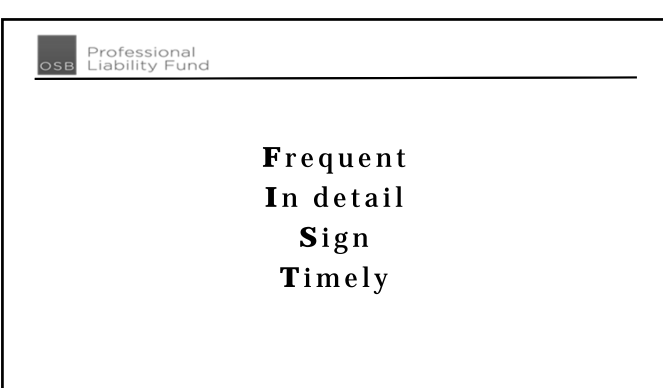


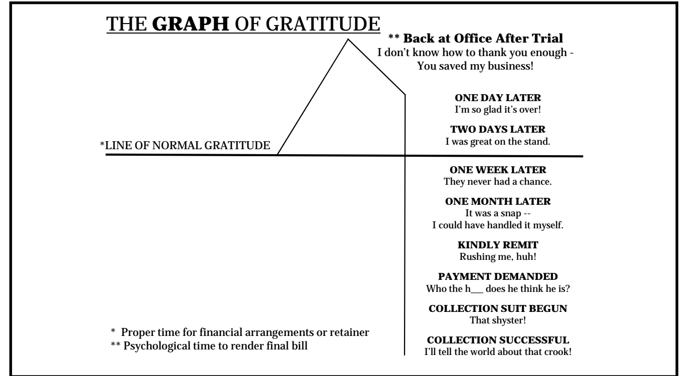


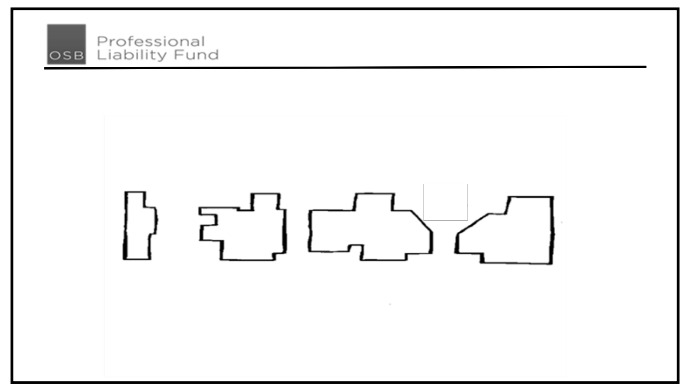
FEE$

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.







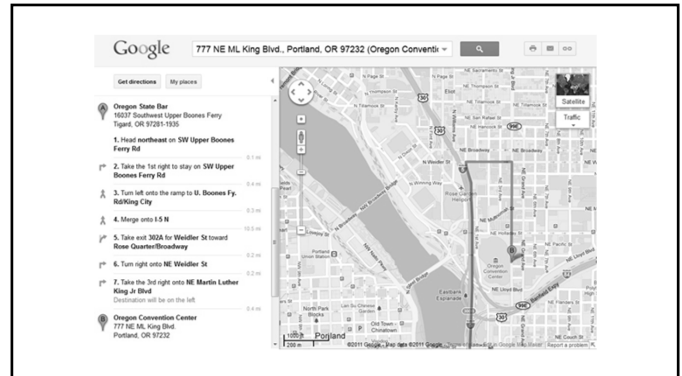
MOST COMMON CLIENT COMPLAINTS

- 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 *

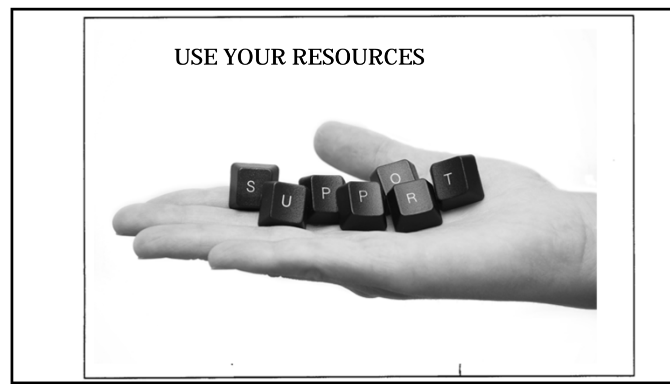
* Avoid having client feel <u>trapped</u>



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*



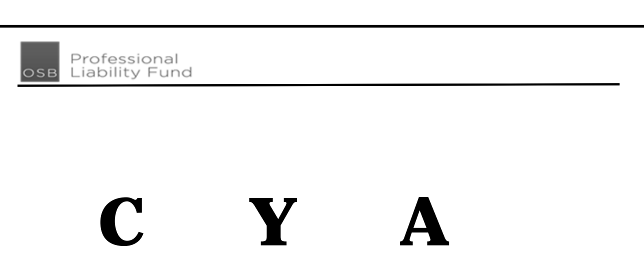
DOCUMENTATION

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.**



C Y A

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

CHAPTER 2

"WHO YA GONNA CALL?"

Matthew A. Borillo
Professional Liability Fund Claims Attorney

Chapter 2

WHO YA GONNA CALL?

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ON BEING SUED OR HOW IT FEELS WHEN THE NIGHTMARE HAPPENS TO YOU 2-3

PLF
Claims Department

NOW YOU HAVE A FRIEND IN THE MALPRACTICE BUSINESS

Likelihood of Claim

- 7,146 Lawyers Covered by the PLF
- 2018 – 861 Claims
- 2019 – Over 900 Claims Projected

- Chances are roughly 1 in 7 (about 15%)
- 10 yrs (75%) - 15 yrs (81%) – 20 yrs (85%)

PLF Claims Staff

- All Attorneys
- All were previously in Private Practice
- All experienced in Professional Liability matters

Client Does Not Know There May Be An Issue

1. Gather Information
2. Contact PLF
3. Contact Excess Carrier
4. Consider "repairs" so we can discuss them
5. Consider ethics issues
6. Inform the client

Informing the Client Potential/ Actual Issue

- Call the PLF First
- Facts Only
- No Opinions
- Recommend Independent Legal Advice
- Discuss Ethical Issues
- Send Confirming Letter

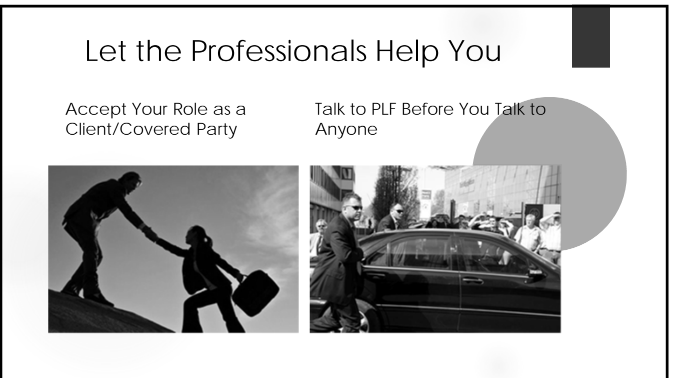
Actual Claim by Client or Non-Client

- Notify PLF ASAP
- Notify Excess Carrier
- Respond Promptly
- Cooperate

Let the Professionals Help You

Accept Your Role as a Client/Covered Party

Talk to PLF Before You Talk to Anyone



Don'ts

- Don't Try to Fix It Yourself
- Don't Negotiate Directly with the Client
- Don't Contact Claimant or Claimant's Attorney Without Consulting the PLF First
- Don't Testify Without Consulting with the PLF First

(503) 639-6911

ON BEING SUED
OR
HOW IT FEELS WHEN THE NIGHTMARE HAPPENS TO YOU

originally published in the PLF *inBrief*

My initial reaction to the lawsuit was utter amazement. I was shocked that my client would have the audacity to take such a drastic step. I felt wronged. I blamed the client, the ungrateful s.o.b. He didn't even have the courage to call me to discuss the problem. Instead, he rushed off to another attorney and filed suit. The attorney didn't even check-out the facts with me first. The client's dissatisfaction was conveyed by the complaint. The local newspaper didn't miss it either, they managed to print it along with the list of other "lawsuits filed." I felt totally humiliated.

I just *knew* that I had given the client an excellent work product. I had witnessed serious mistakes by other lawyers, none of which had generated a claim. I couldn't believe THE NIGHTMARE was actually happening to me. This was much worse than having a bill questioned, or dealing with an unhappy client directly.

Within a few days of receiving the bad news, my shock and amazement transformed into despair. I began to mistrust my judgment. I became paranoid. I was so afraid of making another mistake and getting sued again that my stress level rose out-of-sight whenever I gave legal advice.

I began to worry, particularly at night. I feared that there were other dissatisfied clients that I was not aware of. I found myself being tentative and inconclusive when dealing with clients. I often felt the need to have my legal conclusions validated by other lawyers in the firm in situations when I should have been able to act on my own. I forced myself to go through my client files for an entire day to determine whether I had made a mistake on any pending cases. I had periodic episodes of fear about the quality of my work. These anxiety attacks would only subside with my thorough re-analysis of the advice that I had given to the client.

I began to wonder how other lawyers, both inside and outside the firm, would perceive the case. I worried that they would assume that I had made a mistake, just because a claim was made. I was scared that they would now think less of me as a lawyer, assume that I couldn't do a good job, and that their reactions would begin to affect my reputation, compensation and referral base. I feared that other lawyers whom I respected would find out about the case. If they knew about it, how would I convince them of my innocence? In the few instances when another lawyer was aware of the claim and mentioned it to me, I felt a compelling need to explain that I had not made an error. To avoid embarrassment, I never raised the issue with other lawyers. This lack of communication with my friends and colleagues precluded me from realizing that a single malpractice claim would not ruin my reputation, even if I was negligent. It also postponed my eventual discovery that many of those same lawyers also had been sued and had survived the experience.

I lived in a constant state of anxiety. I found myself writing memos to the file constantly – much beyond what is necessary to document the file. It took very little to get my stress

level up. I experienced a significant amount of anxiety when discussing the claim with defense counsel and an unbearable amount in connection with depositions. Minor anxiety attacks occurred whenever I was reminded of the claim. Copies of routine correspondence from my defense counsel managed to make my throat dry and my palms sweat.

As time passed I finally was able to admit that I had made a mistake, and that it wasn't the end of the world, or my career. I had been fighting to protect my ego, which was actually standing in my way. I finally understood that I could make a mistake and still be a good lawyer. I realized that no uncompensated damage occurred; that we have malpractice insurance so that the client has a remedy. I realized that we all make mistakes. I realized that my friends and colleagues didn't know how to approach the subject either. There we were – I needed to talk, but was afraid to do so. They were willing to listen, but were afraid to let me know.

I'm still working on forgiving myself and accepting full responsibility, but I know I'm headed in the right direction. I am, and always have been, a good attorney. There is no question in my mind that being sued for malpractice is the most gut-wrenching experience I've had to suffer through in my professional practice. I know now that the experience would have been much less of a nightmare, if I had sought counseling early on. A lot of emotions are stirred when you believe that your competence is being held up for the world to scrutinize. Seeking personal assistance would have helped me deal with my fears, and allowed me to be the productive and excellent lawyer that I really am. Instead, I remained frozen in the nightmare – a prisoner to my worst thoughts and beliefs about myself and my abilities.

I eventually did seek help through the OAAP. There I gained strength from the support of colleagues. I realized that I was not alone in my reactions, that many professionals react to malpractice claims by engaging in second-guessing and self-doubts. I found out that having self-doubts after a malpractice claim didn't mean that I was a bad lawyer; they simply were a very common and human reaction to the situation. Once my head was clear and I was free of my self-inflicted torture, I came to understand the real reason the mistake had occurred – my legal analysis had been correct, but I had not successfully communicated with my client.

I offer this information to the readers of this newsletter because I regret that I didn't understand what to expect, and that I didn't know how to ease the pain. I know that reading this won't change the initial shock that occurs when you first find out about a malpractice claim; but it will prepare you for some of the feelings you may experience. In that way, I hope it will be less of a Nightmare for you. I also hope that you won't isolate yourself from others. Get counseling, call the OAAP. Talk to your friends, family and peers about your feelings. Believe me – it will help. We are all in this together – we all make mistakes.

Been There and Survived

CHAPTER 3

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

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Chapter 3

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

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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.

<u>Settlement before or during trial</u>

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

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

Negotiation tips and tactics

<u>Credibility and Integrity</u>

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

<u>Listen and advocate</u>

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

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

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

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

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

Disclosure of authority

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

"Bottom line' representations

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

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

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

Initial demands and offers - how to position them

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

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

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

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

Direct Negotiation or Mediation?

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

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

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

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

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

Preparing your clients for settlement negotiations.

Preparing Plaintiffs

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

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

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

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

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

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

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

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

Preparing Defendants and Insurers

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

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

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

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

Conclusion

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

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

CHAPTER 4

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

Rachel M. Edwards
Professional Liability Fund
Practice Management Advisor

Chapter 4

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

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POWERPOINT SLIDES 4-1

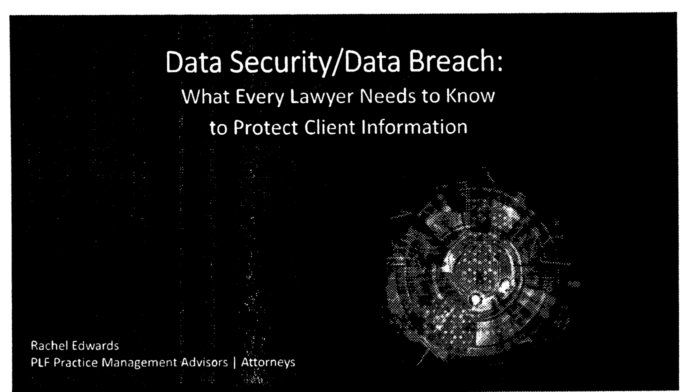
To view these chapter materials and the additional resources below on or before October 30, 2019 go to www.osbplf.org , select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After October 30, 2019, select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

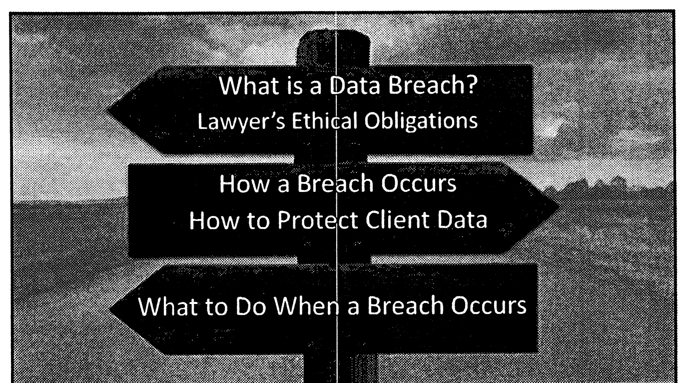
Additional Resources

a. PLF Practice Aids available at www.osbplf.org > Practice Management > Forms > View Forms by Category:
   i. Cybersecurity and Data Breach
      1. Information Security Checklist for Small Businesses
      2. Protecting Yourself and Your Law Firm from Data Breach Checklist
      3. What to Do After a Data Breach
   ii. Hardware and Software
      1. How to Backup Your Computer
b. InBrief articles available at www.osbplf.org > Practice Management > Publications > In Brief:
   i. June 2019- Cybersecurity and Employee Training
   ii. January 2019- File Retention and Destruction Procedures: Additional Safeguards to Protect Your Firm from Lost or Exposed Client Data
   iii. October 2018- Incident Response Plan
   iv. May 2018- Cybersecurity Risk Assessment and Analysis
   v. January 2018- Anatomy of a Ransomware Attack: One Firm's Story
   vi. December 2016- What's Backing Up Your Data
   vii. August 2016- Beware Ransomware
c. InPractice blog articles available at www.osbplf.org > Blog:
   i. A Few Simple Ways to Increase Data Security (Lee Wachocki, April 19, 2019)

ii. Evolving Scams: Don’t Let Your Guard Down (Rachel Edwards, January 11, 2019)
iii. All Travel and No Play: Confidentiality Concerns if Working While Traveling (Rachel Edwards, August 10, 2018)
iv. Don’t Fall Prey to Spear Phishing (Sheila Blackford, November 13, 2017)
v. Understanding Security When Using Cloud Storage (Hong Dao, October 20, 2017)

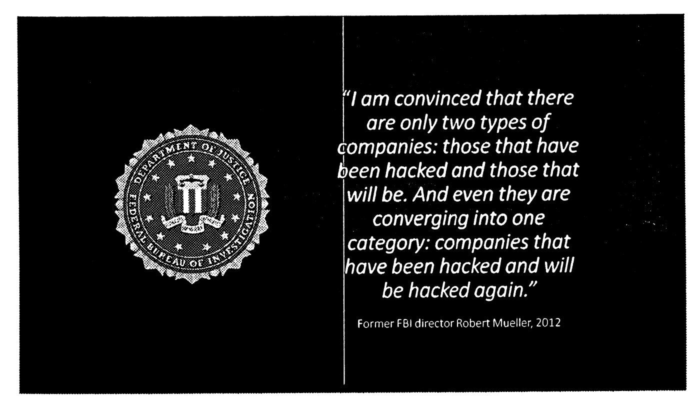
d. National Institute of Standards and Technology Framework for Improving Critical Infrastructure and Cybersecurity (https://www.nist.gov/cyberframework/framework)
e. Federal Trade Commission: Cybersecurity for Small Businesses (https://www.ftc.gov/tips-advice/business-center/small-businesses/cybersecurity)

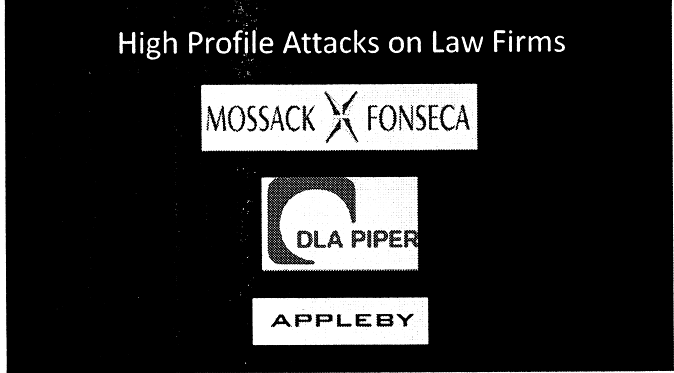


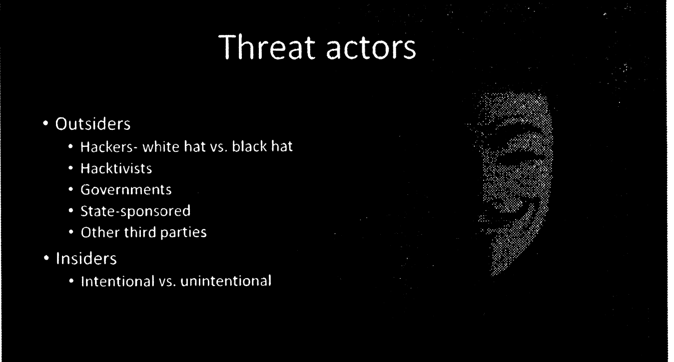


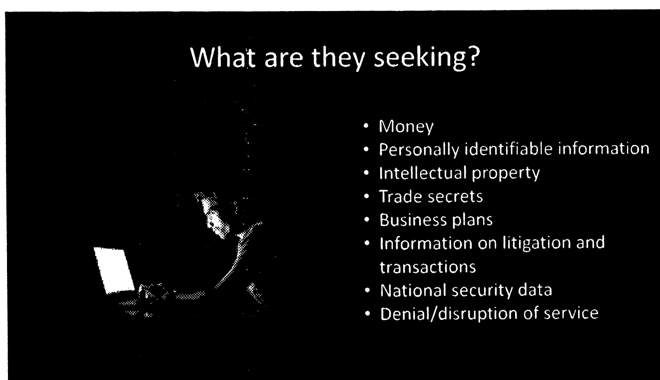
What is a data breach?

Viewed, stolen or used without authority or knowledge

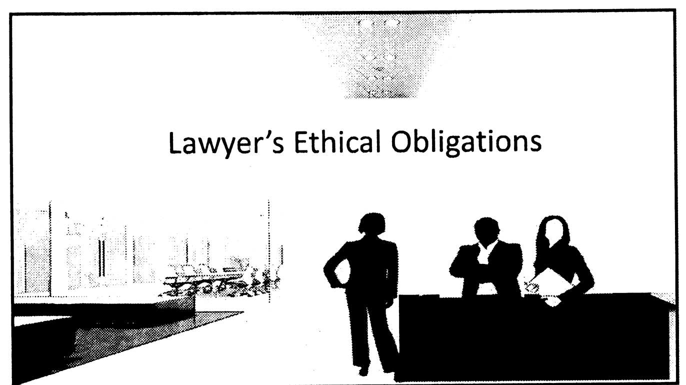


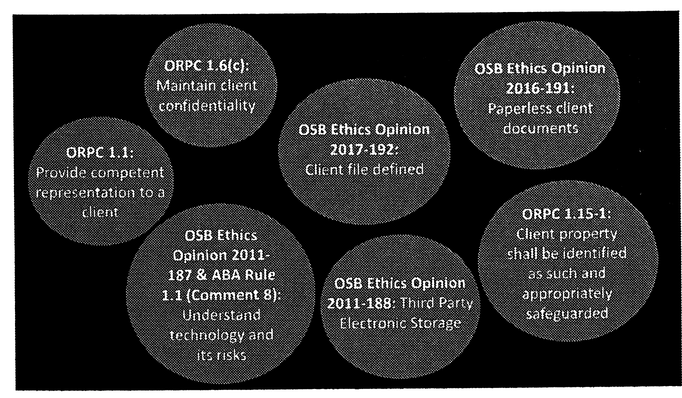


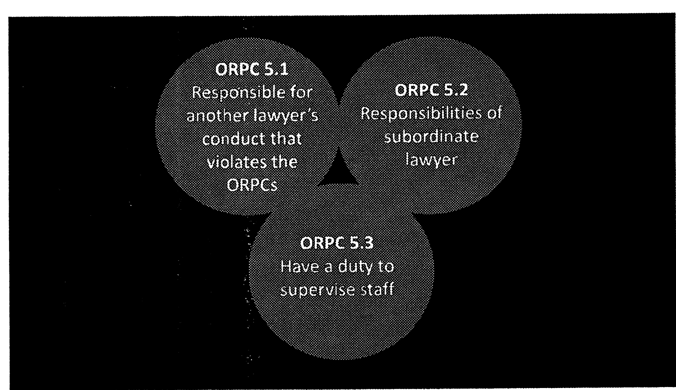


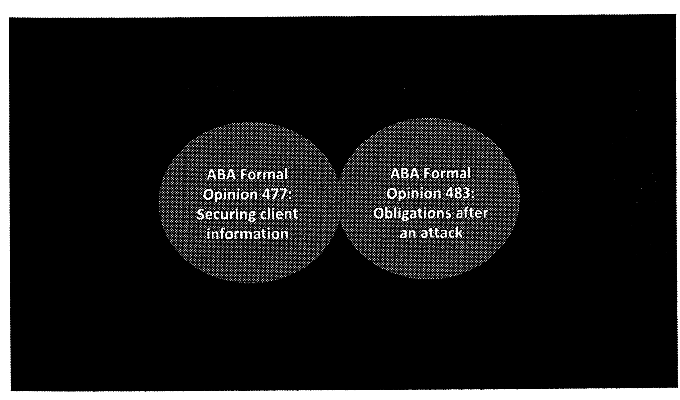

What are they seeking?
• Money
• Personally identifiable information
• Intellectual property
• Trade secrets
• Business plans
• Information on litigation and transactions
• National security data
• Denial/disruption of service

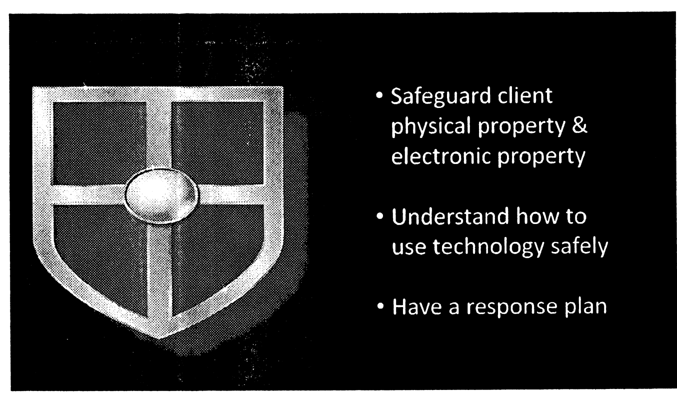
Why are law firms targets?
• Store valuable information
• Inferior or lack of safeguards
• Large amounts of money held in operating and/or trust accounts


Lawyer's Ethical Obligations

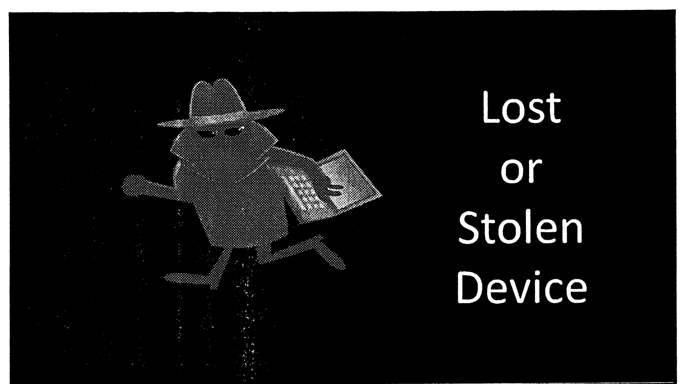

ORPC 1.6(c): Maintain client confidentiality
OSB Ethics Opinion 2016-191: Paperless client documents
ORPC 1.1: Provide competent representation to a client
OSB Ethics Opinion 2017-192: Client file defined
ORPC 1.15-1: Client property shall be identified as such and appropriately safeguarded
OSB Ethics Opinion 2011-187 & ABA Rule 1.1 (Comment 8): Understand technology and its risks
OSB Ethics Opinion 2011-188: Third Party Electronic Storage

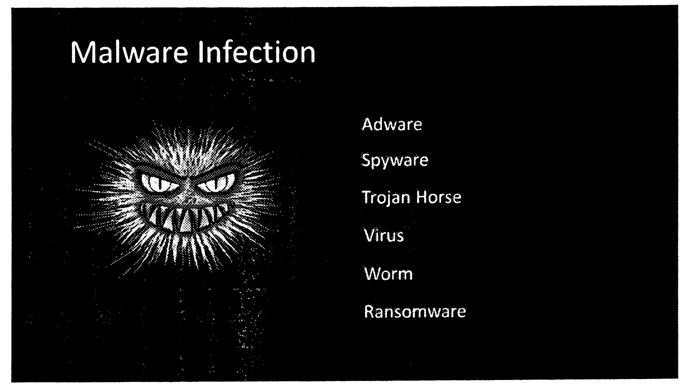

ORPC 5.1 Responsible for another lawyer's conduct that violates the ORPCs
ORPC 5.2 Responsibilities of subordinate lawyer
ORPC 5.3 Have a duty to supervise staff

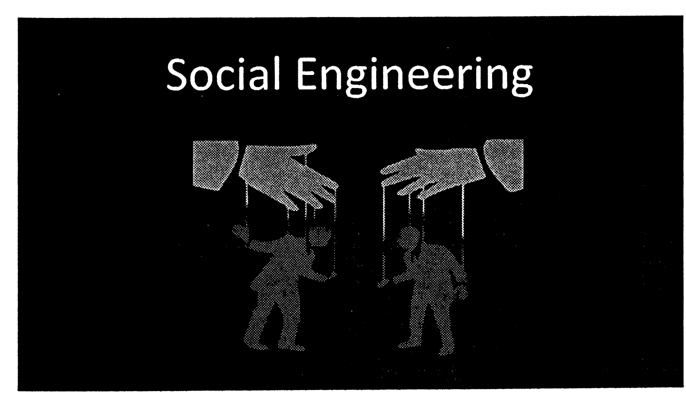

ABA Formal Opinion 477: Securing client information
ABA Formal Opinion 483: Obligations after an attack

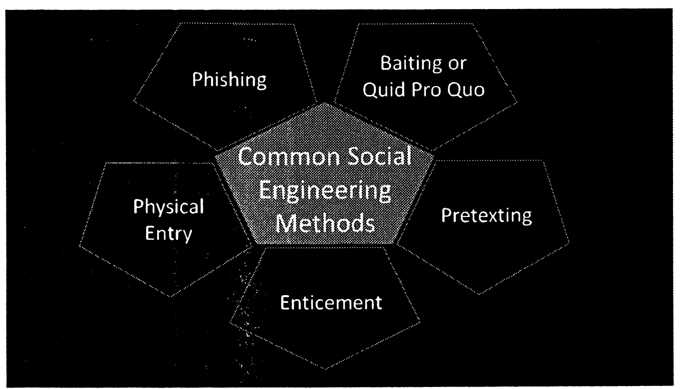


How It Occurs

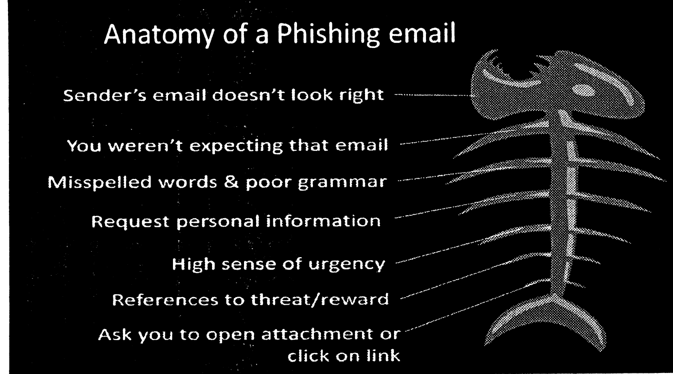


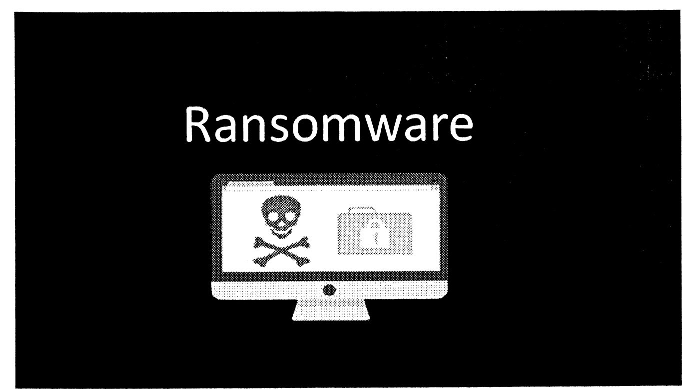


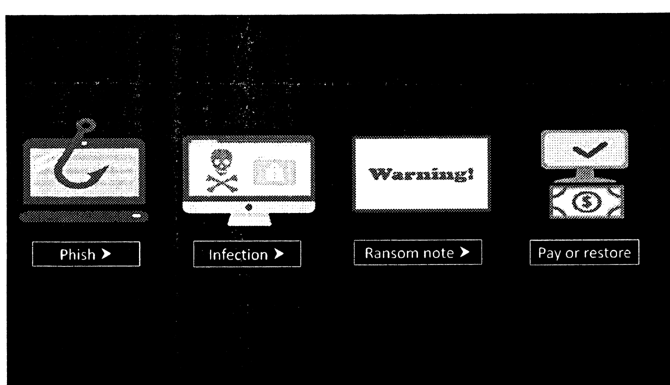


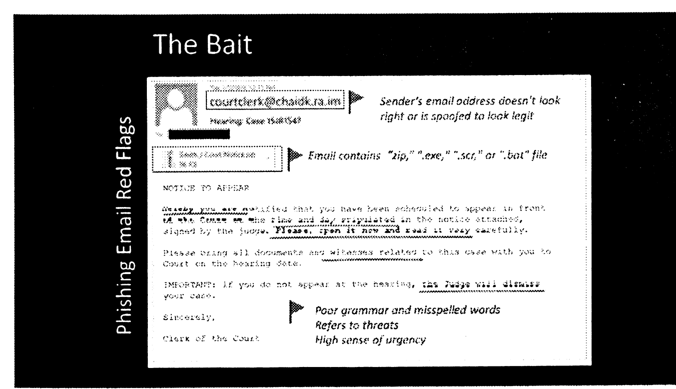

Phishing
Baiting or Quid Pro Quo
Common Social Engineering Methods
Physical Entry
Pretexting
Enticement

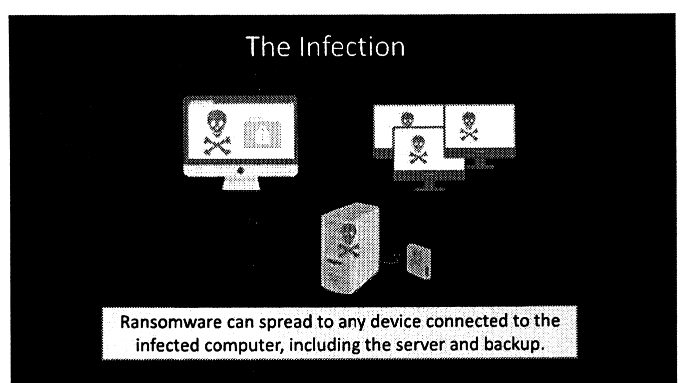
Phishing


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


The Bait
Phishing Email Red Flags
courtclerk@chaidk.ra.im
Sender's email address doesn't look right or is spoofed to look legit
Email contains "zip," ".exe," ".scr," or ".bat" file
NOTICE TO APPEAR
Please bring all documents and witesses related to this case with you to Court on the hearing date.
IMPORTANT: If you do not appear at the hearing, the Judge will dismiss your case.
Sincerely,
Clerk of the Court
Poor grammar and misspelled words
Refers to threats
High sense of urgency



Phishing emails

Potential "client"

Can you handle the enforcement of a breached severance agreement? Please respond if you can,I do like to discuss one.

Can't talk, but ready to sign

I tried to call you but could not get through to you. We will have to reschedule a perfect time for a call back. I believe you must have gone through the materials i sent to you. In the interim i would like to know your fee, kindly send me your fee agreement with your terms for my review and signing pending my return .

Flattery and imminent settlement

A copy of the signed agreement is attached . I have informed [redacted] of my intentions to take this issue to court . I wanted them to know that i have involved a reputable attorney to represent me. They have requested we give them a couple of days to come up with the funds and have assured that they would be no failure this time. I think taking this case to court should be a last resort.

Phishing emails

Expect a check

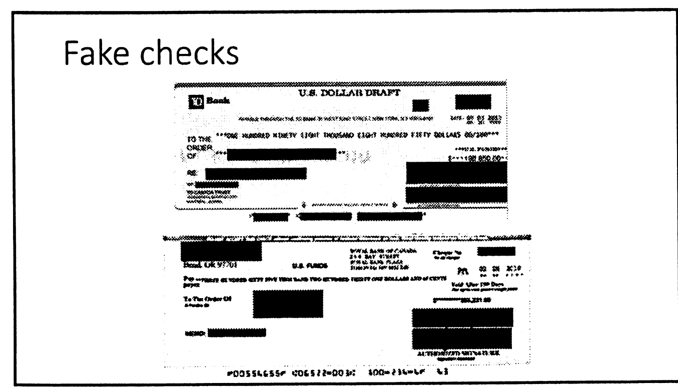
I will be out of the country for a week or more due family emergency, My Uncle isnt doing so well , However I instructed them to have further correspondence and funds owed sent to you and should be held till this matter is fully resolved ,

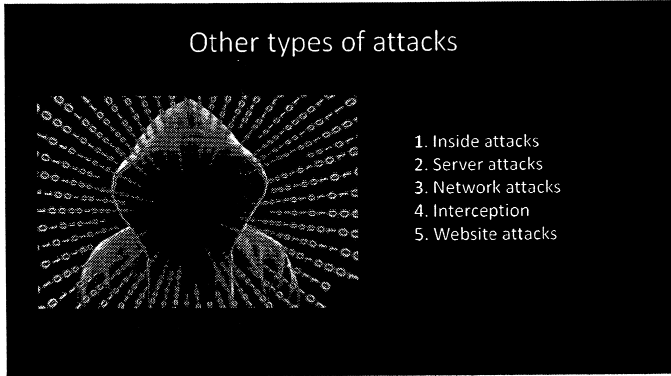
Do nothing, get paid

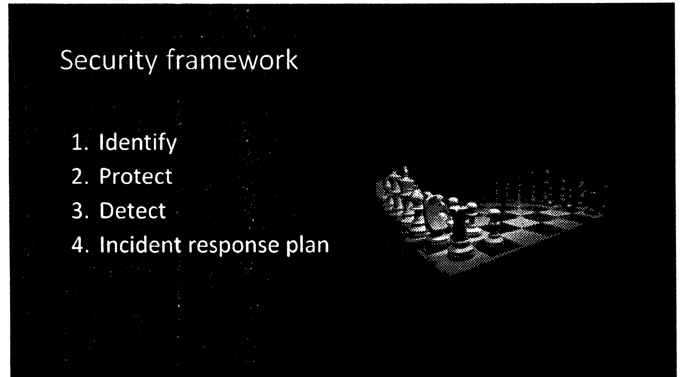
Lastly, If [redacted] decides to breach the deadline of a week given to them again, you can then proceed with whatever action you deem necessary.

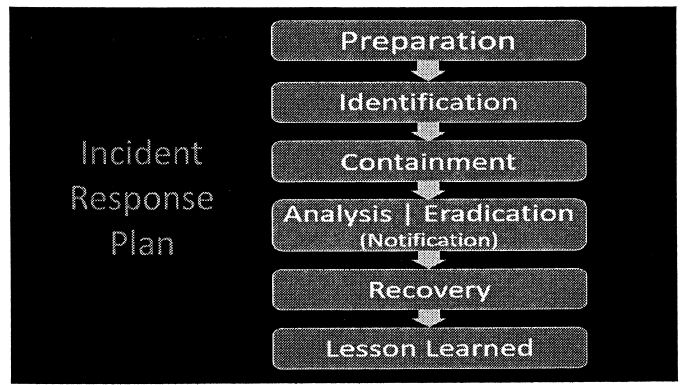
"Opposing party" caves

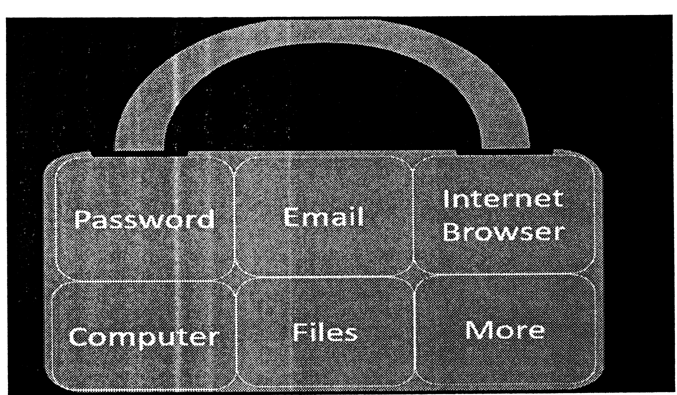
Your client [redacted] has notified us that you are to represent him in the pursue of his severance pay. We acknowledge the fact he is owed exactly $124,200.00 and we request that you give us till end of next week to make payment in full. He has also instructed us to make all payments due to you ,so please furnish me with details for remitting his payment to you including the name the check is to be made out to just to make sure there are no errors and the address it should be sent to.

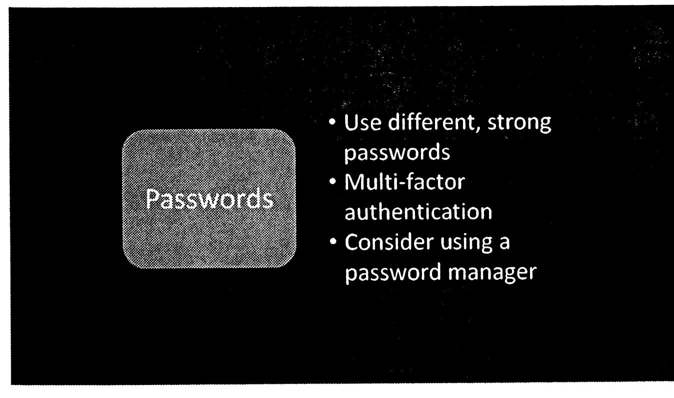


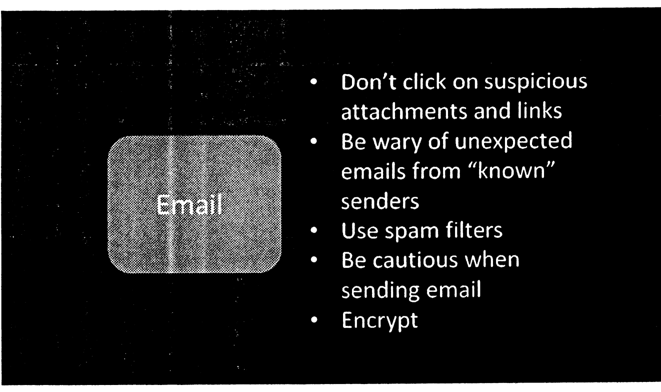


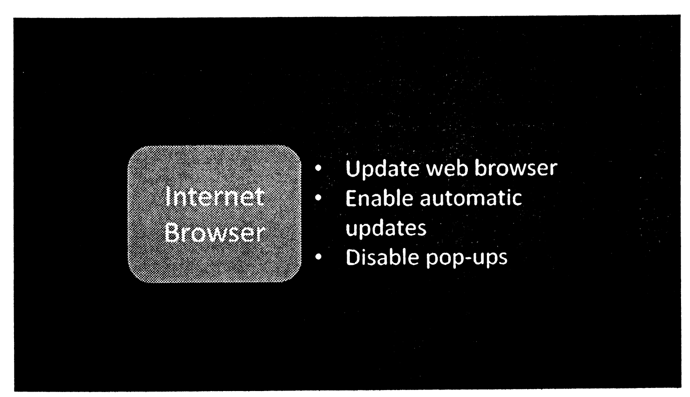

Security framework
1. Identify
2. Protect
3. Detect
4. Incident response plan

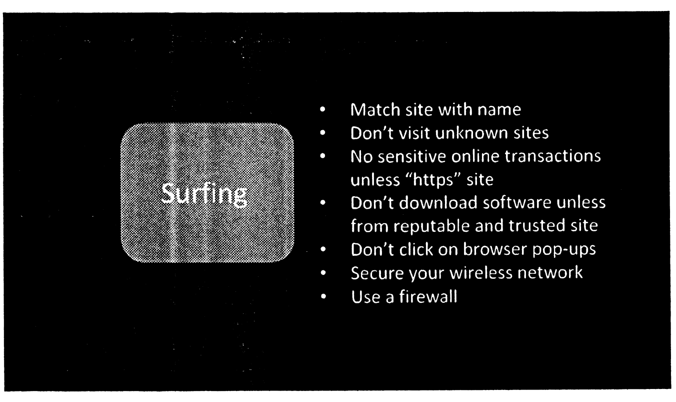

Incident Response Plan
Preparation
Identification
Containment
Analysis | Eradication
(Notification)
Recovery
Lesson Learned

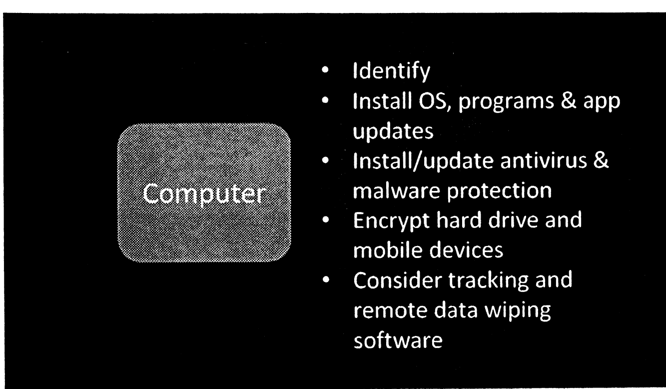

Password
Email
Internet Browser
Computer
Files
More

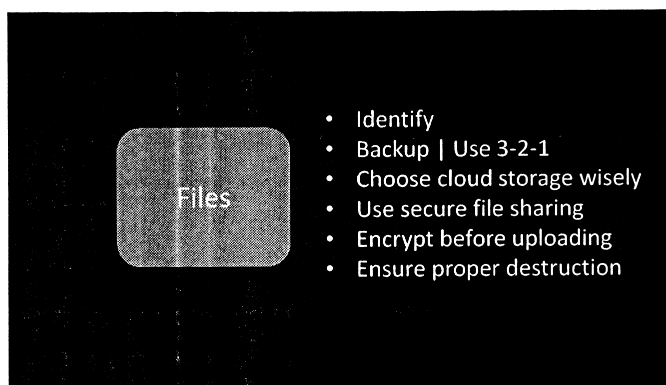

Passwords
• Use different, strong passwords
• Multi-factor authentication
• Consider using a password manager

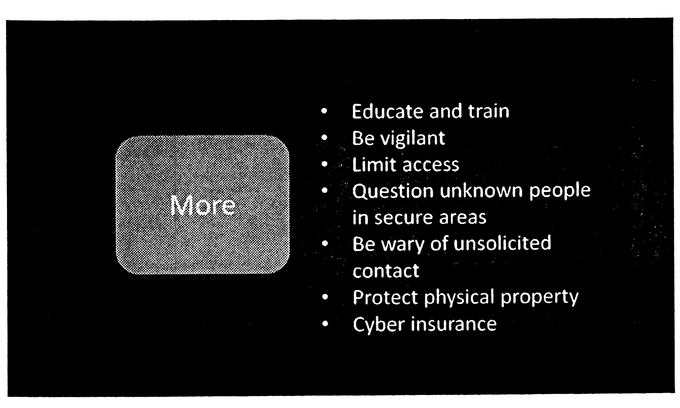

Email
• Don't click on suspicious attachments and links
• Be wary of unexpected emails from "known" senders
• Use spam filters
• Be cautious when sending email
• Encrypt

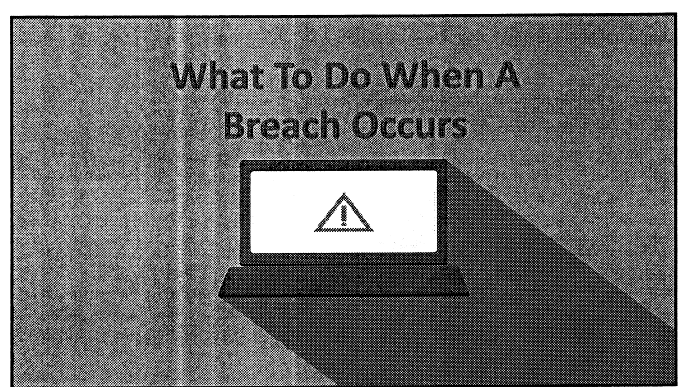

Internet Browser
• Update web browser
• Enable automatic updates
• Disable pop-ups







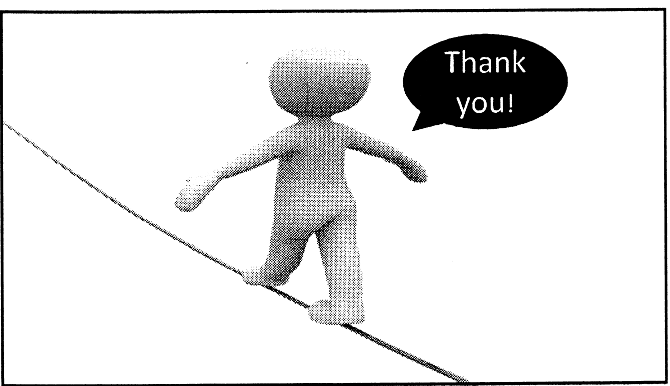




✓Contact Professional Liability Fund
✓Contact Oregon State Bar
✓Contact private legal ethics lawyer
✓Call IT expert
✓Change usernames and passwords

www.osbplf.org > Practice Management > Forms > Cybersecurity and Data Breach > What To Do After a Data Breach

✓Consider placing bank/credit/security freeze
✓File police report
✓Notify clients
✓Contain the attack
✓Notify the FBI
✓Restore



CHAPTER 5

TORT LITIGATION

Jane Paulson
Paulson Coletti Trial Attorneys PC

Chapter 5

TORT LITIGATION

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POWERPOINT SLIDES 5-10

To view these chapter materials and the additional resources below on or before October 30, 2019, go to www.osbplf.org , select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After October 30, 2019, select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

Oregon Statutory Time Limitations Handbook Excerpts, 2018 Revision
Potential Malpractice Trap in the OTCA, inBrief, January 2019
Malpractice Risk Factors and How to Avoid Them Part I and II, inBrief, October 2018 and January 2019
Settlements Proceeds and Other Traps, inBrief (Revised October 2011)
Protecting Minor's Money, inBrief, August 2003
Settlements for Minors – 2009 Legislative Changes, inBrief (November 2010)
Multnomah County Supplementary Local Rules 9.055
Duties of a Conservator (PLF Practice Aid)
Acknowledgment of Restriction of Assets (PLF Practice Aid)
Conservatorship Checklist (PLF Practice Aid)
Commencing or Settling a Personal Injury Case (PLF Practice Aid)
Settlement or Judgment Disbursal Checklist (PLF Practice Aid)

AVOIDING LEGAL MALPRACTICE
TIPS AND TRAPS FOR LAWYERS

Jane Paulson
Paulson Coletti Trial Lawyers, P.C.

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.

The PLF reviewed common claims errors over the last five years and summarized some of the major factors that lead to malpractice claims in a chart by Hong Dao **(See October 2018, *in* Brief, Malpractice Risk Factors and How to Avoid Them, by Hong Dao, PLF Practice Management Advisor):**

Inadequate office systems
Inadequate experience in the law
Failure to follow through
Inadequate preparation
Incorrect / inaccurate documents
Failure to file / record documents
Failure to meet deadlines
Poor client relations
Trial errors

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

CHOOSE CLIENTS & 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…"

GET DETAILS RIGHT

a) **Advise Clients That Bills Have to Be Paid Back:** many clients do not understand that health and auto insurance bills usually 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 or go online and search (http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.login). It is also helpful to check OJIN for other cases where the same defendant was named. 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.

    b. Beware of Weekends & Holidays: The time period for giving the Tort Claim notice is **NOT EXTENDED** by Saturdays, Sundays or legal holidays. See Tyree v. Tyree, 116 Or App 317, 840 P2d 1378 (1992), rev. denied, 315 Or 644, 849 P2d 524 (1993).

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 and E-Filed Where Allowed**: 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 <u>and</u> 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.

<u>OREGON TORT CLAIMS ACT</u>

a) Claims against public bodies in Oregon are arguably subject to the Oregon Tort Claims Act. ORS 30.260, 30.271, 30.272, etc.
b) Public bodies include school districts, police, fire, the State of Oregon, hospital districts, state boards, agencies, departments, transit districts, etc. ORS 30.260
c) There are caps on damages for claims against public bodies and the amount of the cap depends on whether the entity is a "State" or "Local" public body. ORS 30.271 & 30.272. https://www.courts.oregon.gov/Pages/tort.aspx provides the caps updated each year (see below).
d) The caps on damages have a cap per claimant and an aggregate cap for multiple claimants.

Effective July 1, 2019

The Office of the State Court Administrator (OSCA) has calculated the annual adjustment to the limitations on liability of state and local public bodies for personal injury, death, and property damage or destruction. See ORS 30.271(4), 30.272(4), and 30.273(3), as amended by 2019 SB 186 (effective March 27,

2019). Based on these calculations, the limitations are adjusted as shown in this table:

Public Body	Claimant(s)	Claim	Adjusted Limit
state	single	injury or death	$ 2,247,000
state	multiple	injury or death	$ 4,494,000
local	single	injury or death	$ 749,000
local	multiple	injury or death	$ 1,498,000
state or local	single	property damage or destruction	$ 122,900
state or local	multiple	property damage or destruction	$ 614,300

e) In Oregon, there is a wrongful death cap of $500,000 non-economic damages. ORS 31.710.

f) However, in claims against public bodies, the wrongful death cap does not apply. ORS 30.262(2). The cap is just the state or local public body cap – per claimant. ORS 30.269-273.

g) In addition, if there are two surviving beneficiaries, each beneficiary has a separate cap. The combined cap on claims would be $1,498,000 for local public entities and $4,944,000 for state public entities (as of July 2019). *Miller v Tri-Cty. Metro Dist.,* 241 Or App 86, rev den, 350 Or 408 (2011).

h) The statute does not establish different caps for non-economic and economic damages. There is just one total cap for all wrongful death damages.

i) Another caution is that there are currently 33 "hospital districts" in Oregon, which are public bodies subject to the OTCA – cap and notice requirements. A helpful list of the hospital districts can be found at https://secure.sos.state.or.us/muni/public.do

j) Be careful because some federally funded hospitals and health clinics (VA Hospital, WIC, etc) and are subject to the Federal Tort Claims Act notice provisions and you have to sue the United States.

k) **See also January 2019, *In Brief*, "Potential Malpractice Trap in the OTCA" by Marilyn Heiken.**

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 effect on public assistance/benefits (including social security) and health insurance among others.

(g) **Send Your Client a List of Bills:** to make sure your client agrees and there are not more bills out there. We have our clients sign a settlement agreement acknowledging the bills we are aware of and paying back and that any outstanding bills are the client's responsibility.

(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. **https://www.irs.gov/pub/irs-pdf/p4345.pdf** is a helpful article to share with clients. If there is any question whether a settlement is taxable, it is always safest to advise your client to see the advice of an accountant.

(k) **Assess Where Money Is Going if Minor Client (See August 2003, *In Brief* "Protecting Minor's Money" and November 2010, *In Brief*, "Settlements for Minors – 2009 Legislative Changes" by Brooks F. Cooper).**

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:** the courts like to know for the court docket. In addition, docket how long you have to wrap up the case before the case is dismissed by the court after reporting it settled (often only 30 days). If the case is going to take longer to wrap up (maybe you need probate court approval or approval of a minor's settlement), request additional time from the court and docket the new deadline so your case does not get dismissed.

(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:** if owed back (see above)

(d) **Pay Workers' Compensation Lien:** per the statutory distribution ORS 656.593

(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.

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!

(b) **Common Client Relationship Errors: (See October 2018 & January 2019, *in* Brief, Malpractice Risk Factors and How to Avoid Them Part I and II, by Hong Dao, PLF Practice Management Advisor):**
  - **a.** Not returning client's phone calls or emails;
  - **b.** Not responding to client's request for information;
  - **c.** Not actively listening to client's concerns;
  - **d.** Allowing phone calls or staff to interrupt client meetings;
  - **e.** Being late for appointments;
  - **f.** Rescheduling too many times.

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, 503-223-5587), Oregon Association of Defense Counsel (civil defense attorneys, www.oadc.com, 503-253-0527) or Oregon Criminal Defense Lawyers Association (criminal defense attorneys, 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. Some 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**

TORT TIPS & TRAPS

JANE PAULSON
PAULSON COLETTI
TRIAL ATTORNEYS, P.C.

OVERVIEW

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

MOST COMMON PLF CLAIMS

Inadequate office systems
Inadequate experience in the law
Failure to follow through
Inadequate preparation
Incorrect / inaccurate documents
Failure to file / record documents
Failure to meet deadlines
Poor client relations
Trial errors

October 2018, *in Brief*, Malpractice Traps & How to Avoid Them by Hong Dao

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

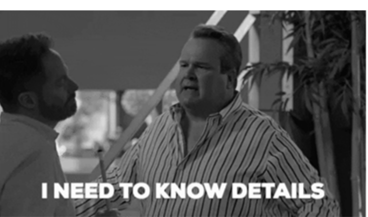
OTHER PITFALLS

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

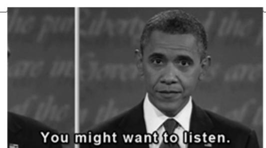
Pitfalls (cont)

- ◆Dead Defendant
  - ◆Service on Urn
- ◆Not Sure of Address
  - ♦How Are You Going to Get Service??

GET DETAILS RIGHT



IT'S THE SMALL STUFF



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

Oregon Tort Claims Act (OTCA)

- ▶What is a "Public Body"
  - ▶State boards, agencies, etc
  - ▶Cities, counties – police, fire, etc.
  - ▶School districts

Oregon Tort Claims Act (OTCA)

- ▶PUBLIC BODIES
- ▶ALL need tort claim notice
  - ▶1 year for death
  - ▶180 days for injury
  - ▶270 days for minors, incompetence or incapacity
- ▶ORS 30.275

Oregon Tort Claims Act (OTCA)

- ▶PUBLIC BODIES
- ▶File suit within 2 years!
- ▶ORS 30.275(9)

Oregon Tort Claims Act (OTCA)

- Monetary Caps on Damages
  - Per claimant and aggregate cap
  - “State” public body ORS 30.271
  - “Local” public body ORS 30.272

Oregon Tort Claims Act (OTCA)

Public Body	Claimant(s)	Claim	Adjusted Limit
state	single	injury or death	$ 2,247,000
state	multiple	injury or death	$ 4,494,000
local	single	injury or death	$ 749,000
local	multiple	injury or death	$ 1,498,000
state or local	single	property damage or destruction	$ 122,900
state or local	multiple	property damage or destruction	$ 614,300

Oregon Tort Claims Act (OTCA)

- Wrongful Death Cap
  - $500,000 normally (in ORS 31.710)
  - **DOES NOT** apply in OTCA claims
    - See ORS 30.262(2)
  - **Each** beneficiary has own cap
    - Capped by aggregate

Oregon Tort Claims Act (OTCA)

- Hospital Districts
  - Are considered "public bodies"
  - Subject to OTCA
  - https://secure.sos.state.or.us/muni/public.do

Federal Tort Claims Act (FTCA)

- Hospitals(VA), WIC, smaller clinics
- Need notice within 2 years
- USA is often defendant

Employer Liability Law (ELL)

- Wrongful Death Cap
  - $500,000 normally (in ORS 31.710)
  - **DOES NOT** apply in ELL claims
  - ORS 654.325 (provides a right of action to the surviving children “**without any limit** as to the amount of damages which may be awarded.”)

