

### Beverly Michaelis Retires

This July, after 20 incredible years of service, PLF Practice Management Advisor Beverly Michaelis will move on to new adventures. Beverly's energy, enthusiasm, and expertise have given us far more than 20 years of great work. Her unique combination of skills, judgment, and demeanor has allowed us to successfully grow our loss prevention department in many important directions. Her work for the PLF, and with Oregon lawyers, has been extraordinary.

Her intricate knowledge of law office systems, broad social media reach, extensive practice aid development, and high-quality CLE

presentations made her well known in the legal community. Her prompt, thorough, and professional answers to all questions also made her much appreciated.

Since 1996, Beverly has provided confidential practice management assistance to over 2,100 law firms, answered over



*Continued on page 2*

April 2016

Issue 128

Beverly Michaelis Retires  
page 1

Independent Contractors  
or Employees?  
page 3

Significant Changes to the  
FRCP - Effective  
December 1, 2015  
page 6

Accepting Credit Cards  
page 7

What to Do After a  
Data Breach  
page 9

Cyber Extortion Coverage  
Added to PLF Excess  
Coverage!  
page 10

Tips, Traps, and Resources  
page 11

Cases of Note  
page 11

PLF Practice Aids  
Thank You's  
page 12

### PLF Practice Management Advisor and Project Manager

The Oregon State Bar Professional Liability Fund is hiring a full-time practice management advisor to educate attorneys and law office staff on law office systems and to lead a variety of practice management projects.

The position requires diverse skills, including experience with law office systems and management; initiative; the ability to relate to and teach lawyers and law office staff of all generations; a high level of experience with technology (hardware, software, the cloud, and social media); and excellent communication, writing, proofing, and speaking skills. Preferred candidates will have five years of experience practicing law and will have experience managing a law practice, marketing, creating and editing content for websites or blogs, and familiarity with EAP programs. The position requires travel throughout Oregon, with office base in Tigard. For more detailed information, go to [www.osbplf.org](http://www.osbplf.org), About PLF, Job Opportunities.

Please submit your résumé and cover letter to Barbara S. Fishleder, Professional Liability Fund, Director of Personal and Practice Management Assistance, [HR@osbplf.org](mailto:HR@osbplf.org), with the subject line: PMA position – (your name).

AN EQUAL OPPORTUNITY EMPLOYER

#### DISCLAIMER

This material is provided for informational purposes only and does not establish, report, or create the standard of care for attorneys in Oregon, nor does it represent a complete analysis of the topics presented. Readers should conduct their own appropriate legal research. The information presented does not represent legal advice. This information may not be republished, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund except that permission is granted for Oregon lawyers to use and modify these materials in their own practices. © 2016 OSB Professional Liability Fund.

*Continued from page 1*

50,000 phone calls and emails, and assisted with over 350 office closures. She reached lawyers at all stages of practice and is particularly known for helping lawyers with their transitions, including transitioning to using Oregon eCourt.

Beverly has been using social media to assist lawyers since 2009 and has maintained the PLF's social media accounts since 2013. She has more than 15,000 followers and over 130,000 combined tweets, posts, and page views on social media. Her blog, <http://oregonlawpracticemanagement.com>, includes over 600 articles and tips.

Beverly has also been a frequent writer and speaker on a variety of practice management, technology, and malpractice avoidance topics for law-related organizations. In the last 20 years, she has written over 75 articles for legal publications and has delivered over 300 quality CLE programs and training sessions.

Beverly's work for the PLF extended beyond her assistance to law offices and law office staff. When the PLF launched its website in 2000, Beverly was the exclusive administrator, a role in which she served for 14 years. She continues to design and maintain practice management, CLE, news, and event content on the PLF website.

Beverly also assumed responsibility for updating and maintaining the PLF forms library. In the last 16 years, she directed over 20 comprehensive reviews of the PLF forms collection, coordinating the efforts of hundreds of volunteers who analyzed and updated PLF practice aids.

This impressive list of accomplishments falls far short of conveying Beverly's full contributions. A true privilege to work with and an honor to know, Beverly is a rare gem who will be greatly missed by the PLF and

## Errata

In the January 2016 issue of *In Brief*, in "PLF Coverage for Marijuana-Related Claims," we incorrectly referred to the "Cole Memo" as being issued by the Department of Justice (DOJ) in 2012. The "Cole Memo" was issued by the DOJ on August 29, 2013. The memo can be found at [www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf). We regret the error.