DEFENSE

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

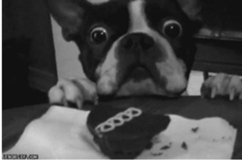
PLAINTIFF & DEFENSE

- ▶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 a Mediation in Writing

STATUTES TO WATCH

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

STATUTES TO WATCH



- ▶ <u>Minors:</u>
  - ▶Normally 5 Years + 2 Years For Discovery Or 1 Year Past 18th Birthday
  - ▶**Minor's Claim Against Public Body**
    - ▶**Notice is 270 days**
    - ▶**File within 2 years to be safe**
  - ▶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

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

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
- Insurance Company:
  - Must Check With Department of Consumer & Business Services

- 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?

- File All Pleadings With Clerk
  - ORCP 9E – Delivery To Judge Is Not Filing
  - Stamp "Original" & "Copy"

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

Protecting Minor's Money

- Conservatorship
- Court Approval
- Annuity
- Trust
- Affect on Public Benefits??

THINGS TO DO AFTER CASE SETTLES

- Report Case Settled to Court
- Pay Liens – PIP, Comp, Medical
- Be Careful Submitting $ Judgments

DO YOU WANT TO HIRE AN ATTORNEY TO REPRESENT YOU IN AN INJURY CASE? THINK AGAIN! JANE PAULSON FROM PAULSON & COLETTI DOES NOT GIVE A CRAP ABOUT YOU AND YOUR INJURY! **SHE IS A CONSERVATIVE GAY HATER!** LOOK AT HER...SHE EVEN HAS A BITCH HAIR CUT! STAND UP TO SLEAZE BAG LAWYERS LIKE THESE AND DRIVE THEM OUT OF TOWN!

1022 NW MARSHALL, SUITE 450 PORTLAND, OR 97209/503-226-6361

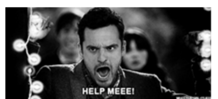
PAULSON & COLETTI = WRONG CHOICE!

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, 2018 Revision
Potential Malpractice Trap in the OTCA, inBrief, January 2019
Malpractice Risk Factors and How to Avoid Them Part I and II, inBrief, October 2018 and January 2019
Settlements Proceeds and Other Traps, inBrief (Revised October 2011)
Protecting Minor's Money, inBrief, August 2003
Settlements for Minors – 2009 Legislative Changes, inBrief (November 2010)
Multnomah County Supplementary Local Rules 9.055
Duties of a Conservator (PLF Practice Aid)
Acknowledgment of Restriction of Assets (PLF Practice Aid)
Conservatorship Checklist (PLF Practice Aid)
Commencing or Settling a Personal Injury Case (PLF Practice Aid)
Settlement or Judgment Disbursal Checklist (PLF Practice Aid)

§ 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. *See Baker v. Kennedy*, 115 Or App 360, 362, 838 P2d 634 (1992), *aff'd*, 317 Or 372 (1993); *Johnson v. MacGregor*, 55 Or App 374, 376–77, 637 P2d 1362 (1981), *rev den*, 292 Or 589 (1982).

> 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)

Subsection (1) of ORS 12.160, which extends the time limit for a minor to commence an action, tolls 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) (ORS 30.260 to 30.300). *See Robbins v. State ex rel. Dep't of Human Servs.*, 276 Or App 17, 20, 366 P3d 752 (2016) ("ORS 12.160(1) does not serve to eliminate a minor's ability to extend the statute of limitation in claims under the OTCA."); *Smith v. OHSU & Clinic*, 272 Or App 473, 486, 356 P3d 142 (2015). 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(2) 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 (1) is younger than 18 years of age or (2) has a disabling mental condition that bars the person from comprehending his or her rights, 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 minority or disability ceases, whichever occurs first. ORS 12.160.

Using the disability to suspend the running of the statute of limitations requires that the disability existed 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(1)–(2)) plus the two years provided in ORS 12.110(1), 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 a disabling mental condition to less than the period of minority or disability 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 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 persons with a disabling mental condition 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) (applicability of ORS 12.160 to the OTCA).

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

The minority-tolling statute, ORS 12.160 (*see* § 2.6B(1)(a)), tolls the two-year limitations period under the OTCA for a minor's cause of action. *Robbins v. State ex rel. Dep't of Human Servs.*, 276 Or App 17, 19–20, 336 P3d 752 (2016); *Smith v. OHSU & Clinic*, 272 Or App 473, 486, 356 P3d 142 (2015). 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(2)(b) 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, the Oregon Youth Authority, or certain private nonprofits that provide public transportation.

See also § 2.1A(1) to § 2.1B (actions in general), § 2.18A to § 2.18C (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), § 7.16C (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 § 2.18C (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) (defendant's death), § 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*, 221 Or 209, 212, 350 P2d 913 (1960); *Wright v. Osborne*, 151 Or App 466, 470, 949 P2d 321 (1997), *rev den*, 327 Or 448 (1998).

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 & Assocs., Inc. v. Guillory*, 98 Or App 691, 694, 780 P2d 783, *rev den*, 308 Or 660 (1989), *modified by Wright*, 151 Or App at 469 n 1 (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 31.565 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 31.565, 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).

> NOTE: The term *advance payment* means "compensation for the injury or death of a person or the injury or destruction of property prior to the determination of legal liability therefor." ORS 31.550. However, a party's provision of free or discounted medical services can also qualify as compensation for an injury, and can constitute compensation "prior to the determination of legal liability" for purposes of tolling the statute of limitations. *Humphrey v. OHSU*, 286 Or App 344, 356, 398 P3d 360 (2017).

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(6), made without providing written notice of the statute of limitations as set forth in ORS 12.155(1), will toll the limitations period. *Hamilton v. Paynter*, 342 Or 48, 53–54, 58, 149 P3d 131 (2006).

§ 2.6C(3) Advance Payment to Minor

The Oregon Court of Appeals has held that an advance payment to a minor does not toll the two-year statute of limitations provided for under the OTCA (ORS 30.275(9)). It reasoned that because of the "notwithstanding" clause in that statute, the tolling provision of ORS 12.155(2) did not apply to the OTCA limitations period. *Lawson v. Coos Cnty. Sch. Dist. No. 13*, 94 Or App 387, 391, 765 P2d 829 (1988), *abrogated by Baker v. City of Lakeside*, 343 Or 70, 164 P3d 259 (2007). However, in *Baker v. City of Lakeside*, the Oregon Supreme Court interpreted the "notwithstanding" clause differently. It held that the clause "applies only to those provisions of ORS chapter 12 and other statutes that provide a limitation on the commencement of an action." *Baker*, 343 Or at 83. Given that interpretation, it appears that ORS 12.155, which does not provide a limitation on the commencement of an action, would apply to the OTCA limitations period. It follows that, although no appellate court has so ruled yet, an advance payment made without the notice specified in ORS 12.155(1) would, in accordance with ORS 12.155(2), toll the OTCA's two-year limitations period in ORS 30.275(9).

§ 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.

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 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 section 362, 11 USC section 922, 11 USC section 1201, or 11 USC section 1301; dismissal of the petition; or the debt on which the creditor bases its claim being excepted from discharge. *See* 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. *See* 11 USC § 546(b).

See § 11.20 to § 11.20E(18) for further discussion of creditors' rights when a debtor declares bankruptcy.

§ 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. But the defendant must have had actual notice of the filing of the original action within 60 days after the original action's filing. ORS 12.220(1)–(2); *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); *see Bell v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 353 Or 535, 548, 301 P3d 901 (2013) (holding that ORS 30.075(1) constitutes a "statute providing a limitation on the commencement of an action," and thus the two-year limitation in ORS 30.275(9) applied to the plaintiff's survival action against the transportation district). But see § 2.18A(4)(b) regarding the commencement of an action by a minor or person with a disabling mental condition.

> NOTE: Construction-defect actions must be commenced within two years, but ORS 12.135 can affect the period of ultimate repose. ORS 12.135(2); ORS 30.275(9).

§ 2.18A(4)(b) Commencement of Action by Minor or Person with Disabling Mental Condition

ORS 12.160, as amended in 2015 (Or Laws 2015, ch 510), the tolling statute for minors and for persons with disabling mental conditions that prevent them from comprehending their rights at the time the cause of action accrues, tolls the two-year statute of limitations found in ORS 30.275(9) for commencing a cause of action against a public body under the OTCA. *Robbins v. State ex rel. Dep't of Human Servs.*, 276 Or App 17, 19–20, 336 P3d 752 (2016).

> NOTE: Case law predating the 2015 amendments provides helpful context but is based on former versions of ORS 12.160, so earlier cases should be relied on only with caution. *See Baker v. City of Lakeside*, 343 Or 70, 82, 164 P3d 259 (2007) ("Nothing in the legislative history suggests . . . 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."). The legislature expressly made the 2015 amendments retroactive to "all causes of actions arising on or after January 1, 2008." Or Laws 2015, ch 510, § 2(1).

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), § 7.3A to § 7.3B (actions against governmental bodies).

§ 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 A–B.

(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 has a disabling mental condition 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 no longer has a disabling mental condition, whichever occurs first. ORS 12.160(2), (4). See § 6.3B(2), § 6.5C(1), and § 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 (OTCA).

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

> 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).

> NOTE: The appointment of a guardian ad litem, conservator, or guardian does not affect the tolling period. *Luchini By & Through Luchini v. Harsany*, 98 Or App 217, 221–23, 779 P2d 1053, *rev den*, 308 Or 608 (1989).

> NOTE: The Oregon Constitution does not prevent the legislature from imposing statutes of limitation on claims accruing during the minority of a claimant. *Christiansen v. Providence Health Sys. of Oregon Corp.*, 344 Or 445, 454–56, 184 P3d 1121 (2008).

§ 6.1F References

See generally Guardianships, Conservatorships, and Transfers to Minors (OSB Legal Pubs 2018).

§ 6.3A Death of a Party

§ 6.3A(1) Action Continued by Personal Representative

Upon the death of a party, the court, on motion, must allow the action to be continued by the party's personal representative or successors in interest if the motion is made any time within one year after the party's death. ORCP 34 B(1); *see* § 6.5A to § 6.5E (wrongful death).

§ 6.3A(2) Action Continued against Personal Representative

"An 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. In the case of such failure, the claim may be barred.

§ 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(2).

§ 6.3B Disability of a Party

§ 6.3B(1) Action Continued

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

§ 6.3B(2) Tolling for Minority or Insanity

If a person is younger than 18 years of age or has "a disabling mental condition that bars the person from comprehending rights that the person is otherwise bound to know" 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 has such a disabling mental condition. ORS 12.160(1), (3); *see* § 6.1E. However, the statute of limitations will not be extended for more than five years by reason of age or disabling mental condition, or for more than one year after the person reaches 18 years of age or no longer has such a disabling mental condition, whichever occurs first. ORS 12.160(2), (4). See § 6.5C(1) and § 2.6B(1)(a) to § 2.6B(1)(b) for discussion of how the OTCA affects the tolling statute.

> 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 a disabling mental condition as defined in ORS 12.160(3), the 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) (quoting *Hoffman v. Keller*, 193 F Supp 733, 735 (D Or 1961)). 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 limitations period set forth in ORS 30.075(1), 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(1), the personal representative must commence the action within three years (extending the otherwise applicable two-year statute of limitations under ORS 12.110 for one year). *See Giulietti v. Oncology Associates of Oregon, P.C.*, 178 Or App 260, 266, 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) (generally, three years).

> 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 attorney's death, or within the statute of limitations, whichever is later, if

(1) "[t]he attorney has agreed to represent the person in the action";

(2) "[t]he 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) (substitution of parties); *see also* 2 *Torts* ch 30 (OSB Legal Pubs 2012) (wrongful death and survival of personal injury actions).

§ 7.4 PERSONAL INJURY

§ 7.4A Statutes of Limitation—In General

An action for personal injury may be governed by one of several different statutory limitations periods, including medical, surgical, and dental malpractice (ORS 12.110(4)); product liability (ORS 30.905); wrongful death (ORS 30.020); and claims against public bodies (ORS 30.275). These 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 this chapter, 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); § 7.18 to § 7.18F (compensable crimes).

> PRACTICE TIP: ORS 30.765 establishes parental liability for the intentional or reckless acts of a minor in that parent's legal custody. No Oregon case comments on the time limit for such claims, but ORS 12.110(1) should by its terms apply.

§ 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 decedent's personal representative 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 a consent is filed, 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).

§ 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 child's parent, guardian, or conservator "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 OTCA 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 generally 2 *Torts* chs 28, 32 (OSB Legal Pubs 2012).

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Malpractice Prevention Education for Oregon Lawyers

Potential Malpractice Trap in the OTCA

By Marilyn Heiken

For claims subject to the Oregon Tort Claims Act (OTCA), the $500,000 cap on noneconomic damages in ORS 31.710 does not apply. ORS 30.262(2). That means that in a wrongful death case against a public body, the caps in the OTCA apply rather than those in ORS 31.710. The caps in the OTCA are set forth in ORS 30.269-273.

Another thing to be aware of is that there are currently 33 "hospital districts" in Oregon, which are public bodies subject to the OTCA. For a current list of hospital districts, go to https://secure.sos.state.or.us/muni/public.do. Other public bodies include state boards, agencies, departments, cities, counties, school districts, transit districts, and hospital districts. ORS 30.260.

The limitations on liability for claims against public entities are adjusted every year. ORS 30.271. In a wrongful death case arising in August of 2018 against a local hospital district, the applicable cap on damages is $727,200 per claimant, with an aggregate limit of $1,454,300. ORS 30.272. If there are two surviving beneficiaries, each beneficiary has a separate cap. The combined cap on the claims would be $1,454,300. *Miller v. Tri-Cty. Metro. Dist.*, 241 Or App 86, rev den, 350 Or 408 (2011). The statute does not establish different caps for noneconomic and economic damages. There is just one total cap for all the wrongful death damages.

In some cases where the beneficiaries have sustained no economic damages because the decedent was not generating income at the time of his or her death, the beneficiaries could potentially recover the full $1,454,300 in noneconomic damages.

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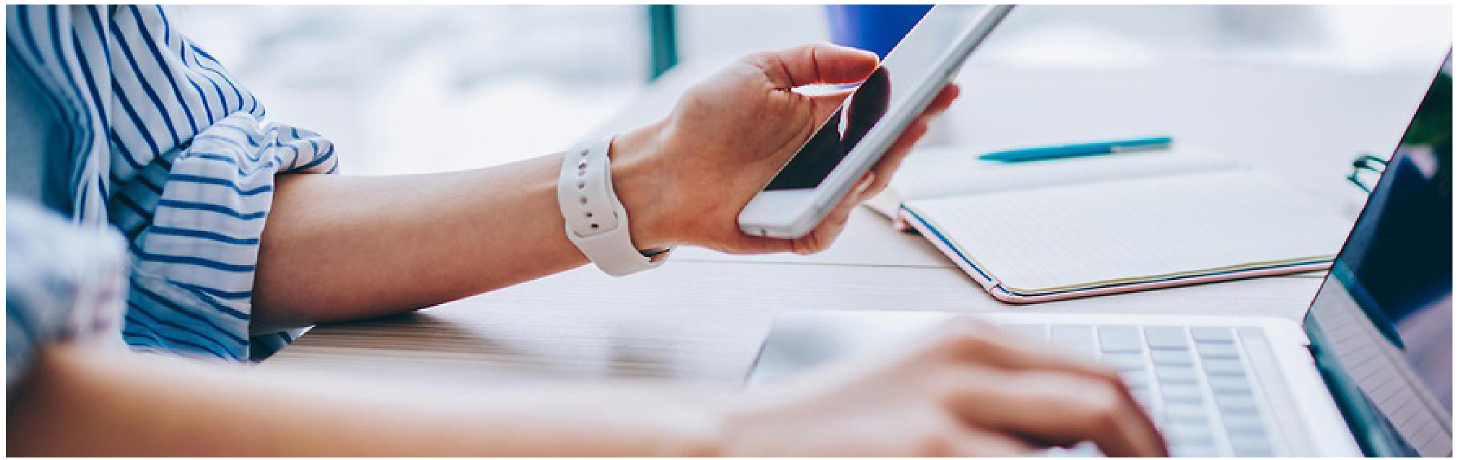
Malpractice Prevention Education for Oregon Lawyers



Malpractice Risk Factors and How to Avoid Them

By Hong Dao, PLF Practice Management Advisor

After reviewing PLF claims data for the past five years, I want to highlight some of the major factors that lead to malpractice claims filed against our covered parties. Those factors are represented in the chart below.

Inadequate office systems
Inadequate experience in the law
Failure to follow through
Inadequate preparation
Incorrect / inaccurate documents
Failure to file / record documents
Failure to meet deadlines
Poor client relations
Trial errors

The malpractice risks resulting from many of these factors (e.g., failure to follow through, inadequate preparation, failure to meet deadlines, and poor client relations) can be avoided by focusing on one major risk factor: inadequate office systems.

This and a later article will explore ways to improve your office systems as a risk management tool.

Reduce Malpractice Risks by Improving Your Office Systems

Having the necessary law office systems helps ensure that your law practice runs smoothly. The systems set out procedures and processes to handle daily firm operations such as screening and engaging clients, checking for conflicts, entering deadlines, managing

the file, and disengaging clients. With these in place, lawyers will not have to scramble to come up with a way to do things or reinvent the wheel for each new client or matter. Most importantly, lawyers can reduce their malpractice risk by having reliable systems in which to practice law. Necessary office systems consist of the following components:

- Client screening and case assessment
- Calendaring
- File management
- Client management
- Conflict checking
- Time tracking and billing

These systems need not be thoroughly planned out or perfected before you open your law practice. But consider how you will set up and manage each component. As you practice, you figure out what works and what does not, and continue to refine and improve your systems.

This article will discuss the first three components on this list: client screening and case assessment; calendaring; and file management. The last three components will be discussed in a later article.

CLIENT SCREENING AND CASE ASSESSMENT

Proper client screening is one of the most effective ways to reduce the risk of malpractice claims. The purpose of screening is to filter out high-risk clients, who are more likely to bring an unmerited malpractice claim against lawyers or otherwise make your practice unenjoyable. Client screening will help you identify unwanted clients from desirable ones.

You can screen clients with the help of a checklist. (Read my blog post about why lawyers should use a checklist at *https://www.osbplf.org/inpractice*.) The checklist should consist of questions to evaluate the client's attitude toward the case, the client's experience and relationship with previous lawyers, the client's ability to pay, and other areas that may raise a red flag. Below are some red flags and what they could mean:

- **Client had multiple prior lawyers for the same matter –** This may indicate a problem client, a non-paying client, or a case with serious flaws (lacks merit, no evidence, no witness, etc.).
- **Client is motivated by revenge, a feeling of victimization, or other extreme emotions –** This may indicate the client has her or his own agenda and may be difficult to work with.
- **Client waited until the last minute to look for a lawyer –** This may be a signal that the client is unprepared, not proactive, and may not cooperate or respond to your requests for information, thus preventing you from performing competently.
- **Client has unrealistic expectations that cannot be changed –** This may indicate the client will be difficult or impossible to please, second-guess your legal advice, impose unreasonable demands on you, and will not be satisfied with the result, no matter how good.
- **Client expresses difficulty or inability to pay fees –** This may be a sign that the client will not pay on time or at all, will likely dispute the bills, will expect you to advance costs, and will blame you if anything goes badly.

Screen every prospective client. If a red flag is raised during the consultation or interview, put extra effort into evaluating the client by asking follow-up questions. If many alarm bells are going off, you will be better off declining the client. Send that person a nonengagement letter. Sample nonengagement letters are available at our website at *www.osbplf.org > Practice Management > Forms*.

Besides screening clients, it's also important to assess the case to ensure you can provide competent representation. Decline cases that fall outside your practice area. Dabbling is dangerous. Reject cases if you do not have and cannot acquire the requisite skill or knowledge to take them on. Consider rejecting cases if you don't have the needed time and resources to be thorough and prepared. Properly assessing your cases will help you reduce your exposure to other malpractice risk factors, including inadequate experience in the law and inadequate preparation.

CALENDARING SYSTEM

A calendaring system is an important risk management tool to manage deadlines. Claims resulting from

a missed deadline may be due to a clerical error, miscalculating deadlines, filing at the last minute, not knowing the statute of limitations, or general neglect due to procrastination or personal difficulties. Here are some calendaring errors the PLF has seen:

- Waiting until the last minute to electronically file a complaint that got rejected and missing a statute of limitations;
- Failing to appear at a final resolution conference in a case because the date was not calendared, resulting in judgment by default against the client;
- Missing a statute of limitations by untimely serving the registered agent of the corporate defendant;
- Miscalendering an administrative hearing in a case, resulting in the lawyer not appearing at the hearing.

A missed deadline is an avoidable mistake if lawyers have a reliable calendaring system to keep track of deadlines and dates. Some lawyers use rule-based calendaring software to generate a list of deadlines for a case based on applicable statutes and court rules in their local jurisdiction. When a statute or rule changes, affecting a deadline, the software automatically recalculates all the dates in the system. Other lawyers calculate manually to determine the deadlines. Whatever method you use, make sure the deadlines are promptly entered into your calendaring program.

Have one calendaring system as the main point of entry. Don't use multiple calendars (one for the office, one for home, one on your phone, and one using sticky notes). It's hard to keep track of dates and deadlines when you enter them in different places.

Enter all dates related to a case, including court dates, statutes of limitation, litigation deadlines, discovery deadlines, and client appointments. Also enter reminder dates so you have advance warning before the deadlines. Tickle dates to review your files on a recurring basis.

Adding reminders to follow up or confirm that work is complete and blocking out time to do work prior to a deadline will help you avoid at least four other risk factors — failure to follow through, inadequate preparation, failure to file/record documents, and failure to meet deadlines.

The firm should have a master calendar that pulls important deadlines and dates in cases from all the lawyers' individual calendars. This practice makes it easier for one lawyer to cover for another if an emergency occurs. A calendaring error made by one person could also be noticed and caught by another.

Make sure you back up your calendar by making a duplicate copy of the calendar. Synchronize your calendar across all your devices so you can have easy access to it. If calendaring is delegated to staff, make sure they are properly trained on how to calculate deadlines and how to use the calendaring program.

The PLF has CLEs and practice aids on calendaring available at *www.osbplf.org > CLE > Past* and at *www.osbplf.org > Practice Management > Forms*.

FILE MANAGEMENT

How you manage your files can present a malpractice risk. Proper file management can help you reduce the risk because it allows you to find the documents you need and encourages documentation. One aspect of file management is implementing a system to organize, store, and retrieve files. When you cannot find documents because they are misplaced, lost, or not properly labeled, it might jeopardize the success of your client's matter or affect your ability to represent the client. It also may lead to missed deadlines and other malpractice risks.

The second important aspect of file management is documentation. It is essential that lawyers keep a record of their communications with clients and other parties, as well as major events and milestones related to the client matters.

Documentation serves many useful purposes. It conveys information in writing to clients and gives them time to process the information. It helps prevent misunderstanding by giving the client a chance to dispute the content of the conversation. It also helps the lawyer articulate the thought process behind an action or a decision. Finally, it may help ward off a claim for legal malpractice and provide the lawyer with evidence to defend against one. If a conversation is

not documented, the client can later argue that it never occurred. But if the conversation is followed up with a letter to the client, it is harder to dispute it later.

Lawyers can document the files in different ways. One effective method is to contemporaneously memorialize the conversation or event in writing and then promptly send it to the person with whom you had the conversation by mail or email or any manner you know he or she will receive it. A second method is to write a contemporaneous and detailed memorandum to the file. A third method is to take handwritten notes during the interaction or conversation. The least effective method is doing any of these things after the fact — instead of contemporaneously.

Lawyers need to use judgment in deciding which method to use while keeping client relations in mind. Some clients may get annoyed when you send them too many "CYA" letters. You might want to explain the purpose for sending the letters (e.g., convey information, give them time to process, prevent misunderstanding, etc.).

Below are some areas you should document:

- **Commencement, scope, and termination of representation –** Use an engagement letter to document when your representation of a client begins and the scope of your legal services to avoid misunderstanding on what you will do for the client and when. Use a disengagement letter to document the termination of the attorney-client relationship when the matter is concluded or for other reasons. Use a nonengagement letter when declining a prospective client. This type of letter documents that an attorney-client relationship does not exist and that the lawyer is not responsible for any deadlines or statute of limitations in the matter. Both nonengagement and disengagement letters will help protect lawyers against allegations they failed to take an action before the statute of limitations expired. Sample engagement, nonengagement, and disengagement letters are available at *www.osbplf.org > Practice Management > Forms*.
- **Client's instructions and lawyer's advice –** Follow up with a letter to a client to document any advice given to the client and the client's instruction. Decisions about settlement, authority to settle, dismissal, or appeal should all be documented. This will help avoid finger-pointing if the matter goes south and the client does not get the desired result.
- **Important conversations with clients, opposing parties, and other parties involved –** By documenting these conversations, you will have evidence to help defend any claims for malpractice.
- **Major events and milestones in the matter –** Any significant event that happens in the client's matter should be documented, such as filing of pleadings or the court's ruling on a motion. Even when the matter is not currently active, it's still a good idea to inform clients in writing of major milestones in the case and its status. This might help stave off a claim that you didn't take action on the matter.

Proper file management, particularly documentation, can help improve client relations and allow you to prove what went on in the case, which can go a long way in avoiding malpractice.

I will discuss the last three components of an effective office system in the next issue of *in*Brief. ■

Special thanks to Bruce Schafer, recently retired Director of Claims at the PLF, for his input on documentation.

PLF *in*BRIEF

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Malpractice Prevention Education for Oregon Lawyers

Malpractice Risk Factors and How to Avoid Them Part II

By Hong Dao, PLF Practice Management Advisor

In my previous article in the October 2018 issue of *in*Brief, I discussed the importance of implementing law office systems to help reduce your risk of legal malpractice. I specifically focused on calendaring systems, client and case screening, and file management. This article will focus on client relations, conflict checking systems, and billing as risk management tools.

CLIENT RELATIONS

Risk management does not end when you screen and select the "right" client or case. It's an ongoing process requiring continuous evaluation of your client relationship and a diligent effort to remain on good terms with clients. Clients hire lawyers because of their skills, experience, and reputation, but those qualities alone do not result in a good attorney-client relationship. It's easy to think that as long as you're able to get the result clients want, they will have nothing to complain about.

Providing quality legal services is simply not enough to protect against malpractice risk. Of course, getting the desired outcome is important to clients. Just as important, however, is how they are treated during the course of representation. If your communication and interaction with clients leave them feeling dissatisfied, unhappy, or disrespected, the good outcome you obtained may still not be satisfactory to them. These feelings will affect how forgiving they are toward you. Clients who feel they are treated poorly are less likely to refer prospective clients to you and may be more likely to bad mouth you, file a malpractice claim against you, or complain about you to the Bar.

Let's look at some relationship errors that make clients unhappy or dissatisfied:

- Not returning clients' phone calls or emails;
- Not responding to their requests for information;

- Not actively listening to their concerns;
- Allowing phone calls or staff to interrupt client meetings;
- Being late for appointments;
- Rescheduling their appointments too many times.

You can avoid these errors by setting expectations and treating clients with common business courtesies.

Set expectations and boundaries for communicating with you

In addition to explaining the scope of your legal services and your fees at the beginning of your attorney-client relationship, it's also important to discuss with clients what they can expect of you in terms of communication. In order to do this, you have to determine what works best for you. This includes intentionally deciding whether you want to take client calls during business hours only, what period of time is workable for you to return calls, and whether you want to regularly block time for calls. Once you have made a plan, discuss it with your clients. A conversation about the best method and date/time for them to reach you and vice versa will save a lot of potential frustration and anger. For example, if you set aside one or two hours during the day for phone calls, communicate that schedule to clients. Absent an emergency, make yourself available at those times. Include your regular schedule in your engagement letter or fee agreement and make sure you stick with it. If the schedule needs to change, communicate that with the client and follow up with a letter or email.

Once you establish and communicate your policies, stick with them. For example, if you tell clients you don't take after-hours calls, but you answer and talk with them, you're undermining the expectations you've set.

Treat clients with common business courtesies

Clients are also customers. They want good customer service and respect. Treating them with common business courtesies helps foster a respectful relationship that will have a lasting impact.

- **Promptly return clients' telephone calls** – You can also ask staff to call clients to explain your delay in returning their calls. If their calls or emails are not urgent or important, then respond on the days you've set aside to communicate with clients.
- **Be on time for their appointments** – Don't make clients wait more than 5 minutes to meet with you. Give them the courtesy of meeting them on time. Reschedule their appointment only if it is absolutely necessary. A client whose appointment is frequently rescheduled may feel like you don't respect their time.
- **Give clients your undivided attention** – When you meet with them, tell staff not to interrupt you. Put your office phone on "Do Not Disturb" and silence your cell phone. Refrain from constantly looking at the clock.
- **Be responsive** – If clients ask you for something related to their matter, provide the requested information to them in a reasonable amount of time. Your failure to fulfill your commitment may affect your relationship with the client and lead to more serious issues.
- **Be a good listener** – Actively listen to what the client has to say, and communicate back to the client what you hear the client say. This verbal assurance lets the client know that you understand what the client is saying and makes him or her feel heard. Delay asking questions or offering advice or comments until the client has had the opportunity to talk about her or his problem without interruption.
- **Be available** – Staff play an important role as a conduit between the lawyer and client. But don't let staff be a barrier between you and the client. Be personally available to communicate important issues or developments in the matter to the client.

Other aspects of managing client relations include documention, using a written fee agreement, and more. Those practices are discussed in my previous article available at *www.osbplf.org > Practice Management > Publications > InBrief > October 2018*. Additional tips on how to improve your client relations are available at *https://www.osbplf.org/assets/forms/pdfs//Client%20Relations%20Best%20Practices.pdf*.

CONFLICT CHECKING SYSTEMS

Another malpractice risk factor for lawyers is not using a conflict checking system. The failure to

properly screen can result in representing clients with conflicting interests. This creates legal malpractice problems as well as ethical issues with serious consequences.

Many situations may give rise to a conflict of interest. These include representing opposing parties in the same matter, or not providing full disclosure and obtaining a waiver in a matter with multiple clients. Whatever it may be, lawyers need a system to identify and resolve the situation that may give rise to an actual or potential conflict.

It's important to establish a reliable system that allows you to do a thorough and complete search of the entire database to find and match the queried name. Input all parties in your conflict database, including the clients, adverse parties, related parties, declined prospective clients, pro bono clients, etc. Set up procedures for conflict checking to properly search, analyze, and document potential conflicts as well as to obtain informed consent or decline representation due to a conflict. The PLF has a helpful practice aid called "Conflict of Interest Systems and Procedures" that discusses setting up a conflict database and how to systemize procedures. It is available at *www.osbplf.org > Practice Management > Forms > Conflicts of Interest*. It's also available at this link: *https://www.osbplf.org/assets/forms/pdfs//Conflict%20of%20Interest%20Systems%20-%20Procedures.pdf*.

BILLING ISSUES

The final legal malpractice risk factor to be mindful of is your billing and fee collection practices. Your efforts to get paid may result in a response you least expect: the client disputes your fees, accuses you of providing negligent service, and threatens to file a malpractice claim against you. The response may be triggered by an underlying issue that finally surfaces on receipt of the final bill. You can prevent this by taking a few precautionary measures.

- **Only take clients who can afford your legal services** – This advice harkens back to my previous article on client screening. Clients who express an inability or unwillingness to pay for your services may find fault in your work and avoid paying their bills.

- **Use a written fee agreement** – Clearly explain how your legal fees are determined and your billing procedures, such as when clients will be billed and the procedures for withdrawing funds. Document the billing process and withdrawal procedures in a written fee agreement. Follow the terms of the fee agreement. If you and the client agree that you will bill monthly, make sure you send the monthly statement out on time.

- **Review statements before sending** – Make sure you review all billing statements before sending them to clients. In addition to looking for errors, also review billing practices that may cause confusion to the client, such as block billing or vague entries (e.g., "legal research"). It's also an opportunity to reassess whether the charges reflect the value that clients receive from your work. If not, consider writing off some time. If you're discounting your hourly rate as a promotion or a favor to the client, include your normal rate so the client can see the actual value of your service.

- **Enter time contemporaneously or at least daily** – To avoid under- or over-billing clients, it's best to track and enter time contemporaneously with the task. If that is not possible, then enter your time at the end of every day. You can do this with a notepad or using time-tracking software. Recording time daily prevents the frantic search for emails you sent or documents you drafted to recreate a list of billable tasks. Lawyers who do not record time on a daily basis end up losing many billable hours, resulting in undercharging for their legal services or padding their bills.

You can find more information on good billing practices at our website, *www.osbplf.org > Practice Management > Forms > Financial Management*.

Of particular relevance are two practice aids titled, "Daily Time Sheet," available at *https://www.osbplf.org/assets/forms/pdfs//Daily%20Time%20Sheets.pdf*, and "Billing and Time Slips," available at *https://www.osbplf.org/assets/forms/pdfs//Billing%20and%20Time%20slips.pdf*.

If you have any questions on how to improve your office systems. please call a PLF practice management advisor at 503.639.6911.

Professional Liability Fund
www.osbplf.org
Malpractice Prevention Education for Oregon Lawyers

SETTLEMENT PROCEEDS AND OTHER TRAPS

THIS ISSUE

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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-

DISCLAIMER
IN BRIEF includes claim prevention information that helps you to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate research.

cal bills. When a minor child is injured by a wrongdoer, a parent may file an action against the wrongdoer to recover the reasonable medical expenses paid to treat the child's injuries. See RESTATEMENT (SECOND) OF TORTS §703(e) (1977). A parent's action to recover the medical expenses of the child is governed by a two-year statute of limitations set forth in ORS 12.110(1). If a child's guardian ad litem files an action on behalf of the child against the wrongdoer, the parents may file a consent along with the complaint to include the claims for medical expenses in the guardian's action. ORS 30.810(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. ORS30.810(2).

Although the statute and case law are not specific on this issue, when possible, a prudent guardian ad litem will bring an action to recover the medical expenses of the child within two years. See Palmore v. Kirkman Laboratories, 270 Or 294, 527 P2d 391 (1974).

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). If, however, the action is one for medical, surgical or dental negligence, the time to file pursuant to ORS 12.160(1) may not exceed the 5-year statute of ultimate repose found at ORS 12.110(4), absent fraud, deceit, or misleading representation. ORS 12.110(4).

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
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Continued on page 4

IN BRIEF

THIS ISSUE
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Special Issue

MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

PROTECTING MINORS' MONEY

Your friend, Trial Lawyer, has asked you to assist his clients John and Jane Smith. Their 14-year-old minor child was injured in a motor vehicle collision, and Trial Lawyer has settled the claim and obtained court approval of the settlement. Trial Lawyer has deposited the net funds payable to the child in his IOLTA account. John and Jane both work outside the home. They live a comfortable middle-class lifestyle but are certainly not wealthy.

At your initial meeting, John and Jane impress you as honest, conscientious parents who have their child's best interests at heart. They indicate their desire to invest the funds in part in a growth account to provide a down payment or nest egg for their child. They would like this account restricted so that their child cannot access it until he is at least age 28. They would like the rest of the funds placed into an accessible, liquid account that they can access to provide for their child's needs, such as school clothes and summer camp fees, with any remainder available to pay college tuition and expenses after their son graduates from high school.

How should the money be held? Who should be the account holder? Is court oversight required? Is court oversight advisable if not required? Can the parents restrict their child's access to the money after he becomes an adult?

PAYMENTS TO MINORS

At first blush it might appear that the UTMA (as adopted in Oregon, ORS 126.805 - 126.886) would provide a simplified process in which funds of $10,000 or less may be transferred to a "custodian" for the minor without the necessity of a conservatorship. However, a review of the statute reveals that it is directed at gifts, bequests, and other voluntary transfers to minors, not to settlements of litigation or payments of judgments.

Oregon Revised Statute 126.700 (formerly ORS 126.025) controls in circumstances such as the hypothetical in this article. *NOTE* - This act protects only the *transferor* of the funds. *See*, ORS 126.700(4). It does not shield John and Jane from liability for mismanaging the settlement funds, nor does it protect counsel. This raises the related question – whom do you represent?

WHO IS THE CLIENT?

A fundamental question to answer before determining what advice to give John and Jane is – who is your client? The money belongs to the child. It will be applied for the child's benefit. Ultimately, the child will suffer if the money is not administered wisely. It might seem obvious that the child – the final recipient of your services – is the client whose needs must be foremost in your mind. Although this is the obvious answer, it also is almost certainly wrong. In *Roberts v. Feary*, 162 Or App 546 (1999), the court held that the lawyer retained by the personal representative represents only the personal representative and does not have a lawyer-client relationship with the beneficiaries, creditors, or other interested persons of the estate. OSB Legal Ethics Opinion No 1991-119 opines that, with respect to a trust, the trustee's attorney represents only the trustee, not the beneficiaries. Also, Opinion No 1991-62 opines that, although the

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THIS NEWSLETTER INCLUDES CLAIM PREVENTION TECHNIQUES THAT ARE DESIGNED TO MINIMIZE THE LIKELIHOOD OF BEING SUED FOR LEGAL MALPRACTICE. THE MATERIAL PRESENTED DOES NOT ESTABLISH, REPORT, OR CREATE THE STANDARD OF CARE FOR ATTORNEYS. THE ARTICLES DO NOT REPRESENT A COMPLETE ANALYSIS OF THE TOPICS PRESENTED AND READERS SHOULD CONDUCT THEIR OWN APPROPRIATE LEGAL RESEARCH.

personal representative of an estate owes fiduciary duties to the estate and the beneficiaries, the attorney for the personal representative is only the personal representative's attorney. This leads to the conclusion that you represent John and Jane and have duties only to them, while they, in turn, have duties to their child. However, *Hale v. Groce*, 304 Or 281, 744 P2d 1289 (1987) complicates this inquiry by holding that counsel for a deceased testator may be liable to the beneficiaries for her negligence in drafting the will. *Hale* seems to support the argument that counsel has at least some direct duties to the child and that counsel certainly could be liable to the child for negligence that results in depletion of the settlement funds.

CONSERVATORSHIP

At first glance it appears that the complexities of a conservatorship would be an unnecessary burden in this instance. However, this is the *only* mechanism by which counsel, parents, tortfeasor, and insurer all receive assurances that the funds are properly applied. Further, conscientious adherence to the statutes and rules governing conservatorships can limit or even eliminate the risk of malpractice.

For basic forms and procedures to establish a conservatorship, see *Guardianships, Conservatorships and Transfers to Minors* (OSB CLE 2000). Note that in this hypothetical the minor is 14 years of age. The minor is therefore entitled to notice of the petition and an opportunity to object.

A conservatorship usually entails a bond posted by the conservator and paid for with the protected person's funds. The conservator also usually has direct access to the protected person's funds, often in a checking account. Further, the conservator is required to file detailed annual accountings, which often necessitates the assistance of an attorney or CPA. All in all, this is not an ideal solution, especially if the child does not need the funds to live but instead the funds can be left to grow over time for the minor's use as an adult.

A modified form of conservatorship is a better choice. First, in the petition to establish the conservatorship, counsel should request that the conservator hold all funds in restricted accounts and ask that no bond be required of the conservator. A "restricted account" is one that the financial institution has agreed will be frozen and inaccessible to the conservator except as ordered by the court. A sample Acknowledgment of Restricted Assets can be found in *Guardianships, Conservatorships and Transfers to Minors* (OSB CLE 2000) and at www.osbplf.org, loss prevention, practice aids, guardianships and conservatorships.

Further, given that the funds will be restricted and no withdrawals will occur without court order, the petition also should request permission to use a simplified form of accounting. Ideally, this would be a short form accounting with copies of the account statements attached so that the court could verify that no withdrawals were made during the accounting period.

STRUCTURED SETTLEMENTS

It is entirely understandable that John and Jane would not want their child to suddenly receive a large sum of money the instant he turns 18. Although there is specific authority for such a restriction on a gift or transfer to a minor of $10,000 or less (ORS 126.872), a conservator of a minor child does not have any such authority. The conservatorship, and therefore the conservator's powers, necessarily terminate when the disability ceases. In this instance the minor's disability is simply his minority.

Many courts refuse to approve investments in annuities, structured settlements, and the like that have the effect of restricting the minor's access to the settlement funds after the age of majority. In addition, the foregoing analysis might differ greatly if the injury resulted in brain damage, permanent cognitive impairment, or similar condition.

SPENDING FOR NECESSITIES

Under the hypothetical presented, John and Jane wish to use some of the settlement funds to provide for the child's clothing, recreation, and so on. May they do so? As a conservator, John or Jane stands in a fiduciary relationship to the child. As a fiduciary, John or Jane has an obligation to place the child's interests and welfare above all else when dealing with the settlement funds. As parents, John and Jane have duties under ORS 109.010 to provide for the support of their children, so the conflicting roles create a conflict of interest. Generally it is improper for parents to use the child's settlement funds to defray the costs of raising the child. Certainly, one can envision circumstances in which a

family is so poor that use of the funds to improve the child's standard of living would be appropriate. However, use of the funds in this manner is likely to draw the ire of the probate court unless persuasively explained. Great care must be exercised to ensure that the child's interests remain paramount. Generally, the court will not permit a parent to retain funds without a bond and strict oversight. If a conservatorship has been established with a restricted account, the problem is lessened because funds cannot be withdrawn without court order.

PUBLIC BENEFITS AND SPECIAL NEEDS

If the family is receiving public benefits such as food stamps or the Oregon Health Plan, counsel should consider the impact of the settlement on the child's benefits. A discussion of these impacts is beyond the scope of this article. For an overview of the law, see *PI Settlements and Welfare*, *In Brief*, July 2002. (Available at www.osbplf.org, click on loss prevention, *In Brief*.)

CONCLUSION

It is vital to have open, detailed discussions with John and Jane about the limits of their ability to use the child's funds during his minority, their responsibilities as conservators, and the nature of their fiduciary duties. Use of the court's conservatorship mechanisms, modified by restriction of the funds, is the best way to ensure that the child's interests are protected along with those of the conservator and counsel.

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IN BRIEF

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Malpractice Prevention Education for Oregon Lawyers

Settlements for Minors – 2009 Legislative Changes

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-

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DISCLAIMER
IN BRIEF includes claim prevention information that helps you to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate research.

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.

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) The Chief [*Probate*] **{Family Law}** 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.

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:

Account Number	Value of Account Assets	Type of Account	Maturity
_____________	____________________	_____________	____________

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.

CONSERVATORSHIP CHECKLIST

Conservatorship of:	Case No.
Respondent's SSN:	
Fiduciary:	Phone:
Address:	
City/State/Zip:	

ESTABLISHMENT OF PROTECTIVE PROCEEDING

Initial Appointment:
☐ Intake questionnaire ☐ Conflict check ☐ Fee Agreement signed
☐ Filing fees received ☐ Source of retainer:_________________________

Petition for Conservatorship

Respondent:		Date of Birth / Age:
Address: Phone:		Current Location: Address: Phone:
Interest of Petitioner:		
Petitioner:	Age:	Relationship:
Address: Phone:		
Fiduciary:	Age:	Relationship:
Address: Phone: ☐ Pre-bond application approved		

Is proposed fiduciary a certified professional (*see* ORS 125.240(1)(a))? ☐ Yes ☐ No

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 ORS 125.221(4) and make necessary disclosures.)

Required information:
- ☐ 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, or removal of Respondent from the parent's or former guardian's home)
- ☐ Statement that fiduciary is willing to serve
- ☐ Name, address, and phone number of existing fiduciary, trustee, healthcare representative or agent under Power of Attorney
- ☐ Name, address, and phone number of Respondent's treating physician and any person providing care to Respondent
- ☐ Specific factual information supporting a finding that Respondent is financially incapable; names, addresses, and phone numbers of persons who have information supporting finding

; and less-restrictive alternatives to appointment of a fiduciary that have been considered and why the alternatives are inadequate
- ☐ General description of estate of Respondent and source and amount of income (court will use information to set bond amount)
- ☐ Statement indicating whether nominated fiduciary is a public or private agency or organization providing services
- ☐ Consent to serve, if petitioner is not fiduciary
- ☐ Dependents of Respondent
- ☐ Members of Respondent's household
- ☐ Pecuniary conflicts of interest disclosed for court approval
- ☐ Principal residence and intent to keep or sell

Petition Filed:	Fee Paid:
Create agent or rule in email program to duplicate and forward copies of e-notices from attorney-of-record to appropriate staff. ☐ Done ☐ N/A (Some electronic case filing systems only generate e-notices to the attorney-of-record. Staff email addresses or firm addresses (*such as* docketing@johndoelawfirm.com) may not be permitted.)	

Notice and Order Requirements

Form of Notice:
- ☐ Review ORS 125.060 and ORS 125.070(1), (2), (4), and (5)

Date of personal service on Respondent (if age 14 or older):
Date of personal service on parent (if Respondent is a minor):

Service to:
- ☐ Spouse, parents, and adult children of Respondent (if none, persons most closely related)
- ☐ Any person cohabiting with Respondent
- ☐ Fiduciary nominated by Respondent
- ☐ Fiduciary appointed by court
- ☐ Any attorney who is representing the Respondent in any capacity
- ☐ Trustee
- ☐ Healthcare representative
- ☐ Agent under a Power of Attorney
- ☐ Notice required by court
- ☐ Department of Veterans Affairs, if applicable
- ☐ Department of Human Resources, if Respondent is receiving public assistance under ORS chapter 411 or ORS chapter 414 (notice to DHS satisfies requirement of notice to Oregon Health Authority)
- ☐ Office of the Long-Term Care Ombudsman, if applicable
- ☐ Disability Rights Oregon, if applicable
- ☐ Foreign consulate, if Respondent is a foreign national

For service requirements, review ORS chapter 125. See also the PLF Service of Process Checklist on the PLF website at www.osbplf.org (click on Practice Management, then Forms, and then 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 UCCJEA) *Add 3 days if service is by mail, email, facsimile communication, or electronic service (ORCP 10 B).	Tickled:	Received: ☐ Yes ☐ No

Date proof of personal service to Respondent (or parent, if Respondent is a minor) filed:		
Date proof of mailing/personal service to others filed:		
Request for notice of further filings or motions received and noted (attach list including date filed):		
Limited Judgment Appointing Conservator:	Date filed: Date signed:	Reminder tickled for:

Guardian Partners (nonprofessional fiduciary class required in certain counties) Registration deadline (15 days following appointment): Deadline for completing class (60 days following appointment): Date completed:		
Asset Restrictions:	Due date: Date obtained: Filed with court:	
Bond Application:	Date applied for: Fiduciary signature: ☐	Date obtained: Filed with court:
Letters of Conservatorship*: *It is recommended that a copy of the Limited Judgment be attached to the letters.	Date received from court: Date transmitted to Conservator:	
Date informational letter sent to Fiduciary explaining duties/responsibilities:		
ANNUAL ACCOUNTING DUE: (Due 60 days after appointment anniversary, along with annual accounting fees) Names and addresses of persons requesting notice: (check with fiduciary and court file) ________________ ________________ ________________ ________________ ________________ ________________ ________________ ________________		Reminder tickled:

INVENTORY

Date inventory due (90 days after appointment):	Tickled:
Date inventory information requested:	Date received:
Date attorney fee petition and declaration filed (if adjustment of bond is necessary, do not submit attorney fee petition until bond rider and/or acknowledgment of restricted assets is filed with the court):	
Date inventory filed: Adjustment of bond required ☐ Yes ☐ No	Filing fee paid in full:
Date inventory served on Protected Person (if age 14 or older): Date inventory served on parent (if Protected Person is a minor):	
Date proof of mailing/service filed:	
If real property, date certified copy of inventory, or abstract per ORS 125.470(3), recorded in County where situated:	
If bond adjusted, date bond rider filed:	

Alternatively, date petition freezing/restricting assets filed (if applicable):

ANNUAL ACCOUNTINGS (due 60 days after anniversary of Appointment)
Annual Due Date: __________

Date information requested:	Date documentation received:
Adjustment to bond amount: ☐ Reduced ☐ Increased Bond Rider filed:	
Professional Fiduciary: Include statement regarding the total amount of compensation that investment advisers charged for managing investments.	
Date annual accounting prepared:	Date signed by client: Date filed:
Date notice to Protected Person and those requesting sent:	
Last date to object:	Objections received: ☐ Yes ☐ No
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:	

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).	
Date notification received from client or triggering event: Reason for termination:	
Date Petition for Termination/Final Accounting signed:	Date filed:
Date General Judgment Approving Termination/Final Accounting filed: Date received from court: Date client notified of termination: Date Receipts filed: Closing Order signed: Date bonding company notified: Date bond exonerated: NOTE: Whether a filing fee is necessary for a General Judgment Approving Termination and/or Closing Order is not clear under Oregon Laws 2009, chapter 659 (HB 2287) (specifying filing fee surcharges in certain instances). Check with your local court clerk.	
FILE CLOSED:	Final fees/costs paid:

NOTE:

For multistate protective proceeding, refer to ORS125.800 to 125.852 (Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act).

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ISSUES FOR CONSIDERATION IN COMMENCING AND SETTLING A PERSONAL INJURY CASE

COMPETENCY
1. Do you have adequate experience to handle the case? 2. Do you have adequate time and resources to handle the case? 3. Should you associate counsel to assist you? 4. Is the client a client that you would have accepted if he or she had come to you off the street (as opposed to by a referral, a friend, a relative, or some other source)? 5. Have you screened this case and client before you accepted the case and client? 6. Do you have adequate PLF coverage to handle the case? 7. Does any potential claim require admission to a jurisdiction in which you are not admitted? 8. Does your client or do you prefer that communications occur through an interpreter to avoid any possible confusion due to a language barrier?

ESTABLISHING THE ATTORNEY / CLIENT RELATIONSHIP
1. Have you identified who your client is and is not? 2. If the case involves multiple clients, are there any conflicts between them? For example: Husband/wife; child/parent; passenger/driver; or employer/employee. 3. Should the clients be given a conflict disclosure and consent letter to sign? 4. Did you present your client(s) with the OSB approved Model Explanation of Contingent Fee Agreement and obtain their signatures prior to entering into a contingent fee agreement? 5. Have you sent engagement letters and fee agreements to each client whom you are representing? 6. Have you checked to ensure that you have no conflict of interest by representing these clients or litigating against any potential defendant in this matter?

INTAKE INFORMATION
1. Have you had the client fill out a client intake form? 2. Have you obtained the pertinent HIPAA-compliant medical authorizations? 3. Have you obtained an employment and tax records authorization? 4. Have you discussed your fee and advancement of litigation costs with the client and how they may increase at different stages of litigation? 5. Has the client signed a retainer agreement and explanation of the fee agreement? 6. Have you provided the client with a letter confirming the scope of your representation (an engagement agreement)? 7. Have you ascertained the client's bankruptcy status? The Bankruptcy Code requires debtors to disclose claims that exist prior to the filing of the petition, regardless of whether a claim is pending in a court proceeding or has yet to be pursued in any way, and regardless of whether the debtor is even aware of the claim. 11 U.S.C. Section 521. Failure to list actual or potential claims may preclude the debtor from pursuing the claim later in a non-bankruptcy action. Use PACER (Public Access to Court Electronic Records) to check for bankruptcy filings. Contact the US Bankruptcy Court at 503-326-2231 for more information if needed. See Personal Injury Claims and Bankruptcy, PLF *In Brief*, February 2008. Available online at www.osbplf.org. 8. Have you discussed the scope of the attorney-client privilege with your client and explained what they should or should not discuss with family members, on social media, or anyone else to protect it from discovery by the adverse party? 9 Have you determined whether the client is Medicare eligible and whether the issue of "set asides" needs to be addressed? 10. Have you asked the client if they have an on-line social networking account and whether they have discussed their case or aspects of their injury in a public forum? Have you warned your client that information put into such a forum can be obtained by lawyers representing the adverse party?

11. Have you determined whether the client is Medicare or Medicaid eligible and have you put the agencies on notice so that you can be aware of any potential lien or set-aside requirement?
12. Does your client have a workers' compensation claim related to the injury at issue?
13. Does your client receive food stamps, social security disability, or other public benefits that need to be taken into consideration before receipt of any recovery?
14. If your client was a victim of a crime have you asked whether they received any benefits from the Crime Victims Compensation Fund and, if so, have you contacted the fund to see if they have a lien against a recovery?
15. If your client was a victim of a crime have you notified the prosecutor of your involvement and need to be included in any discussions about a civil compromise that the criminal defendant may propose?
16. Have you warned your client about the potential adverse consequences of the loss or destruction of potentially relevant evidence?
17. Was your client possibly injured by a "phantom vehicle" that requires that immediate notice be provided to their Uninsured Motorist insurer?

PREPARING THE CLIENT

1. Have you prepared the client for the amount of time and money it will take to proceed with the case?
2. Have you prepared the client for the costs that will need to be paid as you proceed with the case?
3. Have you prepared the client for the costs and expenses (including liens and reimbursements) which will need to be paid out of the settlement or verdict?
4. Is your client receiving Medicaid, Social Security Disability benefits or Supplemental Security Income? If so, have you discussed the impact that a recovery may have on those benefits and the potential need to establish a Special Needs Trust (or, a Pooled Trust if your client is 65 or older) to avoid impacting those benefits? Have you discussed the limitations on spending that a Special Needs Trust creates?
5. Have you explained that any social networking that your client participates in may be subject to discovery and admissible as evidence at trial, including Facebook and Twitter?
6. Have you explained to client that any punitive damages based on an Oregon common law action (whether in state or federal court) or other Oregon state court claim will be split with the State and is subject to income tax?
7. If an injured party is a minor have you explained to their parent or guardian the potential need for a conservator and court approval of any settlement?

DOCUMENTATION OF THE CASE

1. Do you have a system for documenting your conversations with your client?
2. Do you send your client confirming letters that review important advice given to them by phone or in person?
3. Do you have a back-up file system such as on-line encrypted data back up to ensure the integrity of your file system should you suffer a computer failure or theft?
4. Do you have a system to calendar important dates and provide reminders for upcoming events?

COMMENCEMENT OF THE ACTION

1. Does the case involve an entity entitled to a "tort claim" notice? (Dram shop, ski facility, public body, etc.)
2. Have you correctly recorded and calendared the time within which a tort claim notice must be sent?
3. Have you correctly recorded and calendared the applicable time limitations?
4. Have you calendared the time within which the complaint must be served?
5. Have you calendared not only the applicable time lines, but also a reminder well in advance of the time line?
6. Is the defendant easy to locate?
7. Have you served all of the necessary defendants?

8. Is the defendant dead? If so, if the claim is not covered by insurance, have you presented the claim to the estate's personal representative for disallowance prior to commencement of the action (ORS 115.325)?
9. Before filing the suit have you considered alternate venues for the action and the costs/benefits of each?
10. After filing have you provided the required notice to all third parties having a potential claim to any recovery your client achieves such Medicare, Medicaid, Health Insurers, Auto Insurers, etc.?
11. Have you provided notice of claim for any potential Uninsured or Underinsured Motorist coverage?
12. Have you sent "spoliation" letters to any party or non-party that may possess relevant evidence that needs to be preserved?

CASE SETTLEMENT

1. Does the case involve injuries that are in excess of the insurance coverage of the defendant?
2. If the defendant's insurance coverage is inadequate, have you investigated other applicable insurance coverage, including Underinsured Motorist Coverage, an "umbrella" policy, credit card travel insurance, or AAA travel insurance that may provide benefits to the plaintiff?
3. Have you read the Underinsured Motorist policy or policies before settling the case to determine if the underinsured motorist carrier requires consent before the case can be settled? If insurer denies consent, have you protected the insurer's subrogation rights by not releasing the tortfeasor?
4. Have the medical providers been paid prior to disbursing the settlement proceeds?
5. If your client has health insurance coverage through a private carrier, have you examined the health insurance policy for provisions requiring repayment of funds or denial of coverage for injuries which have been the subject of a personal injury settlement?
6. Did your client receive benefits through the Oregon Health Plan (OHP)? Medicaid? Medicare? Crime Victims Compensation Fund? If so, there may be a lien against the client's settlement proceeds. If your client has received such benefits have you obtained the required approval for settlement?
7. Is your client currently receiving welfare, social security disability, Supplemental Security Income, or workers compensation benefits? If so, have you considered how the settlement will affect the client's eligibility for benefits? If lien rights may be involved?
8. Have you discussed the advantages and disadvantages of using a structured settlement with your client?
9. Is a minor involved in the settlement? If so, are the minor's rights being protected? Should the settlement be approved by the court? See ORS 126.025.
10. Did your client file bankruptcy? If so, it may be necessary to obtain relief from the bankruptcy stay before moving to dismiss in a state court action. See *In re Enyedi,* 371 BR 327 (Bankr. N.D. Ill. 2007). Also see item number 7 under *Intake Information* above. You must also execute a new fee agreement listing the bankruptcy trustee as a co-plaintiff and seek the trustee's approval of any settlement.
11. Have you confirmed your client's (or clients') consent to the settlement in writing?
12. Have you prepared a settlement accounting and reviewed it with the client?
13. Have you sent your client a closing letter?
14. Have you returned the client's original documents?
15. Have you advised your client to speak with an accountant about any potential tax liability?

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SETTLEMENT OR JUDGMENT DISBURSAL CHECKLIST FOR PAYMENT OF MEDICAL BILLS OR LIENS

☐ Is the client in bankruptcy? If so, it may be necessary to obtain relief from the bankruptcy stay before moving to dismiss in a state court action. See *In re Enyedi*, 371 BR 327 (Bankr. N.D. Ill. 2007). Also see Personal Injury Claims and Bankruptcy, PLF *In Brief*, February 2008. Available online at www.osbplf.org. Further, the bankruptcy trustee should sign the fee agreement as a client and must consent to any settlement of the legal claim.

☐ Did the client receive benefits from a workers' compensation insurer, Medicaid, Medicare, or another source of any public benefits? If so, there may be a lien against the settlement proceeds. Determine the client's benefit status and ascertain lien amounts, if any. Also, for any benefits received from the Crime Victims Compensation Fund, etc. determine if you must obtain approval of any settlement.

☐ Will you need court approval of the settlement?

☐ Have you discussed the possibility of a structured settlement with your client and asked if they are interested in obtaining information about potential future payment streams?

☐ Does your client need to consider a Special Needs Trust (or, Pooled Trust if they are over 65 years of age) to protect against being disqualified from receiving public benefit in the future?

☐ If your client is a Medicare recipient or will they soon be Medicare eligible (either by reaching the age of 65 or by having been a Social Security Disability Income recipient for the requisite period of time) have you obtained a Conditional Payment Letter and Final Demand from Medicare? Have you determined whether you must fund a Medicare Set-Aside for future medical treatment and, if so, what is the amount needed?

☐ Clearly mark files when a notice of lien is received in a client's case. A red stamp on the outside of the filing stating "LIEN FILED" works well. If you are using case management software, make a prominent note in the client's electronic record.

☐ If a notice of lien has been filed, contact the courthouse in the county where the lien was filed to see if the lien has been satisfied. If not, call the lien holder to verify the amount of the lien and list that amount, along with the date called and the name of the personal spoken with, on your list of bills.

☐ Obtain client's consent in writing to negotiate and pay all outstanding medical bills out of any settlement or judgment obtained for the client. (Explain the benefits of doing it in this manner.)

☐ Keep a running list of all bills incurred by the client as they are received in the office. Keep all bills in a separate envelope in the file.

- ☐ Have the client review all bills prior to final disbursal to see if any are missing.

- ☐ Prior to final disbursal, make a list of all bills (doctor, telephone number, and amount) and a list of any hospital (or other) liens (name, date of filing, and amount).

- ☐ Call each doctor or medical care provider to verify amount owed. Document your list of bills with the date called, the person spoken with, and the amount of the bill.

- ☐ Send a cover letter to the medical provider with each payment confirming the date the provider was called, the person spoken to, and the amount reported as due.

- ☐ Pay any outstanding liens and make sure a satisfaction of lien is recorded. For contractual liens or reimbursement rights, obtain written confirmation from the insurer, etc. that their interest has been satisfied.

- ☐ Have you discussed with your client whether their settlement is confidential and the potential consequences of breaching a confidentiality clause?

- ☐ Send a final statement to client outlining all payments made from the judgment or settlement including a detailed accounting for the reimbursement of any litigation costs you have advanced on the case.

IMPORTANT NOTICES

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CHAPTER 6

ESTATE PLANNING AND ADMINISTRATION; GUARDIANSHIPS AND CONSERVATORSHIPS

Melissa F. Busley
Dunn Carney LLP

Chapter 6

ESTATE PLANNING & ADMINISTRATION
GUARDIANSHIPS & CONSERVATORSHIPS

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To view these chapter materials and the additional resources below on or before October 30, go to www.osbplf. org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After October 30, select Past CLE, select Learning The Ropes, and click on program materials under Quick Links.

Additional Resources

Duties of a Conservator, Professional Liability Fund

Circuit Court letter to the Personal Representatives of the Estate, September 2016

Capacity Issues in Representing Clients, Oregon Estate Planning and Administration Section Newsletter, April 2010

ESTATE PLANNING AND ADMINISTRATION; GUARDIANSHIPS AND CONSERVATORSHIPS[1]

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: <u>be responsive, respectful and pragmatic in all of your dealings</u>. 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."

[1] Thank you to my colleague Heather L. Guthrie for graciously allowing me to use her presentation materials.

2. ***Establishing the relationship.***

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.

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.
l. 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 notices 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:

1. Administering Oregon Estates. Oregon Bar Association Continuing Legal Education publication, updated periodically.
2. Administering Trusts in Oregon. Oregon Bar Association Continuing Legal Education publication, updated periodically.
3. Elder Law. Oregon Bar Association Continuing Legal Education publication, updated periodically.
4. Guardianships, Conservatorships and Transfers to Minors. Oregon Bar Association Continuing Legal Education publication.
5. Oregon Revised Statutes chapters 111 through 130.
6. Will and Trust Forms, published by US Bank National Association.
7. The list-serv 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. WHAT IS AN AVERAGE DAY LIKE IN THIS PRACTICE AREA?

III. WHAT ARE THE PROS AND CONS OF THIS PRACTICE AREA?

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.

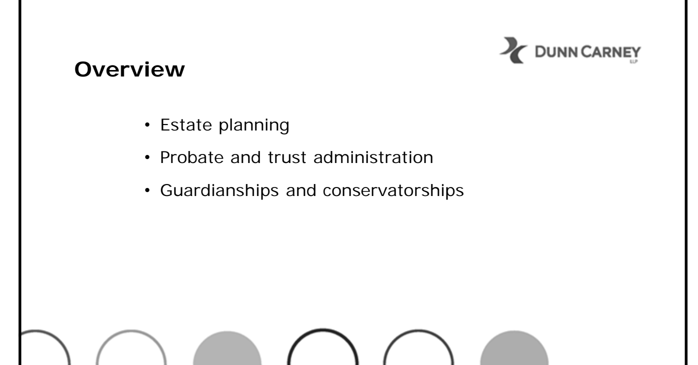
E. ***Personality characteristics of a good estate planning and administration practitioner***. The following is a list of personality characteristics that are important to have in order to succeed and enjoy practicing in this area:

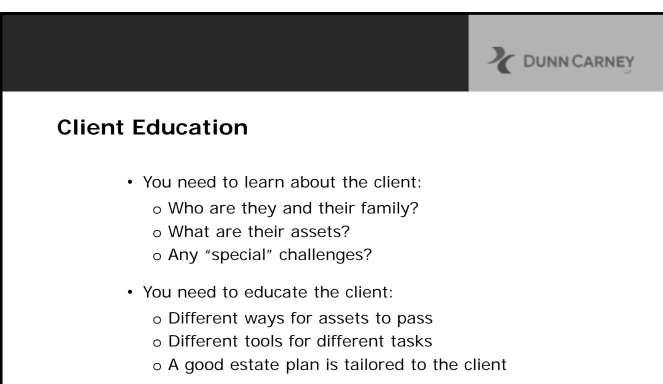
1. A good listener
2. Compassionate
3. Detail-oriented
4. Practical
5. Patient
6. Must enjoy working with elderly people

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
DUNN CARNEY LLP


DUNN CARNEY
Overview
• Estate planning
• Probate and trust administration
• Guardianships and conservatorships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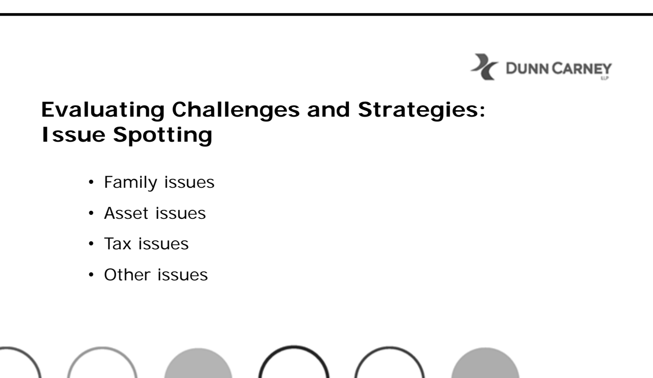
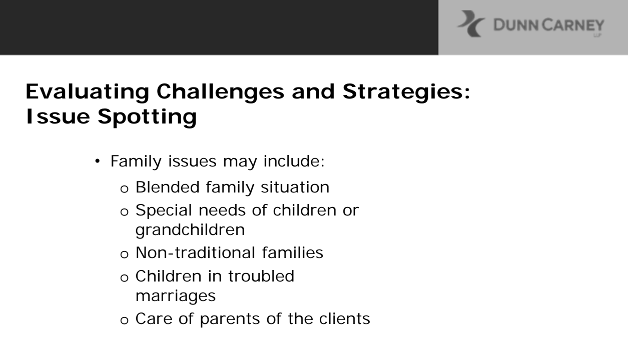
Client Education
• You need to learn about the client:
o Who are they and their family?
o What are their assets?
o Any "special" challenges?
• You need to educate the client:
o Different ways for assets to pass
o Different tools for different tasks
o A good estate plan is tailored to the client


DUNN CARNEY
Evaluating Challenges and Strategies: Issue Spotting
• Family issues
• Asset issues
• Tax issues
• Other issues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Evaluating Challenges and Strategies: Issue Spotting
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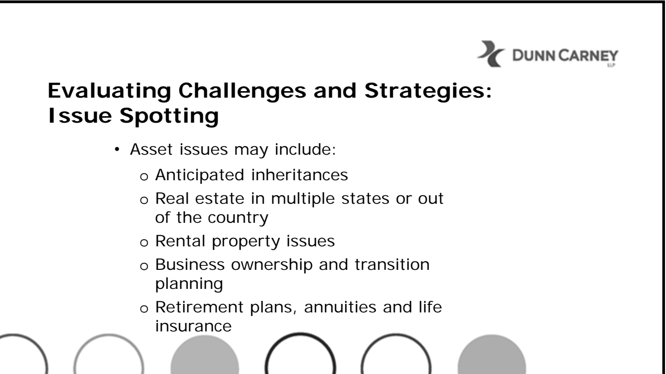
o Children in troubled marriages
o Care of parents of the clients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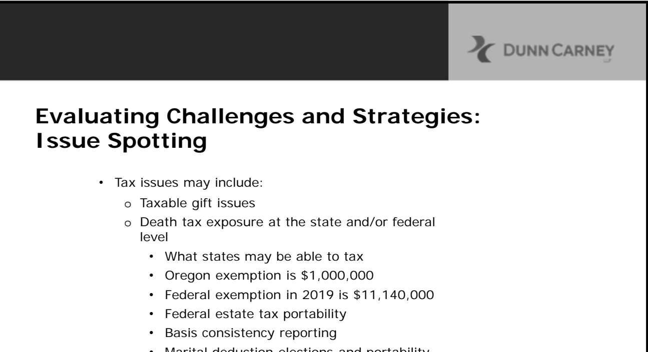
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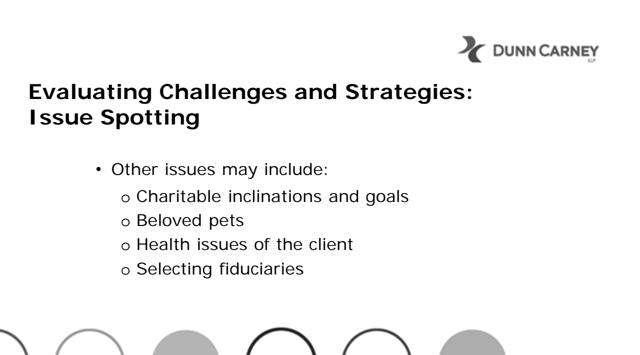
Evaluating Challenges and Strategies:
Issue Spotting
• Tax issues may include:
o Taxable gift issues
o Death tax exposure at the state and/or federal level
• What states may be able to tax
• Oregon exemption is $1,000,000
• Federal exemption in 2019 is $11,140,000
• Federal estate tax portability
• Basis consistency reporting
• Marital deduction elections and portability require timely filing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Evaluating Challenges and Strategies:
Issue Spotting
• Other issues may include:
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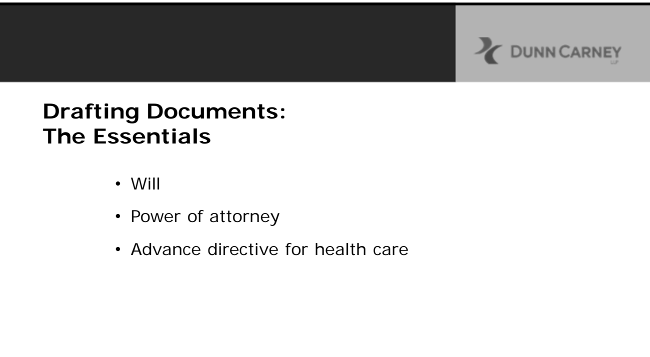
o Beloved pets
o Health issues of the client
o Selecting fiduciaries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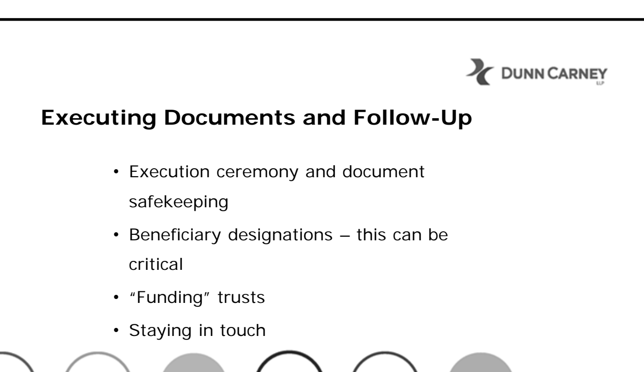
Drafting Documents:
The Essentials
• Will
• Power of attorney
• Advance directive for health care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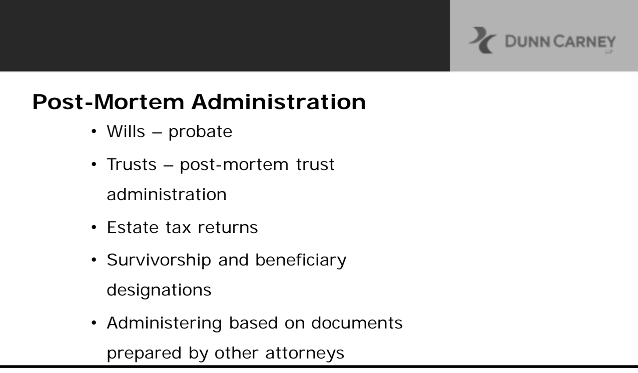
Executing Documents and Follow-Up
• Execution ceremony and document safekeeping
• Beneficiary designations – this can be critical
• "Funding" trusts
• Staying in touch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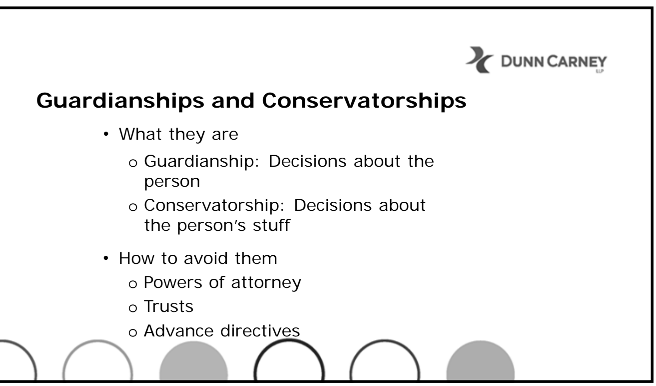
Post-Mortem Administration
• Wills – probate
• Trusts – post-mortem trust administration
• Estate tax returns
• Survivorship and beneficiary designations
• Administering based on documents prepared by other attorneys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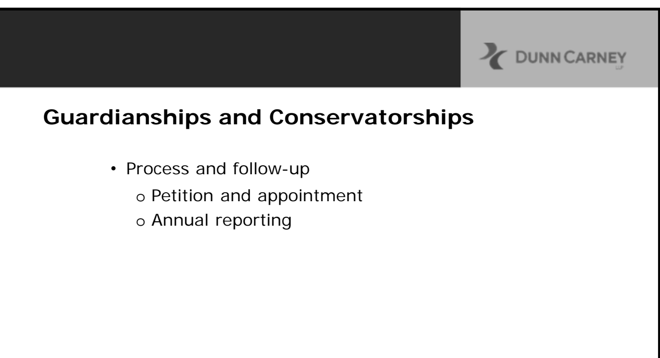
Guardianships and Conservatorships
• What they are
o Guardianship: Decisions about the person
o Conservatorship: Decisions about the person's stuff
• How to avoid them
o Powers of attorney
o Trusts
o Advance directives



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

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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?

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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*

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
1021 SW Fourth Avenue Portland Oregon 97204
Probate Department 503-988-3022 Opt.4

'2016

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 a 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 is it 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 Shaefer 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

FAMILY LAW

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Chapter 7

DOMESTIC RELATIONS AN OVERVIEW

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To view these chapter materials and the additional resources below on or before October 30, 2019 go to www.osbplf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After October 30, 2019, 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[1]

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 party must file and serve their USD within 14 days of service of the motion seeking temporary support.

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:

http://www.oregonchildsupport.gov/professionals/index.shtml

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. <u>You cannot have *any* contact with a party who is represented by an attorney, absent the representing attorney's consent</u>. 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 of 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.

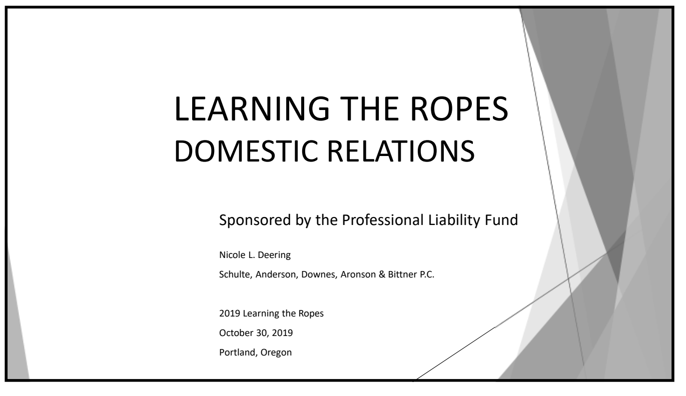
The same principle is at work in cases where the parties want a "quicky" divorce, and neither wants to do any discovery because they "trust" one another and they "already know" what assets and debts exist. Another variation is where the lawyer is called upon to review an agreement reached in mediation, 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.

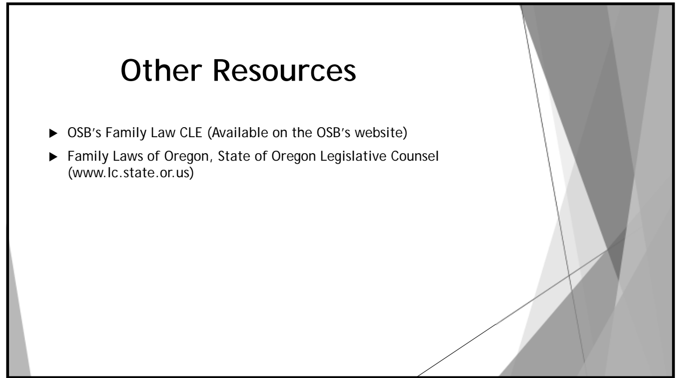
M. Drafting the Judgment. Make up your own form of Judgment with all the scenarios written in so you don't forget any issues. Then, for each dissolution tailor the language for your client's fact pattern, deleting issues that do not apply. Always think about modifications and appeals down the road, and 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.



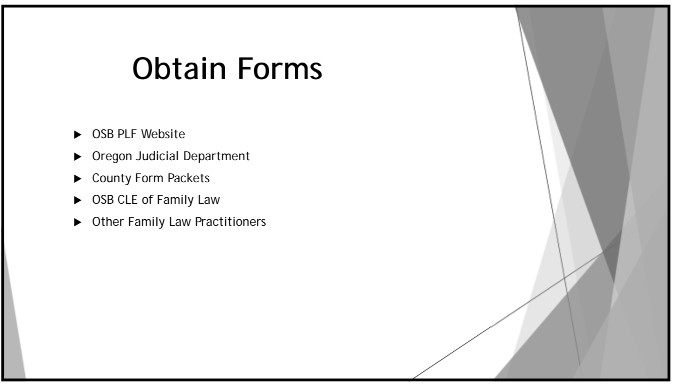
What Does Domestic Relations Law Include?

- Divorce
- Legal Separation
- Modifications
- Custody, Parenting Time and Child Support for Unmarried Parents
- Domestic Partnerships
- Paternity
- Third Party Custody and Visitation
- Adoptions
- Guardianships
- Abuse Prevention (FAPA)
- Stalking
- Premarital Agreements
- Unbundled Services

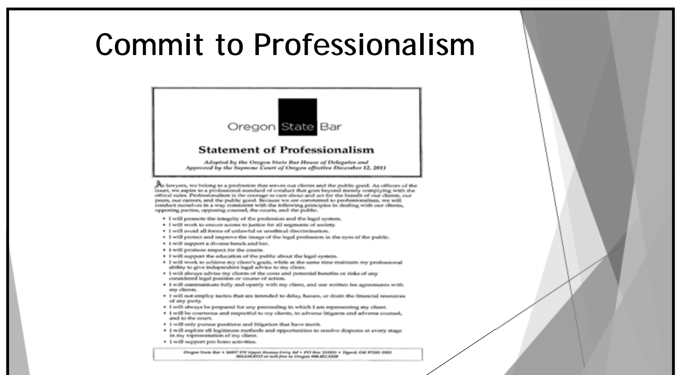


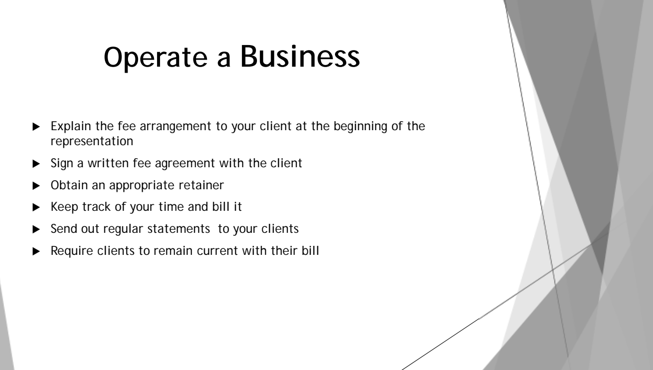
Find A Mentor

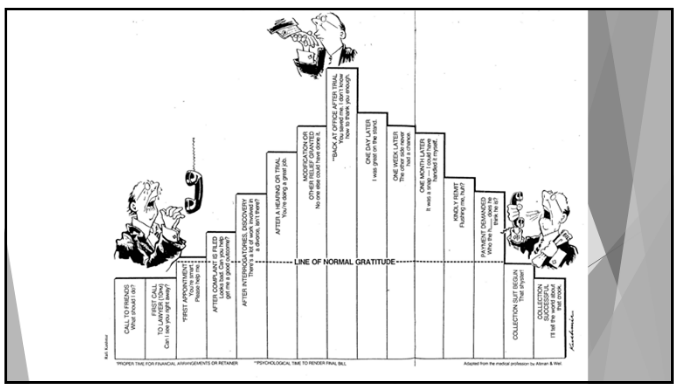
- An attorney in your office
- OSB Mentorship Program
- County Bar Mentorship Programs
- Join the OSB Family Law Section. Subscribe to and read the OSB Family Law Listserve
- Attend Family Law CLEs

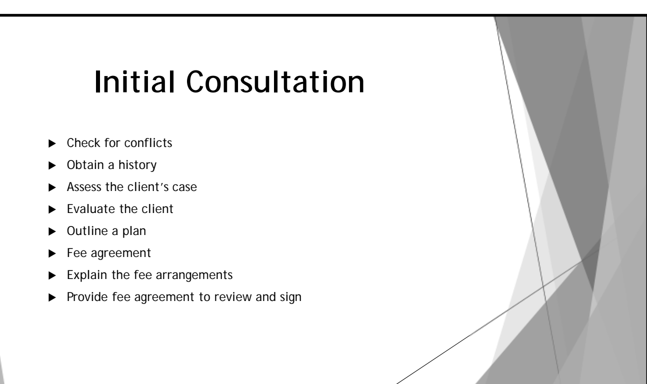

Obtain Forms
OSB PLF Website
Oregon Judicial Department
County Form Packets
OSB CLE of Family Law
Other Family Law Practitioners

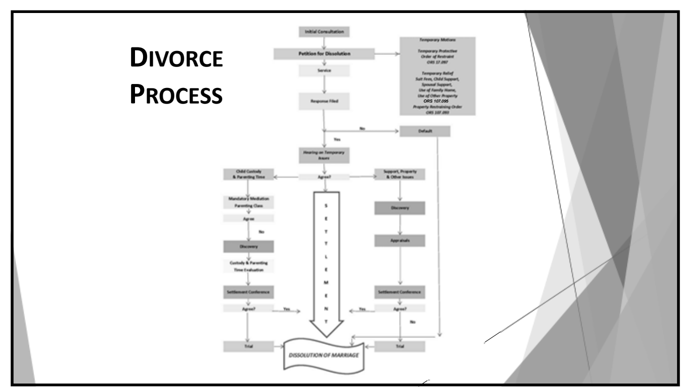
Build a Positive Relationship with Your Client
Select your client carefully
Listen to your client
Be realistic and honest
Be responsive to phone calls from your client
Keep your client updated as to the status of the case
Be empathetic, but maintain appropriate boundaries
Refer your client to other professionals, where needed
Talk about fees to help you prepare for your case
Observe and honor the grieving process of your client

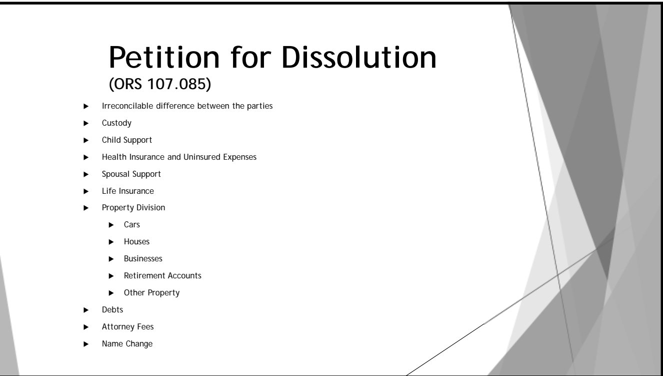

Commit to Professionalism
Oregon State Bar
Statement of Professionalism


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


LINE OF NORMAL GRATITUDE

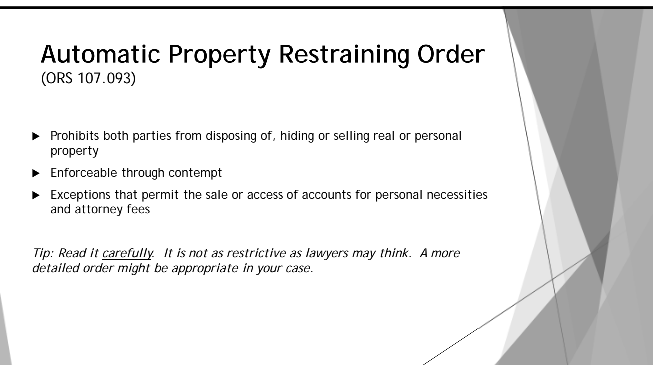

Initial Consultation
Check for conflicts
Obtain a history
Assess the client's case
Evaluate the client
Outline a plan
Fee agreement
Explain the fee arrangements
Provide fee agreement to review and sign

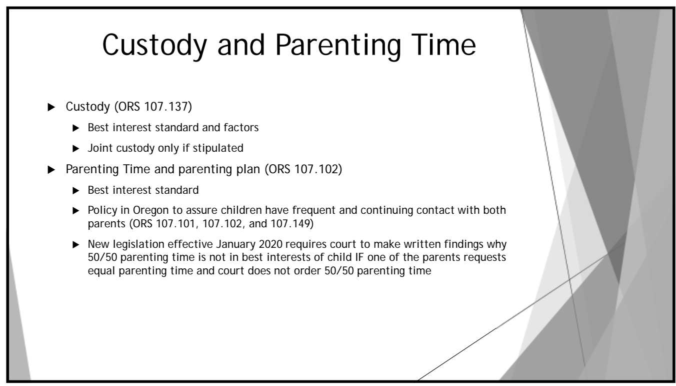


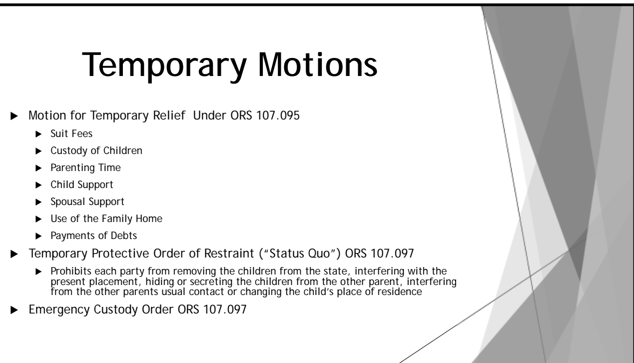


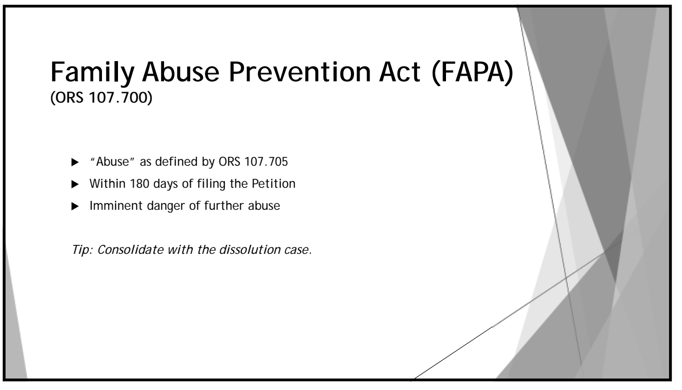
Documents to Accompany Petition

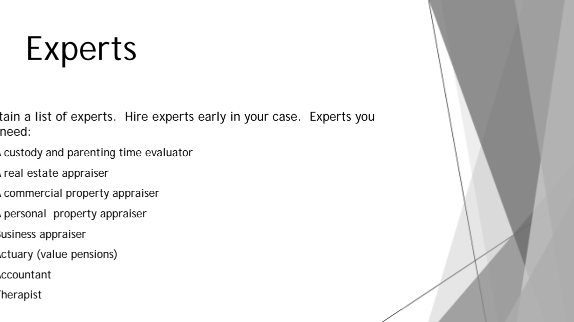
- Summons, including Statutory Restraining Order and Request for Hearing Re: Statutory Restraining Order
- Record for Dissolution of Marriage (Vital Stats Form)
- Notice of Filing Family Law Confidential Information Form
- Family Law Confidential Information Forms (for all parties)
- Certificate Re: Pending Child Support Proceedings and/or Existing Child Support Orders/Judgments



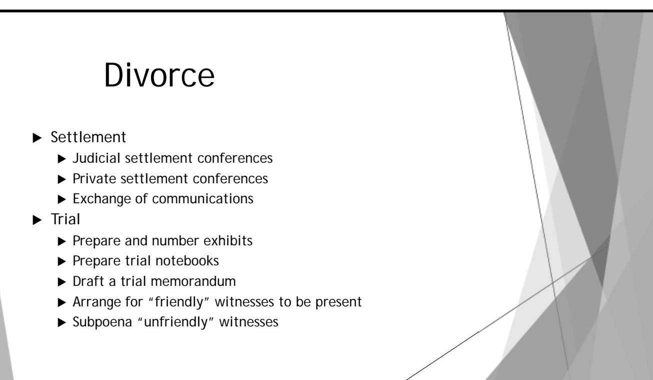





Family Abuse Prevention Act (FAPA)
(ORS 107.700)
"Abuse" as defined by ORS 107.705
Within 180 days of filing the Petition
Imminent danger of further abuse
Tip: Consolidate with the dissolution case.


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

Thank You!
"For a divorce case, that went smoothly."

CHAPTER 8

BUSINESS LAW/ BUSINESS TRANSACTIONS

W. Todd Cleek
Cleek Law Office LLC

Laura E.K. Warf
Davis Wright Tremaine LLP

Learning the Ropes
Business Transactions

October 30, 2019

Laura E.K. Warf and W. Todd Cleek

1. Introduction

2. What do Business Lawyers Do?

   a. General Description – 30,000-foot view
      - Entity selection and formation
      - Real estate development (purchase and sale)
      - Financing – equity and debt
      - Mergers & acquisitions
      - Employment advice
      - Compensation and benefits
      - Securities
      - Intellectual property
      - Regulatory compliance
      - Contract review
        - ➢ Vendor agreements
        - ➢ Service agreements
        - ➢ Goods agreements
      - Succession planning
      - Buying and selling of business assets
      - Licensing and other regulatory advice
      - Tax
      - Secured transactions

   b. Specific Examples
      - Mergers and Acquisitions
      - Representing Small Businesses

3. Day in the Life

   a. Negotiating and advising through emails, meetings, conference calls etc

   b. Document drafting and review
      - Nondisclosure agreements
      - Term Sheets/Letters of Intent
      - Purchase and Sale Agreements
        - ➢ Real Estate
        - ➢ Asset purchases
        - ➢ Equity purchases
        - ➢ Goods and services
        - ➢ Other
      - Leases
        - ➢ Real Estate
        - ➢ Equipment
      - Licensing and other regulatory documents
      - Entity Documentation
        - ➢ Operating Agreements and other formation documents
        - ➢ Consent Resolutions
      - Loan Documents
        - ➢ Promissory notes
        - ➢ Loan agreements
        - ➢ Trust deeds

- Guaranties
- Collateral assignments
- Construction contracts
- Other Real Estate-related agreements
    - ➢ Easement and licenses
    - ➢ Environmental indemnities

c. Lawyer to counselor/strategic advisor

Speakers will take questions at the end of this segment.

4. <u>Characteristics of a Successful Business Attorney</u>
    a. Problem solver/strategic thinker and advisor
    b. Pragmatic – focused on practical solutions
    c. Skilled at listening to the client to determine what they really are trying to accomplish, want, and need.
    d. Organized
    e. Able to analyze risks and articulate them in a way clients can understand
    f. Negotiator
    g. Emotionally intelligent/People skills – ability to relate well with clients and also be able to evaluate what risks your clients present
    h. Initiator/planner/self-motivated and able to pace yourself
    i. Attention to detail
    j. Passion/"Fire in the belly"
    k. What personal characteristics does transaction work draw on for Laura and Todd
5. <u>Advantages of Practicing as a Business Attorney</u>
    a. Common goal
    b. Collaborative
    c. Long-term relationships with clients
    d. Helping clients with an opportunity they want
    e. Allows for efficiencies
    f. Schedule can be flexible
6. <u>Disadvantages of Practicing as a Business Attorney</u>
    a. Risks can be difficult to quantify and analyze
    b. Urgency - this varies depending on the deal and client
    c. Predictability can vary widely

Speakers will take questions at the end of this segment.

7. Business Development and other Practice Tips
    a. Finding and Developing Clients
        - Where to go and who to network with – industry groups; other professionals
        - How to reach people in a way that encourages them to hire you as their lawyer
        - Presenting yourself in a way that makes your strength and interests clear
    b. Know your own limits - associate other lawyers as co-counsel/get help; establish a network of professionals in various fields; learn what cases to reject
    c. Know your client base and where your money is coming from; have a sufficiently diverse base for law practice sustainability
    d. Find mentors
    e. Attend substantive CLEs

Speakers will take questions at the end of this segment.

8. <u>Resources and Practice Tools:</u>

a. Free resources

- Bar Books
- FastCase
- PLF forms
- Law libraries

b. Other resources

- Practical Law (affiliated with Westlaw)
- Onecle
- Friedman on Leases
- RealDealDocs.com
- American Arbitration Association forms
- JAMS Mediation, Arbitration, ADR services and forms
- National Venture Capital Association (NVCA) forms
- Building Owners and Managers Association (BOMA) forms
- Lexis Nexis Forms and Templates
- Nolo.com
- Podcasts in your industry of interest; podcasts on practice management

CHAPTER 9

CIVIL MOTION PRACTICE

Melissa Bushnick
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Chapter 9

CIVIL MOTION PRACTICE

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LEARNING THE ROPES

– CIVIL MOTION PRACTICE –

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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.

- The rules of statutory construction apply. The court will attempt to ascertain the meaning that the legislature most likely intended, based on an examination of the text in context and legislative history to the extent it is helpful. *Alfieri v. Solomon*, 358 Or 383, 392-404, 365 P3d 99 (2015) (statutory construction of mediation statutes to determine whether trial court properly struck pursuant to ORCP 21 E allegations about statements made during mediation); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (stating current methodology for statutory construction).

- The court need not consider untimely arguments or responses. *See Bailey v. State of Oregon*, 219 Or App 286, 292-294, 182 P3d 318 (2008) (untimely response to motion to dismiss is insufficient to preserve issues for appeal).

- 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. Timing

- 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).

- Under ORS 174.120(3), when the last day a court may perform an act on is a legal holiday, the act must be performed "on the next day the court is open for the purpose of filing pleadings and other documents. *State v. Meiser*, 290 Or App 617, 619, 415 P3d 335 (2018). This is also the rule under ORCP 10A.

C. 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. A new fee schedule went into effect October 1, 2019.
https://www.courts.oregon.gov/Documents/2019_CircuitFeeSchedule_public_eff-2019-10-01.pdf

D. 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. It was last updated in August 2018.
https://www.mbabar.org/assets/documents/multnomah%20county%20motion%20panel%20consensus%20statement%20august%202018.pdf

E. 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

In addition to motions based on the proper place for venue, ORS 14.110 provides for motions to change venue when "the convenience of witnesses and the parties would be promoted by such change." ORS 14.110(1)(c). Affidavits or declarations will be required to show that the motion is not made for purposes of delay and to show why convenience requires a different venue.

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).

The court may set aside an *order* of default for "good cause shown" upon motion of the defaulted party. ORCP 69 F. *See Portland Gen. Elec. Co. v. Ebasco Servs., Inc.*, 263 Or App 53, 64-65, 326 P3d 1274 (2014) for the court's "excusable-neglect" analysis.

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); *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).

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 between the same parties on the same cause. *Fuentes v. Tillett*, 263 Or App 9, 25, 326 P3d 1263 (2014) (another action pending); *see Castro v. Ogburn*, 140 Or App 122, 914 P2d 1 (1996).

- ORCP 21 G(2) – Plaintiff lacks capacity to sue, claimant is not real party in interest, statute of limitations. *See, e.g., Mountain Woodworkers, Inc. v. Voss,* 218 Or App 707, 717, 180 P3d 735 (2008).

- 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)

A motion to dismiss for failure to state a claim tests the legal sufficiency of the allegations; all well-pleaded facts are assumed to be true and the court draws all reasonable inferences in the non-moving party's favor. *Rowlett v. Fagan*, 262 Or App 667, 679-80, 327 P3d 1 (2014); *Stewart v. Kids Incorporated of Dallas, Or.,* 245 Or App 267, 269, 261 P3d 1272 (2011), *rev dismissed*, 353 Or 104 (2012); *Moser v. Mark,* 223 Or App 52, 195 P3d 424 (2008).

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. 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

ORCP 21 B provides for a motion for judgment on the pleadings after the pleadings are closed and in advance of trial. *See Simpkins v. Connor*, 210 Or App 224, 228, 150 P3d 417 (2006); *Beason v. Harcleroad*, 105 Or App 376, 379-80, 805 P2d 700 (1991).
The court may enter judgment on the pleadings if the allegations show the nonmoving party cannot prevail as a matter of law. ORCP 21 B. *Rowlett v. Fagan*, 358 Or. 639, 649, 369 P3d 1132 (2016); *Lehman v. Bielenberg*, 257 Or App 501, 508, 307 P3d 478 (2013); *Pendergrass v. Fagen*, 218 Or App 533, 537, 180 P3d 110 (2008), *rev den*, 344 Or 670 (2008) (court did not err in granting plaintiff's motion for judgment on the pleadings in FED action).

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).

  When neither party objects, a court may treat a motion to dismiss filed with declarations and other supporting exhibits as a motion for summary judgment. *Schiele v. Montes*, 231 Or App 43, 47-48, 218 P3d 141 (2009); *see L. H. Morris Electric v. Hyundai Semiconductor*, 203 Or App 54, 61-63, 125 P3d 1 (2005), *rev den*, 341 Or 140 (2006) (treating motion to dismiss under ORCP 21 B as motion for summary judgment where both parties submitted evidence outside the pleadings without objection); *Kelly v. Olinger Travel Homes, Inc.*, 200 Or App 635, 641, 117 P3d 282 (2005), *rev den*, 340 Or 308 (2006) (same).

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.

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.

The court may in its discretion, deny a motion to amend to add new claims because it is not timely filed, because the proposed amendment lacks colorable merit, or because the amendment would prejudice the opposing party. *Ballard v. City of Albany*, 221 Or App 630, 191 P3d 679 (2008) (affirming denial of motion to amend on day of trial); *O'Hara v. David Blain Construction, Inc.*, 216 Or App 384, 388, 173 P3d 1257 (2007); *Boise Cascade Corp v. Board of Forestry*, 216 Or App 338, 336-37, 174 P3d 587 (2007), *rev den*, 344 Or 390 (2008), and *cert den*, 555 US 828 (2008).

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."

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 404, 413, 939 P2d 608 (1997). "The whole scheme of summary judgment is designed to cut off litigation at an early stage, without subjecting the parties to months or years of extensive and expensive litigation * * * ." *Tiedemann v. Radiation Therapy Consultants*, 299 Or 238, 246, 701 P2d 440 (1985). *See Assoc. Unit Owners of Timbercrest Condo. v. Warren*, 352 Or 583, 596-597, 288 P3d 958 (2012) (reviewing legislative intent of ORCP 47).

The court reviews the facts and draws all reasonable inferences in favor of the nonmoving party. ORCP 47 C; *Chapman v. Mayfield*, 263 Or App 528, 530, 329 P3d 12 (2014); *see Perry v. Rein,* 215 Or App 113, 168 P3d 1163 (2007) (record permitted competing inferences); *West v. Allied Signal, Inc.*, 200 Or App 182, 113 P3d 983 (2005). "Summary judgment is proper if the 'pleadings, depositions, affidavits, declarations and admissions on file show that there is not genuine issue as to any material fact.' ORCP 47 C." *Greer v. Ace Hardware Corp.*, 256 Or App 132, 134, 300 P3d 202 (2013); *Hagler v. Coastal Farm Holdings, Inc.,* 354 Or 132, 140, 309 P3d 1073 (2013).

When the moving party does not have the burden of proof, it may move for summary judgment without coming forward with evidence in support of its motion. Rather, the party with the burden of proof must demonstrate there is

no admissible evidence to create a triable issue of fact. *O'Dee v. Tri County Metropolitan Trans. Dist.*, 212 Or App 456, 157 P3d 1272 (2007).

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; *Thorson v. Bend Memorial Clinic*, 291 Or App 33,36, 419 P3d 756 (2018); *Mason v. BCK*, 292 Or App 580, 584,____P3d_____(2018). 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 21,* 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 modifie* 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 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. AlliedSignal, 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. CH. 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).

Of course, the submission of an ORCP 47 E affidavit or declaration does not automatically create an issue of fact. *VFS Financing, Inc., v. Shilo Management Corp.*, 277 Or App 698, 706, 372 P3d 582 (2016), *rev den* 360 Or 401 (2016). An ORCP 47 E affidavit will create an issue of fact when the expert testimony is "'required' to establish a genuine issue of material fact" and not otherwise. *Id* (quoting *Hinchman v. UC Market, LLC.,* 270 Or App 561, 569, 348 P3d 328 (2015)); *Gibson v. Bankofier*, 275 Or App 257, 281, 365 P3d 568 (2015) (same).

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 or claims

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)).

A timely motion for a directed verdict is a "necessary predicate" to a post-trial motion challenging the sufficiency of the evidence. *Gritzbaugh Main St. Properties, LLC v. Greyhound Lines, Inc.*, 205 Or App 640, 135 P3d 345 (2006) *opinion adh'd to on recons*, 207 Or App 628, 142 P3d 514 (2006), *rev den*, 342 Or 299 (2007); *Arena v. Gingrich*, 305 Or 1, 8, 748 P2d 547 (1988). A party cannot challenge the sufficiency of the evidence post trial in a motion for j.n.o.v., or an appeal, unless the party has first moved for directed verdict before the jury is instructed. *See* ORCP 60; *Edward D. Jones*, 161 Or App at 564.

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.

See, e.g., DeWolf v. Mt. Hood Ski Bowl, LLC, 284 Or App 435, 449-452, 284 P3d 435 (2017) (court affirmed order granting new trial in favor of plaintiff based on defendant's misconduct under ORCP 64 B(2) in failing to produce evidence in violation of court's in limine order); *Gragg v. Hutchinson*, 217 Or App 342, 176 P3d 407 (2007), *rev den*, 344 Or 401 (2008) (reviewing arguments that trial court erred in granting new trial for legal error under ORCP 64 B(6)).

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.

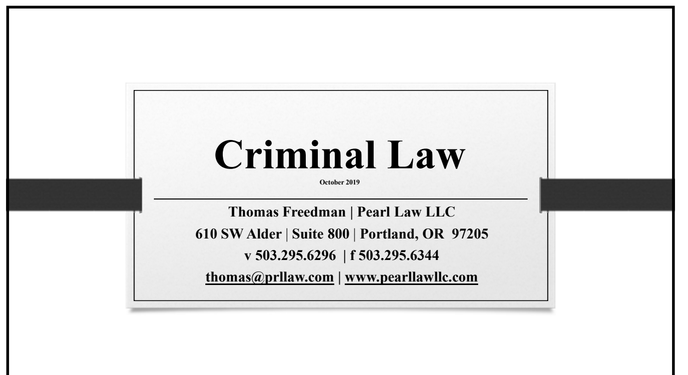
C. Motions to Stay Enforceable Judgment Pending Determination of Post-Trial Motions

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.

CHAPTER 10

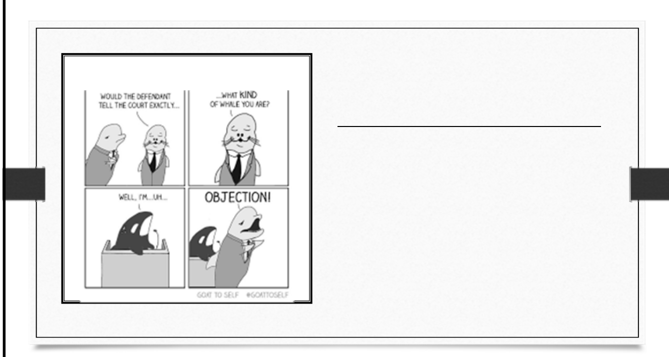
CRIMINAL LAW

Thomas Freedman
Pearl Law LLC



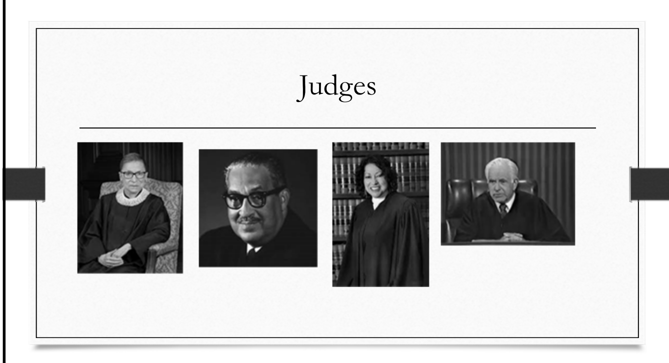
Why Criminal Law?

- Make a difference in people's lives. Help people.
- Fill the most important role in the justice system.
- You can go to court. And try cases. (And be a real lawyer!)
- Be your own boss. Choose which cases to take.
- Make a living.
- Interesting stories for cocktail parties.
- Path to becoming a Judge.
- Do something you believe in. Do something you are passionate about.



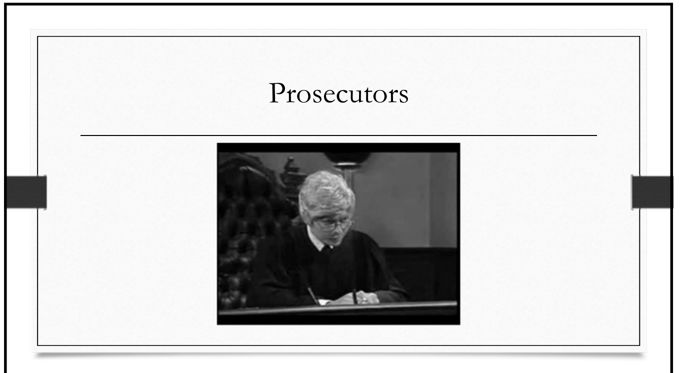
Criminal Justice System

- Judges – define the law.
- Prosecutors – enforce the law.
- Defense Counsel
  - zealously advocate for and defend the accused
  - important check on government power and abuse
  - stand up for the underdog.
- "The first thing we do, let's kill all the lawyers."



Criminal Justice System: Judges

- "All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary." Andrew Jackson, 1882
- State court judges are elected; federal court judges are generally appointed (with advice & consent of the Senate) for life.
- Criminal Cases: Judges make rulings whether the government followed the law in its investigation, preside over cases involving a person's guilt, impose punishment.



Criminal Justice System: Prosecutors

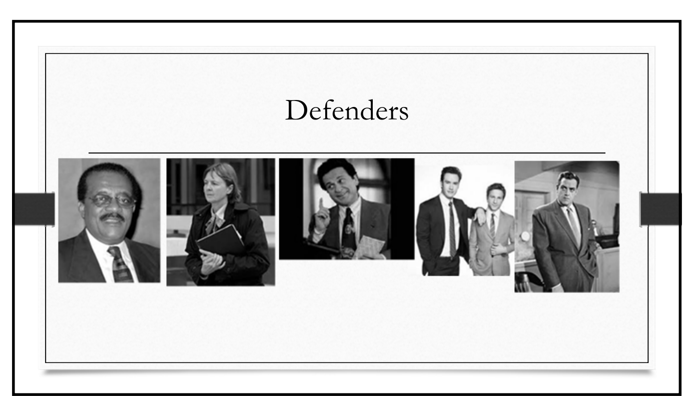
- "The duty of the prosecutor is to seek justice, not merely to convict." ABA Criminal Justice Standards for the Prosecution Function 3-1.2 (4th ed.).
- *Brady v. Maryland*, 373 US 83 (1963) – The prosecution's withholding of evidence material to guilt or punishment violates due process.

Types of Prosecutors

- State – Deputy District Attorney (DDA)
- Federal – Assistant United States Attorney (AUSA)
- Assistant Attorney General – federal appellate attorney
- Municipal Prosecutor – city attorney

Prosecutors – Typical Activities

- Review police reports and follow up with law enforcement.
- Meet with complaining witnesses/case witnesses.
- Review discovery prepared by law enforcement and staff for the defense.
- Meet with supervisors to review cases & receive input on proposed settlements/plea offers and upcoming trials.
- Court appearances:
  - Arraignments & sentencings
  - Release hearings, probation violation hearings, grand jury proceedings
  - Motions to suppress, other motion hearings
  - Trials.



Defenders

Types of Defense Attorneys

- Public defender – state or federal.
- Retained caseload – law firm or sole practitioner.
- Combination – retained cases and court-appointed conflict cases.
- Felony v. misdemeanor caseload.
- Appellate attorney.
- Post-conviction relief attorney.

Criminal Justice System: Defense Counsel

- "Defense counsel is essential to the administration of criminal justice."
- "Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their client's counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity."

ABA Criminal Justice Standards for Defense Function, 4-1.1 (4th ed.)

Defenders – Typical Activities

- Meet with clients – in jail or office, often with investigators.
- Phone calls, meetings or emails with clients, clients' families, prosecutors, probation officers, experts.
- Review defense-derived discovery, like investigator reports or client educational records.

Defenders – Typical Activities (con't)

- Review discovery prepared by government:
  - Look for possible motions to suppress evidence or motions *in limine*;
  - Review for information that might impact sentencing;
  - Look for areas that need investigation or expert consultation;
  - Mark areas for potential cross-examination of witnesses.

Defenders – Typical Activities (con't)

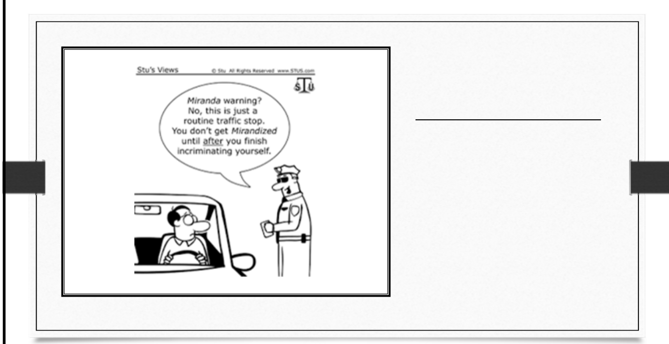
- Research and write motions:
  - Compel discovery;
  - Challenges to the charging document (e.g., missing element, multiplicity);
  - Challenges to the way the prosecution gathered the evidence (Motions to Suppress);
  - Pretrial motions and filings (*in limine* motions, jury instructions, *Daubert* challenges).

Defenders – Typical Activities (con't)

- Court appearances:
  - Arraignments;
  - Sentencing hearings;
  - Release hearings, probation violations;
  - Motions to suppress, other motion hearings;
  - Trials.

Which is More Important: Prosecution or Defense?

- Equally important.
- Prosecutors have more power than defenders, including:
  - Initial decisions over what charges to seek, including mandatory minimum sentences
  - Plea bargaining
  - Sentencing focus.
- Defenders stand up to those in power, fight for the underdog, are law enforcement officers of law enforcement officers, and have the ability to directly impact the lives of people in marginalized communities.



How to Be Successful Regardless of Role

- Be honest.
- Be humble.
- Be compassionate.
- Be respectful.
- Be ethical. If something seems not right, seek help. OSB Legal Ethics Helpline: 503-431-6475.
- Be creative.
- Don't sandbag or pull dirty tricks; a single victory obtained by underhanded means can ruin your reputation.
- Strive to be equally adept as a fact & law-lawyer; they are two essential halves of the same job.

Things to Remember

- ✓ Pick your clients and your cases carefully. Develop a good compass.
- ✓ Be prepared. It is your advantage, take advantage of it.
- ✓ Be honest. Do what you say you're going to do.
- ✓ Offer to help other lawyers and follow through on it.
- ✓ Don't promise too much to the new client. Promise clients your best efforts.
- ✓ Charge what you're worth, whether or not you're going to get it. After awhile, you will.
- ✓ Let people know what kind of cases you handle and that you are interested in referrals.
- ✓ Treat other lawyers, prosecutors, judges and clients the way you'd like to be treated.
- ✓ Don't be afraid to go to court.

Your First Case – Know the Answers to these Questions

- What are the charges?
- What does the statute say?
- What does the jury instruction say?
- What pretrial motions can you file? Should you file
  - How did the police contact with the citizen begin?
  - What searches were performed?
  - What statements were made?
- What other aspects of the case (substantive or procedural) should be addressed by motion?
- What are the potential defenses?
- What does the case law have to say on any of the above?

The Big 6 Generic Defenses

- It never happened.
- It happened, but I didn't do it.
- It happened, I did it, but it wasn't a crime.
- It happened, I did it, it was a crime, but it wasn't this crime.
- It happened, I did it, it was a crime, but I'm not responsible.
- It happened, I did it, it was a crime, but who gives a shite?

Advocacy

- To change "what is" into "what should be."

Clarence Darrow's Perspective

- "You can only protect your liberties in this world by protecting other [people's] freedom. You can only be free if I am free."
- "As long as the world shall last there will be wrongs, and if no man objected and if no man rebelled, those wrongs would last forever."
- "Sympathy is the child of imagination."

Criminal Defense Resources

- Oregon Criminal Defense Lawyers Association | www.ocdla.org
- Federal Public Defender | www.fd.org
- OSB criminal law resources via BarBooks | https://www.osbar.org/secured/barbooksapp/#/
- PLF –State Court Checklist | https://www.osbplf.org/assets/forms/pdfs//Criminal%20Case%20Checklist.pdf
- OSB mentor program
- Trial Watching

Yes, this happens. Frequently.

Good luck!