## A Message from Beverly Michaelis

*I look forward to the next chapter of my life and new challenges ahead. It has been a rewarding 20 years serving Oregon lawyers. My best to each of you.*

*I will continue to blog at <http://oregonlawpracticemanagement.com> and welcome new followers on Twitter, LinkedIn, Google Plus, and other social media platforms.*

the Oregon legal community. Beverly helped the PLF evolve into the high-quality, service-oriented organization that we now are. We know that she will bring her diverse strengths into the next chapter of her life. We wish her well and will miss her personally and professionally.

On behalf of the legal professionals of Oregon, the staff of the Professional Liability Fund, and the PLF board of directors, we extend our sincere gratitude for an incredibly well-done job and for her dedication and exemplary service.

Congratulations, Beverly! We wish you much happiness and success in your next adventure in life – and we will miss you greatly!

## Beverly Michaelis's publishing credits include:

Author, "Lawyer Trust Accounts and Client Property," *The Ethical Oregon Lawyer*, published by the Oregon State Bar (2005; 2015).

Principal editor and co-author, *A Guide to Setting Up and Running Your Law Office*, published by the Professional Liability Fund (1999-2016).

Principal editor, *A Guide to Setting Up and Using Your Lawyer Trust Account*, published by the Professional Liability Fund (2005-2016). Co-author (2001-2016).

Co-author, *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*, published by the Professional Liability Fund (1999-2015).

## Independent Contractors or Employees?

Law firms, just like any other business, must be sure that the lawyers, paralegals, and other individuals providing services to the firm are correctly classified as either independent contractors or employees. If the firm is audited by a federal or state agency or challenged by a worker and is determined to have incorrectly classified a lawyer, paralegal, or other service provider as an independent contractor rather than an employee, the consequences could be severe. The law firm could be responsible for unpaid federal and state income and employment taxes; pension and profit sharing, health, life, disability, and other employee benefits; workers' compensation benefits; and unemployment benefits. The firm also could be exposed to potential liability for failure to provide protected family medical or sick leave, violation of discrimination or wage and hour laws, failure to comply with I-9 requirements, and a host of other employment-related claims.

### Agencies and Tests Governing Independent Contractors

Several state and federal agencies audit businesses to determine whether they have correctly classified individuals as independent contractors or employees. In Oregon, some of the state agencies that evaluate whether a person is correctly classified as an independent contractor include the Department of Revenue, the Employment Department, the Oregon Bureau of Labor and Industries, the Construction Contractors Board, the Landscape Contractors Board, and the Workers' Compensation Division. At the federal level, the IRS and the Department of Labor both independently audit employers to ensure that the workers are correctly classified as independent contractors. On July 15, 2015, the Department of Labor issued an interpretive memorandum entitled "Administrator's Interpretation No. 2015-1," which provides guidance to employers in determining who should be classified as an employee rather than an independent contractor under the Fair Labor Standards Act.

The various state and federal agencies auditing these relationships each apply different tests and factors in analyzing whether a person is an employee or independent contractor. The IRS recently replaced its 20-factor test with 13 factors in three categories; the Department of Labor and the Bureau of Labor Wage and Hour Division apply an "economic reality" test; the Oregon Department of Revenue applies the factors listed in ORS 670.600; the Oregon Civil Rights Division and the Workers' Compensation Di-

### PLF Board Positions

The Board of Directors of the Professional Liability Fund is looking for two lawyer members to each serve a five-year term on the PLF Board of Directors beginning January 1, 2017. Directors attend approximately six one- to two-day board meetings per year, plus various committee meetings. Directors are also required to spend considerable time reading board materials and participating in occasional telephone conferences between meetings. PLF policies prohibit directors and their firms from prosecuting or defending claims against lawyers.

**Interested persons should send a brief résumé by July 8, 2016, to:**

Carol J. Bernick  
carolb@osbplf.org  
Professional Liability Fund  
PO Box 231600  
Tigard, OR 97281-1600

vision apply the "right-to-control" test. (See the accompanying Resources sidebar of federal and state websites on page 5.)

### The Contract

Given the complexity of classification and the risks of incorrect classification, law firms wanting to retain lawyers or paralegals as independent contractors should consider drafting a written agreement setting forth the factors that legally establish an independent contractor relationship and also includes other protections. Provisions the parties may want to consider include the following:

- The lawyer/paralegal is responsible for his or her own income taxes (including estimated tax payments), self-employment taxes (in lieu of Social Security and Medicare taxes), professional liability insurance, and excess coverage.
- The firm will issue a Form 1099-MISC for the services performed by the lawyer/paralegal unless the firm determines that the form is not required.
- The firm and lawyer/paralegal agree that they are not entering into a joint venture and do not have a shared business interest.