Find your truth…

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CHAPTER 11

AT THE CROSSROADS OF ETHICS AND PRACTICE MANAGEMENT

Sheila M. Blackford
Hong Dao
Rachel M. Edwards
Professional Liability Fund
Practice Management Advisors

Chapter 11

AT THE CROSSROADS OF ETHICS AND PRACTICE MANAGEMENT

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PowerPoint Slides 11-1

To view these chapter materials and the additional resources below on or before October 30, 2019, go to www.osbplf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After October 30, 2019, select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

a. PLF Practice Aids available at www.osbplf.org > Practice Management > Forms > View Forms by Category:
   - i. Trust accounting
     1. Accepting Credit Cards
     2. Client ledger card and trust journal
     3. Embezzlement Happens: Protect Your Firm
     4. Frequently Asked Trust Account Questions
     5. How to Set Up Your Trust Account in QuickBooks
     6. Notice to Financial Institutions- Opening an IOLTA Account in Oregon
     7. To Catch a Thief: How a Partner or Employee Can Steal from Your Firm
     8. Trust Account Reconciliation
   - ii. Docketing & Calendaring
     1. Calendaring Note
     2. Docket Control Follow-Up
     3. Docket Sheet
     4. Docketing and Calendaring Checklist
     5. Reminder and Tickler Systems
     6. State Court Rules
   - iii. Client Relations
     1. Using Email in the Office
   - iv. Conflicts of Interest
     1. Checklist for Avoiding Phantom Clients
     2. Conflict Disclosure and Consent Letters
     3. Conflict Informed Consent Checklists
     4. Conflict of Interest Self Audit
     5. Conflict of Interest Systems and Procedures

6. Declined Prospective Client Information Sheet
7. Lawyer Engages in Business Transaction with Client- Disclosure Letter
8. Request for Conflict Search and System Entry

v. Cybersecurity and Data Breach
1. Information Security Checklist for Small Businesses
2. Notice to Clients re Theft of Computer Equipment
3. Protect Client Information from Identity Theft
4. Protecting Yourself and Your Law Firm from Data Breach Checklist
5. Removing Metadata

vi. File management
1. File Closing Checklist
2. File Retention and Destruction Guidelines
3. New Client Information Sheet with Disclaimer
4. Production of Client File
5. Setting Up an Effective Filing System
6. The Ethics of Electronic Client Files: Floating in the Cloud

vii. Hardware and Software
1. ABA Technology Resources
2. Digital Signatures
3. Disclaimers
4. How to Backup Your Computer
5. Technology Resources for Mac Users

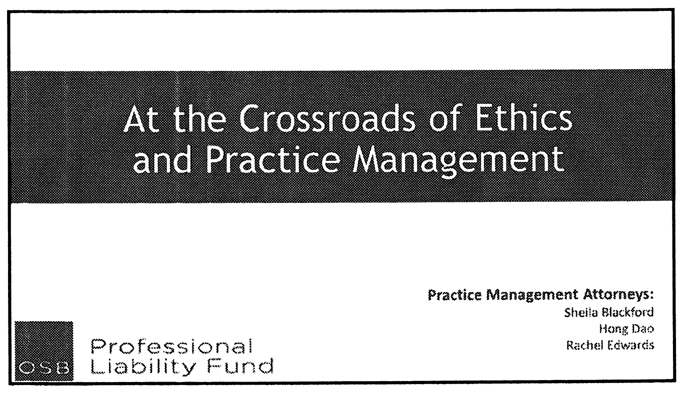
viii. Mail Handling
1. Mail Handling- Paper Filing System
2. Mail Handling- Paperless Filing System

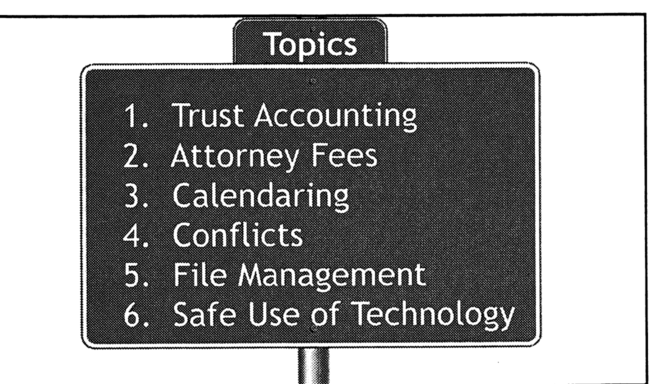
ix. Paperless Office and Cloud Computing
1. Checklist for Scanning Client Files
2. Documenting Email as Part of the Client File
3. Floating in the Cloud
4. Is It Time to Go Paperless?
5. Online Data Storage Providers
6. Our Paperless World 2013
7. Paperless in One Hour
8. Retention of Electronic Records
9. Saving Text Messages as Part of the Client File

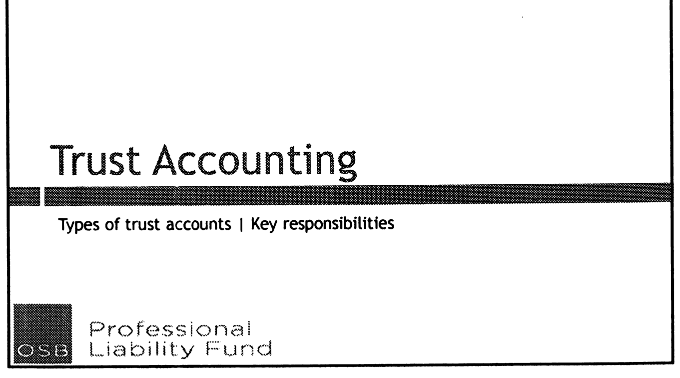
b. *InBrief* articles available at www.osbplf.org > Practice Management > Publications > In Brief:

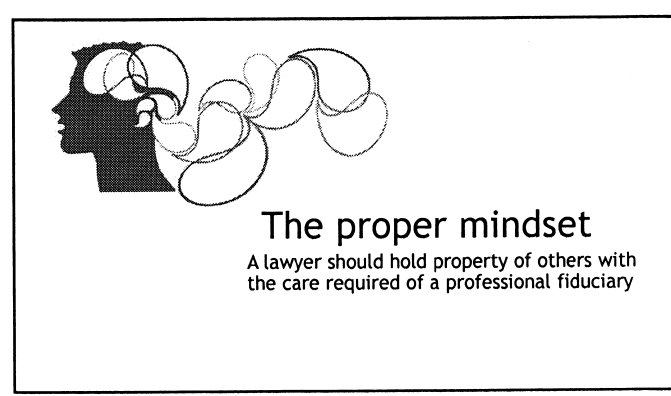
i. January 2019- File Retention and Destruction Procedures: Additional Safeguards to Protect Your Firm from Lost or Exposed Client Data
ii. January 2019- Malpractice Risk Factors and How to Avoid Them Part II
iii. October 2018- Malpractice Risk Factors and How to Avoid Them
iv. April 2017- Unwanted Data: How to Properly Destroy Data in Hardware
v. December 2016- What's Backing Up Your Data?
vi. April 2016- Accepting Credit Cards

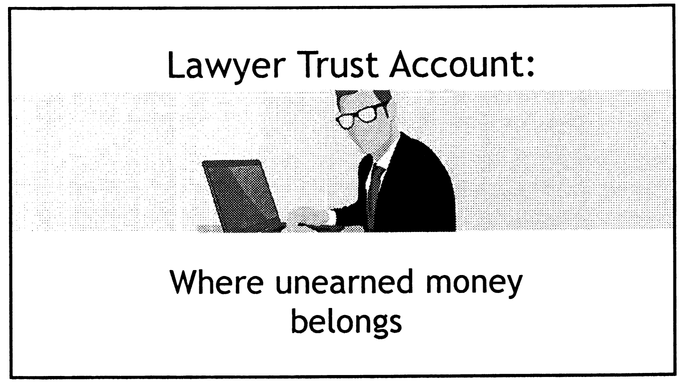
c. Additional articles available in our bi-monthly blog, *InPractice*, at www.osbplf.org > Blog

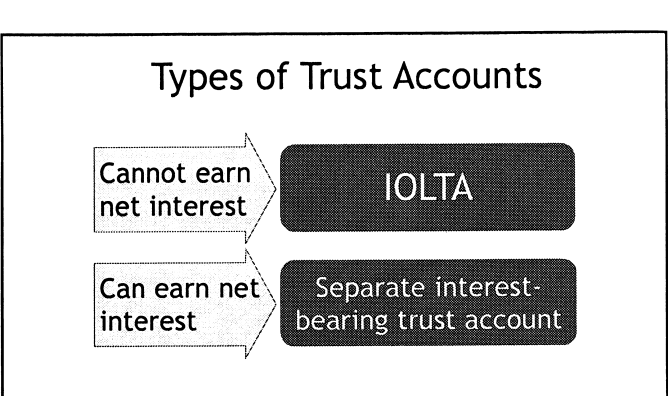

At the Crossroads of Ethics and Practice Management
Practice Management Attorneys:
Sheila Blackford
Hong Dao
Rachel Edwards
OSB
Professional
Liability Fund


Topics
1. Trust Accounting
2. Attorney Fees
3. Calendaring
4. Conflicts
5. File Management
6. Safe Use of Technology


Trust Accounting
Types of trust accounts | Key responsibilities
OSB
Professional
Liability Fund


The proper mindset
A lawyer should hold property of others with the care required of a professional fiduciary


Lawyer Trust Account:
Where unearned money belongs


Types of Trust Accounts
Cannot earn net interest
IOLTA
Can earn net interest
Separate interest-bearing trust account

Formula to calculate net interest:

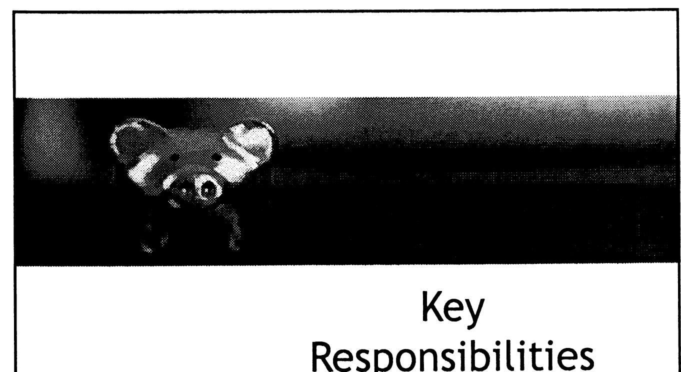
Principal x Interest Rate/12 x Number of Months = Interest

Example:
Principal = $10,000
Interest rate = 5%
Number of months = 1
Cost = $25
Monthly fee = $7.50

$10,000 x .05/12 x 1= $41.67

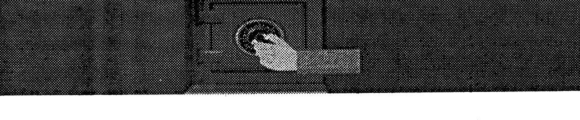
Net positive interest return:

$41.67 - $25 cost - $7.50 fee = **$9.17**



Key Responsibilities

1.
Keep funds separate



- Do not commingle your money and clients' money in the same account
- Do not use IOLTA to hide money from IRS, creditors, or divorcing spouse

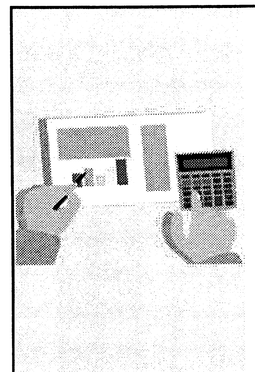
2.
Know each client's balance

Keep and review
individual client ledgers

3.
Maintain records

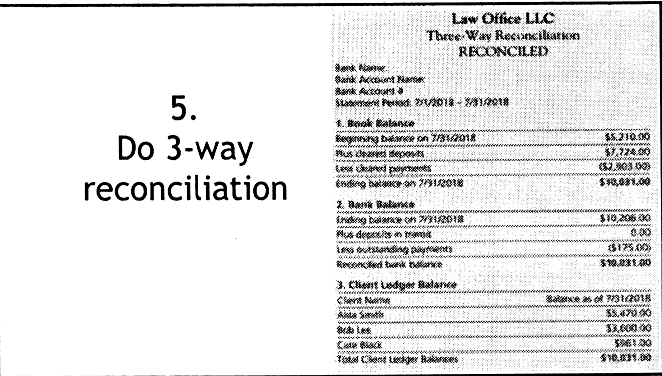
- Client ledger
- Trust journal
- More...

Keep for 5 years



4.
Wait for funds
to be available

- Use 3-5-10 day rule
- Avoid overdrafts



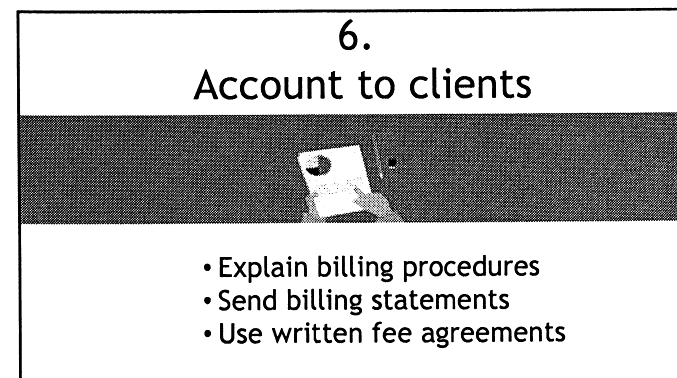
Law Office LLC
Three-Way Reconciliation
RECONCILED

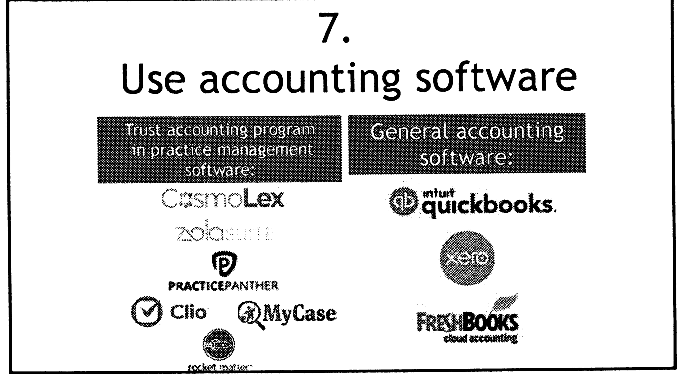
Bank Name:
Bank Account Name:
Bank Account #
Statement Period: 7/1/2018 - 7/31/2018

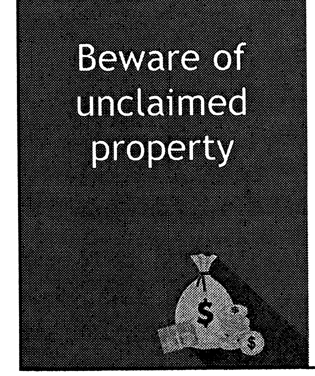
1. Book Balance	
Beginning balance on 7/31/2018	$5,210.00
Plus cleared deposits	$7,724.00
Less cleared payments	($2,903.00)
Ending balance on 7/31/2018	$10,031.00

2. Bank Balance	
Ending balance on 7/31/2018	$10,206.00
Plus deposits in transit	0.00
Less outstanding payments	($175.00)
Reconciled bank balance	$10,031.00

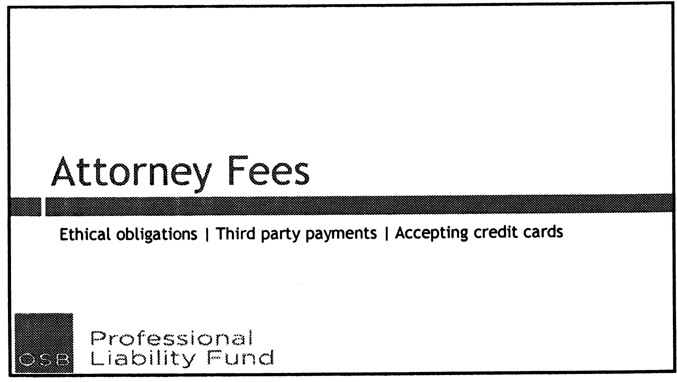
3. Client Ledger Balance	
Client Name	Balance as of 7/31/2018
Alisa Smith	$5,470.00
Bob Lee	$3,600.00
Cate Black	$961.00
Total Client Ledger Balances	$10,031.00

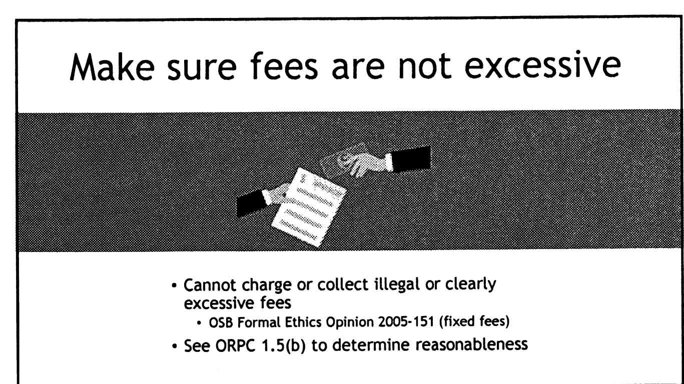






- Take steps to find person
- Return to whomever is "entitled" to it
- Abandoned after 2 years
- Report to DSL
- Remit funds to OSB





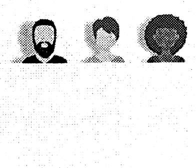
Put it in writing

CAUTION

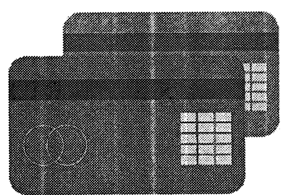
1. Contingent
   - Cannot be used in domestic relations or criminal matters
   - Comply with ORS 20.340
2. Earned upon receipt
   - Written
     - Will not be deposited into lawyer trust account
     - Entitled to refund

Third party payments

- ORPC 1.8(f)
  - Client must provide informed consent
  - No interference with lawyer's independence of professional judgment or client-lawyer relationship
  - Maintain confidentiality (also see OSB formal ethics opinion 2005-157)
- Specify in writing who receives refund



Accepting credit cards



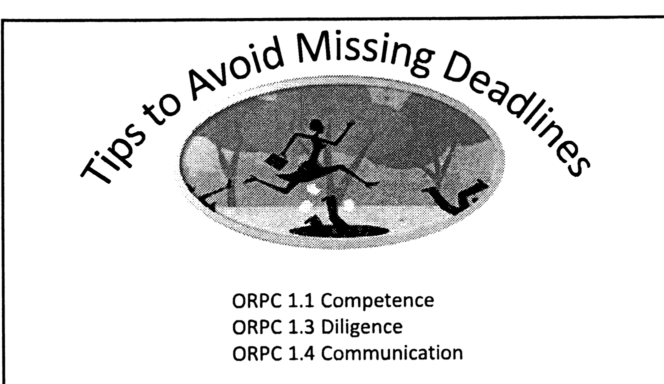
- OSB Formal Ethics Opinion 2005-172
  - If single merchant account, it must be a trust account
  - Truth in Lending Act
  - Set-up fees, monthly fees, or annual fees are the lawyer's responsibility

Calendaring

Common issues| Tips to avoid missing deadlines

Missed deadline common issues:

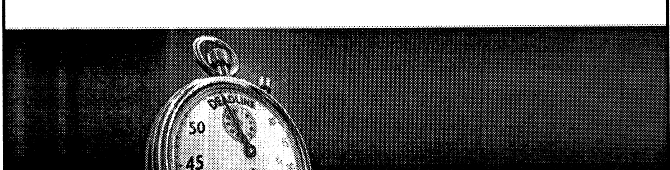
- Not entering deadlines
- Not knowing SOLs
- Miscalculating deadlines and SOLs
- Filing at the last minute
- Clerical errors
- Not verifying dates
- General neglect



ORPC 1.1 Competence
ORPC 1.3 Diligence
ORPC 1.4 Communication

1. Use calendar to:

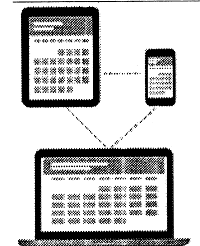
- Docket all deadlines and reminders
- Set recurring reminders to retrieve and review files



What to Calendar?

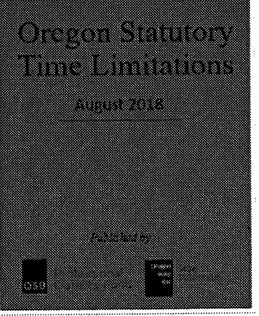
- SOLS and case-related deadlines
- Client-imposed deadlines
- Self-imposed deadlines
- Court appearances
- Appointments

Good calendaring habits



- Enter dates immediately
- Have one entry point
- Capture dates from email, intake sheets, incoming documents
- Synchronize calendars

2. Know statutes of limitations

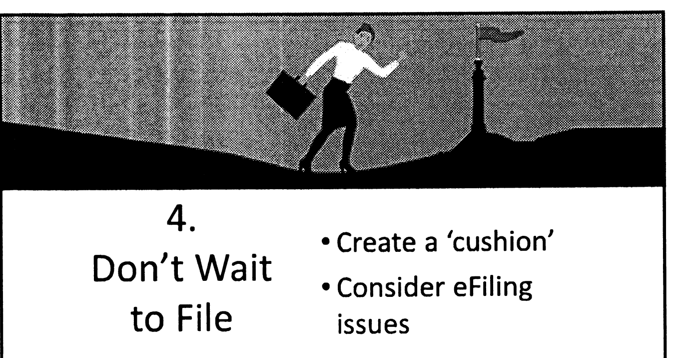


3. Know how to calculate deadlines

- Manually calculate
- Use rules-based calendaring software

Rules-based calendaring software

Stand-alone rules-based calendaring software	Practice management software integrates w/ stand-alone tools	Practice management software w/ built-in rules-based calendaring
LawToolBox	HoudiniEsq PracticeMaster	FIRM CENTRAL
CALENDARRULES	Clio actionstep PRACTICEPANTHER rocket matter	AMICUS ABACUSLAW



4.
Don't Wait
to File

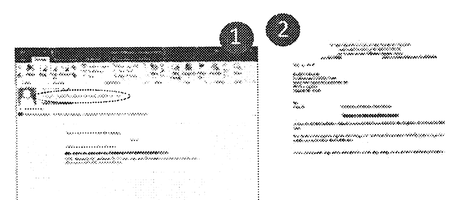
- Create a 'cushion'
- Consider eFiling issues

5. Double check entries

Check for:

- Plain errors
- Typographical errors
- Omissions

6. eCourt Notices & Calendaring



1. Notification via email
2. Link to court notice
3. Calculate deadline if necessary and calendar immediately

Conflicts

Types | Imputation | System: What, How, When | Documentation

OSB Professional Liability Fund

Types of Conflicts

ORPC 1.7: Current Clients

Watch self-interest conflicts, conflicts with personal interests, and conflicts with family interests.

ORPC 1.8: Current Clients Specific Rules

Need helpful examples of the Conflicts 'Shall Nots"? Look here!

ORPC 1.9: Duties to Former Clients

There are still duties owed! Recognize "interests that are materially adverse" and matters that are "substantially related."

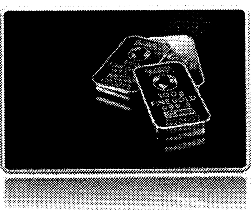
Imputation of Conflicts

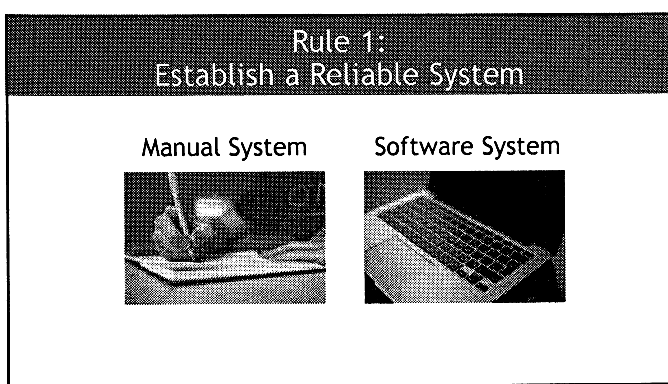
ORPC 1.10: Imputation of Conflicts of Interest; Screening

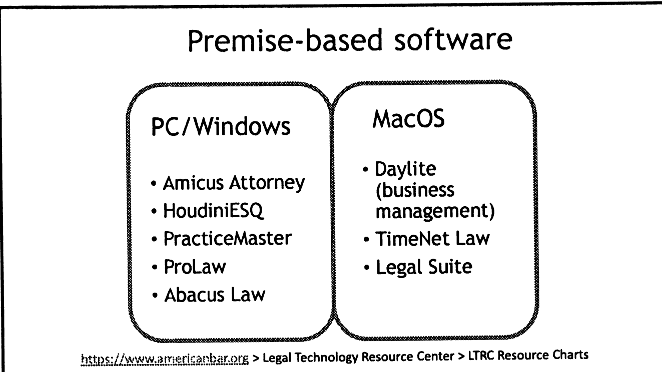
Find out how to handle conflicts in your firm when any one of you would be prohibited from doing so by ORPC 1.7 or 1.9.

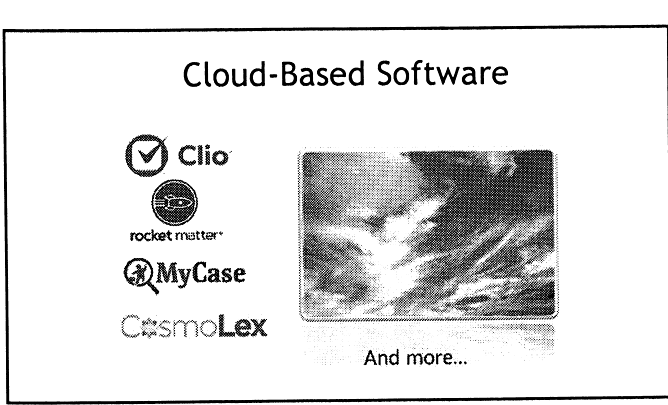
The Golden Rules

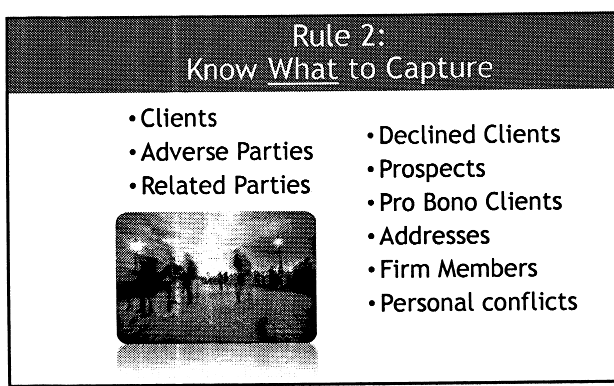
1. Establish a reliable system
2. Know what to capture
3. Know how to use the system
4. Know when to run a conflict check
5. Document search and result

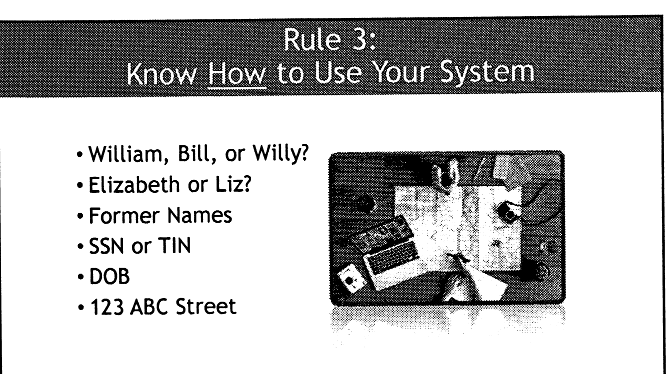


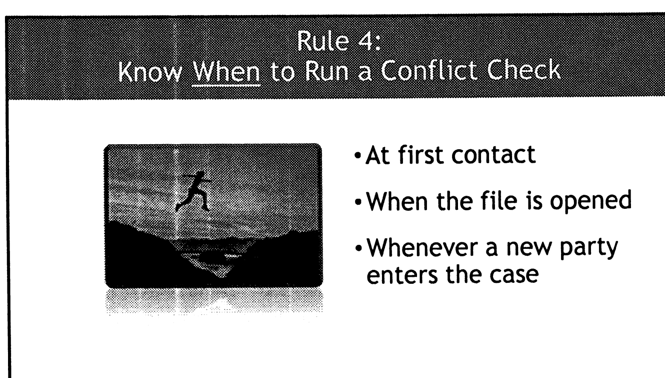


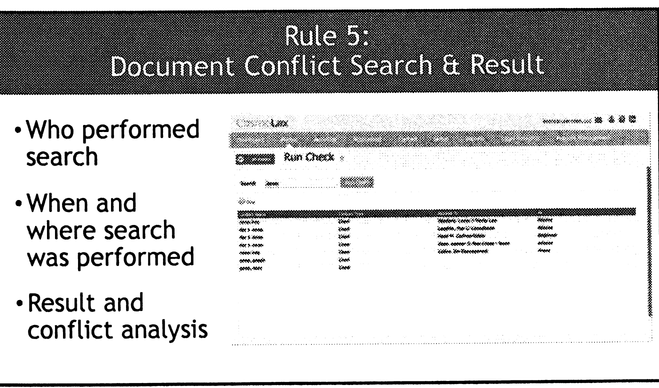


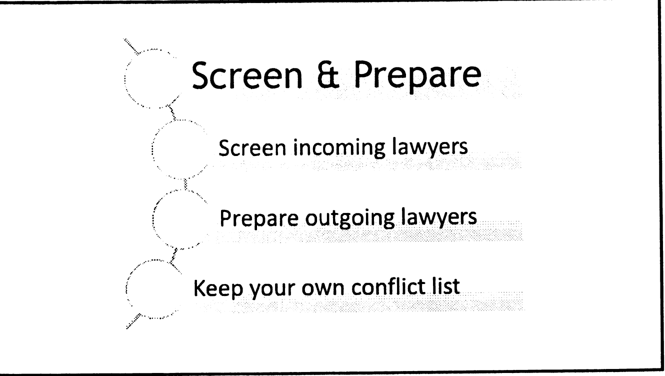


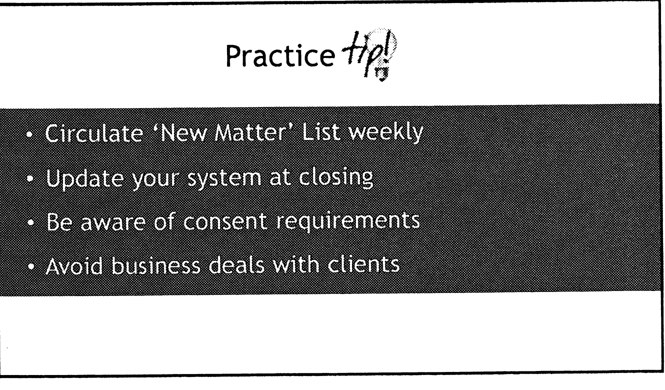


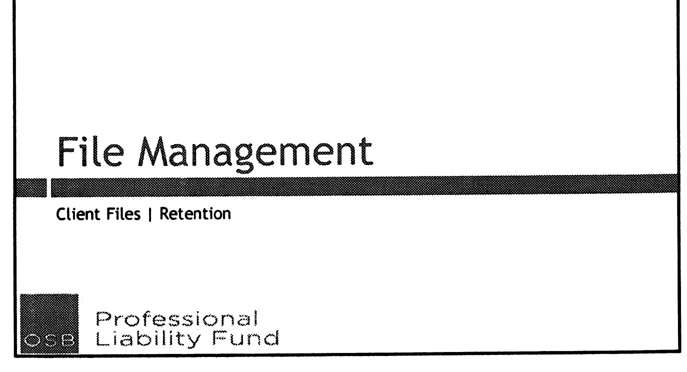


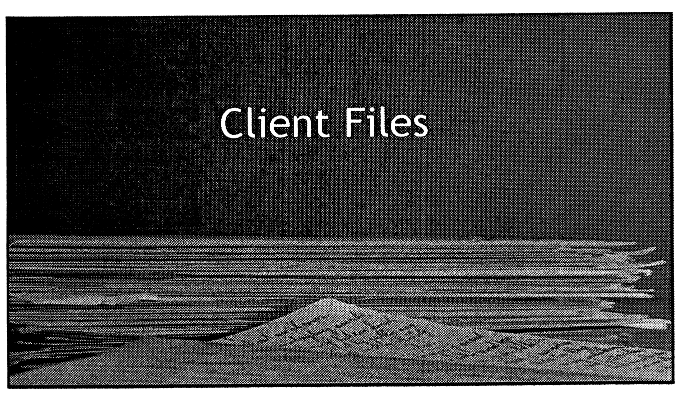

Rule 4:
Know When to Run a Conflict Check
• At first contact
• When the file is opened
• Whenever a new party enters the case


Rule 5:
Document Conflict Search & Result
• Who performed search
• When and where search was performed
• Result and conflict analysis
Run Check


Screen & Prepare
Screen incoming lawyers
Prepare outgoing lawyers
Keep your own conflict list


Practice tip!
• Circulate 'New Matter' List weekly
• Update your system at closing
• Be aware of consent requirements
• Avoid business deals with clients


File Management
Client Files | Retention
OSB
Professional
Liability Fund


Client Files

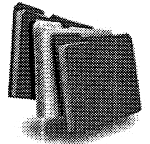
What is the client file?

Oregon Formal Opinion No. 2017-192

Client Property: Duplication Charges for Client Files, Production or Withholding of Client Files

Typical Documents to Keep in Client File

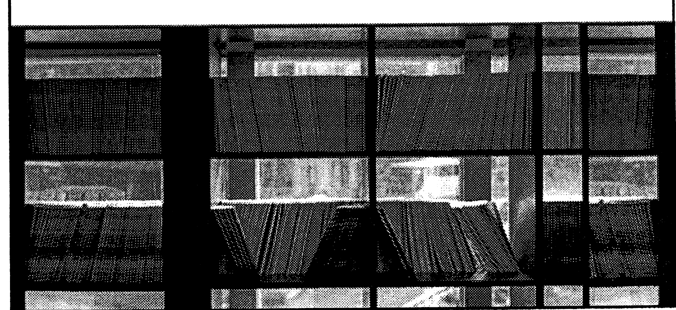
- ❑Client Intake Form
- ❑Conflicts of Interest
- ❑Engagement Letter
- ❑Nonengagement Letter
- ❑Disengagement Letter
- ❑Correspondence
- ❑Fee Agreement
- ❑Timekeeping Records
- ❑Billing Statements
- ❑Documents
- ❑Records
- ❑Attorney Notes



How will you organize your client files?

1. Consider setting up a system to organize and retrieve documents whether paper or digital
2. Consider having a standard sub-file structure for each practice area
3. Consider establishing file opening and closing procedures

Retention



File Retention Guidelines

1. See our *File Retention and Destruction Guidelines.* Retain most files for at least 10 years but retain others over 10 years.
2. Research and evaluate any additional factors particular to your practice area, cases, and clients.
3. Treat digital and paper files the same!

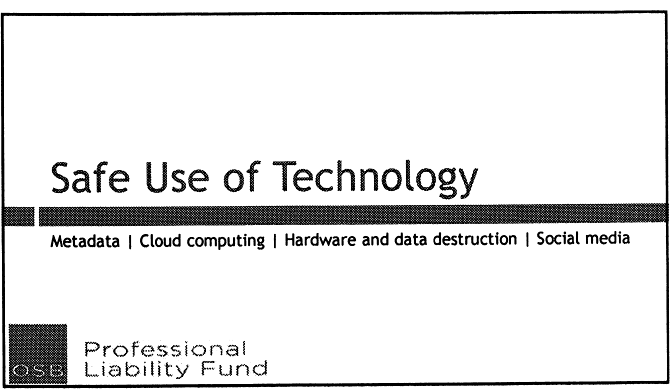
Storage

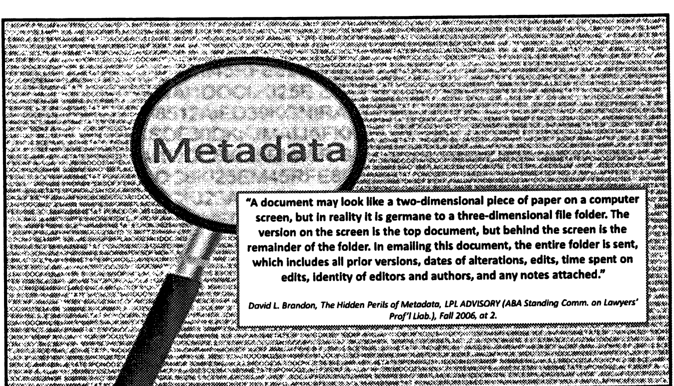
Physical files
- Physical location
- Think 10 years ahead

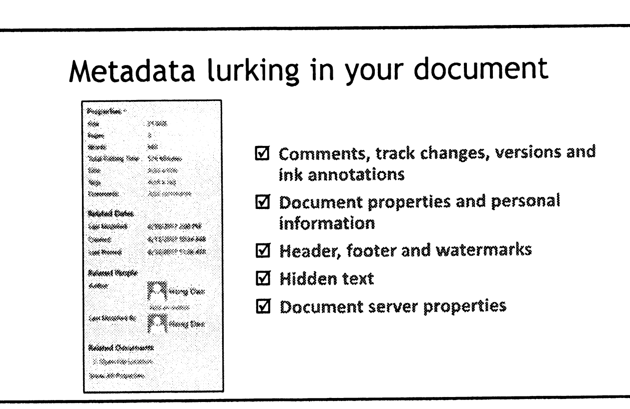
Electronic files
- Hard drive or cloud
- Think 10 years ahead

It is never a good time to lose your data. Back it up.

Devices	Software	Devices w/software
▪ External hard drive ▪ External solid state drive ▪ Network attached storage ▪ Backup server	▪ Windows Backup | MAC TimeMachine ▪ Acronis True Image ▪ AOMEI Backupper ▪ EaseUS Todo Backup ▪ Cloud backup service (Backblaze, Carbonite, iDrive, SpiderOak)	▪ Seagate Backup Plus drive ▪ Western Digital My Passport portable drive ▪ Samsung T5 SSD



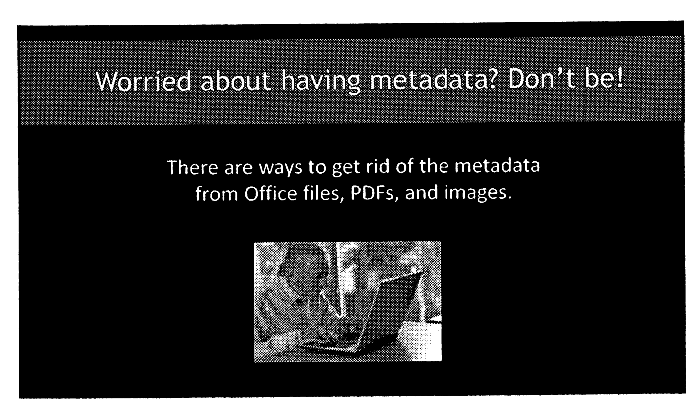


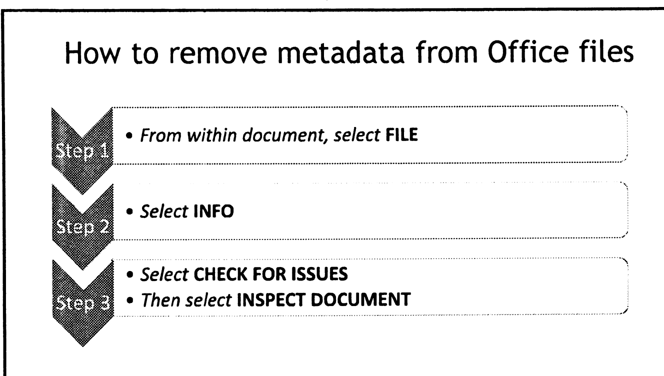


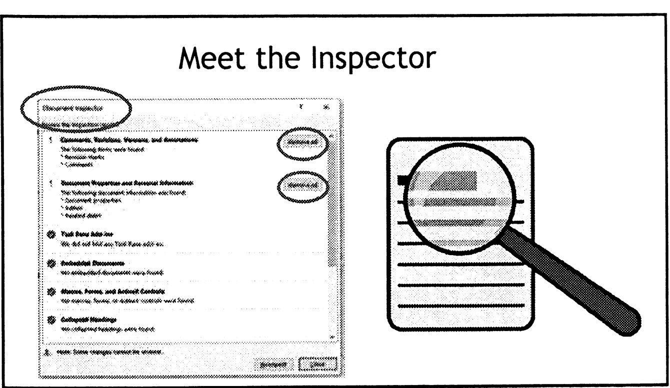
Competency: Disclosure of Metadata

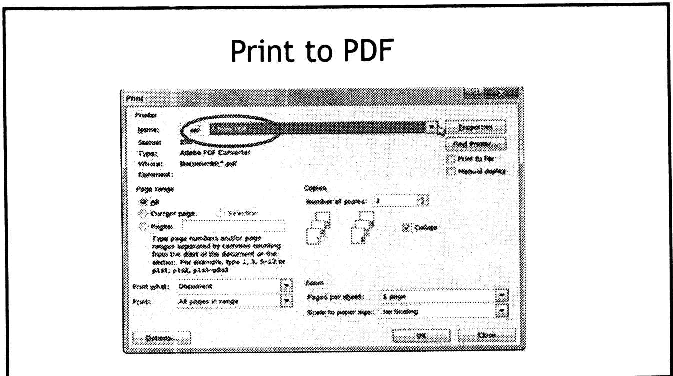
"Oregon RPC 1.6(c) requires that a lawyer must use reasonable care to avoid the disclosure of confidential client information, particularly when the information could be detrimental to a client. With respect to metadata in documents, reasonable care includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent. What constitutes reasonable care will change as technology evolves."

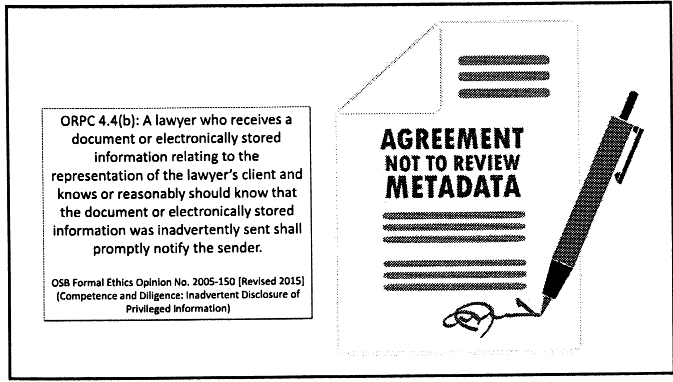
OSB Formal Ethics Opinion No. 2011-187 (Revised 2015)

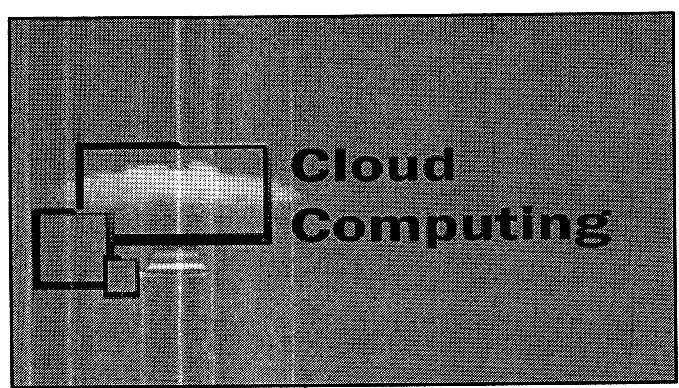


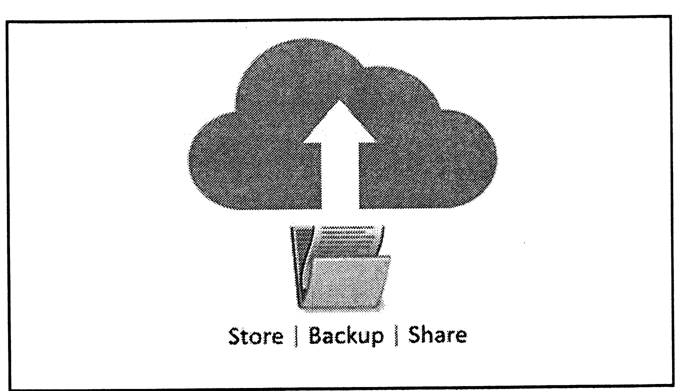

How to remove metadata from Office files
Step 1
• From within document, select FILE
Step 2
• Select INFO
Step 3
• Select CHECK FOR ISSUES
• Then select INSPECT DOCUMENT

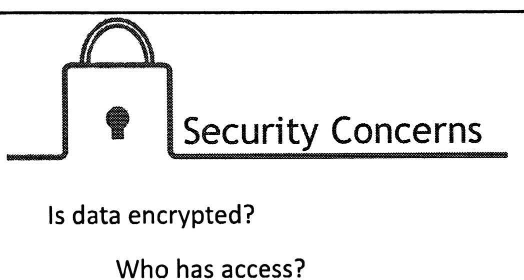

Meet the Inspector


Print to PDF


ORPC 4.4(b): A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
OSB Formal Ethics Opinion No. 2005-150 [Revised 2015] (Competence and Diligence: Inadvertent Disclosure of Privileged Information)
AGREEMENT
NOT TO REVIEW
METADATA


Cloud
Computing


Store | Backup | Share



Security Concerns

Is data encrypted?

Who has access?

Where are servers located?

Take reasonable steps:

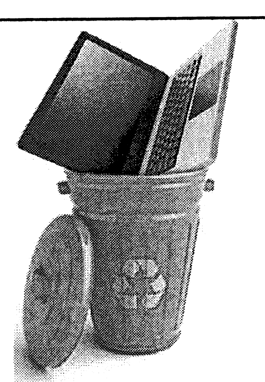
- Ensure storage company will reliably secure client data
- Keep information confidential

1. Vet the vendors; and
2. Review terms of service and user agreements

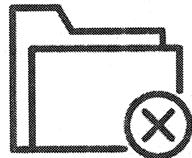
OSB Formal Ethics Opinion 2011-188
(Third-Party Electronic Storage of Client Materials)

Hardware and Data Destruction

ORPC 1.6 Confidentiality



Options to completely destroy data:

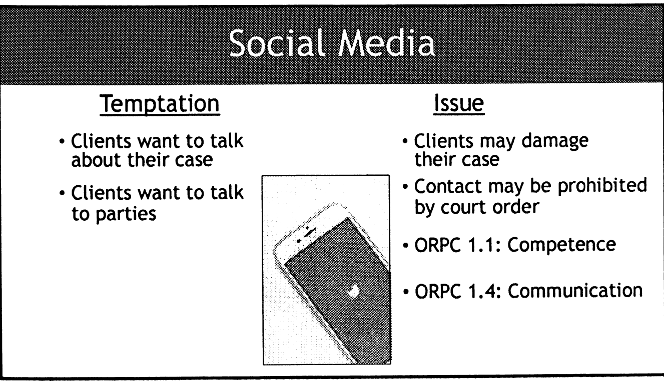


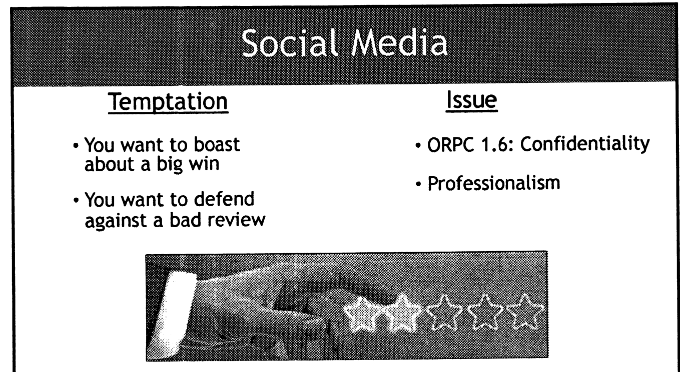
1. Use specialized software to overwrite data
2. Physically destroy the hard drive

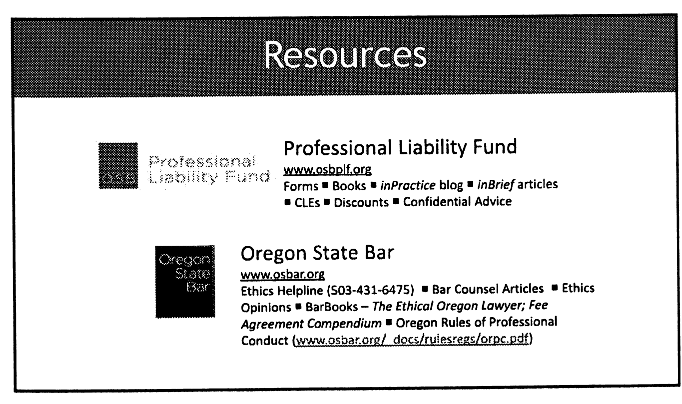
Software

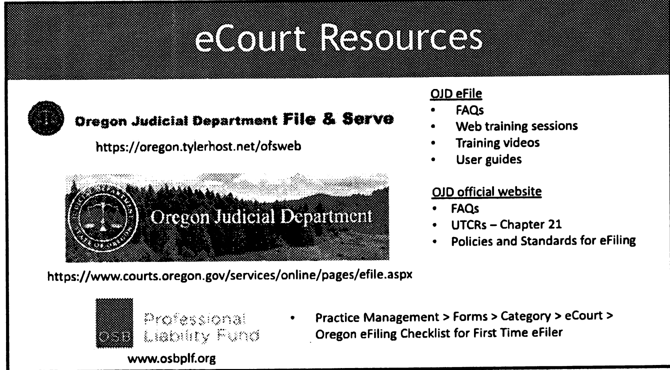
Data Destruction	File Shredder
• DBAN (Darik's Boot & Nuke) • CBL Data Shredder • HDDErase • KillDisk	• zDelete • Eraser • Freeraser • File Shredder • Secure Eraser
Use if you want to recycle, refurbish or donate computer	Use if you want to keep computer but permanently delete unwanted files

Physically Destroy Hard Disk
Do it yourself
Bring it to a professional
Electronic Recycling Facility


Social Media
Temptation
• Clients want to talk about their case
• Clients want to talk to parties
Issue
• Clients may damage their case
• Contact may be prohibited by court order
• ORPC 1.1: Competence
• ORPC 1.4: Communication


Social Media
Temptation
• You want to boast about a big win
• You want to defend against a bad review
Issue
• ORPC 1.6: Confidentiality
• Professionalism


Resources
Professional Liability Fund
Professional Liability Fund
www.osbplf.org
Forms ■ Books ■ inPractice blog ■ inBrief articles
■ CLEs ■ Discounts ■ Confidential Advice
Oregon State Bar
Oregon State Bar
www.osbar.org
Ethics Helpline (503-431-6475) ■ Bar Counsel Articles ■ Ethics Opinions ■ BarBooks – The Ethical Oregon Lawyer; Fee Agreement Compendium ■ Oregon Rules of Professional Conduct (www.osbar.org/_docs/rulesregs/orpc.pdf)


eCourt Resources
Oregon Judicial Department File & Serve
https://oregon.tylerhost.net/ofsweb
OJD eFile
• FAQs
• Web training sessions
• Training videos
• User guides
Oregon Judicial Department
OJD official website
• FAQs
• UTCRs – Chapter 21
• Policies and Standards for eFiling
https://www.courts.oregon.gov/services/online/pages/efile.aspx
Professional Liability Fund
www.osbplf.org
• Practice Management > Forms > Category > eCourt > Oregon eFiling Checklist for First Time eFiler

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Hong Dao hongd@osbplf.org
Rachel Edwards rachele@osbplf.org
free and confidential

CHAPTER 12

CREATING A FIRM

SOLO SUCCESS: LAUNCHING YOUR OWN PRACTICE

Sheila M. Blackford
Hong Dao
Professional Liability Fund
Practice Management Advisors

Chapter 12

SOLO SUCCESS: LAUNCHING YOUR OWN PRACTICE

TABLE OF CONTENTS

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PowerPoint Slides 12-1

To view these chapter materials and the additional resources below on or before October 30, 2019 go to www.osbplf.org , select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After October 30, 2019 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

Checklist for Opening a Law Office
https://www.osbplf.org/assets/forms/pdfs//Checklist%20for%20Opening%20a%20Law%20Office.pdf

A Guide to Setting Up and Running Your Law Office
https://www.osbplf.org/assets/A%20Guide%20to%20Setting%20Up%20and%20Running%20Your%20Law%20Office%202019.pdf

ABA Technology Resources
https://www.osbplf.org/assets/forms/pdfs//ABA%20Technology%20Resources.pdf

Law Office Business Plan Worksheet
https://www.osbplf.org/assets/forms/pdfs//Law%20Office%20Business%20Plan%20Worksheet.docx

Start-up Budget
https://www.osbplf.org/assets/forms/pdfs//Start-Up%20Budget.doc

Monthly Budget
https://www.osbplf.org/assets/forms/pdfs//Monthly%20Budget.docx

Marketing and Business Development Worksheet
https://www.osbplf.org/assets/forms/pdfs//Marketing%20and%20Business%20Development%20Worksheets.pdf

Cash Flow Worksheet 12 Months
https://www.osbplf.org/assets/forms/pdfs//Cash%20Flow%20Worksheet%2012%20month%20-%20legal%20size.xls.pdf

The Basic of Financial Statements
https://www.osbplf.org/inpractice/the-basics-of-your-financial-statements/

Office Sharing Guidelines
https://www.osbplf.org/assets/forms/pdfs//Office%20Sharing%20Guidelines.pdf

Solo Success:

Launching Your Own Practice

Sheila Blackford
Hong Dao
OSB PLF | Attorneys | Practice Management Advisors

Stage 1: Planning

- Choice of entity
- Location
- Software/hardware
- Office systems
- Business description
- Marketing
- Financial plan
- Practice management

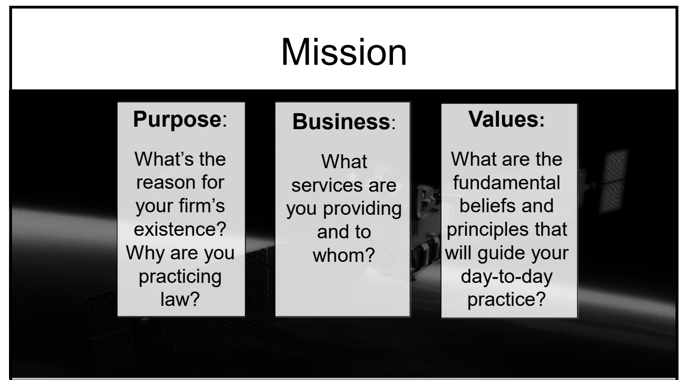
Business Description

Vision & Mission Statements

Be the “go-to” counsel for all your small business’s legal needs.

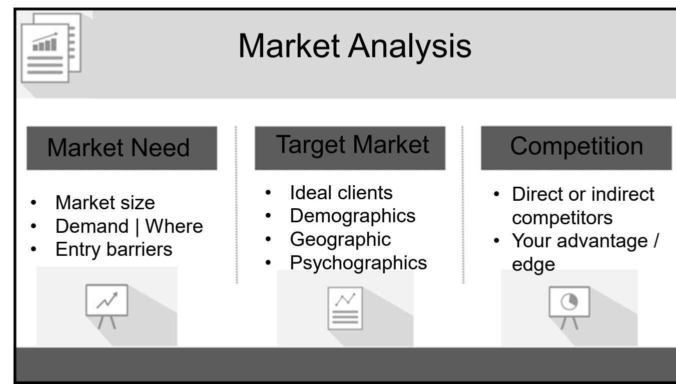
To serve as the state’s leader in the field of employment and labor law.

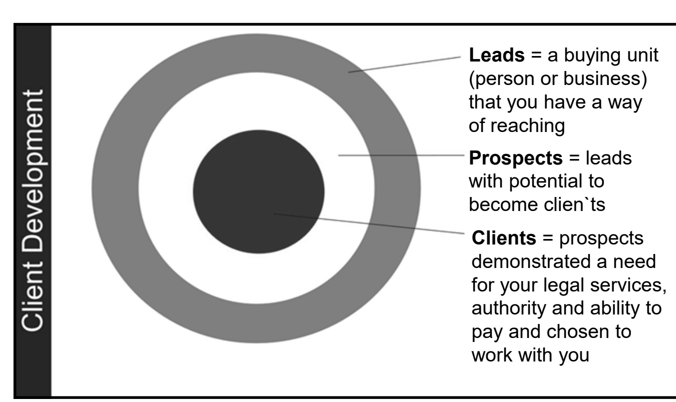
We strive to be the standard for excellence in the field of marital and family law.

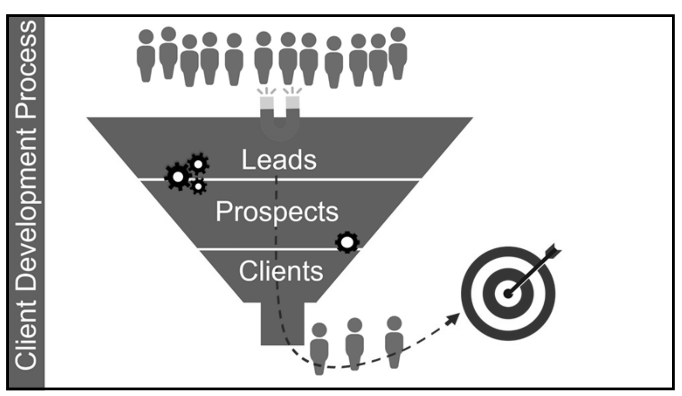


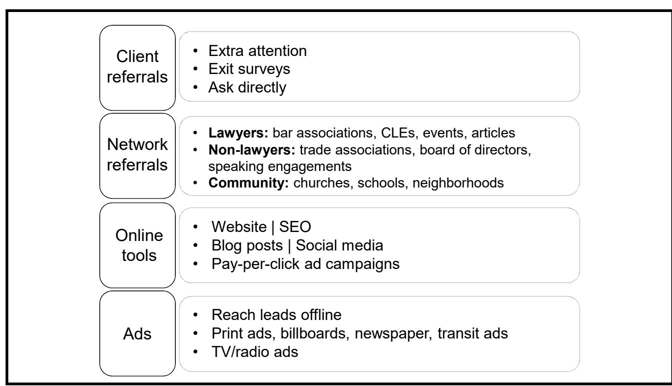
At ABC Law Firm, we help families overcome their differences and put their lives back on track. Our firm is committed to delivering top-notch traditional and non-traditional legal services tailored to clients of all financial abilities. We take our time to listen to and understand our clients' concerns and customize a solution that directly responds to their individual needs.

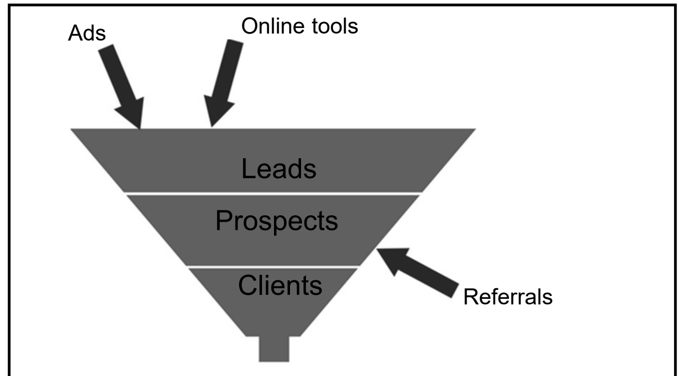
Purpose
Business
Value

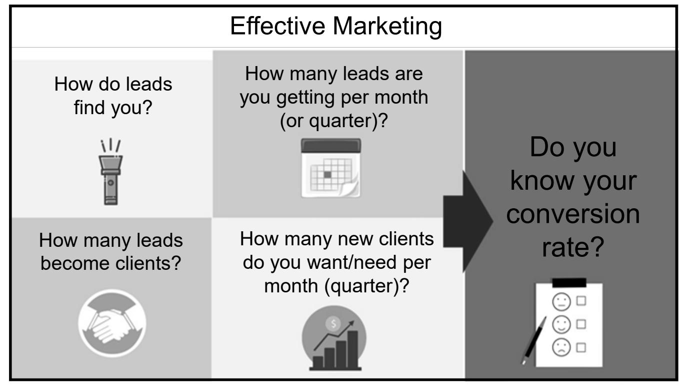


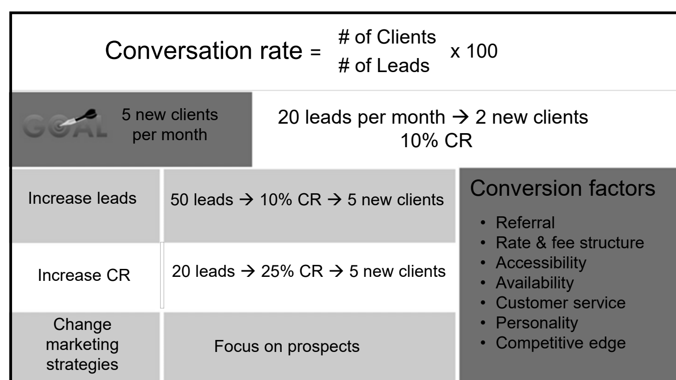



Client Development Process
Leads
Prospects
Clients

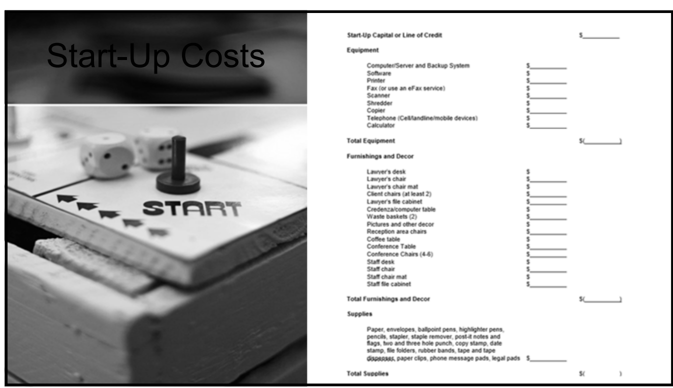

Client referrals
• Extra attention
• Exit surveys
• Ask directly
Network referrals
• Lawyers: bar associations, CLEs, events, articles
• Non-lawyers: trade associations, board of directors, speaking engagements
• Community: churches, schools, neighborhoods
Online tools
• Website | SEO
• Blog posts | Social media
• Pay-per-click ad campaigns
Ads
• Reach leads offline
• Print ads, billboards, newspaper, transit ads
• TV/radio ads


Ads
Online tools
Leads
Prospects
Clients
Referrals

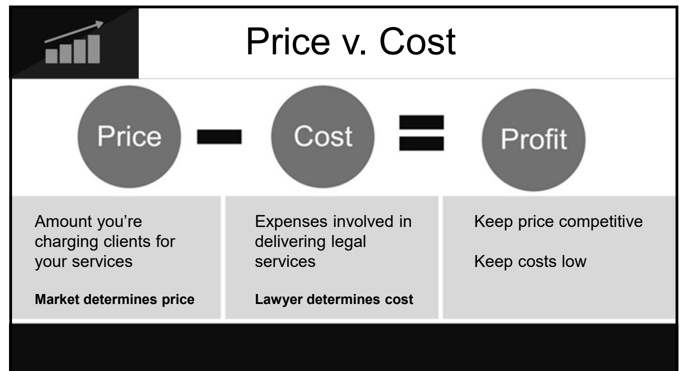

Effective Marketing
How do leads find you?
How many leads are you getting per month (or quarter)?
How many leads become clients?
How many new clients do you want/need per month (quarter)?
Do you know your conversion rate?

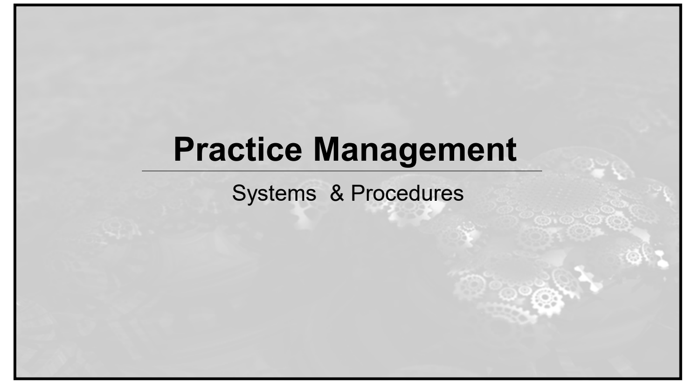

Conversation rate = # of Clients / # of Leads x 100
GOAL
5 new clients per month
20 leads per month → 2 new clients
10% CR
Increase leads
50 leads → 10% CR → 5 new clients
Increase CR
20 leads → 25% CR → 5 new clients
Change marketing strategies
Focus on prospects
Conversion factors
• Referral
• Rate & fee structure
• Accessibility
• Availability
• Customer service
• Personality
• Competitive edge

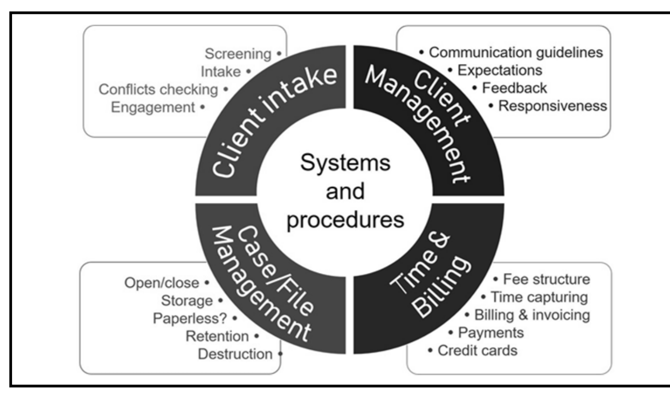
Financial Operations
Start-up Costs | Ongoing Costs

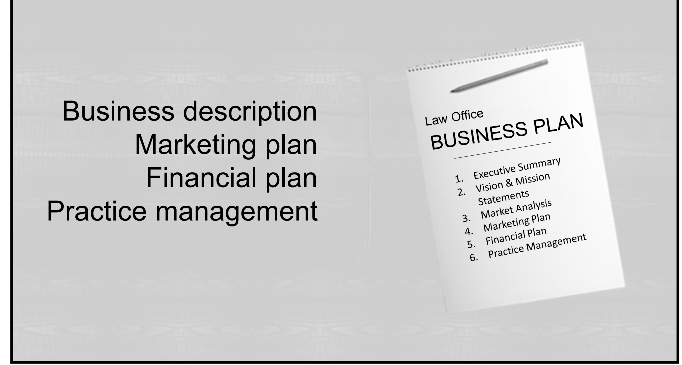

Start-Up Costs
START
Start-Up Capital or Line of Credit $______
Equipment
Computer/Server and Backup System $______
Software $______
Printer $______
Fax (or use an eFax service) $______
Scanner $______
Shredder $______
Copier $______
Telephone (Cell/landline/mobile devices) $______
Calculator $______
Total Equipment $(______)
Furnishings and Decor
Lawyer's desk $______
Lawyer's chair $______
Lawyer's chair mat $______
Client chairs (at least 2) $______
Lawyer's file cabinet $______
Credenza/computer table $______
Waste baskets (2) $______
Pictures and other decor $______
Reception area chairs $______
Coffee table $______
Conference Table $______
Conference Chairs (4-6) $______
Staff desk $______
Staff chair $______
Staff chair mat $______
Staff file cabinet $______
Total Furnishings and Decor $(______)
Supplies
Paper, envelopes, ballpoint pens, highlighter pens, pencils, stapler, staple remover, post-it notes and flags, two and three hole punch, copy stamp, date stamp, file folders, rubber bands, tape and tape dispenser, paper clips, phone message pads, legal pads $______
Total Supplies $( )

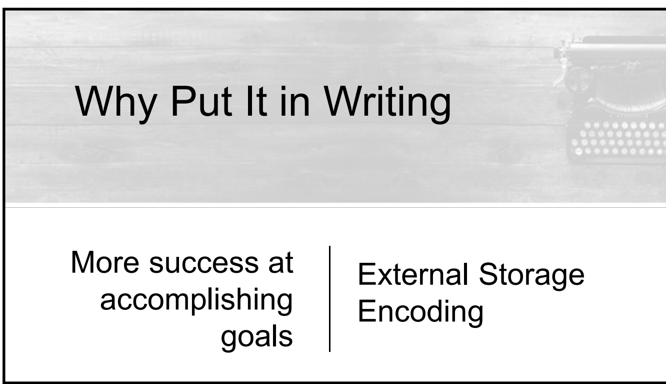
Monthly Expenses
Monthly rent (should include water and garbage) $______
Utilities/Internet (if not included in rent) $______
Communications (cell, landline, mobile devices) $______
Recycling/Shredding services $______
Parking $______
Supplies $______
Salaries $______
Tax withholding $______
Payments on furniture and equipment $______
Insurance premiums (pro-rated monthly) $______
Dues for professional organizations (pro-rated monthly) $______
Subscriptions (pro-rated monthly) $______
Continuing legal education $______
Legal research $______
Miscellaneous (business lunches, travel, marketing) $______
Other $______
TOTAL MONTHLY BILLS $______
Fees and Income
Fees needed to pay monthly bills $______
Fees needed to pay self (including student loan payments) $______
REQUIRED INCOME $______
Required income divided by number of billable hours = hourly rate $______
Ongoing Costs
EXPENSES $$

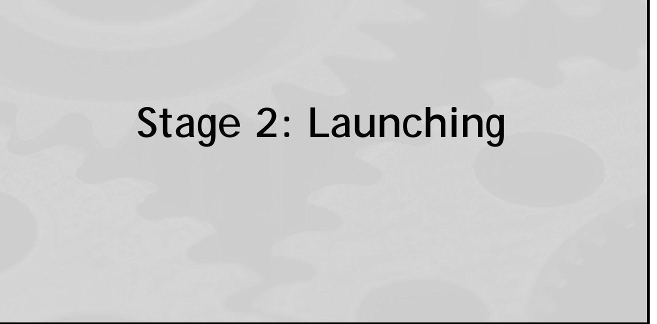

Price v. Cost
Price
Cost
Profit
Amount you're charging clients for your services
Market determines price
Expenses involved in delivering legal services
Lawyer determines cost
Keep price competitive
Keep costs low

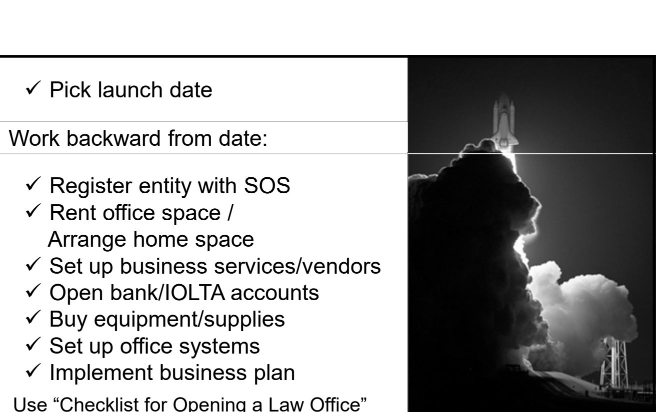

Practice Management
Systems & Procedures


Systems and procedures
Client intake
Screening •
Intake •
Conflicts checking •
Engagement •
Client Management
• Communication guidelines
• Expectations
• Feedback
• Responsiveness
Case/File Management
Open/close •
Storage •
Paperless? •
Retention •
Destruction •
Time & Billing
• Fee structure
• Time capturing
• Billing & invoicing
• Payments
• Credit cards


Business description
Marketing plan
Financial plan
Practice management
Law Office
BUSINESS PLAN
1. Executive Summary
2. Vision & Mission Statements
3. Market Analysis
4. Marketing Plan
5. Financial Plan
6. Practice Management

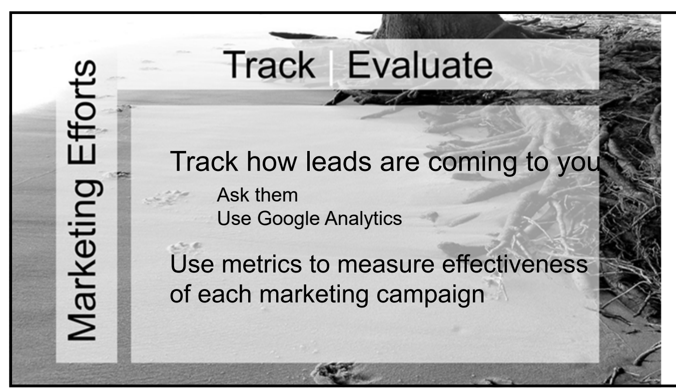


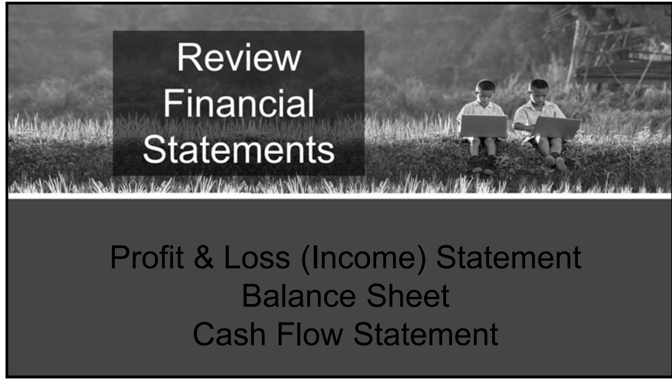


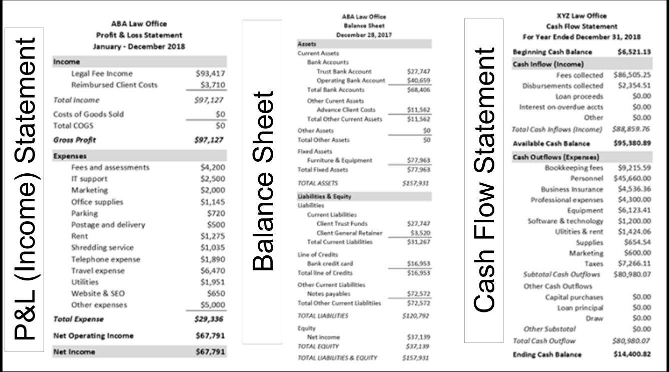


Stage 3: Assessing

Marketing Effectiveness
Financial Health
Continue or Not







ABA Law Office
Profit & Loss Statement
January - December 2018

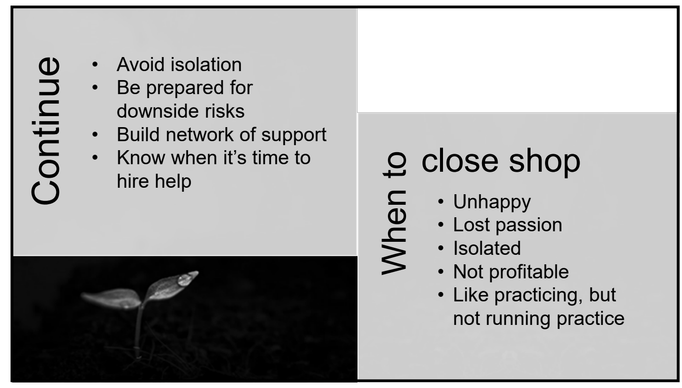
Income	
Legal Fee Income	$93,417
Reimbursed Client Costs	$3,710
Total Income	*$97,127*
Costs of Goods Sold	$0
Total COGS	$0
Gross Profit	***$97,127***
Expenses	
Fees and assessments	$4,200
IT support	$2,500
Marketing	$2,000
Office supplies	$1,145
Parking	$720
Postage and delivery	$500
Rent	$1,275
Shredding service	$1,035
Telephone expense	$1,890
Travel expense	$6,470
Utilities	$1,951
Website & SEO	$650
Other expenses	$5,000
Total Expense	***$29,336***
Net Operating Income	**$67,791**
Net Income	**$67,791**

ABA Law Office
Balance Sheet
December 28, 2017

Assets	
Current Assets	
Bank Accounts	
Trust Bank Account	$27,747
Operating Bank Account	$40,659
Total Bank Accounts	$68,406
Other Curent Assets	
Advance Client Costs	$11,562
Total Other Current Assets	$11,562
Other Assets	$0
Total Other Assets	$0
Fixed Assets	
Furniture & Equipment	$77,963
Total Fixed Assets	$77,963
TOTAL ASSETS	*$157,931*
Liabilities & Equity	
Liabilities	
Current Liabilities	
Client Trust Funds	$27,747
Client General Retainer	$3,520
Total Current Liabilities	$31,267
Line of Credits	
Bank credit card	$16,953
Total line of Credits	$16,953
Other Current Liabilities	
Notes payables	$72,572
Total Other Current Liabilities	$72,572
TOTAL LIABILITIES	*$120,792*
Equity	
Net income	$37,139
TOTAL EQUITY	*$37,139*
TOTAL LIABILITIES & EQUITY	*$157,931*

XYZ Law Office
Cash Flow Statement
For Year Ended December 31, 2018

Beginning Cash Balance	**$6,521.13**
Cash Inflow (Income)	
Fees collected	$86,505.25
Disbursements collected	$2,354.51
Loan proceeds	$0.00
Interest on overdue accts	$0.00
Other	$0.00
Total Cash Inflows (Income)	*$88,859.76*
Available Cash Balance	**$95,380.89**
Cash Outflows (Expenses)	
Bookkeeping fees	$9,215.59
Personnel	$45,660.00
Business Insurance	$4,536.36
Professional expenses	$4,300.00
Equipment	$6,123.41
Software & technology	$1,200.00
Ulitities & rent	$1,424.06
Supplies	$654.54
Marketing	$600.00
Taxes	$7,266.11
Subtotal Cash Outflows	$80,980.07
Other Cash Outflows	
Capital purchases	$0.00
Loan principal	$0.00
Draw	$0.00
Other Substotal	$0.00
Total Cash Outflow	*$80,980.07*
Ending Cash Balance	**$14,400.82**

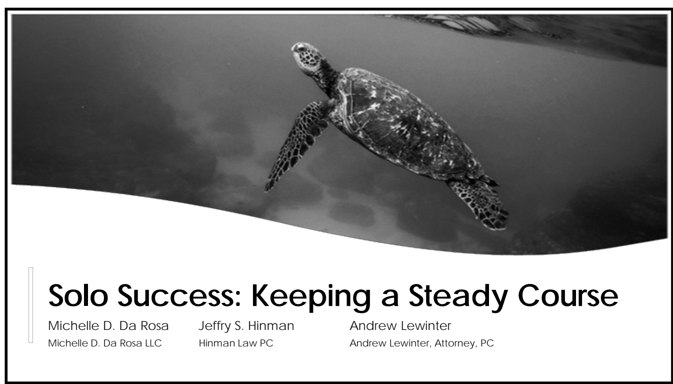


CHAPTER 13

CREATING A FIRM

SOLO SUCCESS: KEEPING A STEADY COURSE

Michelle D. Da Rosa
Michelle D. Da Rosa LLC
Jeffry S. Hinman
Hinman Law PC
Andrew S. Lewinter
Andrew Lewinter, Attorney, P.C.
Sheila M. Blackford moderator
Professional Liability Fund
Practice Management Advisor


Solo Success: Keeping a Steady Course
Michelle D. Da Rosa
Michelle D. Da Rosa LLC
Jeffry S. Hinman
Hinman Law PC
Andrew Lewinter
Andrew Lewinter, Attorney, PC

Why Solo?
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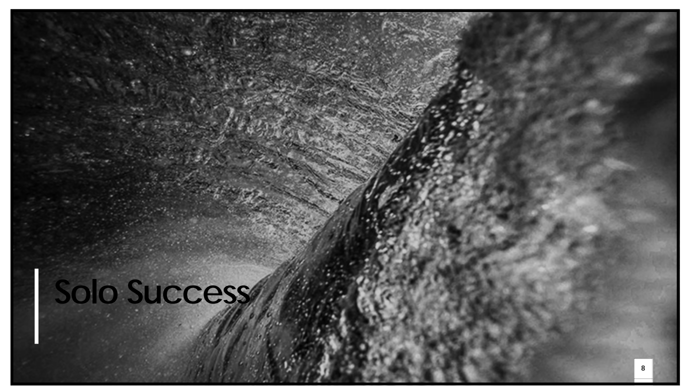
Marketing
3

Financials
4

Client Relations
5

Fees
6

Staff & Support Services
7


Solo Success
8

THANK YOU

CHAPTER 14

JOINING A FIRM

SUCCESS TIPS FOR LAWYERS JOINING FIRMS (PART I)

Jesse Calm
McEwen Gisvold LLP
Duke Tufty
Northwest Alcohol Law LLC
Jovita Wang,
Richardson Wright LLP
Traci Ray, moderator
Barran Liebman LLP

Learning the Ropes 2019
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.
   - Make yourself available.
   - Learning your craft is an investment in yourself.

2. **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.
   - Ask questions. The more direction you get from the partner, the higher quality the work product and the more efficient you will be.

3. **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?
   - Take the initiative.
   - The Portland legal community is very small.

4. **Understand that law is a business.**
   - Understand the finances.
   - Add value.
   - Manage and bill your time –learn how to write effective billing narratives.
   - Have a system and do it consistently.

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. **It’s a career, not just a job.**
    - Think of yourself as a portable asset.
    - Don’t burn bridges.

Traci Ray
Barran Liebman LLP

Duke Tufty
Northwest Alcohol Law

Jovita Wang
Richardson Wright LLP

Jesse Calm
McEwen Gisvold LLP

Success Tips for Lawyers Joining Firms (Part I)
Additional Resources

American Bar Association:

Young Lawyers Division: http://www.americanbar.org/groups/young_lawyers.html
Publications: http://www.americanbar.org/groups/young_lawyers/publications.html
Young Lawyer Toolkit:
https://www.americanbar.org/groups/young_lawyers/initiatives/young_lawyer_toolkit/

Oregon State Bar Oregon New Lawyers Division: http://www.osbar.org/onld

Multnomah Bar Association:

Multnomah Lawyer newsletter: https://mbabar.org/about/archived-newsletters.html
Young Lawyers Section: https://www.mbabar.org/about/young-lawyers-section.html

Oregon Attorney Assistance Program: www.oaap.org
inSight newsletter: https://oaap.org/in-sight-archive/

The Curmudgeon's Guide to Practicing Law, by Mark Herrmann

CHAPTER 15

Joining a Firm

Success Tips for Lawyers Joining Firms (Part II)

Karen A. Neri
Oregon Attorney Assistance Program
Attorney Counselor
Elizabeth Elkington
Gevurtz Menashe PC

Chapter 15

SUCCESS TIPS FOR LAWYERS JOINING FIRMS (PART II)

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INTROVERT'S SURVIVAL GUIDE FOR NETWORKING EVENTS, *inSIGHT* SEPTEMBER 2012 15-11

Success Tips for Lawyers Joining Firms

A. Finding Your Niche

1. OAAP Attorney Counselors assist many lawyers and law students with career-related concerns. Lawyers who request assistance from the OAAP typically represent a broad spectrum of the legal profession:

   - New admittees searching for their first law job.
   - Experienced lawyers evaluating whether to switch practice areas or firms, or leave private practice to work a law-related, or nonlegal job.
   - Lawyers seeking to effectively balance their work, family and personal life.
   - Lawyers who find themselves out of job.
   - Lawyers who are reentering the legal profession after working in other fields, or taking a leave from practice to focus on health issues or their families.
   - Lawyers seeking to find work more suited to their values, skills, interests and personal preferences.
   - Lawyers starting to consider retirement.

2. The OAAP is available to assist you find your niche and offer support at any stage of your legal career. We have several resources to help you navigate career-related concerns, including making a job change:

   - We offer confidential career counseling. Attorney Counselors are available to meet individually to discuss circumstances, administer self-assessments, brainstorm alternatives and strategies, and provide referral resources when appropriate.
   - A few times a year, we hold a six-session networking and support group for lawyers in the process of making a career change, "Finding Meaningful Work." The group is designed to help lawyers create and execute a job search plan, develop a mission statement and elevator speech, learn and practice networking, as well as refine their job search skills.
   - We periodically hold a "Job Satisfaction through Self-Assessment" in Portland. The workshop meets one evening per week for five weeks. The workshop is focused on helping lawyers identify their values, interests, job skills, and strengths.
   - We have a quarterly "Lawyer in Transition" presentation that occurs at our office in downtown Portland during the lunch hour. Each presentation features a new guest speaker who shares their own personal experiences and successes with a career change.
   - We sponsor career-related seminars yearly, some of which are available on CD and DVD.

If you are interested in accessing any of our career-related resources, please visit our website at www.oaap.org or contact the OAAP at (503) 226-1057.

B. Resilience in the Practice of Law

1. Resilience allows lawyers to successfully cope with the stressful demands of legal practice. Resilience has been viewed as a trait, a process and an outcome. As a trait, resilience appears as the inherent ability of individuals to adapt to stress, trauma or adversity. Resilience, as a process, is the continued development of our capacity to adjust to threats or significant sources of stress — such as family and relationship problems, health problems, financial difficulties, or school/workplace. When viewed as an outcome, it means being able to bounce back from stressors (recovery); endure and remain engaged in a positive way despite the stressors (sustainability); and learn as well as build new capacities from the stressful experiences (growth) (Arewasikporn, Davis, & Zautra, 2013). In its absence, we are more likely to see the shadow side of stress such as burnout, compassion fatigue, or unhealthy use of substance. Two of the best resilience resources within your reach are yourself and your social connections.

2. **Building Blocks of Resilience**: Cultivating resilience can be characterized by the acronym ABC. To strengthen your resilience while practicing law, consider:

   A: **Acknowledge.** Acknowledge and adhere to those matters that contribute to your positive emotional experiences. Research shows us that possessing a positive affect can have the powerful effect of deterring the influence of negative events such as stress and pain. These include:

   - ***Identifying and reframing negative thoughts***. The way you view adversity or challenges can impact your productivity, creativity, and self-worth. Viewing stressful events as a challenge or an opportunity instead of a hardship can shift our beliefs and the resulting consequences. Kelly McGonigal (2013), a health psychologist, referred to it as "transforming" stress, and she explained that being in a state of flow (i.e. at work) is a stress response much like when we are threatened or overwhelmed. Seeing stress as a source of energy, resource, or meaning for ourselves can increase the activities in the same areas of our brain that are associated with the type of focused attention we encounter when rising up to a challenge (McGonigal, 2013). Similarly, finding ways to dispute a limiting thought such as by asking ourselves for the evidence that support that negative thought can stop a downward spiral (Levine, 2018) and allow for other constructive possibilities.

     How are you confronting your negative thoughts?

   - ***Practicing Self-Compassion***. Kristin Neff, a professor and self-compassion researcher, defines self-compassion as "being kind and understanding toward oneself in instances of pain or failure, rather

than being harshly self-critical; perceiving one's experiences as part of the larger human experience, rather than seeing them as isolating; and holding painful thoughts and feelings in mindful awareness, rather than over-identifying with them." (Seppala, 2011, p. 60). When we practice self-compassion, we take on an attitude of kindness and understanding toward ourselves much like a trusted and loving friend who listens to us with empathy, and is encouraging and validating. Self-compassion has been associated with lowered anxiety while allowing us to see shortcomings with greater calm and as a learning opportunity (Seppala, 2011).

How might you be kinder and more understanding toward yourself today?

- ***Exercising Gratitude***. Gratitude elicits positive feelings and leads to emotional well-being. A study of a three-month trial of gratitude journaling showed a significant favorable impact on well-being, affect, and depression (O'Connell, O'Shea, & Gallagher, 2017). Setting up a diary of positive experiences provide the opportunity to experience these emotions again and again when re-reading the diary entries (Seligman et al. 2005). Keeping a journal, a file, or record of events with favorable outcomes can help you cultivate gratitude.

  How else might you see yourself practice gratitude?

- ***Identifying your strengths, assets, and resources.*** Individuals who use their strengths experience greater subjective well-being, which is related to mental and physical health-related quality of life (Proctor, Maltby, and Linley, 2010). Make a list of your strengths such as your skills, attitudes, aptitudes, talents, or qualities, and keep it nearby so you can easily be reminded of it. If you are seeking to find your strengths, recall past instances when you overcame a stressful or traumatic situation.

  What did you do that was helpful during the event? What else may your strengths be?

- ***Engaging in Self-Care***: Discovering or rediscovering relaxing, refreshing, and enjoyable activities or endeavors can help replenish your energy and prepare you for the next challenge.

  How do you (or might you) practice self-care?

B: **Balance/Build**. Actively balance or build the different aspects of your life that contribute to your vitality. Start with identifying those matters that you value most and prioritize them. Regularly checking in with ourselves and the ways we are supporting these areas can help us find our flow.

What is your busy schedule saying about you and what matters most? How are you actively supporting the areas of your life that replenishes you?

C: **Connect**. Connect with and maintain a socially resilient environment. Research informs us that having a sense of shared community and accountability where individuals are encouraged to be there for each other and help one another creates a socially resilient environment (Arewaskiporn, Davis & Zautra, 2013). More specifically, among the social environmental factors that promote resilience (as seen in children and adults) are 1) being in contact with caring people who value the person's individuality; 2) being engaged in activities that allow a person to be part of a cooperative endeavor and which encourage helping others; and 3) involvement in groups within the community (e.g. clubs or church) that regard connection, provide meaning, and foster growth (Arewaskiporn, Davis & Zautra, 2013). For these reasons, find like-minded people, and connect with or create your community. Reach out to friends, family, colleagues, peer, or mentors and expand your support system. Remain open to asking for help. Contact professionals such as clinicians or counselors, including the OAAP, for added support.

How else might you stay connected and maintain a socially resilient environment?

C. Brief Resilience Scale (BRS)

The Lawyer Well-Being Took Kit (https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_well-being_toolkit_for_lawyers_legal_employers.authcheckdam.pdf) has a list of assessments (pp. 25-28) for individual lawyers seeking to engage in self-assessment.

Among the assessment is the Brief Resilience Scale (BRS), which can be found here https://ogg.osu.edu/media/documents/MB%20Stream/Brief%20Resilience%20Scale.pdf (a hard copy has been provided below). The BRS is one way of many to evaluate your current level of resilience.

Brief Resilience Scale (BRS)

Please respond to each item by marking one box per row		Strongly Disagree	Disagree	Neural	Agree	Strongly Agree
BRS 1	I tend to bounce back quickly after hard times	☐ 1	☐ 2	☐ 3	☐ 4	☐ 5
BRS 2	I have a hard time making it through stressful events.	☐ 5	☐ 4	☐ 3	☐ 2	☐ 1
BRS 3	It does not take me long to recover from a stressful event.	☐ 1	☐ 2	☐ 3	☐ 4	☐ 5
BRS 4	It is hard for me to snap back when something bad happens.	☐ 5	☐ 4	☐ 3	☐ 2	☐ 1
BRS 5	I usually come through difficult times with little trouble.	☐ 1	☐ 2	☐ 3	☐ 4	☐ 5
BRS 6	I tend to take a long time to get over set-backs in my life.	☐ 5	☐ 4	☐ 3	☐ 2	☐ 1

Scoring: Add the responses varying from 1-5 for all six items giving a range from 6-30. Divide the total sum by the total number of questions answered.

My score: _______ item average / 6

Smith, B. W., Dalen, J., Wiggins, K., Tooley, E., Christopher, P., & Bernard, J. (2008). The brief resilience scale: assessing the ability to bounce back. *International journal of behavioral medicine*, *15*(3), 194-200.

~~~~~~~~~~~~~~

BRS scores can be interpreted as follows (Smith et al., 2013, p. 17):

BRS score:	Interpretation:
1.00-2.99	Low resilience
3.00-4.30	Normal resilience
4.31-5.00	High resilience

Smith, B.W., Epstein, E.E., Oritz, J.A., Christopher, P.K., & Tooley, E.M. (2013). The Foundations of Resilience: What are the critical resources for bouncing back from stress? In S. Prince-Embury & D.H. Saklofske (Eds.), Resilience in children, adolescents, and adults. Translating research into practice (The Springer Series on human exceptionality) (pp. 167-187). New York, NY: Springer
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O'Connell, B. H., O'Shea D., & Gallagher, S. (2017). Feeling Thanks and Saying Thanks: A Randomized Controlled Trial Examining If and How Socially Oriented Gratitude Journals Work. *Journal of Clinical Psychology, 73*(10): 1280-1300. doi: 10.1002/jclp.22469

Proctor, C., Maltby, J., & Linley, P. A. (2011) Strengths use as a predictor of well-being and health-related quality of life. *Journal of Happiness Studies, 12*, 153-169. doi: 10.1007/s10902-009-9181-2

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Smith, B.W., Epstein, E.E., Oritz, J.A., Christopher, P.K., & Tooley, E.M. (2013). The Foundations of Resilience: What are the critical resources for bouncing back from stress? In S. Prince-Embury & D.H. Saklofske (Eds.), *Resilience in children, adolescents, and adults. Translating research into practice (The Springer Series on human exceptionality)* (pp. 167-187). New York, NY: Springer

OAAP

MARCH 2010

Issue No. 77

OREGON ATTORNEY ASSISTANCE PROGRAM

IN SIGHT *for Oregon Lawyers and Judges*

IMPROVING THE QUALITY OF YOUR PERSONAL AND PROFESSIONAL LIFE

NETWORKING FOR INTROVERTS

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.

Realize 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!

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Helping lawyers and judges for over 25 years

- Alcohol & Chemical Dependency
- Career Change & Transition
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- Mental Health
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A free, nonprofit, confidential program for you.

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

- Marti Olsen Laney, PsyD, *The Introvert Advantage: How to Thrive in an Extrovert World* (Workman Publishing Co.: 2002)
- Harvey Mackay, *Dig Your Well Before You're Thirsty: The Only Networking Book You'll Ever Need* (Currency Books: 1999)
- Jay Conrad Levinson and Monroe Mann, *Guerrilla Networking: A Proven Battle Plan to Attract the Very People You Want to Meet* (AuthorHouse: 2009)
- Diane Darling, *The Networking Survival Guide: Get the Success You Want by Tapping Into the People You Know* (McGraw-Hill: 2003)

Welcome, Law Students

OAAP
SEPTEMBER 2012
Issue No. 87

OREGON ATTORNEY ASSISTANCE PROGRAM

IN SIGHT *for Oregon Lawyers and Judges*

IMPROVING THE QUALITY OF YOUR PERSONAL AND PROFESSIONAL LIFE

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

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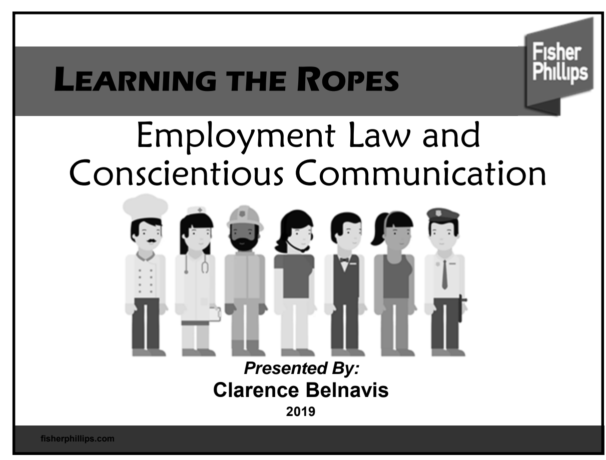
at www.UndeniableRuth.com This post appeared in The Daily Dispatch*, published by Attorney at Work, June 20, 2012 (www.attorneyatwork.com). Reprinted with permission.*

CHAPTER 16

Employment Law and Conscientious Communication

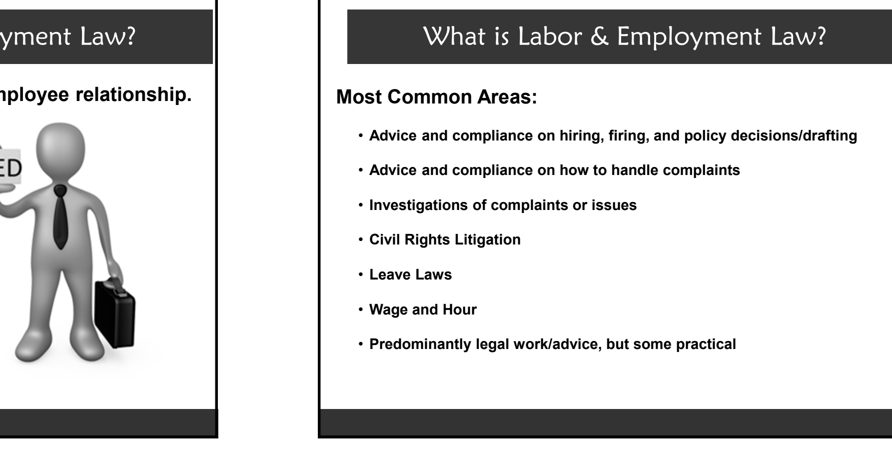
Clarence M. Belnavis

Fisher & Phillips, LLP



What is Labor & Employment Law?

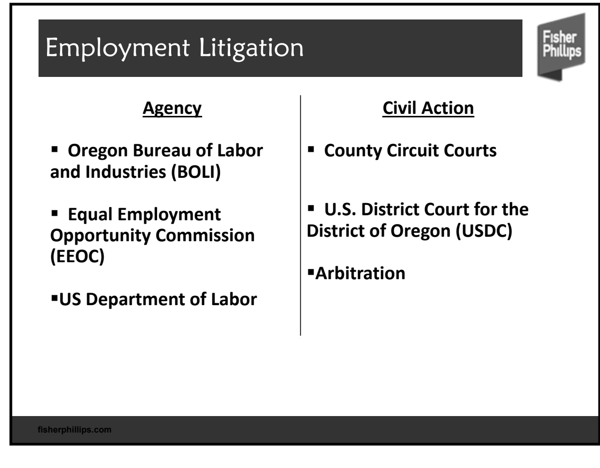
All issues related to the employer-employee relationship.

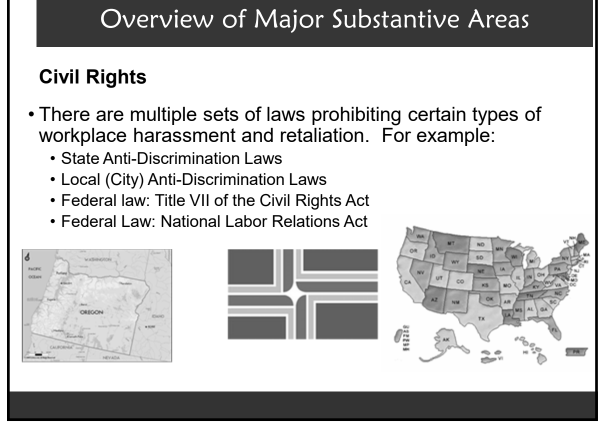


What is Labor & Employment Law?

Most Common Areas:

- **Advice and compliance on hiring, firing, and policy decisions/drafting**
- **Advice and compliance on how to handle complaints**
- **Investigations of complaints or issues**
- **Civil Rights Litigation**
- **Leave Laws**
- **Wage and Hour**
- **Predominantly legal work/advice, but some practical**





Overview of Major Substantive Areas

Civil Rights

Oregon Law Protects Employees Based on:

- ❖ Race or color
- ❖ Religion
- ❖ Sex/gender
- ❖ Age (over 18)
- ❖ National origin or ancestry
- ❖ Sexual orientation
- ❖ Gender Identity
- ❖ Genetic Information
- ❖ Military or veteran status
- ❖ Political Ideology

****This list does __not__ include everything!***

Overview of Major Substantive Areas

Civil Rights

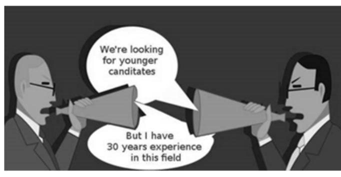
Oregon Law Protects Employees Based on:

- ❖ Marital status
- ❖ Pregnancy/related medical conditions
- ❖ Disability or medical condition
- ❖ Engaging in protected activity:
  - ➢ Example: making complaint of unlawful discrimination
  - ➢ Complaining about wages
  - ➢ Taking FMLA leave

****This list does __not__ include everything!***

What Is Illegal Discrimination?

Treating an employee differently because of a protected category



Overview of Major Substantive Areas

Civil Rights

Corporate Liability

- •An employer is automatically liable for harassment by a supervisor when a "tangible employment action" occurs in connection with the harassment. A tangible employment action is very broadly defined and need not be negative. Examples include changes in work assignment or schedule, terminations or failure to promote.
- •An employer is also liable for harassment by co-workers if the employer knew or should have known of the conduct but failed to take immediate and appropriate corrective action.
- •An employer is also liable for harassment by a non-employee if the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.

SEXUAL HARASSMENT

Not a Joking Matter

SEXUAL HARASSMENT

Section 13307 of the Tax Cuts and Jobs Act eliminates the business deduction for:

(1) any settlement or payment related to sexual harassment or sexual abuse that is subject to a confidentiality agreement; and

(2) attorney fees related to such a settlement.

Sexual Harassment Scandal Reignites at Oregon Capitol

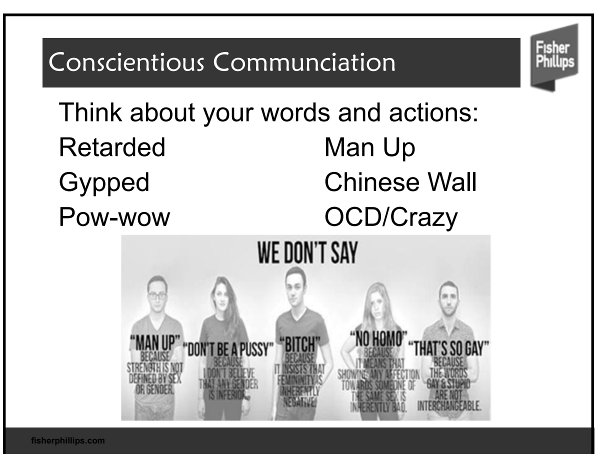
Attorney Named In Harassment Complaint Is Oregon Legislature's New Investigator

Oregon Labor Commissioner Accuses Legislature Of Creating Hostile Workplace

Richard Strauss & Ohio State Sexual Abuse

Hostile Working Environment
Fisher Phillips
Where offensive, unwelcome, severe, or pervasive conduct creates intolerable (hostile) working conditions
fisherphillips.com

Conscientious Communciation
Fisher Phillips
Even conduct that does not rise to the level of "severe and pervasive" can make the workplace uncomfortable or unpleasant
Attorneys, whether employers or employees, should strive to create an inclusive and healthy workplace
fisherphillips.com


Conscientious Communciation
Fisher Phillips
Think about your words and actions:
Retarded
Man Up
Gypped
Chinese Wall
Pow-wow
OCD/Crazy
WE DON'T SAY
"MAN UP"
"DON'T BE A PUSSY"
"BITCH"
"NO HOMO"
"THAT'S SO GAY"
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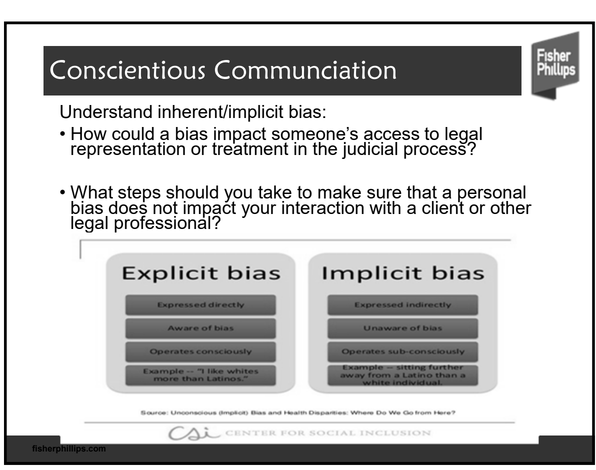
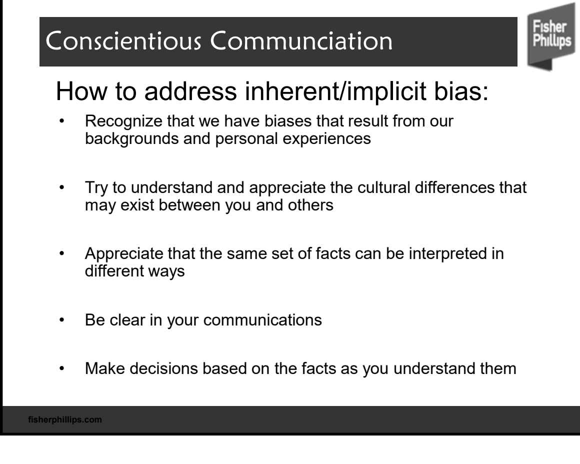

Conscientious Communciation
Fisher Phillips
Understand inherent/implicit bias:
• How could a bias impact someone's access to legal representation or treatment in the judicial process?
• What steps should you take to make sure that a personal bias does not impact your interaction with a client or other legal professional?
Explicit bias
Expressed directly
Aware of bias
Operates consciously
Example -- "I like whites more than Latinos."
Implicit bias
Expressed indirectly
Unaware of bias
Operates sub-consciously
Example – sitting further away from a Latino than a white individual.
Source: Unconscious (Implicit) Bias and Health Disparities: Where Do We Go from Here?
CENTER FOR SOCIAL INCLUSION
fisherphillips.com


Conscientious Communciation
Fisher Phillips
How to address inherent/implicit bias:
• Recognize that we have biases that result from our backgrounds and personal experiences
• Try to understand and 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
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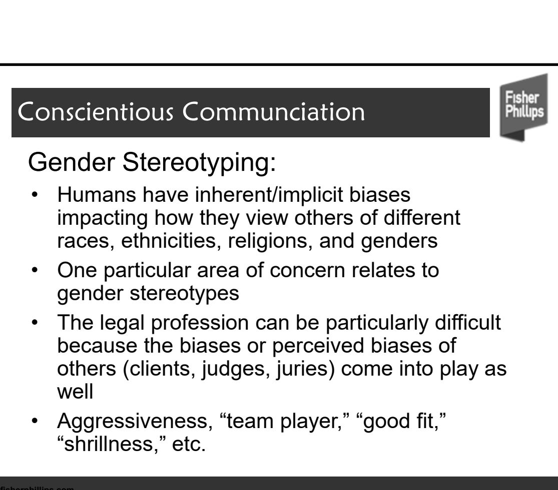

Conscientious Communciation
Fisher Phillips
Gender Stereotyping:
• Humans have inherent/implicit biases impacting how they view others of different races, ethnicities, religions, and genders
• One particular area of concern relates to gender stereotypes
• The legal profession can be particularly difficult because the biases or perceived biases of others (clients, judges, juries) come into play as well
• Aggressiveness, "team player," "good fit," "shrillness," etc.
fisherphillips.com

Overview of Major Substantive Areas

Wage and Hour

How to legally pay wages and salary to employees

Overview of Major Substantive Areas

Wage and Hour

Independent Contractor vs. Employee

- ORS 652.310 defines "employee" to mean:
  - Any individual who otherwise than as . . . an independent contractor renders personal services wholly or partly in this state to an employer . . .
- FLSA defines "employ" as to suffer or permit to work"

- The employment vs. IC test is different depending on the law, but essentially comes down to "control"
  - The Dept. of Revenue and Employment Department rely on ORS 670.600
    - Free from direction and control
    - Customarily engage in independently established business
    - Responsible for obtaining licenses and certificates.

Overview of Major Substantive Areas

Wage and Hour

- Minimum wage and overtime rules
  - If a person is an independent contractor, how a business pays that person is a question of contract law, not employment law
  - If a person is an employee, the basic rule is that the employer must pay
    - At least the minimum wage and
    - Overtime at 1.5x the employee's "regular rate" for all hours worked over 40 in a single week

Overview of Major Substantive Areas

Wage and Hour

- "White collar" exemptions
  - Must meet both the salary and duties test
  - Salary Test:
    - Must be paid on a "salary basis" of at least $455 a week ($23,600 per year) now and $684 a week ($35,568 per year) as of January 1, 2020
  - Duties Test:
    - Must perform duties of administrative, executive, or professional employee (there are other categories)

Wage Payment Upon Termination

- Involuntary Termination - Next Business Day
- 48 Hours' Notice - Upon Termination
- Quit Without Notice - Within Five Business Days

fisherphillips.com

Overview of Major Substantive Areas

Leave Laws

- The Bermuda Triangle of Employment Law
  - Several laws provide employees with rights to leave for all kinds of specific reasons. Examples include:

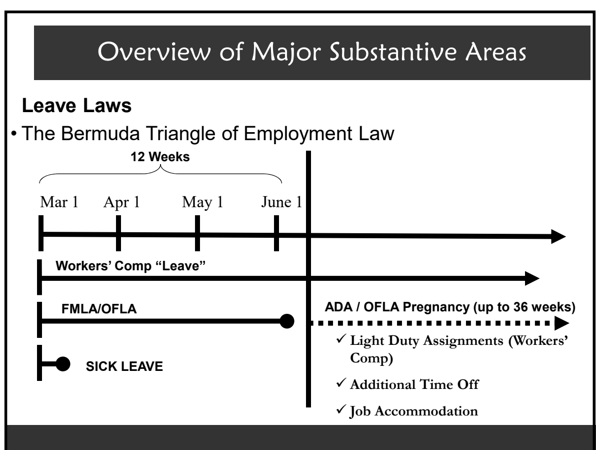
Voting	Jury Duty
Domestic Violence	Military Family
Military Family	Donation of Bone Marrow
Pregnancy	Fire Fighting
Paid Sick Leave (city and state)	Alcohol/Drug Rehabilitation

  - Employment lawyers, however most commonly deal with the ADA/Oregon equivalent, the FMLA/OFLA, and the worker's compensation system.

Overview of Major Substantive Areas

Leave Laws

- The Bermuda Triangle of Employment Law



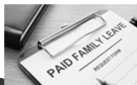
Overview of Major Substantive Areas

Leave Laws

- Disability Discrimination Laws
  - Makes it unlawful to discriminate on basis of disability
    - Must provide reasonable accommodation to allow qualified individual with disability to perform essential functions of job
    - Must engage in interactive process to determine what accommodations may be needed
- FMLA/OFLA
  - Generally require that covered employers provide covered employees up to 12 weeks of unpaid leave as necessary for employee's or employee's family member's serious health conditions
    - Absolute right to leave if entitled – no hardship defense
    - Under OFLA, but not FMLA, leave available for sick child even if sickness is not a serious health condition
    - Intermittent leave available if medically necessary
- Worker's Comp
  - Does not actually provide leave, but does provide reemployment and reinstatement rights for up to three years after an on-the-job injury
    - Usually you can draw OFLA and FMLA leave down concurrently, but can only draw down OFLA leave if employee refuses light duty assignment

Paid Family Leave

- HB 2005 / Operative January 1, 2022 – payroll contributions begin and written notice to employees required / January 1, 2023 – employees can start taking leave.
- This Bill creates a medical leave insurance program to compensate covered individuals with family leave, medical leave or safe leave.
  - Available to those who made at least $1,000 in a calendar year.
  - 12 weeks of paid time off to recuperate for employee's own serious illness, assist a family member, care for kids (new, adopted and foster), and/or deal with domestic violence.
  - Payroll tax split 60-40 between workers and employers.
  - Low income workers (pay equal to or less than 65 percent of the state average weekly wage) will get full wage replacement, and other works will get partial wage replacement.



Paid Family Leave

- Businesses with at least 25 employees will have to contribute.
- Employee cannot get paid family leave while getting workers' compensation or unemployment benefits.
- Unlawful to discriminate or retaliate against an employee for inquiring about or using this benefit.
- Employee entitled to reinstatement to the same or equivalent position held before taking leave.

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 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.

"Welcome back from sick leave. You look completely recovered."

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.

Equal Pay Act of 2017

In 2017, Oregon enacted the Oregon Equal Pay Act, which bans employers from asking about or using prior salary in hiring decisions.

The Oregon EPA goes further than the federal Equal Pay Act of 1963 in preventing employers from justifying an otherwise unlawful pay disparity on the basis of prior salary.

Equal Pay Act of 2017

Overview:

- Prohibits discrimination in pay and disparate pay rates between employees on basis of Protected Class.
- Same compensation for "work of comparable character."
- Can only pay different rates based on "bona fide" reasons.
- You can only go up, never down.
- Can't ask, screen, or set wages based on past compensation.

Noncompetition Agreements

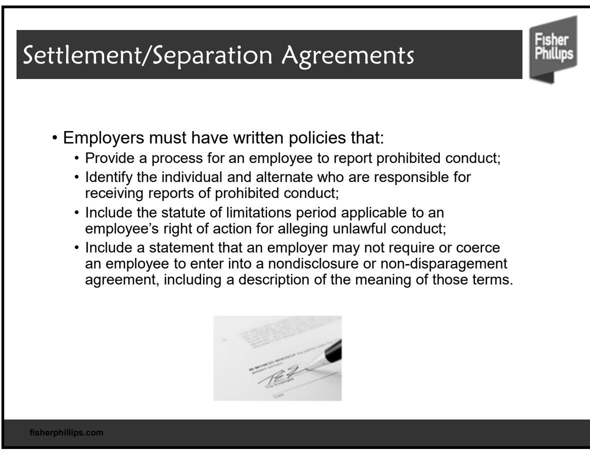
- **HB 2992** / Effective January 1, 2020
- Bill Places Extra Restrictions on the Validity/Enforceability of Noncompetition Agreements:
  - Employer must provide employee with a signed copy of the terms of the agreement within 30 days after the termination date.
- Other Restrictions:
  - Employer must tell employee in a written job offer at least two weeks before employee starts that the noncompete is required, or the noncompete is entered into upon a bona fide advancement;
  - Employee must be exempt from Oregon minimum wage and overtime laws;
  - Employer must have a "protectable interest" (access to trade secrets or competitively sensitive confidential information);

Noncompetition Agreements

- The employee must make more than the median family income for a family of four as calculated by the Census Bureau; and
- The agreement cannot be effective for longer than 18 months from the date of the employee's termination.

Settlement/Separation Agreements

- SB 726 / Effective September 30, 2019 / October 1, 2020
- This Bill makes it an unlawful employment practice for employer to enter into an agreement that would prevent employee from disclosing or discussing conduct that constitutes unlawful discrimination.
- Other specifics:
  - Expands the statute of limitations for most discrimination claims to five years after the occurrence of the alleged violation.


Settlement/Separation Agreements
Fisher Phillips
• Employers must have written policies that:
• Provide a process for an employee to report prohibited conduct;
• Identify the individual and alternate who are responsible for receiving reports of prohibited conduct;
• Include the statute of limitations period applicable to an employee's right of action for alleging unlawful conduct;
• Include a statement that an employer may not require or coerce an employee to enter into a nondisclosure or non-disparagement agreement, including a description of the meaning of those terms.
fisherphillips.com

Settlement/Separation Agreements
Fisher Phillips
• Include an explanation that an employee claiming to be aggrieved by prohibited conduct may voluntarily request to enter into an agreement that has non-disparagement, no-rehire and/or nondisclosure agreements and that employee has at least seven days to revoke the agreement; and
• Include a statement that advises employers and employees to document any incidents involving prohibited conduct.
fisherphillips.com

Settlement/Separation Agreements
Fisher Phillips
• Employer may enter into a settlement, separation, or severance agreement that includes a nondisclosure, non-disparagement, or no-rehire provision only when an employee claiming to be aggrieved by discrimination requests to enter into the agreement. Such agreement must provide employee at least seven days to revoke, and the agreement may not become effective until after the expiration of the revocation period.
SEPARATION AGREEMENT
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Questions?
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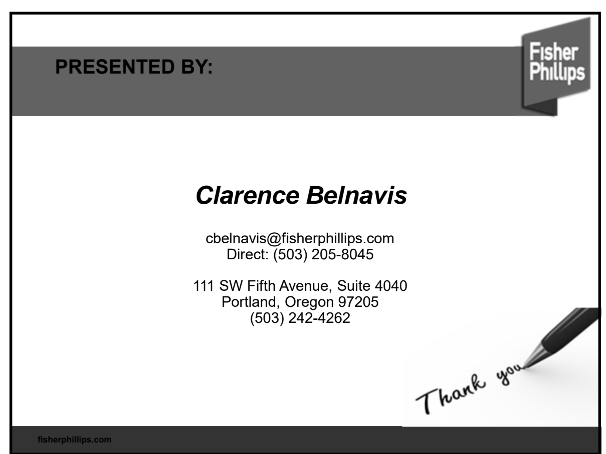
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Thank you
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CHAPTER 17

Increasing Access to Justice Through Trauma Informed Lawyering

Ali Schneider
Meadowlark Immigration, PC

Chapter 17

INCREASING ACCESS TO JUSTICE THROUGH TRAUMA INFORMED LAWYERING

TABLE OF CONTENTS

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POWERPOINT SLIDES 17-1

To view these chapter materials and the additional resources below on or before October 30, 2019, go to www.osbplf.org , select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After October 30, 2019, select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

Trauma Informed Structured Interview Questionnaires for Immigration Cases, National Immigrant Women's Advocacy Project
Trauma Informed Legal Advocacy Practice Scenarios Series, National Center on Domestic Violence, Trauma and Mental Health
SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach, Substance Abuse and Mental Health Services Administration

Access to Justice Through Trauma Informed Lawyering

Ali Schneider, Meadowlark Immigration PC

Defining Trauma

Individual Trauma results from an **event**, series of events, or set of circumstances that is **experienced** by an individual as physically or emotionally harmful or life threatening and that has lasting adverse **effects** on the individual's functioning and mental, physical, social, emotional, or spiritual well-being.

- Trauma experiences are highly individualized
- Influenced by culture

Substance Abuse and Mental Health Services Administration. SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach. HHS Publication No. (SMA) 14-4884. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2014.

Examples of Traumatic Experiences

- Sexual abuse/assault
- Physical abuse/assault
- Neglect
- Traumatic Loss
- Being injured
- Industrial or transportation accident
- Imprisonment/torture
- Medical Trauma
- Emotional abuse
- Secondary trauma
- Racial trauma
- Gender based trauma
- Systemic trauma
- War related- combat or refugee
- Natural disaster
- Other

Trauma Informed Defined: The 4 R's

According to SAMHSA's concept of a trauma-informed approach, A program, organization, or system that is trauma-informed:

- ***Realize*** the widespread impact of trauma and understand potential paths for recovery;
- ***Recognize*** the signs and symptoms of trauma in clients, families, staff, and others involved with the system;
- ***Respond*** by creating policies, procedures, and practices for all areas of the organization
- Seek to ***resist Re-traumatization***-

Substance Abuse and Mental Health Services Administration. SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach. HHS Publication No. (SMA) 14-4884. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2014.

SAMHSA's Six Key Principles of a Trauma-Informed Approach

- Safety
- Trustworthiness and transparency
- Peer support
- Collaboration and mutuality
- Empowerment, voice, and choice
- Cultural, historical, and gender Issues

Substance Abuse and Mental Health Services Administration. SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach. HHS Publication No. (SMA) 14-4884. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2014.

Barriers

Economic

- Legal fees
- Transportation
- child care
- Extenuating costs

Communication

- Literacy
- Language
- Legal jargon
- Systemic processes

Cultural

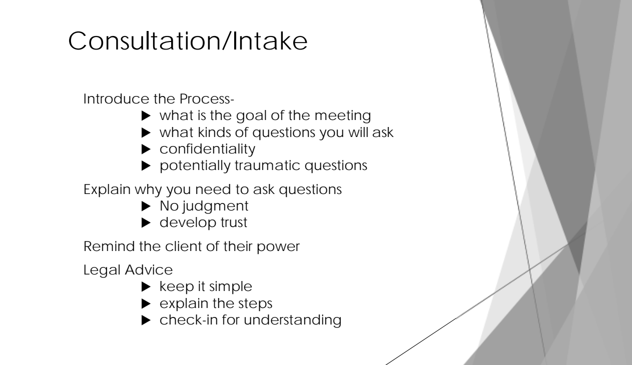
- White Supremacy
- Prejudice
- Systemic oppression

Trauma

- Retelling of events
- Memory
- Document Gathering
- Safety

Creating a Trauma Informed Space

- Parking/Transportation accessibility
- Greeting/Reception
- Family friendly
- Comfortable environment
- Safety
- Health

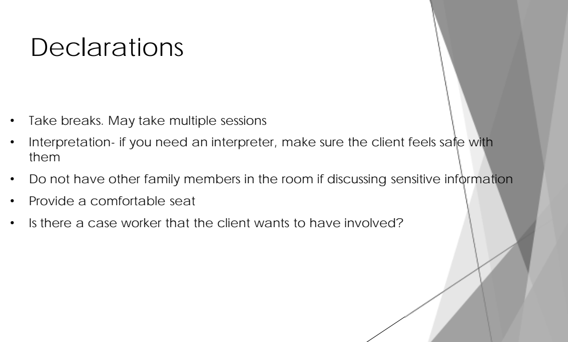


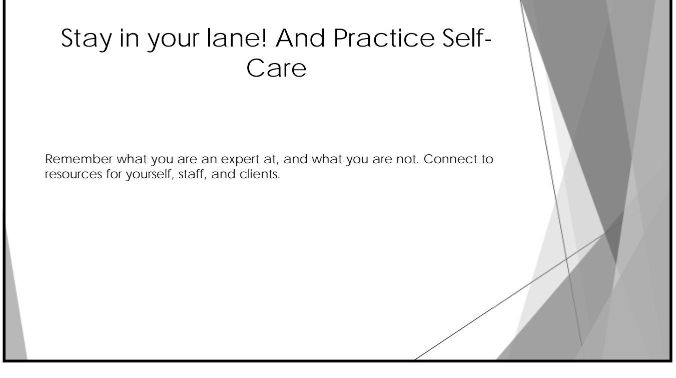
Case Process and Gathering Evidence

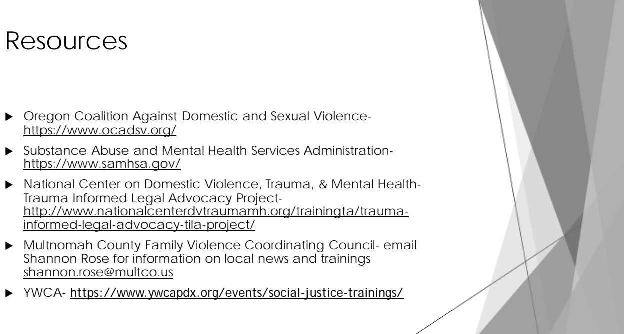
- Set expectations and boundaries
- Explain confidentiality, especially if representing multiple people
- Set check-ins, if a case is going to be pending for a long time
- Respond to phone calls in a timely fashion
- Creating protocols and templates to streamline your processes

Gathering documentation and information can be especially difficult for survivors of trauma, including:

- Recalling dates, addresses, work history, details of events
- Gathering documents, support letters
- Testifying- preparation







Chapter 17

INCREASING ACCESS TO JUSTICE THROUGH TRAUMA INFORMED LAWYERING

Additional Resources

Trauma Informed Structured Interview Questionnaires for Immigration Cases, National Immigrant Women's Advocacy Project
Trauma Informed Legal Advocacy Practice Scenarios Series, National Center on Domestic Violence, Trauma and Mental Health
SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach, Substance Abuse and Mental Health Services Administration

Trauma Informed
Structured Interview Questionnaires for Immigration Cases (SIQI)[1]

By: Mary Ann Dutton, Krisztina Szabo, Rocio Molina, Maria Jose Fletcher,
Mercedes V. Lorduy, Edna Yang, and Leslye Orloff
The National Immigrant Women's Advocacy Project[2]
September 21, 2015 (Updated April 18, 2018)

The following questionnaires are provided to facilitate the Trauma Informed Structured Interview.[3] During the story developing session, clients are encouraged to share their story uninterrupted while advocates and attorneys listen, take notes, and watch for triggers. This tool is designed to be used during follow up interviews with clients. This Structured Interview Questionnaire for Immigration (SIQI) will aid advocates and attorneys in eliciting additional in-depth information to strengthen their client's immigration case and will also provide a complete picture of trauma and distress endured by survivors. The questions are designed to facilitate the client's healing and to strengthen the client's immigration application by uncovering important details of the story by screening for additional incidents, experiences, and emotional harms that contribute to extreme cruelty and/or substantial mental or physical abuse. Attorneys and advocates should explain the goals of this session to the client before initiating the trauma informed structured interview.

While conducting the Trauma Informed Structured Interview Questionnaire for Immigration (SIQI), it is important to be mindful of the following:

- The story developing session in which clients are encouraged to share and to the extent possible write their stories uninterrupted comes first.
- This SIQI can be used by the attorney or advocate during that first interview as a note taking guide to annotate or identify issues that you want to be sure to follow up on in the second interview. However, trauma informed best practices make it important to assure that the first interview is the victim's uninterrupted account and if you use the SIQI it should be for note taking only.
- These questions should be administered by the advocate or attorney and are not intended to be used as a questionnaire(s) that clients fill out on their own.
- Clients should be told ahead of time that some of these questions are sensitive in nature and that they are not required to answer questions that make them uncomfortable. The advocate or attorney may want to tailor the questions to the client's ability to understand the question. (i.e. education, cognitive understanding, bilingual advocates adapting the questions to be most understandable in the client's native language)
- Use this tool in conjunction with crisis intervention techniques and be mindful of your own self-care needs during this and all other sessions.
- Allow time for breaks and "check-ins" with your client.

This tool was created to help both attorneys and advocates navigate the different immigration protections available to immigrant survivors. The tool will provide you with step by step information on how to

[1] This training is supported by Grant No. 2011-TA-AX-K002 awarded by the Violence Against Women Office, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.
[2] Copyright © National Immigrant Women's Advocacy Project, American University, Washington College of Law 2013, 2017.
[3] Part of the introduction to this Trauma Informed Tool, pages 1-3, was jointly developed by CALCASA and NIWAP.

make an immigration relief assessment, complete immigration relief intake, draft declarations, collect supporting documents, and complete VAWA and U visa files.

It is paramount that in your interaction and interview with the survivor that you take a trauma-informed approach. A trauma-informed approach recognizes the widespread impact of trauma and understands potential paths for recovery. Trauma is defined as an emotional response to a terrible event like an accident, rape or natural disaster. Immediately after the event, shock and denial are typical. Longer term reactions include unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea. While these feelings are normal, some people have difficulty moving on with their lives.[4]

A trauma-informed approach recognizes the signs and symptoms of trauma in clients and responds by fully integrating knowledge about trauma into policy and practice while actively seeking to avoid re-traumatization of the victim. Importantly, a trauma-informed approach can be utilized in any setting. The key principles to a trauma-informed approach are: Making the survivor feel safe during the interview process; having a relationship of trust between the interviewer and the survivor; feeling supported; feeling empowered during the course of the interview, having their voice heard and feeling they have choices; the interview proceeding mindful of cultural, historical and gender issues.

Initial Survivor Interview

The story of the survivor is one of the central pieces to Violence Against Women Act (VAWA) and U visa applications and processes, which sets them apart from other immigration proceedings. The story or affidavit is the place for the survivor to impress upon the Department of Homeland Security (DHS) Adjudicator the impact of the trauma on their life and their reasons for needing the support of a VAWA or U visa. When reading the survivor's story, the reader – ultimately, the DHS adjudicator – should be able to know and feel what the survivor felt after being subjected to abuse or crime victimization.

The initial interview also provides advocates and attorneys with the opportunity to establish a good rapport with the survivor, build trust, make the survivor feel heard, safe and supported, further discuss the application process, uncover cultural, historical and gender issues, review supporting documents, and assist with the survivor's declaration. It is important to explain the legal process and any necessary requirements in simple language to avoid confusion. Our goal is to empower clients to reclaim their autonomy and independence. Each survivor will determine what is best for them, and regardless of our personal opinion and/or feelings, we have to support survivor's decisions. The survivor should be given the option of writing their own story, having it transcribed by an advocate, or recording it.

In the initial story telling session, it is important to let the survivor share their story as a stream of consciousness. As the recorder and support interviewer, resist the urge to interrupt the story telling process. Save the clarification of details until later. Ask open-ended questions, such as: and then what happen? And use affirming body language—nodding and agreeing with the survivor. Ask the survivor to let you know when they need a break or if they are feeling stressed or anxious during the story telling.

Preparing for Story Collection

It is important that you prepare prior to preparing the survivor's story. Take time in advance to read police reports, request for protection orders, court records and medical records, or whatever else might be available to you that might be beneficial in telling the survivor's story. Tell your client ahead of time what your goals are before the story collection so they can best prepare. Determine how your client wants to document their story. Do they want to write it themselves, do they want you to transcribe it, or do they want to record it? Ensure that both you and your client have set aside adequate time to document the

[4] American Psychological Association, *Trauma*, http://www.apa.org/topics/trauma/.

story taking into account the use of interpreters and translators. Determine in advance whether you will refer to the "story" as such or refer to it as an "affidavit."

Your Client's Story on Paper
The client is their expert. Listen to your client's story with support and empathy. When your client appears upset or triggered, pause and take a break, offering them a glass of water. Listening to their experience with empathy validates their experience and sympathizes with the trauma they have experienced. It minimizes re-traumatization. If your client does not speak English, you can either record the experience and have it translated later, or transcribe it in their native language and have it translated later. For the first draft, spelling and grammar are not important. Fluidity of story telling is what is important and creating an environment whereby your client tells their story and feels heard is what matters most. Whatever manner your client chooses to document their experience, transcribe it themselves, have you transcribe it, or record it, respect their decision.

Supplemental Interview
After the client has documented their story, you as the advocate/attorney will proceed to the next step in the story development process, reviewing with your client a series of additional questions. These questions are trauma-informed while getting to the details that are important for the visa application. These questions are designed to solicit more complete information about the survivor, their case, experiences, and the impact of these events on the victim and their children. This interview will also be a time when it will be important to ask follow-up questions obtaining more detail about events raised in your client's story. Again, it is important that one follow a trauma-informed approach when asking these questions. One needs to recognize that the questions could be upsetting or trigger a client. When your client appears upset or triggered, pause and take a break, offering them a glass of water or simple breathing or grounding exercises.[5] Do not proceed until your client appears ready to proceed, and you have been given verbal assurance that they are ready to proceed.

Integrating the Story
After you have obtained the story your client wrote/told you, and held your follow up questioning session, you as the advocate/attorney will shape the story into a cohesive whole. In doing so you will: 1) organize the story chronologically; 2) correct all grammar and spelling, and; 3) ensure that the story remains in your client's own words. Once the story has been edited, it will be reviewed with your client one last time, again with a trauma-informed approach. Upon completion, you will secure your client's signature and submit the story as evidence in the immigration case.

Importance of Self-Care
Self-care is particularly important for attorneys and advocates that work closely with clients who have experienced trauma and have difficult stories to tell. Self-care is not a sign of weakness. It is a way of making our bodies and minds stronger, thus enabling us to continue living our lives. Documenting their traumatic experiences can impact those helping them. Often one may experience stress, fatigue or sadness after helping an immigrant survivor document their history of abuse. Remember, we cannot take care of others unless we first take care of ourselves.[6]

STRUCTURED INTERVIEW QUESTIONS FOR VAWA SELF-PETITION

[5] *See* Tula Biederman & Rocio Molina, *Supplemental Grounding Exercises for Trauma-Informed Approach*, NIWAP (2014), http://niwaplibrary.wcl.american.edu/pubs/groundingtool/.
[6] *See* Benish Anver & Rocio Molina, *Self-Care Tools, Strategies and Assessment*, NIWAP (2014), http://library.niwap.org/wp-content/uploads/Self-Care-Tool.pdf.

This section outlines the basic requirements for a VAWA Self Petition and will allow the attorney/advocate to remember follow up questions and details that may be important to document the abuse, battering and extreme cruelty and the impact of these on the client's well-being, physical and mental health and safety for the VAWA self-petition. It begins by documenting the details of the relationship between the abuser and the client, the extreme cruelty suffered and its extent, and any good moral character issues that may affect the client's application. Note that not all sections will apply to your client.

I. Relationship with Abuser and Cohabitation

If the abuser is your spouse or ex-spouse, you will need to show that you got married because you loved each other, and that you lived together at some point.

- When and where did you and your spouse meet?
  - Who introduced you?
  - Who else was there when you first met?
- When did you start dating? What did you do while you were dating?
  - While you were getting to know each other, were you in the U.S. or in another country?
  - Did you go out to eat, go to parties, go to the movies, etc.?
    - What kinds of activities did you do together?
    - Were there people that you went out with?
  - What made you fall in love with your spouse?
- When did you move in together?
- How long did you date or live together before you decided to get married?
- When did you decide to get married?
  - Did your spouse propose to you?
  - Where were you?
  - What were you doing?
  - What did you respond?
  - Was anyone else present?
- When and where did you get married?
  - How was your wedding?
  - Who was present?
  - Was there a party before or after the wedding?
- Did you go on a honeymoon? If yes, when and where?
- Where did you first live as a married couple? Do you remember the address?
- Write down a list of the addresses of all the homes you shared with your spouse and the dates you lived there.
- When you were living together, did anyone else live with you (children, parents, siblings, or friends)?
- Were you allowed to have friends visit you at your home?
- Did you have parties or receptions?
- Do you and your spouse have children together? How many children do you have in common? What are their names and when were they born?
- If you had children from a previous marriage or relationship, did your spouse spend time with them?
- What was the marriage like at the beginning?

  - Were there good times before the abuse started?
  - What did you do together as a family?
  - Do you remember any special occasion from the good times?
  - A family celebration?
  - A birthday party?
  - A family vacation?
- What were your future plans together?

If the abuser is your stepparent, you will need to show that you had a stepparent-child relationship.

- How did your parent and stepparent meet?
  - When did they start dating?
  - When did they move in together?
- How long did your parent and stepparent live together before they decided to get married?
- When and where did your parent and stepparent get married?
  - How was their wedding?
- In addition to you, do your parent and stepparent have any children?
  - How many children do they have in common?
  - What are their names and when were they born?
- Were you ever adopted by your stepparent?
- Did you ever live together with your parent and stepparent?
  - If so, do you remember the address (es)? Try to include all the address (es) of the homes you shared with your parent and stepparent and the dates you lived there.
- Do you remember any special occasions from the good times you spent with your parent and stepparent?
  - A family celebration?
  - A birthday party?
  - A family vacation?

If the abuser is your parent, you will need to show that you had a parent-child relationship.

- How did your parents meet?
  - Did they ever get married?
  - If so, when and where?
- When and where were you born?
- Is the abusive parent listed on your birth certificate or on your baptism record?
- Do you have any siblings or half-brothers or half-sisters from this parent?
- If your parents divorced or separated, did the abusive parent have custody of you?
- Did the abusive parent have to pay child support?
- Did he or she have visitation rights to see you? If so, how often?
- Did you ever live together with your abusive parent?

- If so, do you remember the address (es)?
- Try to include all the address (es) of the homes you shared with him or her and the dates you lived there.

- Do you remember any special occasions from the good times you spent with your abusive parent?
  - A family celebration?
  - A birthday party?
  - A family vacation?

<u>If your abuser is your over 21 year old U.S. citizen son or daughter</u>, you will need to show that you had a parent-child relationship.

- When was your son or daughter born?
  - Are you listed on his or her birth certificate or baptism record?
- Did you live with your son or daughter as he or she was growing up?
  - If not, did you visit him or her?
  - If yes, how often did you see your son or daughter?
  - Did you pay child support for him or her?
- When did your son or daughter come to the U.S.?
  - How did he or she become a U.S. citizen?
- Did you ever live together with your son or daughter in the U.S.?
  - If so, do you remember the address (es)?
  - Try to include all the address (es) of the homes you shared with him or her and the dates you lived there.
- Do you remember any special occasions from the good times you spent with your son or daughter?
  - A family celebration?
  - A birthday party?
  - A family vacation?

II. Battery and/or Extreme Cruelty

- When did the abuse begin and where were you at the time?
  - Did it start with an argument or was it unprovoked?
  - Did it escalate into physical violence?
- After the initial mistreatment, how frequent were your abuser's abusive episodes?
  - Did your abuser get more and more violent?
- Please give a detailed description of what the abuse was like.
  - Can you recall a specific violent or abusive outburst?
  - What did your abuser do specifically?
  - Did your abuser do any of the following things:
    - Yell or curse at you? Did your abuser call you names? If so, what words did he or she use?
    - Hit, kick, or slap you? If so, what did your abuser use and how did he or she hurt you?

        - Throw things at you? If so what did your abuser throw at you?
        - Pull your hair?
        - Grab you by the throat?
        - Force you to have sex against your will (when you didn't want to)?
- Did your abuser also hurt your children? How?
- Did your abuser forbid you to communicate with family or friends?
- Did your abuser ever threaten to kill or hurt you, your children, or family members?
- Did your abuser threaten you with a gun or other weapon?
- Did your abuser threaten to commit suicide?
- Did your abuser threaten to destroy your property?
- Did your abuser threaten to have you deported or take your papers away?
    - Did your abuser threaten to take your children away?
- Did anyone, including family and friends, witness the abuse?
- Did you seek medical assistance because of the abuse? When? Where?
- Did you call the police because of the abuse?
    - When?
    - How many times?
    - What did the police do? Was a police report taken at these times?
- Did you ever get a restraining order?
- Has there been a criminal case charged against your abuser? When? Where did it happen?
- After your abuser's violent periods, did you make up?
    - Did your abuser apologize?
    - How was your abuser's behavior afterwards?
    - Did your abuser treat you better momentarily?
- When and why did you decide to leave your husband?
    - How were you able to do it?

III. Good Moral Character

- Think of examples that show that you are a good parent.
    - Do you work long hours or overtime to support your family?
        - Do you work several jobs to make ends meet?
    - Describe your role in taking care of your children.
        - Do you drive them to and from school?
        - Do you dress them in the morning?
        - Do you prepare their meals?
        - Do you take them to the doctor or dentist?
    - Do you help your children with their homework or school projects?
        - Are you involved with their school activities?
    - Describe your favorite activities with your children.
        - Do you read them stories at night?
        - Do you pray together?
        - Do you take them to the playground?
        - Do you play with them?

- Give examples that show that you are a good member of your community.
- Do you regularly attend religious services?
- Are you an active member in your faith community?
- Do you volunteer your time or donate?
- Do you help out your neighbors, friends, or other family members?

STRUCTURED INTERVIEW QUESTIONS FOR VAWA CANCELLATION OF REMOVAL

VAWA Cancellation is a remedy available only to those clients who are in removal (deportation) proceedings who have cases before an immigration judge. For VAWA Cancellation you will need to write and ask about 2 added elements of the case to qualify, in addition to the questions listed above for VAWA self-petition. Therefore, you should ask these additional questions to be able to show: 1) Continuous Presence in U.S. for 3 years and 2) the hardship your client and her family would face if she were returned to her home country.

IV. Continuous Presence in the U.S.

2. When did you come to the U.S.?
3. How long have you lived in the U.S.?
4. Did you ever leave the country?
    - If yes, for how long were you gone?
    - Did your abuser take out outside of the country?
    - Did you leave the county because of the abuse?
    - Did you go on a vacation outside the U.S.?
    - Did you visit relatives in your home country?
5. If you left several times, it's important to make note of those times with specific dates.

V. Hardship if Returned to Home Country

6. What would happen to you or your family if you were to return to your country of origin? Are you afraid of returning to your country of origin? Why?
- What are the living conditions in your country?
- Do you think you would be safe?
    - Why or why not?
- Can you trust the police?
    - Is there a lot of crime?
- Are there laws or customs in your country that mistreat victims of domestic violence, are divorced, or have children but no husband?
- Does the government of your country protect victims of crime?
- Are you afraid that your abuser would take action against you in your country?
    - Or do you think your perpetrator would try to harm you for having called the police?
    - If so, would you be able to receive adequate protection?
- Are you afraid that the friends and family of your abuser will try to hurt you or your children (physically or psychologically)?

7. Why do you want to stay in the United States?

- o If you had to leave the U.S., would you be separated from your loved ones?
- o Would you still be able to support yourself and your family?
- o Are there services that you have in the U.S. that you wouldn't have if you were deported (ex: social workers, medical help, counseling, government benefits like WIC, etc.)?
- o If you or your children are receiving medical treatments or counseling, would you be able to continue them in your home country?
- o Do your children speak the native language of your country?
- o Would it be difficult for them to adjust going to school in your country?
- o Do you need to stay in the U.S.to have access to the courts and/or help the police in investigating your abuser?

8. What hopes do you have for the future, for you and for your children?

9. Is there anything else you would like to mention or tell the Immigration officer about you or your family?

STRUCTURED INTERVIEW QUESTIONS FOR U VISA CASES

This section outlines the basic requirements for a U Visa and will allow the attorney/advocate to remember follow up questions and details that may be important to document the U visa application. There are a number of questions asking about the harm stemming from the crime which may be difficult for your client to answer, but which is useful in meeting the requirement that an applicant demonstrate the substantial physical, psychological, or emotional harm suffered from the crime.

VI. Relationship with Perpetrator (there need not be a relationship perpetrator)

- Is the perpetrator a relative or family member?
  - o Did you live together? How long was your relationship with him or her?
- Is the perpetrator your spouse, former spouse, or significant other? How did you meet and what has your relationship been like?
  - o How long were you in a relationship?
    - If you were married, when and where did the ceremony take place?
    - Did you have children from a previous relationship?
    - Did you have children with your partner?
    - How did your partner treat the children?
  - o Is the perpetrator someone you went on a date with? If so how and where did you meet?
  - o Is the perpetrator someone who stalked you or tried to go on dates with you?
  - o Is the perpetrator your boss, manager, co-worker, customer, or client?
  - o Is the perpetrator your teacher or classmate?
  - o Is the perpetrator your neighbor or family friend?
  - o Is the perpetrator your clergy member or someone from your faith community?

VII. Qualifying criminal activity

1. <u>If you client was a victim abuse by his/her spouse, partner, or parent:</u>

- When and how did your abuser start mistreating you? For example did your abuser insult you? Did he or she hit you? Push you? Kick you? Did your abuser say bad words to you?

Did he or she call you names?

- How often did your abuser do this?
- Did your abuser do it in front of others? Who?
- How did it make you feel?
- Did you ever call the police? Were you too scared to call for help?
- When was the first time you decided to call the police? What happened?

2. <u>If your client was the victim of a criminal activity or criminal activities by a stranger:</u>
    - Where were you and what were you doing right before the crime? Do you remember the time?
    - How did the incident begin? Did the perpetrator instigate an argument or did he/she attack right away?
    - How and where did the perpetrator hurt you?
    - Did you try to escape? Were you able to cry for help?
    - Did anyone see what happened?

VIII. Physical, physiological, and emotional harm

- Have you suffered any physical injury?
- What was the intensity and the duration of the pain?
- Were you permanently disabled or scarred as a result of the criminal activity?
- Were you taken to the hospital or did your receive any medical care?
- Were you prescribed any medication?
- Have you suffered any psychological injury because of the criminal activity?
- Do you experience humiliation, depression, sleeping problems, anxiety?
- Have you received any counseling?
- Have you been prescribed medication to cope with your psychological problems?
- How has the victimization from the crime changed your physical or emotional energy?
    - Have you been suddenly acting or feeling as if a stressful experience were happening again (as if you were reliving it)?
    - Have you been feeling very upset when something reminded you of a stressful experience from the past?
    - Have you been experiencing physical reactions (e.g., heart pounding, trouble breathing, or sweating) when something reminded you of a stressful experience from the past?
    - Have you been avoiding thinking about or talking about a stressful experience from the past or avoid having feelings related to it?
    - Have you been avoiding activities or situations because they remind you of a stressful experience from the past? If so, what kind of activities have you been avoiding?
    - Did you lose interest in things that you used to enjoy? If so, what sort of things or activities?
    - Have you experienced trouble falling or staying asleep?
    - Have you been feeling irritable or have you had angry outbursts?
    - Have you experienced difficulty concentrating?
    - Have you been feeling "super alert" or watchful on guard? Have you been feeling jumpy or

easily startled?
  - How has victimization changed your reaction to remembering or thinking about certain things? Do you have repeated, disturbing memories, thoughts, or images of a stressful experience from the past? Do you have repeated disturbing dreams of a stressful experience from the past? Do you have trouble remembering important parts of a stressful experience from the past?
  - How has being a victim of this crime changed how you feel about the future? Have you been feeling as if your future will somehow be cut short?
- How has it change your relationships with people?
- How has being a victim of this crime impacted your ability to work or be productive?
- How has it changed your relationship with your family and children?
- Are you more fearful and mistrusting of people? Are you fearful for your life?
- Have you been feeling distant or cut off from other people?
- Have you been feeling emotionally numb or being unable to have loving feelings for those close to you?
- Were your children affected in any way?
- Are they experiencing sleeping or behavioral problems after the incident? Are they acting out in school?
- Did you receive assistance from any community agency? Financial, therapy, social services? Please describe.
- Have you received any kind of counseling or psychological therapy as a result of the incidents that occurred with your perpetrator?

IX. Helpfulness to Law Enforcement

- Did you call the police? If you didn't, who did?
  - If you called the police on previous occasions, then describe the events that occurred when you called the police the last time.
- What happened while you were waiting for the police to arrive? What happened when the police arrived?
  - Did they arrest the perpetrator?
  - Did the perpetrator get away?
- How were you and the police officers able to communicate?
  - Did someone translate for you? If so, who? Did the police bring an interpreter for you?
- What did the officers ask you? What did you tell them?
  - Did you tell the police you wanted the perpetrator arrested?
- Did the police officers take any photos of your injuries or of the place where the criminal activity occurred?
- Did the police report accurately describe what happened? If not, what were the discrepancies?
- Did the police ever call you to follow-up or ask you more questions?
  - Who called you and how many times did the officers call you to ask questions about the incident?
- Did anyone else call you to ask you about the incident?
  - Who were they and what did they ask you?
  - Did they request you appear in court?
  - In their office?

  - How did you feel about everything that was happening?
- Were social services involved as a result of the criminal activity?
  - If so, how did you help them?
- Was the perpetrator charged with a crime?
  - Do you remember what it was?
- Did you get a restraining order?
  - Did the perpetrator ever violate it?
  - If so, did you call the police?
- Did you receive any correspondence from the Court?
  - The State Attorney's Office? The Police Department?
- Did you receive any telephone calls from the Court?
  - The State Attorney's Office? The Police Department?
  - Who called you and what did they need?
- Did you ever receive a notice to appear in Court?
  - Did you ever receive a Subpoena?
  - If so, did you go to court?
  - If you did, describe what happened in court.
  - How did you feel?
  - Were you confused?
  - Were you afraid? Why?

STRUCTURED INTERVIEW QUESTIONS FOR WAIVER OF INADMISSIBILITY

Note that this section may not apply to those who are not subject to any grounds of inadmissibility. An individual who seeks admission into the United States through a VAWA self-petition, a U visa, a T visa or an application for lawful permanent residency must meet certain *admissibility* requirements to be eligible to receive an approved immigration case, receive a visa and eventually be legally admitted into the United States. Immigration law contains lists of inadmissibility grounds that it is important for advocates and attorneys to identify so that the victim's immigration case application can include waivers of inadmissibility requests as part of the client's application. Identifying whether any of the following issues are present in the victim's immigration case is crucial to ensuring that all needed inadmissibility waivers are identified and addressed as the victim's immigration case is being prepared. The ability to attain approvals in VAWA, T or U visa immigration cases is enhanced when inadmissibility issues are identified and addressed as early as possible in the application process.

X. Inadmissibility

1. What was the unlawful activity that you committed? What or who made you do it?
   - Did you enter the U.S. as a minor?
   - Did you enter unlawfully to reunite with your family?
   - Were you trying to escape abuse, physical or sexual violence, or extreme poverty?
   - Did you drive without a license because you had to get to work, take care of your children, or go to the doctor?
2. What were the consequences of the unlawful activity?
   - Did you resolve the matter by paying a fine?
   - Did you have to go to court?

        - If so, what happened at court?
        - Did you plead guilty?
        - Who advised you to plead guilty or why did you decide to plead guilty?
3. Do you feel sorry for what you did?
4. Ask your client to tell you about positive characteristics regarding the kind of person they are? Often survivors may overlook this part of their character. You may want to ask if they consider themselves:
    - A good person, ask for an detailed examples:
        - Are you a responsible parent?
        - Are you a hardworking employee?
        - Are you a law-abiding person?
    - Do you work long hours or overtime to support your family?
    - Do you work several jobs to make ends meet?
    - Describe your role in taking care of your children.
        - Do you drive them to and from school?
        - Do you dress them in the morning?
        - Do you prepare their meals?
        - Do you take them to the doctor or dentist?
        - Do you help your children with their homework or school projects?
        - Are you involved with their school activities?
    - Describe your favorite activities with your children.
        - Do you read them stories at night?
        - Do you pray together?
        - Do you take them to the playground?
        - Do you play with them?
5. To show that your client is a good member of his/her community, ask:
    - Do you regularly attend religious services?
    - Are you an active member in your faith community?
    - Do you volunteer your time or donate?
    - Do you help out your neighbors, friends, or other family members?
6. Ask your client to conclude by explaining how their life would change if they had to leave the U.S. If your client has children, also discuss how it would change the children's lives if they had to return to the client's native country.
7. What would happen to you or your family if you were to return to your country of origin? Are you afraid of returning to your country of origin? Why?
    - What are the living conditions in your country?
    - Do you think you would be safe? Why or why not?
    - Can you trust the police? Is there a lot of crime?
    - Are there laws or customs in your country that mistreat victims of domestic violence, victims who are divorced, or have children but no husband?
    - Does the government of your country protect victims of crime?
    - Are you afraid that your abuser would take action against you in your country?
        - Or do you think your perpetrator would try to harm you for having called the police?

- If so, would you be able to receive adequate protection?
  - Are you afraid that the friends and family of your abuser will try to hurt you or your children (physically or psychologically)?

8. Why do you want to stay in the United States?
   - If you had to leave the U.S., would you be separated from your loved ones?
   - Would you still be able to support yourself and your family?
   - Are there services that you have in the U.S. that you wouldn't have if you were deported (ex: social workers, medical help, counseling, government benefits like WIC, etc.)?
   - If you or your children are receiving medical treatments or counseling, would you be able to continue them in your home country?
   - Do your children speak the native language of your country?
   - Would it be difficult for them to adjust going to school in your country?
   - Do you need to stay in the U.S.to have access to the courts and/or help the police in investigating your abuser?
9. What hopes do you have for the future, for you and for your children?
10. Is there anything else you would like to mention or tell the Immigration officer about you or your family?

TRAUMA INFORMED EVIDENCE BASED STRUCTURED INTERVIEW QUESTIONS

The following trauma informed interview questions are designed to help you and your client identify additional information that will strengthen your client's VAWA or U visa cases in a variety of ways. This section of the structured interview will use research based trauma informed questions. Going through these questions with your client will help you build a stronger case on issues including extreme cruelty, substantial harm, good moral character and your client's qualification for inadmissibility waivers. They will also help you identify additional incidents of abuse and criminal activity that may not have surfaced through story writing or the follow up questions listed above.

XI. Danger Assessment[7]

Note to Advocates and Attorneys: Research among immigrant survivors has found that advocacy involving danger assessment and safety planning strongly correlates with immigrant survivors' willingness to seek protection orders, immigration relief and other forms of legal protections. For victims scoring high on this danger assessment scale provides you a strong indicator of the importance of working to help your client file for VAWA and U visa relief as soon as possible. This is because filing a VAWA, U, or visa immigration case will cut off the ability of the perpetrator to trigger immigration enforcement actions against your client and will strengthen her safety planning. Assessing danger will also help you identify key areas of evidence to develop in support of proving battering and extreme cruelty in your VAWA case and identifying criminal activities and proving substantial harm in your U visa case. High numbers of yes answers on the danger assessment questions may also provide you evidence that you can use to explain why the client was afraid to call the police for help, cooperate with prosecutors,

[7] Jacquelyn C. Campbell, Ph.D., R.N., Danger Assessment,(2003), http://www.dangerassessment.org/DATools.aspx.

seek medical assistance or file for a protection order.

Script: Several risk factors have been associated with increased risk of homicides (murders) of women and men in violent relationships. We cannot predict what will happen in your case, but we would like you to be aware of the danger of homicide in situations of abuse and for you to see how many of the risk factors apply to your situation.

Mark Yes or No for each of the following.
("He/She" refers to your spouse, partner, ex-spouse, ex-partner, or whoever is currently physically hurting you.)

1. Has the physical violence increased in severity or frequency over the past year?
2. Does s/he own a gun?
3. Have you left her/him after living together during the past year?
   a. (If have never lived with her/him, check here___)
4. Is s/he unemployed?
5. Has s/he ever used a weapon against you or threatened you with a lethal weapon?
   a. (If yes, was the weapon a gun?______)
6. Does s/he threaten to kill you?
7. Has s/he avoided being arrested for domestic violence?
8. Do you have a child that is not his?
9. Has s/he ever forced you to have sex when you did not wish to do so?
10. Does s/he ever try to choke you?
11. Does s/he use illegal drugs? By drugs, I mean "uppers" or amphetamines, speed, angel dust, cocaine, "crack", street drugs or mixtures.
12. Is s/he an alcoholic or problem drinker?
13. Does s/he control most or all of your daily activities? (For instance: does s/he tell you who you can be friends with, when you can see your family, how much money you can use, or when you can take the car)?
    a. (If s/he tries, but you do not let her/him, check here:_____)
14. Is s/he violently and constantly jealous of you?
    a. (For instance, does s/he say, "If I can't have you, no one can."?)
15. Have you ever been beaten by her/him while you were pregnant?
    a. (If you have never been pregnant by him, check here:_____)
16. Has s/he ever threatened or tried to commit suicide?
17. Does s/he threaten to harm your children?
18. Do you believe s/he is capable of killing you?
19. Does s/he follow or spy on you, leave threatening notes or messages on answering machine, destroy your property, or call you when you don't want her/him to?
20. Have you ever threatened or tried to commit suicide?

Total "Yes" Answers __________

XII. Conflict Tactics Scale (CTS-2)[8]

Note to Advocates and Attorneys: Domestic violence serves as the basis for all VAWA and many U visa cases. The following questions will help you gain important information about the full range of abuse occurring in the domestic violence, child abuse or elder abuse relationship. In some U visa cases based on sexual assault, trafficking or other crimes these questions could also assist you in obtaining more complete information about the abuse that was occurring that should be included in the victim's application.

Script: No matter how well a couple gets along, there are times when they disagree, get annoyed with each other, want different things from each other, or just have arguments or fights. I'm going to list some things that might happen when you have differences with your partner. For each thing, tell me how many times your partner did these things in the last year:

In the last year…	**1-2 times**	**3-10 times**	**10+ times**	**Happened, but not in last year**	**Never happened**
S/he grabbed me					
S/he pushed me					
S/he threw something at me that could hurt					
S/he slapped me.					
S/he twisted my arm					
S/he pulled my hair					
S/he kicked me					
S/he beat me up					
S/he punched or hit me with something that could hurt					
S/he slammed me against the wall					
S/he choked me					
S/he burned me on purpose					
S/he used or told that s/he would use a knife or gun					
S/he used physical force against me when I was pregnant					
S/he forced me to have sex					
S/he refused to wear a condom during sex					
I had sex with him/her because I was afraid of what s/he would do if I didn't					

[8] Straus, M.A.; Hamby, S.L.; Boney-McCoy, S.; and Sugarman, D.B. The Revised Conflict Tactics Scale (CTS2): Development and preliminary psychometric data. *Journal of Family Issues* 17(3):283-316, 1996.

I felt physical pain that still hurt the next day because of his/her					
I had a bruise or cut because of his/her abuse					
I passed out from being hit so hard by him/her					
I had a broken bone from his/her abuse					
I went to the doctor because of his/her abuse					
I have permanent scars because of his/her past abuse					
I have physical health problems now because of his/her abuse					
I have emotional problems now because of his/her abuse					

XIII. Psychological Maltreatment of Women Inventory (PMWI)[9]

Note to Advocates and Attorneys: For VAWA cases this list of questions will assist you in building the extreme cruelty part of your client's application. For U visa cases these questions will help you collect evidence to help prove substantial harm, domestic violence, stalking and other criminal activities. In addition it is important to remember that under the U visa regulations the perpetrator's actions can in and of themselves be sufficient to prove substantial harm. These questions can help you build that part of your client's U visa case.

Script: Now, I'm going to read you statements about things your partner may have done to you in the last year. For each statement, point to the place on the scale that shows how often the event occurred in the last year.

In the last year…	Never	Sometimes	Often	Very often
S/he called you a bad name, swore, yelled or screamed at you				
S/he treated you like less than s/he was				
S/he watched over your activities or insisted you tell him/her where you were at all times				
S/he used your money or made important financial decisions without talking to you about it				
S/he was jealous or suspicious of your friends				

[9] Richard M. Tolman, Ph.D., Psychological Maltreatment of Women (1995), http://sitemaker.umich.edu/pmwi/home.

S/he accused you of having an affair with another man/woman				
S/he interfered with your relationships with family or community members				
S/he tried to keep you from doing things to help yourself (such as learning English, getting a job, exercising, etc.)				
S/he controlled your use of the telephone				
S/he told you that your feelings were crazy				
S/he blamed you for his/her problems				
S/he told you s/he would or actually took your children away				
S/he told you s/he would or actually threw or locked you out of the house				
S/he told you s/he would or actually locked you in the house or in a room in the house				
S/he told you s/he would take away or not give you money				
S/he told you s/he would or actually turned you in to immigration officials				
S/he told you s/he would or actually failed to file or withdrew immigration papers for you or your children				
S/he told you s/he would hurt you or your unborn child when you were pregnant				
S/he destroyed your property				

XIV. Intimate Partner Violence (IPV) Coercion Measure[10]

Note to Advocates and Attorneys : Research has found that identifying and measuring coercive control in intimate partner relationships provides more refined and accurate picture of the details of how power and control plays out in abusive relationships. Since domestic violence under immigration law is defined as "battering or extreme cruelty" and is more inclusive of a broader range of abusive behaviors than most state protection order and criminal domestic violence statutes, identifying coercive control in abusive relationships can be very useful in proving extreme cruelty for VAWA immigration cases. Similarly for U visa cases, proof of coercive control, provides evidence and details of substantial harm, how it is perpetrated and its effect on the victim.

[10] Dutton et al., Intimate Partner Violence (IPV) Coercion Measure, (2006)

This Intimate Partner Violence Coercion Measure aims to detect and measure the cycle of coercive control. In these situations--

1. One party sets the stage for apprehension of impending violence against the other by
   - creating vulnerabilities,
   - exploiting existing vulnerabilities,
   - wearing down resistance, and
   - facilitating attachment.
2. Subsequently, the cycle of coercive control ensues, which consists of:
   - Coercive demand or expectation
   - Credible threat – meaningful and negative consequence for noncompliance and the likelihood that the consequence will be delivered (willing, able, ready)
   - Surveillance
   - Delivery of the threatened consequences

Appraisal or (Understanding) of IPV Coercion

Appraisal of IPV Coercion means understanding of the likelihood that one's partner would or would try to deliver contingent and meaningful negative consequences for one's noncompliance with demand or expectation. The language *"would or would try"* is important since the agent may try, but not succeed because of the target's resistance – but its still coercion.

IPV Coercion is communicating the threat of a meaningful and credible negative consequence for noncompliance with a demand or expectation. IPV Coercion incorporates: 1) communication of demand or expectation, 2) communication of a contingent threat for noncompliance with the demand or expectation, and 3) credibly reasonable ability to carry out the threat.

Ask your client whether and the extent to which the following things are happening in the relationship.

> If yes, ask the extent to which if your client did not do these things their partner would get back at them by doing something hurtful.

<u>Personal Activities:</u>

1. Not leave the house.
2. Not eat certain foods.
3. Sleep where he (or she) says.
4. Sleep when he (or she) says.
5. Wear (or not wear) what he (or she) says.
6. Bath or use the bathroom only when he (or she) says.
7. Not go places or do things on your own without him (or her) or someone else being there.
8. Not read, watch TV, listen to the radio, or use the internet.
9. Watch or read sexually explicit video or print material.

<u>Support / Social life / Family</u>

10. Not talk to friends or family members on the phone.

11. Not spend time with friends or family members.
12. Not talk to others in a social situation.Not participate in church, school, or other community activities.
13. Not seek help from a counselor, clergy, case worker, advocate or other support person or helping professional.

Household

14. Take care of the house in the way he (or she) says.
15. Buy or prepare foods in the way he (or she) says.
16. Live where he (or she) says.

Work / Economic / Resources

17. Not work.
18. Have the kind of job he (or she) says.
19. Work how much he (or she) says.
20. Spend money or use credit cards only on things he (or she) says.
21. Not learn another language (English or other language).
22. Not go to school.
23. Not use the car or truck.
24. Not use or see the checkbook or other financial records.

Children / Parenting

25. Take care of children in the way he (or she) says.
26. Discipline children in the way he (or she) says.
27. Not make decisions concerning the children on your own.

Health

28. Not take certain medication or go to the doctor.
29. Not use birth control.
30. Have (or not have) an abortion.
31. Use drugs or alcohol.

Intimate Relationship

32. Have sex with him (or her) when he (or she) says.
33. Do sexual behaviors in the way he (or she) says.
34. Talk with him (or her) only when he (or she) says.
35. Spend time with him (or her) when he (or she) says.
36. Have sex with someone else when he (or she) says.
37. Not separate, leave the relationship, or get a divorce.

Legal

38. Do things that are against the law.
39. Be with him (or her) when he (or she) is doing things that are against the way (law?).
40. Carry a gun.

Follow-up Questions to Appraisal of IPV Coercion

<u>Types of Expected Consequences for Noncompliance:</u>

Which of the following specific types of consequences do you believe your partner would actually do (or try to do) in the future if you didn't do what he (or she) wanted?

1 = yes
2 = no

1. Emotionally hurt you.
2. Embarrass or shame you.
3. Emotionally hurt your children.
4. Emotionally hurt your friends or family members.
5. Not let you see or talk to others.
6. Reveal personal information about you to others (medical condition, sexual preference, past behavior).
7. Physically restrain you or lock you in the house or in a room.
8. Physically hurt you.
9. Kill you.
10. Physically hurt your children.
11. Kill your child.
12. Physically hurt a friend or family member.
13. Kill a friend or family member.
14. Not let you take medication.
15. Put you in a mental hospital.
16. Not let you see your children.
17. Take your children away from you.
18. Destroyed or took your property.
19. Cause you to lose your job.
20. Cause you to lose your housing.
21. Destroy you financially.
22. Destroy legal papers.
23. Threaten you with legal trouble.
24. Have you arrested.
25. Threat to have you deported.

Involvement of Third Parties:

Do you believe your partner would try to get any of the following people to help him (or her) do any of these hurtful things in the future?

1 = yes
2 = no

1. Police, prosecutor, judge, probation officer or someone else in the justice system
2. Minister, priest, rabbi, or other spiritual leader
3. Your partner's friend or family member
4. Your friend or family member
5. Doctor,, nurse, counselor or someone else in health care
6. DHS-Immigration
7. IRS
8. Mafia
9. Other

Past IPV Coercion

Surveillance:

In The past, has your partner checked to see if you have done what he (or she) demanded or expected?

1 = yes
2 = no

(If yes)

Which of the following things did your partner do (or try to do) to check to see if you actually did what he (or she) wanted?

1. Called you
2. Check the car (odometer, where parked)
3. Asked children
4. Ask someone else (other than children)
5. Told you to report behavior to him (or her)
6. Used recorder
7. Checked clothing
8. Checked house
9. Didn't need to check, he said or acted like he (or she) just knew
10. Other

Prior Response to Coercion:

In the past, how often did you respond in the following ways to your partner's threat to do something hurtful if you didn't do what he (or she) demanded or expected?

1-Not at all or never

2-Infrequently or not very often
3-Sometimes
4-Often
5-All the time

1. Did what my partner wanted, even though I didn't want to
2. Told myself that I wanted to do what my partner wanted, even though I originally didn't want to
3. Did nothing
4. Told my partner I wasn't going to do it
5. Tried to talk my partner out of wanting me to do it
6. Resisted doing what my partner wanted by trying to buy time
7. Sought help from someone else to resist doing what my partner wanted me to do
8. Resisted doing what my partner wanted in some other way
9. Distracted my partner so he (or she) forgot about what he (or she) wanted me to do
10. Other

Specific Consequences for Prior Noncompliance with Coercion:

In the past, which of the following specific types of consequences did your partner actually do (or try to do) when you didn't do what he (or she) demanded or expected?

1 = yes
2 = no

1. Emotionally hurt you
2. Embarrass or shame you
3. Emotionally hurt your children
4. Emotionally hurt your friends or family members
5. Not let you see or talk to others
6. Revealed personal information about you to others (medical condition, sexual preference, past behavior)
7. Physically restrained you or locked you in the house or in a room
8. Physically hurt you
9. Tried to kill you
10. Physically hurt your children
11. Tried to kill your child
12. Physically hurt a friend or family member
13. Tried to kill a friend or family member
14. Not let you take medication
15. Put you in a mental hospital
16. Not let you see your children
17. Took your children away from you

18. Destroyed or took your property
19. Caused you to lose your job
20. Caused you to lose your housing
21. Destroyed you financially
22. Destroyed legal papers
23. Threatened you with legal trouble
24. Had you arrested
25. Threatened to have you deported

XV. Intimate Partner Violence (IPV) Threat Appraisal & Fear Scale[11]

Note to Advocates and Attorneys: The following questions will be useful in VAWA self-petitioning cases providing important evidence about "extreme cruelty". The victim's appraisal of what is likely to happen to her in the future is founded upon the basis of coercion, threats, intimidation, isolation and the abuse she has experienced in the past. In VAWA cancellation and suspension cases this scale can contribute important information to prove "extreme hardship". In U visa cases this scale provides information central to building your case for substantial harm, and obtaining inadmissibility waivers. All VAWA and U visa cases are forms of humanitarian relief, the following factors can be used to convince DHS that the risk of harm to your client is real. This can help obtain fee waivers and can help strengthen all aspects of the victim's case in which the victim must convince DHS to exercise its discretion in the victim's favor.

Script: I'm going to ask you how likely you think it is that your partner will do certain things in the next year. For each statement, point to the place on the scale between 'Not At All' and "Definitely" that shows how likely you think it is that the event will happen. There is no right or wrong answer; just the way you feel. Do you have any questions before we begin?

In the next year, how likely do you think it is that your partner will…

	Not at all	**Some Likelihood**	**High Likelihood**	**Definitely**
Threaten to harm you physically				
Actually physically harm you				
Force you to have sex against your will				
Try to kill you				
Control or dominate you				
Embarrass you				
Take away your money				
Tell you s/he will physically harm someone you know, such as friends, co-workers, parents, etc.				

[11] Dutton et al., Intimate Partner Violence (IPV) Threat Appraisal and Fear Scale, (2001).

Actually physically harm someone you know, such as friends, co-workers, parents, etc.				
Call immigration authorities to get you in trouble				
Call police to get you in trouble				
Throw or lock you out of the house or room				
Destroy your property or important documents				
Violate a protective order				
Track you down or find you				
Try to take away, get custody, or kidnap your child or children				
Not sponsor, petition for green card or visa for you or your children				

XVI. Identification of Trauma Related Distress[12]

Note to Advocates and Attorneys: VAWA cases are strengthened when the victim describes in her story not only the events that happened to her, but can also describe the effects that the battering or extreme cruelty had on her. The following questions help prove extreme cruelty, extreme hardship and substantiate evidence of battery, and the range of forms of physical and sexual violence occurring in the abusive relationship. In U visa cases, the following questions provide strong evidence of substantial harm as a result of victimization by the criminal activit(ies). These are items included in the list below are will help advocates and attorneys identify and describe trauma related distress more fully in the victim's application for immigration relief.

Instruction to patient: Below is a list of problems and complaints that veterans sometimes have in response to stressful life experiences. Please read each one carefully, put an "X" in the box to indicate how much you have been bothered by that problem in the last month.

No.	**Response:**	**Not at all (1)**	**A little bit (2)**	**Moderately (3)**	**Quite a bit (4)**	**Extremely (5)**

[12] This list is being included to assist advocates and attorneys working with immigrant survivors in identifying trauma related distress factors that victims may have experience. This is taken from the PCL-5 (DCM –V). PCL-5 (8/14/2013) Weathers, Litz, Keane, Palmieri, Marx,& Schnurr -- National Center for PTSD. While the facts that this measure collects can be extremely helpful to VAWA, T and U visa immigration cases in a variety of ways, advocates and attorneys should not use this measure to make conclusions whether not a client has any particular mental health diagnosis. Only experienced mental health professionals are qualified to make mental health diagnoses. VAWA, T and U visa immigration cases are decided on the facts of the crime victimization and the effects on the victim; mental health diagnosis is not required. When persons other than mental health professionals attempt to draw conclusions as to mental health diagnosis based on this or any other measure incorrect diagnosis by untrained professionals can undermine credibility of the victim's immigration case.

1.	Repeated, disturbing, and unwanted memories of the stressful experience?					
2.	Repeated, disturbing dreams of the stressful experience?					
3.	Suddenly feeling or acting as if the stressful experience were actually happening again (as if you were actually back there reliving it)?					
4.	Feeling very upset when something reminded you of the stressful experience??					
5.	Having strong physical reactions when something reminded you of the stressful experience (for example, heart pounding, trouble breathing, sweating)?					
6.	Avoiding memories, thoughts, or feelings related to the stressful experience?					
7.	Avoiding external reminders of the stressful experience (for example, people, places, conversations, activities, objects, or situations)?					
8.	Trouble remembering important parts of the stressful experience?					
9.	Having strong negative beliefs about yourself, other people, or the world (for example, having thoughts such as: I am bad, there is something seriously wrong with me, no one can be trusted, and the world is completely dangerous)?					
10.	Blaming yourself or someone else for the stressful experience or what happened after it?					

11.	Having strong negative feelings such as fear, horror, anger, guilt, or shame?					
12.	Loss of interest in activities that you used to enjoy?					
13.	Feeling distant or cut off from other people?					
14.	Trouble experiencing positive feelings (for example, being unable to feel happiness or have loving feelings for people close to you)?					
15.	Irritable behavior, angry outbursts, or acting aggressively?					
16.	Taking too many risks or doing things that could cause you harm?					
17.	Being "super alert" or watchful or on guard?					
18.	Feeling jumpy or easily startled?					
19.	Having difficulty concentrating?					
20.	Trouble falling or staying asleep?					

XVII. Patient Health Questionnaire (PHQ-9)[13]

Note to Advocates and Attorneys: The following questions provide an additional opportunity to learn how the battering or extreme cruelty and the criminal activities committed against your client affect her ability to function in her daily life. This can provide strong evidence of extreme cruelty in VAWA self-petitioning cases as well as evidence for fee and inadmissibility waivers, including the domestic violence victim waiver for good moral character purposes. In U visa cases these questions provide additional and powerful evidence of substantial harm that goes beyond physical injuries. This evidence is important for obtaining inadmissibility and fee waivers for U visa cases. In all cases this evidence and the evidence provided by the Trauma related Distress Checklist can provide evidence to secure fee waivers in applications for work authorization.

[13] PHQ9 Copyright © Pfizer Inc. All rights reserved. Reproduced with permission. PRIME-MD ® is a trademark of Pfizer Inc. This list is being included to assist advocates and attorneys working with immigrant survivors in identifying symptoms of distress or depression that may have experienced. While the facts that this measure collects can be extremely helpful to VAWA, T and U visa immigration cases in a variety of ways, advocates and attorneys should not use this measure to make conclusions whether not a client has any particular mental health diagnosis. Only experienced mental health professionals are qualified to make mental health diagnoses.

Over the last 2 weeks, how often have you been bothered by any of the following problems? (use "X" to indicate the answer)

	Not at all	Several days	More than half of the days	Nearly every day
1. Little interest or pleasure in doing things	0	1	2	3
2. Feeling down, depressed, or hopeless	0	1	2	3
3. Trouble falling or staying asleep, or sleeping too much	0	1	2	3
4. Feeling tired or having little energy	0	1	2	3
5. Poor appetite or overeating	0	1	2	3
6. Feeling bad about yourself – or that you are a failure or have let yourself or your family down	0	1	2	3
7. Trouble concentrating on things, such as reading the newspaper or watching television	0	1	2	3
8. Moving or speaking so slowly that other people have noticed. Or the opposite – being so fidgety or restless that you have been moving around a lot more than usual	0	1	2	3
9. Thoughts that you would be better off dead or of hurting yourself	0	1	2	3
	Add columns:			
	Total:			
10. If you checked off any problems, how difficult have these problems made it for you to do work, take care of things at home, or get along with other people?	Not difficult at all ____ Somewhat difficult ____ Very difficult ____ Extremely difficult_____			

XVIII. Stressful Life Events Screening Questionnaire (SLESQ)[14]

The SLESQ is helpful to uncover multiple types of trauma exposure. Let the client know that the following questions refer to events that may have taken place at any point in his/her entire life, including early childhood. If an event or ongoing situation occurred more than once, please record all pertinent information about additional events. **FIRST, go through the events and simply ask the Yes/No question as to whether the events have occurred. SECOND, make a reasoned decision as to whether for questions answered "yes" greater detail is necessary and important for the application. If so, follow the prompts to record detail.**

Note to Lawyers and Advocates: The following questions can provide information that in

[14] Goodman, L., Corcoran, C., Turner, K., Yuan, N., & Green, B. (1998). Assessing traumatic event exposure: General issues and preliminary findings for the Stressful Life Events Screening Questionnaire. Journal of Traumatic Stress, 11(3), 521-542.

VAWA cases may provide additional evidence of battering or extreme cruelty. In U visa cases the information gathered below could provide helpful information for substantial harm and inadmissibility waivers. These questions may also in both VAWA and U visa cases uncover additional incidents of abuse or criminal activities that will strengthen your VAWA or U visa case.

yes	no	Trauma Question	Prompts for More Detailed
		1. Have you ever had a life-threatening illness?	• If yes, at what age? • Duration of Illness • Describe specific illness
		2. Were you ever in a life-threatening accident?	• If yes, at what age? • Describe accident • Did anyone die? Who? (Relationship to you) • What physical injuries did you receive? • Were you hospitalized overnight?
		3. Was physical force or a weapon ever used against you in a robbery or mugging?	• If yes, at what age? • How many perpetrators? • Describe physical force (e.g., restrained, shoved) or weapon used against you • Did anyone die? Who?_ • What injuries did you receive? • Was your life in danger?
		4. Has an immediate family member, romantic partner, or <u>very close</u> friend died because of accident, homicide, or suicide?	• If yes, how old were you? • How did this person die? • Relationship to person lost • In the year before this person died, how often did you see/have contact with him/her? • Have you had a miscarriage? If yes, at what age?

		5. At any time, has anyone (parent, other family member, romantic partner, stranger or someone else) ever <u>physically forced</u> you to have intercourse, or to have oral or anal sex against your wishes, or when you were helpless, such as being asleep or intoxicated?	• If yes, at what age? • If yes, how many times? • If repeated, over what period? • Who did this? (Specify stranger, parent
		6. Other than experiences mentioned in earlier questions, has anyone ever touched private parts of your body, made you touch their body, or tried to make you to have sex against your wishes?	• If yes, at what age? • If yes, how many times? • If repeated, over what period? • Who did this? (Specify sibling, date, etc.) • What age was this person? • Has anyone **else** ever done this to you?
		7. When you were a child, did a parent, caregiver or other person ever slap you repeatedly, beat you, or otherwise attack or harm you?	• If yes, at what age • If yes, how many times? • If repeated, over what period? • Describe force used against you (e.g., fist, belt) • Were you ever injured? If yes, describe • Who did this? (Relationship to you) • Has anyone **else** ever done this to you?
		8. As an adult, have you ever been kicked, beaten, slapped around or otherwise physically harmed by a romantic partner, date, family member, stranger, or someone else?	• If yes, at what age? • If yes, how many times? • If repeated, over what period? • Describe force used against you (e.g., fist, belt) • Were you ever injured? If yes, describe • Who did this? (Relationship to you) • If sibling, what age was he/she • Has anyone **else** ever done this to you?

		9. Has a parent, romantic partner, or family member repeatedly ridiculed you, put you down, ignored you, or told you were no good?	• If yes, how many times? • If repeated, over what period? • Who did this? (Relationship to you) • If sibling, what age was he/she • Has anyone **else** ever done this to you?
		10. Other than the experiences already covered, has anyone ever <u>threatened</u> you with a weapon like a knife or gun?	• If yes, how many times? • If repeated, over what period? • Describe nature of threat • Who did this? (Relationship to you) • Has anyone **else** ever done this to you?
		11. Have you ever been present when another person was killed? Seriously injured? Sexually or physically assaulted?	• If yes, at what age? • Please describe what you witnessed • Was your own life in danger?
		12. Have you ever been in any other situation where you were seriously injured or your life was in danger (e.g., involved in military combat or living in a war zone)?	• If yes, at what age?
		13. Have you ever been in any other situation that was extremely frightening or horrifying, or one in which you felt extremely helpless, that you haven't reported? *The interviewer should determine if the respondent is reporting the same incident in multiple questions, and should record it in the most appropriate category.*	• If yes, at what age? • Please describe

Trauma-Informed Legal Advocacy: Practice Scenarios Series

The Trauma-Informed Legal Advocacy (TILA) Project is designed to offer guidance to legal advocates and lawyers on applying trauma-informed principles to doing legal advocacy with survivors of domestic violence.

This document is part of a series: *Trauma-Informed Legal Advocacy (TILA): Practice Scenarios Series*.[1] Within each scenario in this series, we practice a two-step analysis of (1) what is happening from the perspective of the person we are working with, and (2) what strategies we can try to best support or represent them.

Scenario: Legal Interviewing & Traumatic Triggers

You are having a hard time connecting with someone who you are working with. Maybe they seem distracted, anxious and agitated, or just shut down.

Step 1. What happened from their perspective?

A person may be feeling distracted, anxious and agitated, or shut down for many reasons. From a trauma-informed perspective, traumatic triggers are one factor that may explain why you are having trouble connecting. A *trigger* is something that evokes a memory of past traumatizing events, including the feelings and sensations associated with those experiences. Encountering triggers may cause someone to feel uneasy or afraid, although they may not always realize why they feel that way. A trigger can make someone feel as if they are reliving a traumatic experience and can elicit a fight, flight or freeze response. Many things can be a possible trigger for someone. A person might be triggered by a particular color of clothing, by the smell of a certain food, or the time of year. Internal sensations, such as rapid heartbeat, nausea, or tightened muscles, can be triggers as well.[2]

A person who is being triggered by something may become anxious and agitated. They might feel nauseous or have other physical reactions. They may not know why

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[1] The *TILA: Practice Scenarios Series* was created by Rachel White-Domain, JD, NCDVTMH. Find more TILA resources on our the NCDVTMH website: http://www.nationalcenterdvtraumamh.org/trainingta/trauma-informed-legal-advocacy-tila-project/

[2] This paragraph is taken from NCDVTMH's Special Collection: Trauma-Informed Domestic Violence Services: Understanding the Framework and Approach (Part 1 of 3), available at www.VAWnet.org.

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they are feeling or reacting that way. They may also appear bored or uninterested, talk about things in a flat or unemotional way, have a blank stare and spacey look, or appear to be shut down or checked out. Their answers to questions may be slow and incomplete. This may reflect a dissociative response. See Scenario 1 for more information about dissociation.

Step 2. What might help?

There are many things that you can do to limit the number of things in your environment that are common triggers for survivors of trauma, and to make your interactions with someone more trauma informed as well.

1. *Offer options in the physical space.* As best as possible, provide options to the person you are working with in order to avoid situations that might be triggering. For example, you might be able to provide options on where you will meet; which chair they can use; and whether a door is closed, open, or slightly ajar. If you have an office, consider whether you can make slight adjustments to accommodate multiple seating options.

   "Which chair would be most comfortable for you?"

   "Would you prefer the door closed or slightly open?"

   At the same time, be aware that sometimes options can be overwhelming to someone who is not used to being given many choices.

2. *Facilitate self-soothing.* Experiencing trauma can disrupt a person's ability to manage emotions and self-soothe when they are starting to feel upset. All of us do many things to self-soothe (even if we don't call it that), such as listening to music, going for a walk, or snuggling with a dog or cat. In the context of a legal meeting, your options are more limited, but there are still many things that you can do. Doodling or coloring with crayons, fidgeting with toys or other objects, wrapping up in a blanket, looking at calming pictures, and drinking water are all things that can help someone to negotiate their distance from hard material, manage their emotions, and stay present. Consider whether you can provide physical things in your meeting space that will facilitate someone's ability to self-soothe. This may include having pens, crayons, paper, and small toys on the table in the space where you are meeting, offering water, and hanging pictures in places where someone can easily focus if they need to briefly take a little more distance from what's going on.

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3. *Explain things in advance.* For people who have experienced trauma, it can often be helpful to know in advance what is going to happen. This includes telling someone how much time you have to meet, which can also help with building trust. It can also mean telling someone what kinds of things you will need to ask them about during your meeting.

   > *"We have about 45 minutes to talk today. I'd like to hear you talk about your relationship with your partner and then I'd like to ask you some questions. You can ask me questions at anytime. At the end of the meeting, I'd like to make some copies of the materials you brought."*

4. *Offer breaks.* Taking breaks can provide someone with the space they need to stay present during a meeting or interview. Offer breaks not only at the beginning of the meeting but also periodically throughout.

   > *"How are you doing so far? Would you like to take a break or would you like to keep going?"*

5. *Be thoughtful about note taking.* For people who have been involved in criminal legal systems or in social service agencies that don't practice trauma-informed care, having someone take notes about them may have been one part of a very dehumanizing experience. Being open about our note taking, such as by asking permission to take notes, summarizing the notes that we have taken, or using open body language when taking notes can keep this experience from feeling objectifying. Also, don't allow note taking to take you away from being present with someone. Consider how much time you spend with a pen or pencil in your hand. Whenever possible, try to increase the time you spend with the pen or pencil down, just listening.

There are also things that you can do if someone is being triggered.

1. *Notice and validate their feelings.* Noticing and validating someone's feelings can help them become aware of what's happening with them, if they are not already. It can also let someone know that you care about their emotional safety. This matters in part because it contradicts what happens in many traumatic incidents, where a person's feelings of anxiety and fear are often ignored and dismissed, or where showing these feelings may be met with increased violence. Noticing and validating means sitting with someone as they move at their own pace through their feelings.

   > *"That sounds really scary/hurtful."*

   > *"It really means a lot that you are sharing this with me, even though it makes you sad to talk about it."*

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2. *Ask what would help.* When making suggestions, offer several options whenever possible, rather than just asking "yes-no questions." Asking someone how you can help when they seem triggered also reflects that you are approaching the relationship as a partnership of equal respect.

    "Let me know if I can get you a glass of water, or we can just sit together for a moment."

    "Would it help to have a moment to yourself or visit with your friend in the waiting room, or maybe something else?"

3. *Use open body language.* If someone is very upset and agitated, using open body language can help to let them know that you do not pose a threat. This includes keeping your shoulders relaxed, keeping your body posture and hands open and relaxed, and avoiding blocking them from being able to exit or walk away.

4. *Help them to get grounded in the present.* If someone seems to be having a dissociative response, you can say things to help them feel safe and ground themselves in the present. Easy ways to ground someone in the present include helping them notice their breath, their physical presence in the environment, or physical things in the environment. For different people, different senses (sight, sound, smell) may be more grounding than others. (If you know grounding might come up for someone, you can ask in advance.) Remember, dissociative responses come up when cues in the environment tell someone that it is not safe. Therefore, it's also important to be attentive to emotional safety while supporting someone in grounding themselves.

    "I noticed that you are wearing really nice shoes. Are they comfortable?"

    "You know we can sit here on this bench for as long as we need to. We are okay right now, you and me. We can just take our time, no one is going to bother us here."

    "Is it hard for you to focus on these questions? When that happens, some people say it helps them to just take a minute to notice yourself breathing in and out."

***

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SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach

Prepared by

SAMHSA's Trauma and Justice Strategic Initiative

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Introduction

Trauma is a widespread, harmful and costly public health problem. It occurs as a result of violence, abuse, neglect, loss, disaster, war and other emotionally harmful experiences. Trauma has no boundaries with regard to age, gender, socioeconomic status, race, ethnicity, geography or sexual orientation. It is an almost universal experience of people with mental and substance use disorders. The need to address trauma is increasingly viewed as an important component of effective behavioral health service delivery. Additionally, it has become evident that addressing trauma requires a multi-pronged, multi-agency public health approach inclusive of public education and awareness, prevention and early identification, and effective trauma-specific assessment and treatment. ***In order to maximize the impact of these efforts, they need to be provided in an organizational or community context that is trauma-informed, that is, based on the knowledge and understanding of trauma and its far-reaching implications.***

The need to address trauma is increasingly viewed as an important component of effective behavioral health service delivery.

The effects of traumatic events place a heavy burden on individuals, families and communities and create challenges for public institutions and service systems. Although many people who experience a traumatic event will go on with their lives without lasting negative effects, others will have more difficulty and experience traumatic stress reactions. Emerging research has documented the relationships among exposure to traumatic events, impaired neurodevelopmental and immune systems responses and subsequent health risk behaviors resulting in chronic physical or behavioral health disorders.[1,2,3,4,5] Research has also indicated that with appropriate supports and intervention, people can overcome traumatic experiences.[6,7,8,9] However, most people go without these services and supports. Unaddressed trauma significantly increases the risk of mental and substance use disorders and chronic physical diseases.[1,10,11]

With appropriate supports and intervention, people can overcome traumatic experiences.

Individuals with experiences of trauma are found in multiple service sectors, not just in behavioral health. Studies of people in the juvenile and criminal justice system reveal high rates of mental and substance use disorders and personal histories of trauma.[12,13] Children and families in the child welfare system similarly experience high rates of trauma and associated behavioral health problems.[5,14] Young people bring their experiences of trauma into the school systems, often interfering with their school success. And many patients in primary care similarly have significant trauma histories which has an impact on their health and their responsiveness to health interventions.[15,16,17]

In addition, the public institutions and service systems that are intended to provide services and supports to individuals are often themselves trauma-inducing. The use of coercive practices, such as seclusion and restraints, in the behavioral health system; the abrupt removal of a child from an abusing family in the child welfare system; the use of invasive procedures in the medical system; the harsh disciplinary practices in educational/school systems; or intimidating practices in the criminal justice system can be re-traumatizing for individuals who already enter these systems with significant histories of trauma. These program or system practices and policies often interfere with achieving the desired outcomes in these systems.

Thus, the pervasive and harmful impact of traumatic events on individuals, families and communities and the unintended but similarly widespread re-traumatizing of individuals within our public institutions and service systems, makes it necessary to rethink doing "business as usual." In public institutions and service systems, there is increasing recognition that many of the individuals have extensive histories of trauma that, left unaddressed, can get in the way of achieving good health and well-being. For example, a child who suffers from maltreatment or neglect in the home may not be able to concentrate on school work and be successful in school; a women victimized by domestic violence may have trouble performing in the work setting; a jail inmate repeatedly exposed to violence on the street may have difficulty refraining from retaliatory violence and re-offending; a sexually abused homeless youth may engage in self-injury and high risk behaviors to cope with the effects of sexual abuse; and, a veteran may use substances to mask the traumatic memories of combat. The experiences of these individuals are compelling and, unfortunately, all too common. Yet, until recently, gaining a better understanding of how to address the trauma experienced by these individuals and how to mitigate the re-traumatizing effect of many of our public institutions and service settings was not an integral part of the work of these systems. Now, however, there is an increasing focus on the impact of trauma and how service systems may help to resolve or exacerbate trauma-related issues. These systems are beginning to revisit how they conduct their "business" under the framework of a trauma-informed approach.

There is an increasing focus on the impact of trauma and how service systems may help to resolve or exacerbate trauma-related issues. These systems are beginning to revisit how they conduct their business under the framework of a trauma-informed approach.

Purpose and Approach: Developing a Framework for Trauma and a Trauma-Informed Approach

PURPOSE

The purpose of this paper is to develop a working concept of trauma and a trauma-informed approach and to develop a shared understanding of these concepts that would be acceptable and appropriate across an array of service systems and stakeholder groups. SAMHSA puts forth a framework for the behavioral health specialty sectors, that can be adapted to other sectors such as child welfare, education, criminal and juvenile justice, primary health care, the military and other settings that have the potential to ease or exacerbate an individual's capacity to cope with traumatic experiences. In fact, many people with behavioral health problems receive treatment and services in these non-specialty behavioral health systems. SAMHSA intends this framework be relevant to its federal partners and their state and local system counterparts and to practitioners, researchers, and trauma survivors, families and communities. The desired goal is to build a framework that helps systems "talk" to each other, to understand better the connections between trauma and behavioral health issues, and to guide systems to become trauma-informed.

APPROACH

SAMHSA approached this task by integrating three significant threads of work: trauma focused research work; practice-generated knowledge about trauma interventions; and the lessons articulated by survivors

of traumatic experiences who have had involvement in multiple service sectors. It was expected that this blending of the research, practice and survivor knowledge would generate a framework for improving the capacity of our service systems and public institutions to better address the trauma-related issues of their constituents.

To begin this work, SAMHSA conducted an environmental scan of trauma definitions and models of trauma informed care. SAMHSA convened a group of national experts who had done extensive work in this area. This included trauma survivors who had been recipients of care in multiple service system; practitioners from an array of fields, who had experience in trauma treatment; researchers whose work focused on trauma and the development of trauma-specific interventions; and policymakers in the field of behavioral health.

From this meeting, SAMHSA developed a working document summarizing the discussions among these experts. The document was then vetted among federal agencies that conduct work in the field of trauma. Simultaneously, it was placed on a SAMHSA website for public comment. Federal agency experts provided rich comments and suggestions; the public comment site drew just over 2,000 respondents and 20,000 comments or endorsements of others' comments. SAMHSA reviewed all of these comments, made revisions to the document and developed the framework and guidance presented in this paper.

The key questions addressed in this paper are:

- **What do we mean by trauma?**
- **What do we mean by a trauma-informed approach?**
- **What are the key principles of a trauma-informed approach?**
- **What is the suggested guidance for implementing a trauma-informed approach?**
- **How do we understand trauma in the context of community?**

SAMHSA's approach to this task has been an attempt to integrate knowledge developed through research and clinical practice with the voices of trauma survivors. This also included experts funded through SAMHSA's trauma-focused grants and initiatives, such as SAMHSA's National Child Traumatic Stress Initiative, SAMHSA's National Center for Trauma Informed Care, and data and lessons learned from other grant programs that did not have a primary focus on trauma but included significant attention to trauma, such as SAMHSA's: Jail Diversion Trauma Recovery grant program; Children's Mental Health Initiative; Women, Children and Family Substance Abuse Treatment Program; and Offender Reentry and Adult Treatment Drug Court Programs.

Background: Trauma — Where We Are and How We Got Here

The concept of traumatic stress emerged in the field of mental health at least four decades ago. Over the last 20 years, SAMHSA has been a leader in recognizing the need to address trauma as a fundamental obligation for public mental health and substance abuse service delivery and has supported the development and promulgation of trauma-informed systems of care. In 1994, SAMHSA convened the Dare to Vision Conference, an event designed to bring trauma to the foreground and the first national conference in which women trauma survivors talked about their experiences and ways in which standard practices in hospitals re-traumatized and often, triggered memories of previous abuse. In 1998, SAMHSA funded the Women, Co-Occurring Disorders and Violence Study to generate knowledge on the development and evaluation of integrated services approaches for women with co-occurring mental and substance use disorders who also had histories of physical and or sexual abuse. In 2001, SAMHSA funded the National Child Traumatic Stress Initiative to increase understanding of child trauma and develop effective interventions for children exposed to different types of traumatic events.

The American Psychiatric Association (APA) played an important role in defining trauma. Diagnostic criteria for traumatic stress disorders have been debated through several iterations of the Diagnostic and Statistical Manual of Mental Disorders (DSM) with a new category of Trauma- and Stressor-Related Disorders, across the life-span, included in the recently released DSM-V (APA, 2013). Measures and inventories of trauma exposure, with both clinical and research applications, have proliferated since the 1970's.[18,19,20,21] National trauma research and practice centers have conducted significant work in the past few decades, further refining the concept of trauma, and developing effective trauma assessments and treatments.[22,23,24,25] With the advances in neuroscience, a biopsychosocial approach to traumatic experiences has begun to delineate the mechanisms in which neurobiology, psychological processes, and social attachment interact and contribute to mental and substance use disorders across the life-span.[3,25]

Simultaneously, an emerging trauma survivors movement has provided another perspective on the understanding of traumatic experiences. Trauma survivors, that is, people with lived experience of trauma, have powerfully and systematically documented their paths to recovery.[26] Traumatic experiences complicate a child's or an adult's capacity to make sense of their lives and to create meaningful consistent relationships in their families and communities.

Trauma survivors have powerfully and systematically documented their paths to recovery.

The convergence of the trauma survivor's perspective with research and clinical work has underscored the central role of traumatic experiences in the lives of people with mental and substance use conditions. The connection between trauma and these conditions offers a potential explanatory model for what has happened to individuals, both children and adults, who come to the attention of the behavioral health and other service systems.[25,27]

People with traumatic experiences, however, do not show up only in behavioral health systems. Responses to these experiences often manifest in behaviors or conditions that result in involvement with the child welfare and the criminal and juvenile justice system or in difficulties in the education, employment or primary care system. Recently, there has also been a focus on individuals in the military and increasing rates of posttraumatic stress disorders.[28,29,30,31]

With the growing understanding of the pervasiveness of traumatic experience and responses, a growing number of clinical interventions for trauma responses have been developed. Federal research agencies, academic institutions and practice-research partnerships have generated empirically-supported interventions. In SAMHSA's National Registry of Evidence-based Programs and Practices (NREPP) alone there are over 15 interventions focusing on the treatment or screening for trauma.

These interventions have been integrated into the behavioral health treatment care delivery system; however, from the voice of trauma survivors, it has become clear that these clinical interventions are not enough. Building on lessons learned from SAMHSA's Women, Co-Occurring Disorders and Violence Study; SAMHSA's National Child Traumatic Stress Network; and SAMHSA's National Center for Trauma-Informed Care and Alternatives to Seclusion and Restraints, among other developments in the field, it became clear that the organizational climate and conditions in which services are provided played a significant role in maximizing the outcomes of interventions and contributing to the healing and recovery of the people being served. SAMHSA's National Center for Trauma-Informed Care has continued to advance this effort, starting first in the behavioral health sector, but increasingly responding to technical assistance requests for organizational change in the criminal justice, education, and primary care sectors.

FEDERAL, STATE AND LOCAL LEVEL TRAUMA-FOCUSED ACTIVITIES

The increased understanding of the pervasiveness of trauma and its connections to physical and behavioral health and well-being, have propelled a growing number of organizations and service systems to explore ways to make their services more responsive to people who have experienced trauma. This has been happening in state and local systems and federal agencies.

States are elevating a focus on trauma. For example, Oregon Health Authority is looking at different types of trauma across the age span and different population groups. Maine's "Thrive Initiative" incorporates a trauma-informed care focus in their children's systems of care. New York is introducing a trauma-informed initiative in the juvenile justice system. Missouri is exploring a trauma-informed approach for their adult mental health system. In Massachusetts, the Child Trauma Project is focused on taking trauma-informed care statewide in child welfare practice. In Connecticut the Child Health and Development Institute with the state Department of Children and Families is building a trauma-informed system of care throughout the state through policy and workforce development. SAMHSA has supported the further development of trauma-informed approaches through its Mental Health Transformation Grant program directed to State and local governments.

Increasing examples of local level efforts are being documented. For example, the City of Tarpon Springs in Florida has taken significant steps in becoming a trauma-informed community. The city made it its mission to promote a widespread awareness of the costly effects of personal adversity upon the wellbeing of the community. The Family Policy Council in Washington State convened groups to focus on the impact of adverse childhood experiences on the health and well-being of its local communities and tribal communities. Philadelphia held a summit to further its understanding of the impact of trauma and violence on the psychological and physical health of its communities.

SAMHSA continues its support of grant programs that specifically address trauma.

At the federal level, SAMHSA continues its support of grant programs that specifically address trauma and technical assistance centers that focus on prevention, treatment and recovery from trauma.

Other federal agencies have increased their focus on trauma. The Administration on Children Youth and Families (ACYF) has focused on the complex trauma of children in the child welfare system and how screening and assessing for severity of trauma and linkage with trauma treatments can contribute to improved well-being for these youth. In a joint effort among ACYF, SAMHSA and the Centers for Medicare and Medicaid Services (CMS), the three agencies developed and issued through the CMS State Directors' mechanism, a letter to all State Child Welfare Administrators, Mental Health Commissioners, Single State Agency Directors for Substance Abuse and State Medicaid Directors discussing trauma, its impact on children, screening, assessment and treatment interventions and strategies for paying for such care. The Office of Juvenile Justice and Delinquency Prevention has specific recommendations to address trauma in their Children Exposed to Violence Initiative. The Office of Women's Health has developed a curriculum to train providers in primary care on how to address trauma issues in health care for women. The Department of Labor is examining trauma and the workplace through a federal interagency workgroup. The Department of Defense is honing in on prevention of sexual violence and trauma in the military.

As multiple federal agencies representing varied sectors have recognized the impact of traumatic experiences on the children, adults, and families they serve, they have requested collaboration with SAMHSA in addressing these issues. The widespread recognition of the impact of trauma and the burgeoning interest in developing capacity to respond through trauma-informed approaches compelled SAMHSA to revisit its conceptual framework and approach to trauma, as well as its applicability not only to behavioral health but also to other related fields.

SAMHSA's Concept of Trauma

Decades of work in the field of trauma have generated multiple definitions of trauma. Combing through this work, SAMHSA developed an inventory of trauma definitions and recognized that there were subtle nuances and differences in these definitions.

Desiring a concept that could be shared among its constituencies — practitioners, researchers, and trauma survivors, SAMHSA turned to its expert panel to help craft a concept that would be relevant to public health agencies and service systems. SAMHSA aims to provide a viable framework that can be used to support people receiving services, communities, and stakeholders in the work they do. A review of the existing definitions and discussions of the expert panel generated the following concept:

> *Individual trauma results from an* **event***, series of events, or set of circumstances that is* **experienced** *by an individual as physically or emotionally harmful or life threatening and that has lasting adverse* **effects** *on the individual's functioning and mental, physical, social, emotional, or spiritual well-being.*

THE THREE "E'S" OF TRAUMA: EVENT(S), EXPERIENCE OF EVENT(S), AND EFFECT

Events and circumstances may include the actual or extreme threat of physical or psychological harm (i.e. natural disasters, violence, etc.) or severe, life-threatening neglect for a child that imperils healthy development. These events and circumstances may occur as a single occurrence or repeatedly over time. This element of SAMHSA's concept of trauma is represented in the fifth version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), which requires all conditions classified as "trauma and stressor-related disorders" to include exposure to a traumatic or stressful event as a diagnostic criterion.

The individual's **experience** of these events or circumstances helps to determine whether it is a traumatic event. A particular event may be experienced as traumatic for one individual and not for another (e.g., a child removed from an abusive home experiences this differently than their sibling; one refugee may experience fleeing one's country differently from another refugee; one military veteran may experience deployment to a war zone as traumatic while another veteran is not similarly affected). How the individual labels, assigns meaning to, and is disrupted physically and psychologically by an event will contribute to whether or not it is experienced as traumatic. Traumatic events by their very nature set up a power differential where one entity (whether an individual, an event, or a force of nature) has power over another. They elicit a profound question of "why me?" The individual's experience of these events or circumstances is shaped in the context of this powerlessness and questioning. Feelings of humiliation, guilt, shame, betrayal, or silencing often shape the experience of the event. When a person experiences physical or sexual abuse, it is often accompanied by a sense of humiliation, which can lead the person to feel as though they are bad or dirty, leading to a sense of self blame, shame and guilt. In cases of war or natural disasters, those who survived the traumatic event may blame themselves for surviving when others did not. Abuse by a trusted caregiver frequently gives rise to feelings of betrayal, shattering a person's trust and leaving them feeling alone. Often, abuse of children and domestic violence are accompanied by threats that lead to silencing and fear of reaching out for help.

How the event is experienced may be linked to a range of factors including the individual's cultural beliefs (e.g., the subjugation of women and the experience of domestic violence), availability of social supports (e.g., whether isolated or embedded in a supportive family or community structure), or to the developmental stage of the individual (i.e., an individual may understand and experience events differently at age five, fifteen, or fifty).[1]

The long-lasting adverse **effects** of the event are a critical component of trauma. These adverse effects may occur immediately or may have a delayed onset. The duration of the effects can be short to long term. In some situations, the individual may not recognize the connection between the traumatic events and the effects. Examples of adverse effects include an individual's inability to cope with the normal stresses and strains of daily living; to trust and benefit from relationships; to manage cognitive processes, such as memory, attention, thinking; to regulate behavior; or to control the expression of emotions. In addition to these more visible effects, there may be an altering of one's neurobiological make-up and ongoing health and well-being. Advances in neuroscience and an increased understanding of the interaction of neurobiological and environmental factors have documented the effects of such threatening events.[1,3] Traumatic effects, which may range from hyper-vigilance or a constant state of arousal, to numbing or avoidance, can eventually wear a person down, physically, mentally, and emotionally. Survivors of trauma have also highlighted the impact of these events on spiritual beliefs and the capacity to make meaning of these experiences.

SAMHSA's Trauma-Informed Approach: Key Assumptions and Principles

Trauma researchers, practitioners and survivors have recognized that the understanding of trauma and trauma-specific interventions is not sufficient to optimize outcomes for trauma survivors nor to influence how service systems conduct their business.

The context in which trauma is addressed or treatments deployed contributes to the outcomes for the trauma survivors, the people receiving services, and the individuals staffing the systems. Referred to variably as "trauma-informed care" or "trauma-informed approach" this framework is regarded as essential to the context of care.[22,32,33] SAMHSA's concept of a trauma-informed approach is grounded in a set of four assumptions and six key principles.

A program, organization, or system that is trauma-informed **realizes** *the widespread impact of trauma and understands potential paths for recovery;* **recognizes** *the signs and symptoms of trauma in clients, families, staff, and others involved with the system; and* **responds** *by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively* **resist re-traumatization***.*

A trauma informed approach is distinct from trauma-specific services or trauma systems. A trauma informed approach is inclusive of trauma-specific interventions, whether assessment, treatment or recovery supports, yet it also incorporates key trauma principles into the organizational culture.

Referred to variably as "trauma-informed care" or "trauma-informed approach" this framework is regarded as essential to the context of care.

THE FOUR "R'S: KEY ASSUMPTIONS IN A TRAUMA-INFORMED APPROACH

In a trauma-informed approach, all people at all levels of the organization or system have a basic **realization** about trauma and understand how trauma can affect families, groups, organizations, and communities as well as individuals. People's experience and behavior are understood in the context of coping strategies designed to survive adversity and overwhelming circumstances, whether these occurred in the past (i.e., a client dealing with prior child abuse), whether they are currently manifesting (i.e., a staff member living with domestic violence in the home), or whether they are related to the emotional distress that results in hearing about the firsthand experiences of another (i.e., secondary traumatic stress experienced by a direct care professional).There is an understanding that trauma plays a role in mental and substance use disorders and should be systematically addressed in prevention, treatment, and recovery settings. Similarly, there is a realization that trauma is not confined to the behavioral health specialty service sector, but is integral to other systems (e.g., child welfare, criminal justice, primary health care, peer–run and community organizations) and is often a barrier to effective outcomes in those systems as well.

People in the organization or system are also able to **recognize** the signs of trauma. These signs may be gender, age, or setting-specific and may be manifest by individuals seeking or providing services in these settings. Trauma screening and assessment assist in the recognition of trauma, as do workforce development, employee assistance, and supervision practices.

The program, organization, or system **responds** by applying the principles of a trauma-informed approach to all areas of functioning. The program, organization, or system integrates an understanding that the experience of traumatic events impacts all people involved, whether directly or indirectly. Staff in every part of the organization, from the person who greets clients at the door to the executives and the governance board, have changed their language, behaviors and policies to take into consideration the experiences of trauma among children and adult users of the services and among staff providing the services. This is accomplished through staff training, a budget that supports this ongoing training, and leadership that realizes the role of trauma in the lives of their staff and the people they serve. The organization has practitioners trained in evidence-based trauma practices. Policies of the organization, such as mission statements, staff handbooks and manuals promote a culture based on beliefs about resilience, recovery, and healing from trauma. For instance, the agency's mission may include an intentional statement on the organization's commitment to promote trauma recovery; agency policies demonstrate a commitment to incorporating perspectives of people served through the establishment of client advisory boards or inclusion of people who have received services on the agency's board of directors; or agency training includes resources for mentoring supervisors on helping staff address secondary traumatic stress. The organization is committed to providing a physically and psychologically safe environment. Leadership ensures that staff work in an environment that promotes trust, fairness and transparency. The program's, organization's, or system's response involves a universal precautions approach in which one expects the presence of trauma in lives of individuals being served, ensuring not to replicate it.

A trauma-informed approach seeks to **resist re-traumatization** of clients as well as staff. Organizations often inadvertently create stressful or toxic environments that interfere with the recovery of clients, the well-being of staff and the fulfillment of the organizational mission.[27] Staff who work within a trauma-informed environment are taught to recognize how organizational practices may trigger painful memories and re-traumatize clients with trauma histories. For example, they recognize that using restraints on a person who has been sexually abused or placing a child who has been neglected and abandoned in a seclusion room may be re-traumatizing and interfere with healing and recovery.

SIX KEY PRINCIPLES OF A TRAUMA-INFORMED APPROACH

A trauma-informed approach reflects adherence to six key principles rather than a prescribed set of practices or procedures. These principles may be generalizable across multiple types of settings, although terminology and application may be setting- or sector-specific.

SIX KEY PRINCIPLES OF A TRAUMA-INFORMED APPROACH

1. **Safety**
2. **Trustworthiness and Transparency**
3. **Peer Support**
4. **Collaboration and Mutuality**
5. **Empowerment, Voice and Choice**
6. **Cultural, Historical, and Gender Issues**

From SAMHSA's perspective, it is critical to promote the linkage to recovery and resilience for those individuals and families impacted by trauma. Consistent with SAMHSA's definition of recovery, services and supports that are trauma-informed build on the best evidence available and consumer and family engagement, empowerment, and collaboration.

The six key principles fundamental to a trauma-informed approach include:[24,36]

1. **Safety:** Throughout the organization, staff and the people they serve, whether children or adults, feel physically and psychologically safe; the physical setting is safe and interpersonal interactions promote a sense of safety. Understanding safety as defined by those served is a high priority.

2. **Trustworthiness and Transparency:** Organizational operations and decisions are conducted with transparency with the goal of building and maintaining trust with clients and family members, among staff, and others involved in the organization.

3. **Peer Support:** Peer support and mutual self-help are key vehicles for establishing safety and hope, building trust, enhancing collaboration, and utilizing their stories and lived experience to promote recovery and healing. The term "Peers" refers to individuals with lived experiences of trauma, or in the case of children this may be family members of children who have experienced traumatic events and are key caregivers in their recovery. Peers have also been referred to as "trauma survivors."

4. **Collaboration and Mutuality:** Importance is placed on partnering and the leveling of power differences between staff and clients and among organizational staff from clerical and housekeeping personnel, to professional staff to administrators, demonstrating that healing happens in relationships and in the meaningful sharing of power and decision-making. The organization recognizes that everyone has a role to play in a trauma-informed approach. As one expert stated: "one does not have to be a therapist to be therapeutic."[12]

5. **Empowerment, Voice and Choice:** Throughout the organization and among the clients served, individuals' strengths and experiences are recognized and built upon. The organization fosters a belief in the primacy of the people served, in resilience, and in the ability of individuals, organizations, and communities to heal and promote recovery from trauma. The organization understands that the experience of trauma may be a unifying aspect in the lives of those who run the organization, who provide the services, and/or who come to the organization for assistance and support. As such, operations, workforce development and services are organized to foster empowerment for staff and clients alike. Organizations understand the importance of power differentials and ways in which clients, historically, have been diminished in voice and choice and are often recipients of coercive treatment. Clients are supported in shared decision-making, choice, and goal setting to determine the plan of action they need to heal and move forward. They are supported in cultivating self-advocacy skills. Staff are facilitators of recovery rather than controllers of recovery.[34] Staff are empowered to do their work as well as possible by adequate organizational support. This is a parallel process as staff need to feel safe, as much as people receiving services.

6. **Cultural, Historical, and Gender Issues:** The organization actively moves past cultural stereotypes and biases (e.g. based on race, ethnicity, sexual orientation, age, religion, gender-identity, geography, etc.); offers, access to gender responsive services; leverages the healing value of traditional cultural connections; incorporates policies, protocols, and processes that are responsive to the racial, ethnic and cultural needs of individuals served; and recognizes and addresses historical trauma.

Guidance for Implementing a Trauma-Informed Approach

Developing a trauma-informed approach requires change at multiples levels of an organization and systematic alignment with the six key principles described above. The guidance provided here builds upon the work of Harris and Fallot and in conjunction with the key principles, provides a starting point for developing an organizational trauma-informed approach.[20] While it is recognized that not all public institutions and service sectors attend to trauma as an aspect of how they conduct business, understanding the role of trauma and a trauma-informed approach may help them meet their goals and objectives. Organizations, across service-sectors and systems, are encouraged to examine how a trauma-informed approach will benefit all stakeholders; to conduct a trauma-informed organizational assessment and change process; and to involve clients and staff at all levels in the organizational development process.

The guidance for implementing a trauma-informed approach is presented in the ten domains described below. This is not provided as a "checklist" or a prescriptive step-by-step process. These are the domains of organizational change that have appeared both in the organizational change management literature and among models for establishing trauma-informed care.[35,36,37,38] What makes it unique to establishing a trauma-informed organizational approach is the cross-walk with the key principles and trauma-specific content.

TEN IMPLEMENTATION DOMAINS

1. **Governance and Leadership**
2. **Policy**
3. **Physical Environment**
4. **Engagement and Involvement**
5. **Cross Sector Collaboration**
6. **Screening, Assessment, Treatment Services**
7. **Training and Workforce Development**
8. **Progress Monitoring and Quality Assurance**
9. **Financing**
10. **Evaluation**

GOVERNANCE AND LEADERSHIP: The leadership and governance of the organization support and invest in implementing and sustaining a trauma-informed approach; there is an identified point of responsibility within the organization to lead and oversee this work; and there is inclusion of the peer voice. A champion of this approach is often needed to initiate a system change process.

POLICY: There are written policies and protocols establishing a trauma-informed approach as an essential part of the organizational mission. Organizational procedures and cross agency protocols, including working with community-based agencies, reflect trauma-informed principles. This approach must be "hard-wired" into practices and procedures of the organization, not solely relying on training workshops or a well-intentioned leader.

PHYSICAL ENVIRONMENT OF THE ORGANIZATION: The organization ensures that the physical environment promotes a sense of safety and collaboration. Staff working in the organization and individuals being served must experience the setting as safe, inviting, and not a risk to their physical or psychological safety. The physical setting also supports the collaborative aspect of a trauma informed approach through openness, transparency, and shared spaces.

ENGAGEMENT AND INVOLVEMENT OF PEOPLE IN RECOVERY, TRAUMA SURVIVORS, PEOPLE RECEIVING SERVICES, AND FAMILY MEMBERS RECEIVING SERVICES: These groups have significant involvement, voice, and meaningful choice at all levels and in all areas of organizational functioning (e.g., program design, implementation, service delivery, quality assurance, cultural competence, access to trauma-informed peer support, workforce development, and evaluation.) This is a key value and aspect of a trauma-informed approach that differentiates it from the usual approaches to services and care.

CROSS SECTOR COLLABORATION: Collaboration across sectors is built on a shared understanding of trauma and principles of a trauma-informed approach. While a trauma focus may not be the stated mission of various service sectors, understanding how awareness of trauma can help or hinder achievement of an organization's mission is a critical aspect of building collaborations. People with significant trauma histories often present with a complexity of needs, crossing various service sectors. Even if a mental health clinician is trauma-informed, a referral to a trauma-insensitive program could then undermine the progress of the individual.

SCREENING, ASSESSMENT, AND TREATMENT SERVICES: Practitioners use and are trained in interventions based on the best available empirical evidence and science, are culturally appropriate, and reflect principles of a trauma-informed approach. Trauma screening and assessment are an essential part of the work. Trauma-specific interventions are acceptable, effective, and available for individuals and families seeking services. When trauma-specific services are not available within the organization, there is a trusted, effective referral system in place that facilitates connecting individuals with appropriate trauma treatment.

TRAINING AND WORKFORCE DEVELOPMENT: On-going training on trauma and peer-support are essential. The organization's human resource system incorporates trauma-informed principles in hiring, supervision, staff evaluation; procedures are in place to support staff with trauma histories and/or those experiencing significant secondary traumatic stress or vicarious trauma, resulting from exposure to and working with individuals with complex trauma.

PROGRESS MONITORING AND QUALITY ASSURANCE: There is ongoing assessment, tracking, and monitoring of trauma-informed principles and effective use of evidence-based trauma specific screening, assessments and treatment.

FINANCING: Financing structures are designed to support a trauma-informed approach which includes resources for: staff training on trauma, key principles of a trauma-informed approach; development of appropriate and safe facilities; establishment of peer-support; provision of evidence-supported trauma screening, assessment, treatment, and recovery supports; and development of trauma-informed cross-agency collaborations.

EVALUATION: Measures and evaluation designs used to evaluate service or program implementation and effectiveness reflect an understanding of trauma and appropriate trauma-oriented research instruments.

To further guide implementation, the chart on the next page provides sample questions in each of the ten domains to stimulate change-focused discussion. The questions address examples of the work to be done in any particular domain yet also reflect the six key principles of a trauma-informed approach. Many of these questions and concepts were adapted from the work of Fallot and Harris, Henry, Black-Pond, Richardson, & Vandervort, Hummer and Dollard, and Penney and Cave.[39, 40, 41,42]

While the language in the chart may seem more familiar to behavioral health settings, organizations across systems are encouraged to adapt the sample questions to best fit the needs of the agency, staff, and individuals being served. For example, a juvenile justice agency may want to ask how it would incorporate the principle of safety when examining its physical environment. A primary care setting may explore how it can use empowerment, voice, and choice when developing policies and procedures to provide trauma-informed services (e.g. explaining step by step a potentially invasive procedure to a patient at an OBGYN office).

SAMPLE QUESTIONS TO CONSIDER WHEN IMPLEMENTING A TRAUMA-INFORMED APPROACH

KEY PRINCIPLES					
Safety	**Trustworthiness and Transparency**	**Peer Support**	**Collaboration and Mutuality**	**Empowerment, Voice, and Choice**	**Cultural, Historical, and Gender Issues**

10 IMPLEMENTATION DOMAINS	
Governance and Leadership	• How does agency leadership communicate its support and guidance for implementing a trauma-informed approach? • How do the agency's mission statement and/or written policies and procedures include a commitment to providing trauma-informed services and supports? • How do leadership and governance structures demonstrate support for the voice and participation of people using their services who have trauma histories?
Policy	• How do the agency's written policies and procedures include a focus on trauma and issues of safety and confidentiality? • How do the agency's written policies and procedures recognize the pervasiveness of trauma in the lives of people using services, and express a commitment to reducing re-traumatization and promoting well-being and recovery? • How do the agency's staffing policies demonstrate a commitment to staff training on providing services and supports that are culturally relevant and trauma-informed as part of staff orientation and in-service training? • How do human resources policies attend to the impact of working with people who have experienced trauma? • What policies and procedures are in place for including trauma survivors/people receiving services and peer supports in meaningful and significant roles in agency planning, governance, policy-making, services, and evaluation?

SAMPLE QUESTIONS TO CONSIDER WHEN IMPLEMENTING A TRAUMA-INFORMED APPROACH *(continued)*

10 IMPLEMENTATION DOMAINS *continued*	
Physical Environment	• How does the physical environment promote a sense of safety, calming, and de-escalation for clients and staff? • In what ways do staff members recognize and address aspects of the physical environment that may be re-traumatizing, and work with people on developing strategies to deal with this? • How has the agency provided space that both staff and people receiving services can use to practice self-care? • How has the agency developed mechanisms to address gender-related physical and emotional safety concerns (e.g., gender-specific spaces and activities).
Engagement and Involvement	• How do people with lived experience have the opportunity to provide feedback to the organization on quality improvement processes for better engagement and services? • How do staff members keep people fully informed of rules, procedures, activities, and schedules, while being mindful that people who are frightened or overwhelmed may have a difficulty processing information? • How is transparency and trust among staff and clients promoted? • What strategies are used to reduce the sense of power differentials among staff and clients? • How do staff members help people to identify strategies that contribute to feeling comforted and empowered?
Cross Sector Collaboration	• Is there a system of communication in place with other partner agencies working with the individual receiving services for making trauma-informed decisions? • Are collaborative partners trauma-informed? • How does the organization identify community providers and referral agencies that have experience delivering evidence-based trauma services? • What mechanisms are in place to promote cross-sector training on trauma and trauma-informed approaches?
Screening, Assessment, Treatment Services	• Is an individual's own definition of emotional safety included in treatment plans? • Is timely trauma-informed screening and assessment available and accessible to individuals receiving services? • Does the organization have the capacity to provide trauma-specific treatment or refer to appropriate trauma-specific services? • How are peer supports integrated into the service delivery approach? • How does the agency address gender-based needs in the context of trauma screening, assessment, and treatment? For instance, are gender-specific trauma services and supports available for both men and women? • Do staff members talk with people about the range of trauma reactions and work to minimize feelings of fear or shame and to increase self-understanding? • How are these trauma-specific practices incorporated into the organization's ongoing operations?

SAMPLE QUESTIONS TO CONSIDER WHEN IMPLEMENTING A TRAUMA-INFORMED APPROACH *(continued)*

10 IMPLEMENTATION DOMAINS *continued*	
Training and Workforce Development	• How does the agency address the emotional stress that can arise when working with individuals who have had traumatic experiences? • How does the agency support training and workforce development for staff to understand and increase their trauma knowledge and interventions? • How does the organization ensure that all staff (direct care, supervisors, front desk and reception, support staff, housekeeping and maintenance) receive basic training on trauma, its impact, and strategies for trauma-informed approaches across the agency and across personnel functions? • How does workforce development/staff training address the ways identity, culture, community, and oppression can affect a person's experience of trauma, access to supports and resources, and opportunities for safety? • How does on-going workforce development/staff training provide staff supports in developing the knowledge and skills to work sensitively and effectively with trauma survivors. • What types of training and resources are provided to staff and supervisors on incorporating trauma-informed practice and supervision in their work? • What workforce development strategies are in place to assist staff in working with peer supports and recognizing the value of peer support as integral to the organization's workforce?
Progress Monitoring and Quality Assurance	• Is there a system in place that monitors the agency's progress in being trauma-informed? • Does the agency solicit feedback from both staff and individuals receiving services? • What strategies and processes does the agency use to evaluate whether staff members feel safe and valued at the agency? • How does the agency incorporate attention to culture and trauma in agency operations and quality improvement processes? • What mechanisms are in place for information collected to be incorporated into the agency's quality assurance processes and how well do those mechanisms address creating accessible, culturally relevant, trauma-informed services and supports?
Financing	• How does the agency's budget include funding support for ongoing training on trauma and trauma-informed approaches for leadership and staff development? • What funding exists for cross-sector training on trauma and trauma-informed approaches? • What funding exists for peer specialists? • How does the budget support provision of a safe physical environment?
Evaluation	• How does the agency conduct a trauma-informed organizational assessment or have measures or indicators that show their level of trauma-informed approach? • How does the perspective of people who have experienced trauma inform the agency performance beyond consumer satisfaction survey? • What processes are in place to solicit feedback from people who use services and ensure anonymity and confidentiality? • What measures or indicators are used to assess the organizational progress in becoming trauma-informed?

Next Steps: Trauma in the Context of Community

Delving into the work on community trauma is beyond the scope of this document and will be done in the next phase of this work. However, recognizing that many individuals cope with their trauma in the safe or not-so safe space of their communities, it is important to know how communities can support or impede the healing process.

Trauma does not occur in a vacuum. Individual trauma occurs in a context of community, whether the community is defined geographically as in neighborhoods; virtually as in a shared identity, ethnicity, or experience; or organizationally, as in a place of work, learning, or worship. How a community responds to individual trauma sets the foundation for the impact of the traumatic event, experience, and effect. Communities that provide a context of understanding and self-determination may facilitate the healing and recovery process for the individual. Alternatively, communities that avoid, overlook, or misunderstand the impact of trauma may often be re-traumatizing and interfere with the healing process. Individuals can be re-traumatized by the very people whose intent is to be helpful. This is one way to understand trauma in the context of a community.

A second and equally important perspective on trauma and communities is the understanding that communities as a whole can also experience trauma. Just as with the trauma of an individual or family, a community may be subjected to a community-threatening event, have a shared experience of the event, and have an adverse, prolonged effect. Whether the result of a natural disaster (e.g., a flood, a hurricane or an earthquake) or an event or circumstances inflicted by one group on another (e.g., usurping homelands, forced relocation, servitude, or mass incarceration, ongoing exposure to violence in the community), the resulting trauma is often transmitted from one generation to the next in a pattern often referred to as historical, community, or intergenerational trauma.

Communities can collectively react to trauma in ways that are very similar to the ways in which individuals respond. They can become hyper-vigilant, fearful, or they can be re-traumatized, triggered by circumstances resembling earlier trauma. Trauma can be built into cultural norms and passed from generation to generation. Communities are often profoundly shaped by their trauma histories. Making sense of the trauma experience and telling the story of what happened using the language and framework of the community is an important step toward healing community trauma.

Many people who experience trauma readily overcome it and continue on with their lives; some become stronger and more resilient; for others, the trauma is overwhelming and their lives get derailed. Some may get help in formal support systems; however, the vast majority will not. The manner in which individuals and families can mobilize the resources and support of their communities and the degree to which the community has the capacity, knowledge, and skills to understand and respond to the adverse effects of trauma has significant implications for the well-being of the people in their community.

Conclusion

As the concept of a trauma-informed approach has become a central focus in multiple service sectors, SAMHSA desires to promote a shared understanding of this concept. The working definitions, key principles, and guidance presented in this document represent a beginning step toward clarifying the meaning of this concept. This document builds upon the extensive work of researchers, practitioners, policymakers, and people with lived experience in the field. A standard, unified working concept will serve to advance the understanding of trauma and a trauma-informed approach for public institutions and service sectors.

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CHAPTER 18

CULTIVATING LAWYER WELL-BEING AND ASKING FOR HELP

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Chapter 18

CULTIVATING LAWYER WELL-BEING AND ASKING FOR HELP

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- Relationships
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- Planning for retirement

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About the **OAAP**

We provide CONFIDENTIAL and free counseling assistance to lawyers, judges, law students, their family members, and members of the legal community. We can help with your concerns about your well-being, or the well-being of someone you care about. We offer short-term individual counseling, referral to other resources when appropriate, support groups, workshops, CLEs, and educational programs. Most of our programs and services are free. We are funded by the Professional Liability Fund (PLF).

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OAAP Attorney Counselors

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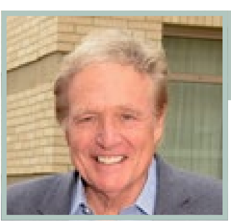
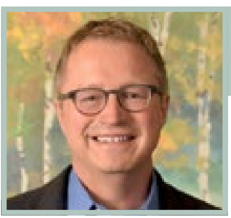


Douglas S. Querin

JD, LPC, CADC I

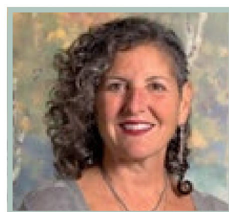
practiced law for over 25 years, before becoming a licensed professional counselor. Working at the OAAP since 2006, he provides individual counseling on issues including stress management, anxiety, depression, relationship challenges, career satisfaction, and retirement planning. Doug is in long-term recovery and frequently provides counseling and support for lawyers dealing with substance use issues. Additionally, he facilitates work-life balance and healthy habit workshops for lawyers.



Bryan R. Welch

JD, CADC I

practiced family law before joining the OAAP in 2015. He is in long-term recovery and provides counseling for issues including problem substance use, career satisfaction, ADHD, and stress management. Bryan also facilitates workshops and support groups for lawyers practicing law with ADHD; with anxiety and depression; while experiencing divorce; or who are seeking greater career satisfaction.



Shari R. Pearlman

LCSW, JD

is the assistant director of the OAAP. She has over 19 years of experience providing individual counseling and facilitating support groups including women and trauma, trans*, and career satisfaction. Her work is fueled by her passion for helping people and building community. She has served on the executive boards of OWLS, the OSB Diversity and Inclusion Section, and the OSB Advisory Committee on Diversity and Inclusion.

Kyra M. Hazilla

JD, LCSW

first started working at the OAAP as an attorney counselor in 2014. She provides individual counseling and facilitates groups on trauma; building resilience; mindfulness; parenting; depression, anxiety and other mental health conditions; career transitions; recovery; and support for trans law professionals. Kyra's previous counseling experience includes crisis intervention and helping survivors of family violence. Her legal career has focused on the practice of juvenile law.

Karen A. Neri

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is working towards her MA in Marriage, Couple, and Family Counseling, a degree that will prepare her for attaining dual licensure as a professional counselor and marriage and family therapist. Her work at the OAAP includes individual counseling and co-facilitating groups. Prior to joining the OAAP staff in 2018, she practiced law in California, litigating primarily family law and personal injury cases.

CULTIVATING LAWYER WELL-BEING AND ASKING FOR HELP

Douglas Querin
Attorney Counselor

Recent Research Regarding Well-Being of American Lawyers

A. COLLABORATION: American Bar Association (ABA) & Hazelden Betty Ford Foundation.
B. PURPOSES: Assess major conditions affecting Lawyer Well-Being in U.S.
    a. Prevalence: "Problematic Substance (alcohol) Use" (i.e., at levels considered Hazardous, Harmful, and/or indicating Possible Dependence);
    b. Prevalence: Depression, Anxiety, and Unhealthy Stress;
    c. Identify Obstacles to Treatment.
C. THE NATIONAL SURVEY (2016).
    a. 13,000 U.S. lawyers;
    b. Participants anonymously answered personal and professional demographic questions & completed self-report screening instruments.
D. STUDY FINDINGS: RATES OF PROBLEMATIC ALCOHOL USE.
    a. Rates in U.S. Adult Population: 6%;
    b. Rates among Physicians, reportedly: 15%;
    c. Rates among Lawyers (per study): 21%;
    d. Gender:
        i. Men 25.1%;
        ii. Women 15.5%;
    e. Practice Environments:
        i. Private firms: 23.4%;
        ii. Government, public, or non-profit: 19.2%;
        iii. Solo practitioners: 19.0%;
        iv. In-house corporate or for-profit institutions: 17.8%.
    f. Significant Correlations – Rates of Problematic Use – Correlated with:
        i. Years of practice/age (10-year increments);
            - Question: Do lawyers' problematic alcohol use rates increase, decrease, or stay the same over time?
        ii. Position/seniority in law firm (e.g., junior associate, senior associate, junior partner, senior partner).

- Question: Do lawyers' problematic alcohol use rates increase, decrease, or stay the same as position/seniority increases in firm?

E. STUDY FINDINGS: RATES OF DEPRESSION, ANXIETY, UNHEALTHY STRESS.
   a. Significant Levels of:
      i. Depression: 28%;
      ii. Anxiety: 19%;
      iii. Unhealthy Stress: 23%.
   b. Gender:
      i. Men: Higher rates of Depression than women;
      ii. Women: Higher rates of Anxiety & Unhealthy Stress than men;
   c. Practice Environments:
      i. Solos – Highest levels of depression, anxiety, and stress;
      ii. Private law firm lawyers – Next highest levels.
   d. Significant Correlations (Depression, Anxiety, Stress):
      i. Lawyers' Ages & Years of Practice:
         - Question: Do rates of depression, anxiety, and stress increase, decrease, or stay the same as time passes?
      ii. Lawyers' position/seniority in law firm:
         - Question: Do rates of depression, anxiety, and stress increase, decrease, or stay the same as position/seniority increases?
      iii. Problem alcohol use Rates of Depression, Anxiety, and Stress.

F. GETTING HELP: Many lawyers needing help, DO NOT seek it/get it.

G. LAW STUDENTS: Survey of Law Student Well-Being (2016).
   a. 15 Law schools; 3300 students;
      i. Findings:
         - 25% at risk for alcohol use disorder;
         - Only 4% received professional help for alcohol or drug issues;
         - 17% screened positive for depression;
         - 37% screened positive for anxiety;
         - 42% reported thinking they needed help for mental health concerns;
         - At least ½ of this group did not seek/receive professional help;
         - 50% of students surveyed reported they had a better chance of "getting admitted to the bar if health and substance use problems are hidden."

H. THEREFORE: What the research tells us.
   a. Lawyers have significantly higher rates:
      i. Problematic alcohol use,

        ii. Depression, anxiety, and unhealthy stress.

   b. Our younger, less experienced lawyers are at Significant Risk, having even higher rates of problematic alcohol use & depression, anxiety, and stress than their older, more experienced peers;
   c. Many lawyers needing help, do NOT seek it;
   d. Law student studies show similar results.

I. RESPONSE TO RECENT STUDIES.
   a. Media response.
   b. Creation of ABA National Task Force.

J. TASK FORCE RECOMMENDATIONS.
   a. Action needed by all Stakeholders, invested in the Profession's well-being:
      i. Law firms and lawyers;
      ii. Law schools and students;
      iii. Bar admissions and regulatory bodies;
      iv. Bar associations, state and local;
      v. Professional associations;
      vi. Judiciary;
      vii. Professional Liability Insurance Carriers;
      viii. Lawyer assistance programs/resources.
   b. Expand educational outreach:
      i. Signs & symptoms of conditions;
      ii. Knowledge of resources and how to access;
      iii. Effectiveness of treatment.
   c. Address Stigma;
   d. Re-consider the role that alcohol and substance use play in the legal profession;
   e. Create a culture of Well-Being within the legal profession.

Barriers to Accessing Support

Only 7% of lawyers get help for their problematic drinking and only 37% of lawyers suffering with depression and anxiety seek treatment. Why not?

- Stigma:
  - Fear that others would find out the lawyer needed help.
  - Concerns regarding privacy or confidentiality
- Shame
  - Inability to recognize signs and symptoms.
  - Not knowing how to access support or being too busy.
- Viewing help-seeking as a sign of weakness, having a strong preference for self-reliance, and/or having a tendency toward perfectionism.

Taking Action to Reduce Stigma

- Allow for vulnerability in the profession.
- Doing something is almost always better than doing nothing.
- You do not have to be a mental health expert to assist an impaired person.
- Normalize struggles and seeking support.
- Encourage distressed colleagues to get help.
- Foster collegiality and respectful engagement.

Recognizing Signs of Problematic Substance Use and Other Mental and Behavioral Health Issues

A. Red Flags common with problem substance use:

- *Trust your instincts.*
- Continuation of problematic behaviors despite adverse consequences.
  - Legal problems (e.g., DUIIs).
  - Social or interpersonal problems (e.g., domestic troubles).
  - High-risk behavior (e.g., driving at excessively high speeds; driving while intoxicated, stealing, unsafe sex).
  - Not meeting major responsibilities (work, school, home, etc.).
  - Reports of concern expressed by family, friends, or clients.
- Difficulty in controlling, or inability to control, substance use.
  - Taking the substance in larger amounts or for longer periods than intended.
  - Persistent desire or unsuccessful attempts to cut down or stop using.
  - Spending more money than you can afford.
  - Making sure you don't run out.
- Cravings.
- 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.).
  - Alcohol withdrawal can be fatal. In cases of high frequency and quantity of use withdrawal from alcohol should be medically managed.

B. Red Flags common with substance use, mental or behavioral health issues:

- Isolation and/or reclusive behavior – especially if there is no family/support system.
- Having difficulty making contact: No response to calls, emails, texts, etc.; telephone voice mail box full; mail not picked up or opened.
- Failure to respond to lawyer and/or to attend to discovery requests and/or other case requirements.
- Paralysis (by anxiety, fear, insecurity, etc.) in handling work/personal responsibilities.
- Excessively passive behavior - especially when inaction may have significant consequences.
- Missed appointments; failure to follow through.

- Decline in personal hygiene or appearance.
- Extreme anxiety over their case, or in performing tasks related to their case.
- Emotional Dysregulation:
    - 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
    - Excessively needy or demanding.
- Unrealistic or improbable excuses for unavailability or inappropriate conduct. Coming in late to work and leaving early.
- Decline in cognitive functioning.
    - Significant memory problems.
    - Difficulty understanding issues.
    - Difficulty understanding, following instructions.
    - Confused thinking.
- Inappropriate/bizarre behavior.
    - Paranoid, exaggerated suspicion or sense of persecution.
    - Phone calls, emails, texts at odd hours (e.g., 2 a.m.).
    - Clearly delusional beliefs.
- Talk or behavior suggesting intent to harm self, loss of hope, or desire to no longer be alive.

C. Risk Factors For Substance Use Disorders

- Family history of substance misuse.
- Early age of first use.
- Personal or family history of emotional or behavioral disorders: e.g. anxiety, depression, ADHD, PTSD.
- Stressful Personal or Family Situations.
    - Known/suspected financial difficulties or bankruptcy.
    - Pending or potential domestic/relationship problems.
    - Pending or potential criminal charges.
    - Significantly ill parent, spouse, child, close friend, etc.

Relevance of Self-Care

A. The definition of self-care can be deeply personal and tends to be different for everyone. One comprehensive definition is from the literature research on the concept of self-care from varying industry perspectives done by Christina M. Godfrey, RN, PhD, and her colleagues. They shared, "*Self-care involves a range of care activities deliberately engaged throughout life to promote physical, mental and emotional health, maintain life and prevent disease.*" Moreover, they stated, "*Self-care is performed by the individual on their own behalf, for their families, or communities, and includes care by others. . . Self-care includes social support and the meeting of social and psychological needs. . .*" These statements reflect self-care as caring for self, caring for others and being cared for by others, all of which is at the core of having a positive well-being.

B. Self-care can serve as a buffer against the stressful and challenging demands of the legal profession, including those intense negative experiences that occur suddenly or repeatedly overtime, which could lead to burnout, compassion fatigue and secondary traumatic stress (secondary trauma):

- *Burnout* is "the physical and emotional exhaustion that workers can experience when they have low job satisfaction and feel powerless and overwhelmed at work" (Mathieu, 2012, p. 10).

- *Compassion fatigue* is the emotional and physical exhaustion that professionals can experience from working in the capacity of helping others, in which there is a gradual erosion of empathy, hope, and compassion for others and themselves (Mathieu, 2012).

- *Secondary trauma* refers to the experience of trauma following repeated exposure to another person's trauma.

Lawyers can build their resiliency through self-care. Regularly participating in activities that replenishes your energy, sustains you and satisfies your mental, social and psychological needs equips you to better manage your stress, bounce back from adversity, sustain any ongoing hardship, and experience growth in the process. Remember to pay attention to your body and become familiar with your own signals of distress. Recognizing your own symptoms of stress would be helpful in allowing you to recognize it in others.

C. Self-care is also the link between one's well-being and professionalism, which includes competence and practicing ethically. As noted by the National Task Force on Lawyer Well-Being following in its report, "To be a good lawyer, one has to be a healthy lawyer."

Using the Dimensions of Lawyer Well-Being in Self-Care Practices

A. The report of the National Task Force on Lawyer Well-Being initially listed six dimensions of well-being:

1. Occupational -Finding satisfaction, meaning and financial stability through work.

2. Emotional - Being able to regulate our emotions.

3. Physical - Engaging in physical activity, healthy diet, and sufficient sleep.

4. Intellectual - Pursuing one's creative or intellectual outlets for continued personal or professional growth and development.

5. Spiritual - Being attuned to those qualities that allows you to find meaning in daily experiences or transcend physical and emotional discomfort.

6. Social - Supporting your need for belonging.

As an important add-on, in maintaining a positive well-being, it is just as crucial to sustain a connection to culture.

7. Cultural Well-Being - Supporting your need to honor your heritage or traditions, and expanding your cultural knowledge.

Self-Care Inventory

Take a moment to assess your own self-care practices by reviewing the different areas of self-care listed in the attached inventory.

How are you doing in each of these areas, and which areas might you spend more time on? Which one might you newly incorporate to your day-to-day?

Consider further the additional questions listed in the inventory

HELP A COLLEAGUE IN NEED: Reaching out to a colleague needing help.

i. Doing nothing vs. Doing something – Have a conversation;

ii. Share your concerns & observations;

iii. Avoid judgment and confrontation;

iv. Care, Compassion, and Candor;

v. Do not need to be a mental health expert; do not need to diagnose;

vi. Listen!;

vii. Recognize: Helping is a process, not one-time event;

viii. Utilize Oregon Attorney Assistance Program resources.

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June 2016

Issue No. 100

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100th Issue!

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NATIONAL STUDY ON LAWYER SUBSTANCE USE AND MENTAL HEALTH

For the first time ever, a national research study has been undertaken to empirically quantify the prevalence of substance use and other behavioral health conditions within the lawyer population of the United States. Results of the study, jointly undertaken by the American Bar Association (ABA) and the Hazelden Betty Ford Foundation (ABA-Hazelden Study), have been published in the February 2016 edition of the *Journal of Addiction Medicine*. The study, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," presents a revealing picture of our profession that is old news to some and disturbing news to many others.[1]

Nearly 13,000 currently employed attorneys completed anonymous surveys assessing alcohol and drug use and symptoms of depression, anxiety, and stress. Specifically, the survey utilized (1) the Alcohol Use Disorders Identification Test (AUDIT)[2], a self-report instrument developed by the World Health Organization to screen for hazardous use, harmful use, and the potential for alcohol dependence; and (2) the Depression Anxiety Stress Scales-21 (DASS-21)[3], a widely used self-report mental health questionnaire.

The study sample's demographic profile was obtained by the participants' self-reports. The personal characteristics of the group were as follows:

GENDER*	
Men	53.4%
Women	46.5%

*Election options limited to the male-female gender binary.

AGE	
30 or younger	11.9%
31-40	25.2%
41-50	21.0%
51-60	23.2%
61-70	16.1%
71 or older	2.7%

Participants were asked to identify legal, illicit, and prescribed substance use within the preceding 12 months. Participants reported as follows:

Alcohol	84.1%
Tobacco	16.9%
Sedatives	15.7%
Marijuana	10.2%
Opioids	5.6%
Stimulants	4.8%
Cocaine	0.8%

The study also elicited detailed information about the participants' professional characteristics, asking respondents to identify their age (≤30, 31-40, 41-50, etc.), their years in the field (≤10, 11-20, 21-30, etc.), work environments (solo practitioner, private firm, government, non-profit, corporation in-house, etc.), firm position (junior associate, senior associate, junior partner, etc.), hours worked per week (≤10, 11-20, 21-30, etc.), and whether or not they did litigation. All personal and professional data obtained were statistically analyzed, revealing the following regarding the rates of substance use[4] among practicing attorneys in the United States:

● Over 20% of the lawyers who responded scored at a level consistent with problematic drinking[5]; that is, using AUDIT criteria, they screened positive for hazardous and/or harmful use, having the potential for alcohol dependence. This rate is over twice that of the general adult population in this country.[6]

● Men scored significantly higher for problematic alcohol use than women, reporting 25.1% and 15.5%, respectively.

● Problematic alcohol use was highest (28.1%) among attorneys in the early stages of their careers (0-10 years), with declining rates reported thereafter:

Years in Legal Field	Problematic %
0-10	28.1%
11-20	19.2%
21-30	15.6%
31-40	15.0%
41 or more	13.2%

● Problematic alcohol use was highest (31.9%) among attorneys ages 30 or younger, with declining rates reported thereafter:

Age Category	Problematic %
30 or younger	31.9%
31-40	25.1%
41-50	19.1%
51-60	16.2%
61-70	14.4%
71 or older	12.1%

● Within different work environments, reported problematic alcohol use rates were varied, though clearly highest in private law firms (23.4%):

Work Environment	Problematic %
Private firms	23.4%
In-house gov't, public, or non-profit	19.2%
Solo practitioner	19.0%
In-house corp. or for-profit institution	17.8%

● Within private firms, reported problematic alcohol use rates tended to be inversely related to law firm seniority:

Firm Position	Problematic %
Junior associate	31.1%
Senior associate	26.1%
Junior partner	23.6%
Managing partner	21.0%
Senior partner	18.5%

The ABA-Hazelden Study produced a second, and equally revealing, set of statistical data concerning depression, anxiety, and stress within the American lawyer population, as follows:

● Utilizing the DASS-21 mental health questionnaire, male respondents reported significantly higher levels of depression than women, a finding generally contrary to conventional findings among the U.S. adult population.[7]

● Female respondents' anxiety and stress scores were higher than corresponding male scores.

● Depression, anxiety, and stress scores among responding lawyers generally decreased as age increased and also as years in practice increased.

● Solo practitioners in private practice reported the highest levels of depression, anxiety, and stress, followed by lawyers working in private firms.

● In private law firm environments, more senior positions were generally associated with lower reported symptoms of depression, anxiety, and stress; that is, fewer senior lawyers reported greater symptom levels of these conditions.

● Significantly, when respondents' AUDIT and DASS-21 scores were compared, a correlation was found – those with problematic alcohol use scores reported higher rates of depression, anxiety, and stress.

● Finally, participating lawyers were asked about past mental health concerns over their legal career. The most common mental health conditions reported were anxiety (61.1%), depression (45.7%), social anxiety (16.1%), attention deficit hyperactivity disorder (12.5%), panic disorder (8.0%), and bipolar disorder (2.4%).

While this study is subject to certain inherent limitations (e.g., participants were not randomly selected, but rather self-selected by voluntarily responding to emails, news postings, and websites; given the nature of the survey, the participants may have overstated or understated their individual symptoms, etc.), it does produce an abundance of data that seem to reinforce in an empirical way what many intuitively suspect represents a fairly accurate description of the behavioral health of our profession. At a minimum, the study does suggest that the prevalence of problematic drinking, depression, anxiety, and stress within the American lawyer population should be cause for significant concern.

In Part II of this article we will discuss some of the implications of the ABA-Hazelden Study and, in particular, provide some recommendations that may be of value in specifically assisting our Oregon legal community.

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OAAP Attorney Counselor

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[1] http://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx

[2] http://pubs.niaaa.nih.gov/publications/Audit.pdf

[3] https://www.cesphn.org.au/images/mental_health/Frequently_Used/Outcome_Tools/Dass21.pdf

[4] For statistical reasons, no significant inferences could be drawn about participating lawyers' use or misuse of substances other than alcohol.

[5] The AUDIT generates scores ranging from 0 to 40. Scores of 8 or higher indicate hazardous or harmful alcohol intake and also possible dependence. Scores are categorized into zones to reflect increasing severity, with zone II reflective of hazardous use, zone III indicative of harmful use, and zone IV warranting full diagnostic evaluation for alcohol use disorder. The study uses the phrase "problematic use" to capture all three of the zones related to a positive AUDIT score.

[6] https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-use-disorders

[7] http://www.mayoclinic.org/diseases-conditions/depression/in-depth/depression/art-20047725?p=1.

OAAP

March 2018

Issue No. 107

Oregon Attorney Assistance Program

In Sight for Oregon Lawyers and Judges

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NATIONAL TASK FORCE REPORT ON LAWYER WELL-BEING

In 2017, the National Task Force on Lawyer Well-Being (Task Force), consisting of the American Bar Association (ABA) Commission on Lawyer Assistance Programs and a broad coalition of other organizations, published the most comprehensive report (Report) to date on the well-being of American lawyers. The Report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, relied on numerous empirical studies, two of the most notable being the recent ABA-Hazelden Betty Ford Foundation survey of nearly 13,000 currently practicing U.S. lawyers and the 2016 Survey of Law Student Well-Being, surveying over 3,300 law students from 15 law schools throughout the country. These studies revealed that many lawyers and law students struggle with anxiety, depression, and/or substance use issues.

Well-Being in the Legal Profession

The findings of these studies and the national media attention their publication generated, sparked the creation of the Task Force and its Report. The central question for the Task Force was how the profession can best address these health concerns in a collaborative, comprehensive, and sustainable way to meet the needs of all concerned.

The Report made clear that, although a disturbing portion of our legal profession has substance use and behavioral health challenges, the majority of lawyers and law students do not. It noted, however, ". . . that does not mean that they're thriving. Many lawyers experience a 'profound ambivalence' about their work, and different sectors of the profession vary in their levels of satisfaction and well-being." Well-being is thus more than "the absence of illness; it includes a positive state of wellness." To be a good lawyer, the Report noted, one has to be a healthy lawyer, and the research suggests that "the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust." The Task Force thus undertook to address not only mental health and problematic substance use concerns, but also the overarching issue of lawyer well-being within the profession. How can lawyers experience well-being and actually thrive in their personal and professional lives?

The Task Force defined lawyer well-being as a continuous process whereby one seeks to thrive in six primary areas of one's life:

Emotional health – identifying and managing emotions in personal and professional environments;

Occupational pursuits – cultivating personal satisfaction, growth, enrichment, and financial stability;

Creative or intellectual endeavors – engaging in continuous learning and the pursuit of creative or intellectually challenging activities;

Spirituality – experiencing a sense of meaningfulness and purpose in all aspects of life;

Social connections – developing a sense of belonging and support with others important in one's life; and

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Physical health – striving for regular physical activity, proper diet, nutrition, sufficient sleep, and recovery from the use of unhealthy substances.

Stakeholders

The Task Force's Report makes over 40 recommendations, some general to all stakeholders within the legal community and some very specific to each individual stakeholder group. The Report is nothing less than a call to action. It seeks to encourage through collective action significant change in the culture of the legal profession. The stakeholder groups addressed include judges, regulators, legal employers, law schools, bar associations, professional liability carriers, and lawyer assistance programs.

Task Force Recommendations

To their credit, many of the stakeholders in Oregon are committed to lawyer well-being and have already begun implementing some of the Task Force's recommendations. However, there is always room for additional improvement when it comes to one of the most important issues for this and future generations of our legal community.

Some of the general recommendations to all stakeholder groups include:

- Take action to minimize the stigma that is often attached to mental health and substance use disorders; encourage those with such conditions to seek help.

- Foster collegiality and respectful engagement throughout the profession; reduce chronic incivility that can foment a toxic culture that is counter to well-being.

- Promote diversity and inclusivity initiatives that encourage both individual and institutional well-being.

- Create meaningful mentoring and sponsorship programs, which research shows can aid well-being and career progress, particularly for women and diverse professionals.

- Guide and support the transition of older lawyers to, among other things, capitalize on the wealth of experience they can offer and, at the same time, reduce risks sometimes faced by senior lawyers challenged by the demands of technically evolving professional environments.

- De-emphasize alcohol at social events, and provide a variety of alternative non-alcoholic beverages at such events.

- Utilize monitoring to support recovery from substance use disorders in environments where it can be supportive.

Some of the recommendations to specific stakeholder groups include:

- Conduct judicial well-being surveys.

- Provide well-being programming for judges and staff.

- Encourage judicial participation in the activities of lawyer assistance programs, such as volunteering as speakers, particularly when the judge is in recovery him/herself.

- Educate and inform the judiciary regarding signs and symptoms associated with substance use and behavior health conditions so they are better able to identify when a lawyer may be in need of assistance.

- Adopt regulatory objectives that prioritize lawyer well-being, such as expanding continuing education requirements to include well-being topics; require law schools to create well-being education as a criterion for ABA accreditation; more closely focus on conduct and behavior rather than diagnosis and treatment as character and fitness bar admission criteria so as to avoid stigmatizing mental and behavioral health conditions and treatment; educate and accurately inform law students about bar admission criteria to reduce their fear that getting needed professional treatment will hinder their chances of bar admission.

- Adopt diversion programs and other alternatives to discipline for minor lawyer misconduct to encourage treatment for underlying substance use and mental health disorders.

- Add well-being-related questions to the multistate professional responsibility exam.

- In legal work environments, form active lawyer well-being committees; monitor for signs of work addiction and poor self-care in legal work; and actively combat social isolation and encourage interconnectivity.

- In law schools, create best practices for assisting law students experiencing psychological distress; provide training to law school faculty regarding student mental

What the Research Tells Us

For years, many have voiced varying degrees of concern about the physical and behavioral health of the legal profession. The findings of the two research studies referred to above clearly signaled "an elevated risk in the legal community for mental health and substance use disorders tightly intertwined with an alcohol-based social culture." Below are some highlights of that research:

Among law students surveyed:

- 17% experienced some level of depression;
- 14% experienced severe anxiety;
- 23% had mild or moderate anxiety;
- 6% reported serious suicidal thoughts in the past year;
- 43% reported binge drinking at least once in the prior two weeks;
- Nearly one-quarter reported binge drinking two or more times in the prior two weeks;
- 25% qualified as being at risk for alcoholism for which further screening was recommended; and
- 50% reported that chances of bar admission are better if a mental health or substance use problem is hidden.

Among lawyers surveyed:

- Between 21% and 36% qualified as problem drinkers (i.e., hazardous use, possible dependence);
- 28% struggled with depression;
- 19% struggled with anxiety; and
- 23% struggled with unhealthy stress.

Lawyers with less than 10 years of practice and those working in private law firms experienced the highest rates of problem drinking and depression and elevated levels of other difficulties, including social isolation, work addiction, suicide, sleep deprivation, job dissatisfaction, and work-life conflicts.

health and substance use disorders; and develop mental health and substance use disorder resources, including taking active steps to encourage help-seeking practices by students.

- Empower law students to help fellow students in need; facilitate a confidential recovery network for students; provide educational opportunities on well-being-related topics in law schools; and discourage alcohol-centered law-school-related events.
- Encourage local and state bar associations to sponsor quality CLE programming on well-being topics, and utilize the resources of state lawyer assistance programs when appropriate.
- Emphasize well-being in loss prevention programs, including being aware of the role of lawyer impairment in claims activity.
- Among lawyer assistance programs, encourage emphasis on confidentiality; high-quality well-being programming; and appropriate and stable funding for outreach, screening, counseling, professional staffing, and preventative education.

The Task Force Report "makes a compelling case that the legal profession is at a crossroads" and the time for action is now. It is premised on the belief that, through collective action by all of us, we have the capacity to create a better future for our nation's lawyers. Improving lawyer well-being is a win-win for everyone: it is good for clients, good for business, good for the profession – and it is the right thing to do!

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

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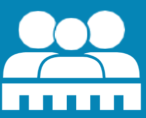


Defining Lawyer Well-Being: A Multi-Dimensional Approach

Well-being cannot be defined just by the absence of illness but also encompasses a positive state of wellness. From a whole-health perspective, it can be viewed as a continuous process in which we work across multiple dimensions of wellness. The way we function in one dimension can enhance or impede the way we function in another dimension. The report of the National Task Force on Lawyer Well-Being identified six dimensions that make up full well-being for lawyers:

1. Occupational.

Cultivating personal satisfaction, growth, and enrichment in work; financial stability.

2. Emotional.

Recognizing the importance of emotions. Developing the ability to identify and manage our own emotions to support mental health, achieve goals, and inform decision-making. Seeking help for mental health when needed.

3. Physical.

Striving for regular physical activity, proper diet and nutrition, sufficient sleep, and recovery; minimizing the use of addictive substances. Seeking help for physical health when needed.

4. Intellectual.

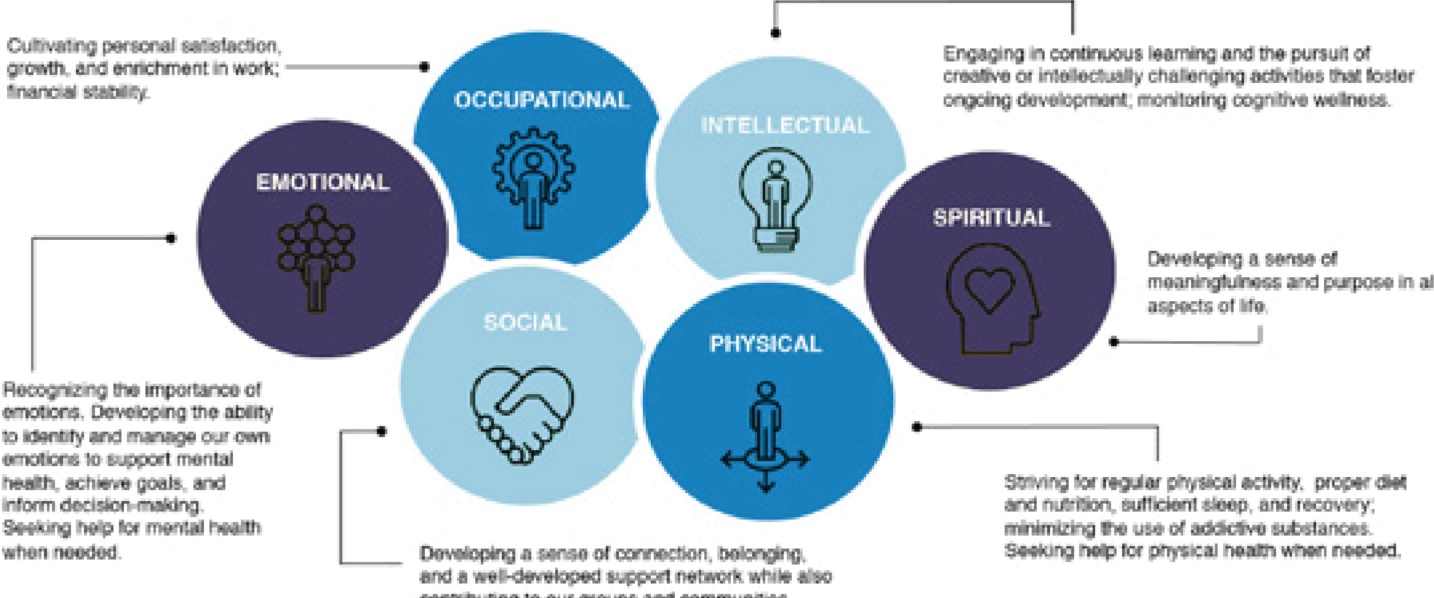
Engaging in continuous learning and the pursuit of creative or intellectually challenging activities that foster ongoing development; monitoring cognitive wellness.

5. Spiritual.

Developing a sense of meaningfulness and purpose in all aspects of life.

6. Social.

Developing a sense of connection, belonging, and a well-developed support network while also contributing to our groups and communities.



* OAAP adds Cultural Well-Being as a 7th dimention asking you if you are fulfilled in practicing your traditional celebrations/rituals/foods/language/learning practices.

Self-Care Inventory

How frequently do I do the following?

0	1	2	3
Never	Rarely	Sometimes	Often

Physical Self-Care

_____ Eat regularly (e.g., breakfast, lunch, & dinner)
_____ Eat healthy foods
_____ Exercise regularly (3 times per week)
_____ Get enough sleep
_____ Preventative medical care
_____ Medical care when needed
_____ Take time off work when sick
_____ Get massages
_____ Dance, swim, walk, run, play sports, sing, or do other physical activity you enjoy
_____ Take time to be sexual
_____ Take vacations

Psychological Self-Care

_____ Decrease stress in your life
_____ Make time away from demands
_____ Write in a journal
_____ Read literature that is unrelated to work
_____ Do something at which you are not an expert or in charge
_____ Let others know different aspects of you
_____ Be curious
_____ Say no to extra responsibilities

Emotional Self Care

_____ Connect with others whose company you enjoy
_____ Stay in contact with the people that matter in your life
_____ Love yourself
_____ Laugh
_____ Cry
_____ Play with animals
_____ Play with children
_____ Identify comforting activities, objects, people, relationships, places and seek them

Spiritual Self-Care

_____ Spend time in nature
_____ Find spiritual connection or community
_____ Cherish optimism and hope
_____ Be open to not knowing
_____ Sing

_____ Pray
_____ Spend time with children
_____ Be open to inspiration
_____ Have gratitude
_____ Meditate
_____ Listen to music
_____ Engage in artistic activity
_____ Yoga
_____ Have experiences of awe
_____ Be mindful of what is happening in your body and around you
_____ Make meanings from the difficult periods
_____ Seek truth

Workplace or Professional Self-Care
_____ Take time to eat lunch
_____ Take time to connect with co-workers
_____ Make quiet time to complete tasks
_____ Identify projects or tasks that are exciting/rewarding
_____ Set limits with clients and colleagues
_____ Balance your workload so that you are not "overwhelmed"
_____ Arrange your workspace so that it is comfortable and comforting
_____ Get regular supervision and consultation
_____ Negotiate for your needs (benefits, pay raise)
_____ Have a peer support group

Adapted from "Compassion Fatigue Prevention and Resiliency,"*J. Eric Gentry, PhD, LHC, and from* "Risking Connection: A Training Curriculum for Working with Survivors of Childhood Sexual Abuse," *Saakvitne, K.W., Gamble, S., Pearlman, L.A., Lev, B.T. (2000). Baltimore, MD: Sidran Press.*

Evaluating ourselves:

_____ What are the healthy behaviors/activities you are involved with that you would like to keep doing or do more of?

_____ Are there risky or unhealthy behaviors that you would like to address/change?

_____ Are there healthy activities that you would like to embark on, if so what are they?

CHAPTER 19

COURTROOM DO'S AND DON'TS

The Honorable Ramón A. Pagán
Washington County Circuit Court
The Honorable Ulanda L. Watkins
Clackamas County Circuit Court

Chapter 19

COURTROOM DO'S AND DON'TS

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PRESENTATION OUTLINE 19-1

To view these chapter materials and the additional resources below on or before October 30, go to www.osbplf.org , select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After October 30, select Past CLE, 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

COURTROOM ETIQUETTE AND DO'S AND DON'TS WRITTEN BY BY JUDGE MAURER AND JUSTICE NELSON

AND ADOPTED BY HONORABLE ULANDA L. WATKINS

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 you and your clients.

When appearing in court, lawyers who abide by the following rules will optimize their cases:

SECTION 1 - PROFESSIONALISM

A. 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 sure you study it. Learn the judge's rules and follow them (even if other lawyers do not)
B. Be on time for all court appearances. This advice extends to your client and your witnesses.
C. Be courteous. Introduce yourself to the court staff and treat them with the utmost respect. This includes but is not limited to: Courtroom clerk, Judicial Assistant and Corrections deputies. These people are like members of our family.
D. Advise the court in advance if you have resolved your case and will not need the hearing. With this being said – it is important to accurately estimate how much time your case will take and adhere to it except in extraordinary and/or unforeseen circumstances.
E. Confer and follow through on your commitments.
F. Remain formal in all interactions. Always refer to the judge as "Your Honor."
G. Both you and client will rise when the judge and jury enter and leave the courtroom.
H. Always stand when speaking to the judge, making an objection, argument or questioning a witness. Never interrupt and make all your arguments to the judge and NOT to opposing counsel. Make sure all of your arguments are made before the judge gives their ruling. (Do not make comments "for the record" after the judge has made their ruling).
I. Ask permission to approach a witness, move around the courtroom or publish exhibits to the jury.
J. Strike from your written and oral arguments all disparaging remarks.
K. 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.
L. Be aware that the microphones feed into the judge's chambers.

M. Remember – you are never offstage if you are within sight or hearing distance of any juror.

SECTION 2 - PREPAREDNESS

A. 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.
B. 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.
C. Be prepared and meet deadlines. Use a trial notebook. Make sure all your exhibits are marked and ready to go and give a copy to the judge. Confer with opposing counsel and stipulate to as many exhibits as possible.
D. 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.
E. Do not expect the judge to "just know" – it is your job to educate the judge.
F. Know the rules – civil procedure, evidence and local. Never guess – have the appropriate citation/case law to back up critical ruling and always know the basis for your objection. Do not use speaking objections.
G. Have your witnesses ready to go. Go over their testimony beforehand.
H. Work Backward: pull out the jury Verdict and Jury Instructions early in the case. Fit your evidence and arguments into the Verdict and the Instructions.
I. 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.

SECTION 3 - PRESENTATION

A. Speak slowly, loudly, clearly. Courtrooms have terrible acoustics.
B. Stand up and sit up. Be mindful of your facial expressions.
C. State your name for the record every time.
D. Tell the judge what you want <u>before</u> you give background of your case.
E. Learn the stages of a trial:
   1. Jury selection. Do not use it to condition the jury. Know what jurors you want.
   2. Opening statement: Roadmap – not argument.
   3. 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 your injuries are so bad, why didn't you call the police?")
   4. Closing argument: succinct, using Jury Instructions and Verdict form.

F. No expression of your personal opinion.
G. Do not show exhibits to the jury before they have been received.
H. Watch the jurors!!
I. Direct all concerns or remarks to the bench and never to opposing counsel. 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.
J. Do not engage in ex-parte discussion with the judge. Talking about topics not involving the case is acceptable.
K. If you use a microphone, make sure it is off when court is not is 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.
L. Be genuine and polite at all times while being yourself. It will not work to be someone you are not.

Chapter 19

GOING TO COURT 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
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- The Trial Memorandum
- Opening Statement
- Objections
- Use of Depositions at Trial
- Closing Argument
- Jury Instructions
- Final Procedures

"Civil Discovery: Working Backwards to Get Ahead" [1]

Michael H. Simon
Perkins Coie LLP

Facts, not law, win trials. 1n civil lawsuits, each side of a lawsuit is entitled to require the other side to disclose facts. This "fonnal discovery" occurs through document requests, depositions of fact witnesses, interrogatories (but not in Oregon state court), requests for admission, and expert discovery (but, again, not in Oregon state court). As part of "fonnal discovery" in civil litigation, parties to a lawsuit may also require other persons (natural and othenvise) who are not parties in that action to provide documents and appear for deposition on matters related to the dispute. Moreover, the opportunities to engage in "informal discovery" are virtually unlimited. When faced with all of these formal and informal discovery tools, a practitioner is likely to ask: "Which tools should I use, in what order should I use them, and what am I trying to accomplish?" This discussion offers one practitioner's views on these questions.

Yogi Berra has been quoted as saying: "If you don't know where you are going, when you get there, you'll be lost." That certainly holds true for trial preparation. Thus, to prepare for trial, one needs to know what the particular trial will look like and what one will need at that trial. Once a lawyer understands what will be needed at a particular trial, he or she can then figure out how to get it.

Regardless of whether a lawyer represents a plaintiff or a defendant in a civil case, the first step in thinking about discovery is to visualize the trial. Especially early in the life of a case, a lawyer might not know who all of the likely witnesses will be, what they will say, or what documents confirm or refute their testimony. But there are some things that every lawyer should know before any formal discovery takes place.

1n representing either a plaintiff or a defendant, a lawyer should determine early on what the elements are of each claim asserted. Also, what are the likely defenses, including the elements of each likely affirmative defense? This may involve legal research and analysis in the beginning of a case that may evolve or need to be refined later, but it is a good place to start.

1n addition, who are the parties and what is known about the relevant aspects of their background and their dispute? This is where early and thorough informal discovery is invaluable. The best sources of such informal discovery include one's own client (and the client's own records and documents), the Internet (an incredible tool for informal discovery), other publicly available information (such as SEC filings, newspaper articles, trade association materials, and court filings from related lawsuits), "friendly" third parties, and fonner employees of an adverse business entity.

Having undertaken this initial legal analysis and informal factual discovery, the lawyer is now ready to start visualizing the trial in greater detail. It is now time to "work backwards to get ahead." To do that, start with the end of the trial and work backwards.

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[1] This article first appeared in the August, 2003, edition of the Oregon State Bar's Litigation Section's magazine, the Litigation Journal. Our thanks to Michael Simon and the Litigation Section for allowing ns to reprint it here.

In your "backwards" visualization, at the end of the trial the jury delivers a favorable verdict. Before that, came the jury's deliberations, and before that, came the court's instructions. Stop for a moment. Make sure you clearly visualize the court's instructions on the elements of the claims and defenses and on any other special instructions that might apply to the case. Once that is clear (and written down for later use), continue with your "backwards" visualization. \Vhat came before the court's instructions was, of course, the closing arguments.

It is generally accepted trial wisdom that a lawyer should begin preparing his or her closing argument ahnost as soon as the client walks through the door. How can that be done? The answer is "by working backwards." Your closing argument will likely talce the jurors through the elements of the claims and defenses (as well as the verdict form) and show the jury that these elements have either been proven or not proven by the evidence. Aha! We will need discovery to see which elements of a claim or defense can be proven relatively easily and which elements might be more problematic.

Also, some elements or facts might be proven with direct evidence; other facts will have to be inferred, or proved or disproved, with circumstantial evidence. \Vhat will be the circumstantial evidence that you will need to prove in order to be able *to* argue the appropriate inferences to the jury? You may need discovery to prove these "supporting" facts or to determine whether you can undermine the opponent's inferences and circumstantial evidence. Oftentimes, the key to proving something circumstantially is to prove motive. Ifyou can show "why" something would have happened, you will be a long way ahead in proving "that" it happened.

Speaking of undermining evidence, will credibility be at issue at trial? If a key witness will supply critical testimony either in support of your case or in support of your opponent's case, one should look for discovery relating to that witness's testimonial credibility, including the witness's honesty, ability to perceive, ability to recall, and ability to communicate. Similarly, some evidence might only be admissible if an appropriate "foundation" has been laid. Is there any evidence that you need in order to lay an appropriate foundation? If so, that is another area for discovery.

All of this will be wasted effort, however, if you cannot make the jury understand your evidence and view it as persuasive. Here is where you will need to develop your theory of the case and your trial themes. \Vhat is the "story" that you are going to tell, and what makes it believable, persuasive, and moving? Where is the "justice" in your story. Every juror (and jndge, hopefully) wants to see that justice is done (which also includes consistently and neutrally applying an established rule of law). This principle applies just as strongly for a defendant as it does for a plaintiff. \Vhat are the facts that will bring out the "justice" in your case? That is another fertile area for discovery.

If the case is even slightly complicated, the closing argument will likely include a timeline and possibility other visual or graphic aids or charts. (Indeed, these demonstrative exhibits might have already been used during the opening.) \Vhat facts will you need to support your use of these demonstrative exhibits? Ifyou start planning your demonstrative exhibits early (even before you undertake formal discovery), you enhance your ability to get the information that you will need for these exhibits.

Before closing argument, of course, is the presentation of the witnesses, including their direct and cross examinations, and the introduction in evidence of the trial exhibits.

Which wi1nesses will be called and which exhibits will be introduced in evidence in order to support or refute each element of the claim or defense (or each step of inferential reasoning)? After you understand the elements and the necessary inferential steps, you can construct your "Order of Proof ' for the trial. Then, you can determine which wi1nesses or exhibits will support each step in your Order of Proof. If you have a "hole" inyour evidence, it will now become apparent, and that is where you will need to focus more attention during formal (and further informal) discovery.

The creation of your "Order of Proof ' is designed to establish what you need to prove or disprove and how you are going to do it. Combining this Order of Proof with your visualization of the entire trial enables you to see where you are going. You can now better construct the map that helps you get there and identify the best discovery tools to use and the best order in which to use them.

After conducting the first stage of informal discovery, most lawyers begin formal discovery with document requests. This is generally a good idea. In crafting requests for production, one must balance the need for complete discovery with the applicable economic constraints. Most lawyers use very little of what they receive from document discovery. Here, it is wise to recall the old adage: "Be careful what you ask for; you might just get it." Ifyour discovery request appropriately invites the production of millions of pages of responsive documents, do you really want to receive them? On the other hand, make sure you ask for what you need. Put yourself in the position of your opposing counsel and ask whether your request is written too narrowly to accomplish its objective. Also, be wary about asking for things that you are not willing to give up. You may receive a "mirror image" request from your opponent. You should also consider asking for e-mail, hard drives, and back-up tapes, when appropriate. (There are a growing number of capable and experienced electronic evidence litigation consulting firms.)

You should also ask for all documents used by your opponent in preparing his or her interrogatory responses in cases where you serve interrogatories. You should also ask for any later-discovered responsive documents that should have been produced earlier had they been located. Although the discovery rules require production of such documents without the need for a further request, it won't hurt politely to "remind" your opposing counsel to produce such later-discovered documents. Finally, make sure that you have an effective and efficient way to store, manage, and retrieve the documents that you receive.

In federal court, and in most state jurisdictions other than Oregon, interrogatory discovery is also available. Interrogatories are best used to identify specific information, such as the names and pertinent details of fact wi1nesses (whom you will then consider deposing), the location of documents and other related information (such as destruction policies, multiple location sites, and the specifics regarding what has been searched and what has not been searched in response to your document requests), and how specific calculations, figures, or other detailed factual data were determined and by whom. You should also ask for the names and roles of all persons who participated in drafting the interrogatory answers or gathering information used to prepare those answers. In addition, you should also include an interrogatory asking for an explanation of all factual bases underlying an opposing party's failure to provide an unequivocal admission in response to your requests for admission. Regarding requests for admission, these are generally best used to narrow the ultimate issues for trial or to provide a necessary foundation to ensure the admissibility of trial exhibits.

The next step in formulating a discovery plan is to decide which witnesses to depose and in what order. One issue to consider in deposing corporate employees and officers is whether it is better in your case to "work from the bottom up" or to depose people higher up in the organization early in the deposition process. Also, some lawyers do not make effective use of federal Rule 30(b)(6) and Oregon Rule 39C(6) deposition notices when deposing adverse corporate parties. These tools allow a lawyer to specify the issues or topics to be addressed and then require the opposing corporation to supply the witness or witnesses who can appropriately speak to those issues on behalf of the corporation.

As part of one's planning for deposition discovery, it is critical to identify the objectives of that particular discovery. Possible objectives include: preserving testimony, locking in a witness's adverse testimony or what an adverse witness does not know, "sizing up" a likely adverse trial witness, learning facts or potential sources of other discovery, laying a foundation for the admissibility of other evidence, setting up a witness for impeaclunent, creating a record to support or oppose a motion for summary judgment (or other motion), demonstrating the strength of your case or the weakness of your opponent's case in order to promote a favorable settlement, or to allow the opposing party simply to "vent" in order to open the way for a favorable settlement. Not all of these objectives will be applicable to any given witness. Advance thinking about one's objectives in deposing a witness, however, will always aid in taking a more effective and efficient deposition.

In addition, advance thought should be given to whether the deposition should be video-taped and digitized in addition to being stenographically recorded. *Also,* thought should be given to whether all deposition exhibits should be sequentially numbered for ease of use during the depositions of other witnesses.

In federal court, there is also the opportunity to depose expert witnesses. One should almost always insist on first obtaining the required expert report (with all required information included) and reviewing all information reviewed or relied upon by the expert well before taking an expert's deposition. *Also,* one's own expert should be consulted well before taking the opposing expert's deposition. In taking the deposition of an opposing expert, there are seven key areas of inquiry that almost always should be explored, and then a critical decision needs to be made. These seven areas are: (1) the expert's background and experience, including the areas of expertise and other related publications, speeches, expert reports, deposition testimony, trial testimony, and the like; (2) the terms of the engagement; (3) all documents reviewed by the expert in preparing his or her opinion and report; (4) the identity and role of all persons who assisted the expert; (5) all communications between the expert and your opposing counsel or any other experts or other persons related to this engagement; (6) a clear and precise statement of all opinions to be expressed by the expert at trial, including all bases and assumptions and all alternatives considered but rejected; and (7) all future work anticipated by the expert to be performed prior to trial.

Before turning to the critical decision to be made in deposing an expert, it is worth pausing briefly to comment upon another decision point. Some counsel agree (either explicitly or implicitly) not to require the production and exchange of "draft" reports prepared by an expert witness. Indeed, many experts and retaining counsel do not maintain copies of draft reports after a given draft has been revised. Early thought should be given whether to follow this practice or whether to insist on the mutual exchange of all

expert "drafts." If the latter approach is preferred in a particular case, then appropriate steps should be taken to place the other side on notice to maintain all expert drafts.

Having addressed all of these expert discovery "background" issues, trial counsel will need to decide the "expert deposition dilenuna." That dilemma is whether to take a "hardball" deposition of the opposing expert in which all of the flaws and vulnerabilities of the opposing expert's opinion are exposed or to take a "softball" deposition of the opposing expert in order to "lock in" the expert on critical matters and save the devastating attack until cross examination at trial. Here, one will need to consider to benefits and risks of each approach. Will the expert be able to "cure" the vulnerabilities exposed? \Vil! a devastating deposition set up the case for a favorable settlement or a motion to exclude the expert's testimony under *Daubert?* Will the opposing party inevitably discover the bases of your trial attack on its expert when you disclose your own expert's report in advance of trial or your own expert is deposed? There are no easy answers to these questions. Probably the best advice is to think about these issues in the context of your particular case and to make a conscious decision after weighing all of the relevant factors.

Indeed, all of discovery in civil litigation benefits from making conscious decisions about options and alternatives after weighing all of the relevant factors. There are no formulas to apply in all cases under all circumstances. One general approach that seems to work in many cases, however, is to work backwards from trial. By visualizing the full trial, seeing what it might look like in all of its various permutations, and then working backwards, a lawyer might be in a better position to identify what needs to be done in discovery and how best to do it in light of the circumstances of a particular case. In following that approach, one minimizes the risk of being lost when one reaches one's destination.

CHAPTER 20

ALTERNATIVE DISPUTE RESOLUTION – MANDATED AND VOLUNTARY

Lisa Almasy Miller
Miller Arbitration

Chapter 20

ALTERNATIVE DISPUTE RESOLUTION

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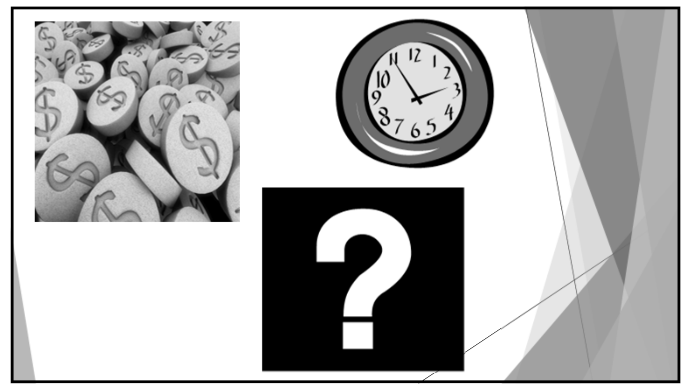
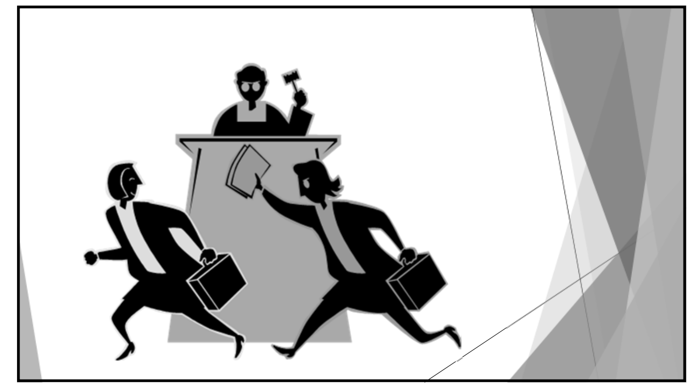
To view these chapter materials and the additional resources below on or before October 30, 2019, go to www.osbplf.org , select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After October 30, 2019, select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

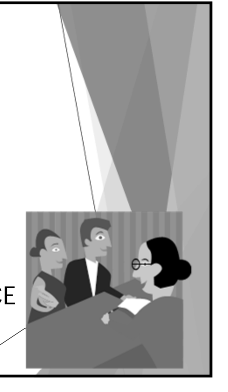
ADR in Oregon (OSB Legal Publications, Fall 2019) To be available at BarBooks https://www.osbar.org/legalpubs/barbooks.html





TYPES OF ADR

- ▶COURT-ANNEXED ARBITRATION
- ▶CONTRACTUAL ARBITRATION
- ▶PRIVATE ARBITRATION
- ▶MEDIATION (CIVIL AND DOMESTIC RELATIONS)
- ▶JUDICIAL SETTLEMENT CONFERENCE
- ▶REFERENCE JUDGE



COURT-ANNEXED ARBITRATION STATUTES AND RULES

- ▶1. ORS 36.400 – 36.425
- ▶2. UTCR Chapter 13
- ▶3. Supplemental Local Rules (SLRs)

Where to find them?
www.courts.Oregon.gov/courts/
name of county, e.g. Multnomah, Clackamas, Washington

Top of the page – Oregon Judicial Branch links - Forms/Rules/ Fees

Left hand side of the page – "Civil" for arbitration forms

Referral to Arbitration

"Subject to Mandatory Arbitration"

- All civil cases with damages of $50,000 or less
- All domestic relations cases involving only distribution of property and debts (no kids or support issues)

Case can be removed from or referred to arbitration after motion practice

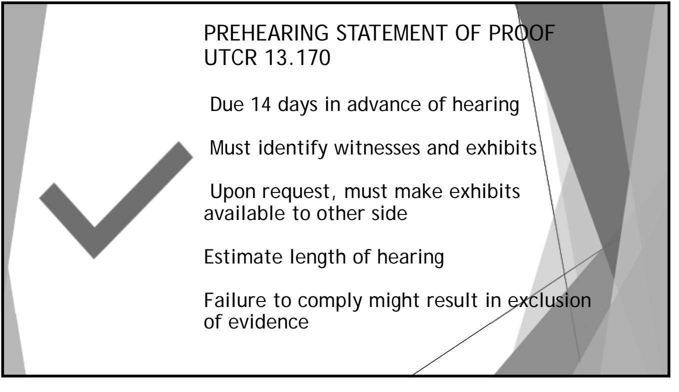
UTCR 13.070 (exemption)

Selection of Arbitrator

- Parties select arbitrator by stipulation (can be a non-lawyer)
- Court furnishes list of names (from panel) and each side follows process of identifying preference or rejection; Court selects

PREHEARING PROCEDURES and REQUIREMENTS

- Arbitrator handles all motions (except whether case subject to arbitration, and in Multnomah County, where motion to amend adds a party)
- Hearing must be scheduled within certain time from assignment to arbitration
- Arbitrator must be paid (if no waiver/deferral) – amount varies
- Prehearing Statement of Proof due 14 days prior to hearing



PREHEARING STATEMENT OF PROOF
UTCR 13.170

Due 14 days in advance of hearing

Must identify witnesses and exhibits

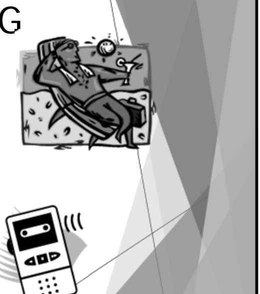
Upon request, must make exhibits available to other side

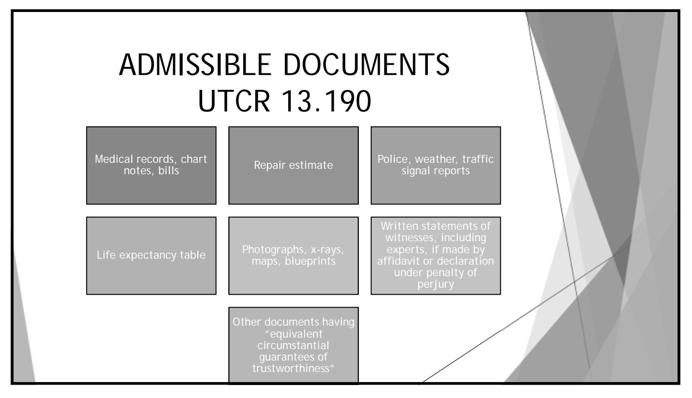
Estimate length of hearing

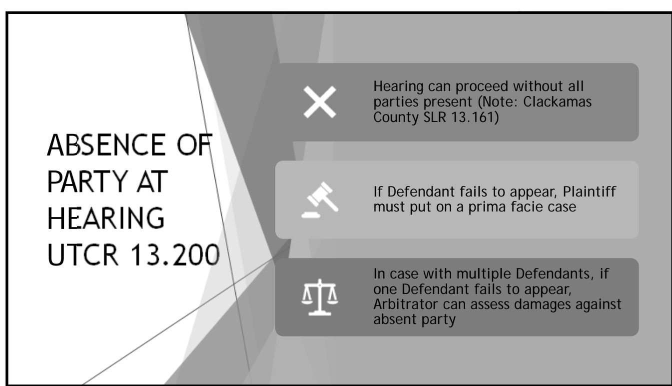
Failure to comply might result in exclusion of evidence

CONDUCT OF HEARING

- Informal and Expeditious
- Admissibility of documents (hearsay schmearsay)
- Public invited
- Hearing may be recorded

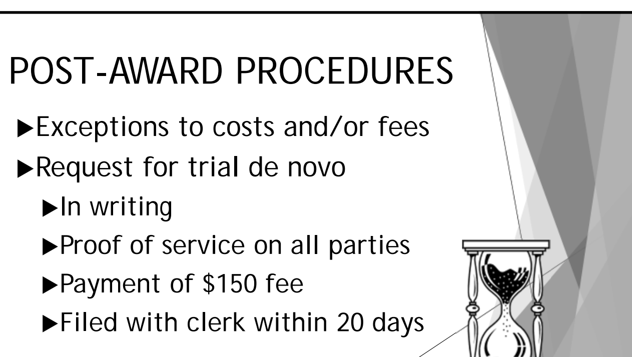


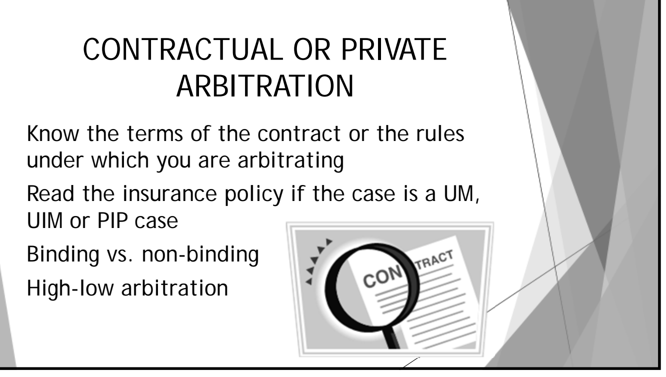


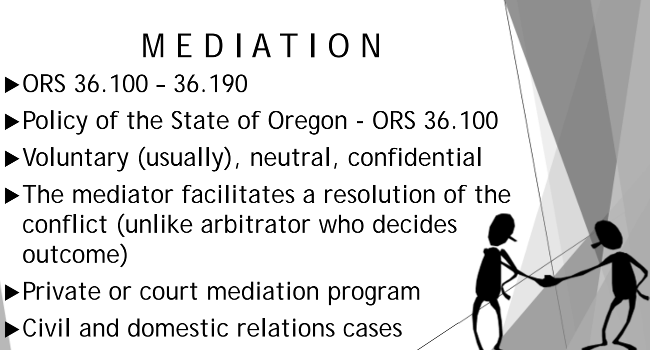


ARBITRATION AWARD

- Prepared on court's form
- Written opinion not required
- Deadline for filing
- Error in award
- Procedure for award of costs and attorney fees ($325 prevailing party fee)

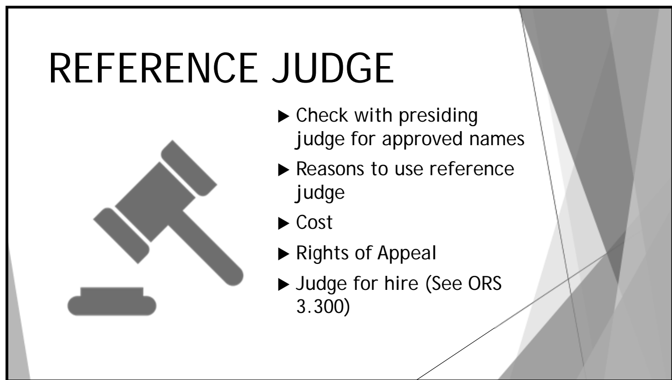






JUDICIAL SETTLEMENT CONFERENCE

- Mandatory conference required in some judicial districts
- Voluntary conference (generally with judge who will not preside over trial)
- Selection of settlement judge (may even be conducted by judge in another county)
- Time more limited than private mediation



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TOP TEN TIPS FOR PREPARING CLIENTS FOR ARBITRATION
by Lisa Almasy Miller

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.

TIPS FOR SELECTING AN ARBITRATOR

by Lisa Almasy Miller

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.

WHAT DO MEDIATORS WANT?
TAKING STEPS TO GET THE BEST SETTLEMENT POSSIBLE
FOR YOUR CLIENT
by Lisa Almasy Miller

Effective Advocacy: Remember, just because you are pursuing settlement through mediation, does not mean you are no longer an "advocate" for your client. In fact, the mediator *wants* you to be an effective advocate. It is, after all, not the mediator's job to represent the interests of your client. The mediator needs *you* to be an effective advocate to help her be the most effective mediator she can be.

Dictionary Definition of "Advocacy": Verbal support for a cause; the act of pleading, supporting or recommending.

Advocacy in mediation can be broken down into three phases: (1) selection of the mediator; (2) pre-mediation preparation; and (3) conduct during mediation.

Selection of the Mediator: The first step in advocating for your client is in the selection of the mediator. Actively analyze who would be the most effective mediator for *that* case, with *that* client. Ask yourself these questions:

1. **FIRST STEP – RECOGNIZE THAT DIFFERENT MEDIATORS HAVE DIFFERENT STYLES.** What style of mediation would likely garner the best result for my client?

2. Do I want a *directive* mediator? (Meaning, one whose style is to "arm-twist" the parties into settling on the terms the mediator thinks are appropriate.)

3. Will my client (and opposing counsel/party) respond more to a mediator with a *facilitative* approach? (Meaning, the mediator will promote communication and determine whether the parties share common interests that can result in a "win-win" settlement.)

4. Does the experience of the mediator lend itself to an *evaluative* approach? (Meaning, the mediator will not only encourage communication between the parties, but will explore the parties' positions, raise questions to draw out information to help expose the relative strengths and weaknesses of each side's case, and provide feedback on their views of each party's position.)

5. **SECOND STEP: RECOGNIZE THAT THE SEX OF THE MEDIATOR MAY PLAY A ROLE.** Would a male or female mediator be more effective in dealing with the facts of the case, or with the client? (EXAMPLE: Plaintiff is a female victim of sexual abuse by a man and you perceive she has serious issues with men in general.)

6. **THIRD STEP: RECOGNIZE THE PERSONALITY OF THE MEDIATOR MAY PLAY A ROLE.** What type of personality should the mediator have considering what you know about your client and opposing counsel? Do you want someone who is sensitive, empathetic and compassionate? Do you want someone who is business-like and no-nonsense? Do you want someone who is capable of both?

7. **FOURTH STEP: WOULD HAVING MORE THAN ONE MEDIATOR BE EFFECTIVE?** Would a favorable outcome be more likely if more than one mediator

was involved? (For example, in a family law case, it can be effective to have co-mediators when custody or parenting time issues are involved.)

Before selecting a mediator, you need to know your case and your client well enough to know which type of mediator is likely to be the most effective in that particular case, with that particular client. If you have a client, for example, who you suspect does not respond well to authority, you probably do not want to agree to a mediator who has a directive approach; to do so might sabotage the process before it even begins. The point is that as an advocate, when it comes to selecting a mediator, you do not simply want to agree to whomever your opponent suggests, nor do you want to automatically select the same mediator in every case. Just as you would analyze the merits of the case, and the credibility of your client, the selection of your mediator must also be analyzed and an informed decision made based on the answers you reach from the questions raised above.

Pre-mediation Preparation: To maximize the likelihood of a good outcome in mediation, one must be prepared just as though the case was going to trial. Having all of one's i's dotted and t's crossed not only gives you, the advocate, added confidence in the mediation setting, but also sends a message to your opponent that you are ready to try the case if mediation is not successful. On the flip side, an unprepared lawyer sends a message to opposing counsel that (1) they aren't interested in investing a lot of time in the case; (2) they have no intentions of going to trial regardless of the offer; and (3) they and their client are willing to settle "cheap."

(1) Providing one's opponent with *all* relevant discovery well in advance of the mediation so all concerned parties have adequate time to evaluate the documentary evidence;
(2) Having *all* economic damages itemized and supported;
(3) Establishing the amounts of all potential liens (e.g. PIP, **Medicare**, hospital, DHS);
(4) Making sure that all lienholders have been contacted about mediation, and are available to participate in person, or by phone (or you have established ahead of time what it will take to satisfy a given lien);
(5) Properly preparing your client for mediation (see more about this below); and
(6) Fully evaluating the strengths and weaknesses of your case.

In *all* types of mediation, pre-mediation preparation also means educating the mediator, and educating the client.

EDUCATING THE MEDIATOR: Provide her with more than a one-page summary of the bare-bones facts of the case. **[Recall definition of "Advocacy."]** There is nothing persuasive about that. Rather, you want to provide the mediator with information and documents that not only inform the mediator about the facts of the case, but also arm the mediator with the "nuggets" that support your client's position and undermine the opposition's. The latter may include excerpts from medical records, an IME report, photographs, e-mails exchanged between the parties, etc.
It is also important to provide the mediator with some perspective on past settlement negotiations, if any. The mediator needs to understand the history of any offers/rejections/counter-offers that have been made so she can explore the reasons for why a settlement wasn't reached on those terms.
Lastly, a lawyer may have "client control" problems. Perhaps the client has unrealistic expectations of what they are entitled to. Perhaps the client is exceptionally emotional and not ready to let go of the conflict. Perhaps the client is from another state and doesn't have a good understanding of Oregon law or precedent. While the lawyer is not going to want to put these kinds of disclosures in writing to the mediator (with a copy going to the client), it is vitally

important that the mediator be aware of these kinds of issues. The way to handle it? Call the mediator ahead of time. Ex parte communications are not taboo in mediation.

EDUCATING THE CLIENT:

1. Explain how mediation works. Make sure they understand the reasons for going to mediation and the statutes that make the process confidential. Find out from the mediator (in a phone conversation or e-mail) whether the parties will be in the same room for some or all of the mediation, and pass that information onto your client.

2. Go over the mediator's written agreement with your client ahead of time and make sure they understand it.

3. Discuss case values. In $ damages cases, have that frank discussion with client about jury verdicts and unpredictability of juries.

4. Don't limit yourself to a cookie-cutter resolution. Be open to creative problem solving.

5. Don't forget the value of an apology.

The client who is well prepared for mediation will be calmer and better able to work more effectively with their advocate and the mediator to reach the best possible settlement of their case.

<u>Conduct during Mediation</u>: Some lawyers do not want the parties to be in the same room, even at the beginning of the mediation, and insist on private caucuses only. In more cases than not, this is a mistake. A joint meeting is important for several reasons: (1) it allows people who haven't met before, to put a face with a name; (2) it allows the lawyers and the parties to identify the issues in the case (a good opportunity for the mediator to identify those things on which everyone agrees); (3) it allows the lawyers to present an "opening statement" to the other side, which can be designed to not only summarize the strengths of one's case, but also show one's opponent how prepared you are; and (4) in family law cases, or other cases where there is an-going relationship between the parties, it gives the parties the chance to get some grievances off their chest.

During joint sessions, the advocate needs to be courteous to the other side and demonstrate a willingness to listen. The dynamics of the negotiations may change significantly, and to your client's benefit, if the opposing party feels he has been heard.

CHAPTER 21

BRIDGING THE DISABILITY GAP

Adrian L. Brown
United States Attorney's Office
Jake Cornett
Executive Director, Disability Rights Oregon
The Honorable Ted Grove
Columbia County Circuit Court Judge
Bill Spiry
Spiry Law LLC
Miranda Summer
Summer Family Law LLC
Barbara Fishleder, moderator
Professional Liability Fund Director of Personal and Practice Management Assistance/Oregon Attorney Assistance Program Executive Director

Chapter 21

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 21-1

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Additional Resources

Disability Etiquette: Tips on Interacting with People with Disabilities.
https://www.unitedspinal.org/disability-etiquette/

The Biggest Hurdle for Lawyers with Disabilities: Preconceptions
http://www.abajournal.com/magazine/article/the_biggest_hurdle_for_lawyers_with_disabilities_preconceptions

ADA at 25: Americans with Disabilities Act Continues to Elevate Civil Rights, with Mental Health Now at the Forefont
https://www.osbar.org/publications/bulletin/14nov/ada25.html

BRIDGING THE ADA GAP

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.

Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy Robert Silverstein 85 Iowa L. Rev. 1691 (2000).

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 r*easonable 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/

Equal Employment Opportunity Commission (EEOC) - REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES https://www.eeoc.gov/facts/accommodations-attorneys.html

Oregon's Deaf and Hard of Hearing Services http://www.oregon.gov/DHS/BUSINESS-SERVICES/ODHHS/Pages/index.aspx

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.

ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background/ada-aba-accessibility-guidelines-2004

Northwest ADA Center http://nwadacenter.org/

Access Services Northwest - http://asnwonline.com/