*Continued on page 4*

*Continued from page 3*

- The lawyer is currently licensed and in good standing with the Oregon State Bar, has current professional liability coverage, and has no pending malpractice claims or ethics complaints.
- The lawyer does not have a conflict with any of the parties involved in the assigned project.
- The lawyer agrees at all times to fulfill his or her professional duties to protect information that is proprietary, privileged, work product, and/or confidential.
- The lawyer will at all times comply with his or her ethical and legal responsibilities as a lawyer licensed to practice law in the state of Oregon.
- The lawyer/paralegal will return or shred all client documents, including all electronic and hard copies of the documents, when the project is complete.
- The lawyer/paralegal will not receive any employee benefits, unemployment compensation, or workers' compensation coverage.

## The Working Relationship

Lawyers and paralegals working as independent contractors should have their own office, business cards, email account (separate from the law firm's email), online research tools, computer and copying capability, and tax ID number. The contract lawyers and paralegals should not be integrated into the law firm or expected to work regularly at the firm or attend firm meetings because they are not employees of the firm. Independent contractors set their own rates and fees, making their own determination as to what they will charge to complete a specific project; at the completion of the project, the contract lawyer or paralegal should submit an invoice to the firm for the work performed. Independent contractors set their own hours and perform their work without supervision; the law firm should not be exercising control over or closely monitoring how the work is performed. While the independent contractor and the firm may agree on the specific requirements and deadlines for the assigned project, the firm should not be supervising the project.

A lawyer or paralegal working as an independent contractor should be contracting to work for more than one firm and should not be economically dependent on any one firm as a source of business. While independent contractors may work regularly with one firm, they must also work with other firms; the working relationship can be frequent but not constant, allowing some intervals when the contract lawyer is not doing work for the firm. The firm's financial success should not be dependent on the work of the independent con-

tractor. As independent contractors work for several firms, they cannot be subject to noncompete agreements.

Independent contractors generally should not be former employees who are performing the same job they had when they worked as an associate or a paralegal in the firm, nor should they be performing the same job duties as employees currently working for the firm. As they are not employees, independent contractors cannot be "fired at will." Instead, the terms of the contract determine the consequences when the contract lawyer or paralegal fails to satisfactorily complete the project he or she contracted to perform according to the contract specifications.

## Summary

In summary, firms wishing to establish an independent contractor relationship with a lawyer, paralegal, or other service provider may want to consider the following guidelines:

- **Right to Control** – The firm should provide information necessary for the contract lawyer or paralegal to perform the work assignment, including the date when the work needs to be completed, but should not micromanage the "means and manner of providing the services."
  - **Scheduling** – The contract lawyer or paralegal should be allowed to set his or her own work hours.
  - **Location** – To the extent possible, contract lawyers and paralegals should perform the work outside the firm, using their own computer and research tools.
  - **Compensation** – Payment should be made on a project basis; contract lawyers and paralegals should invoice the firm for the work performed.
  - **No Employee-Type Benefits** – The firm should not pay for or provide benefits such as insurance for the contract lawyer and paralegal. The firm should review its employee benefit plan documents and consider an exclusion for workers classified by the firm as non-employees, even if they are later reclassified, even retroactively, as employees.
  - **1099 Tax Form** – A Form 1099-MISC (not a Form W-2) should be issued to the independent contractor at the end of the year if the payment amount is at least \$600.
- For the contract lawyer and paralegal, the overall goal is to maintain an "independently established business," which is the test codified in ORS 670.600 and utilized by the Oregon Department of Revenue. While no single factor is conclusive, contract lawyers and paralegals should consider the following steps to maintain their independent contractor status:
- **Independent Office** – Contract lawyers and paralegals should have their own places of business.



- **Assignments** – Contract lawyers and paralegals should work on a project or assignment basis and invoice firms for the work performed.

- **Diversify** – Contract lawyers and paralegals should strive to work for more than one firm, seeking work through appropriate legal and business publications, speaking engagements, and professional networking opportunities.

- **Business Expenses** – Contract lawyers and paralegals should pay for their own supplies, office expenses, staffing and copying assistance, online research tools, business cards, stationery, and business expenses.

- **Bar and Licensing Requirements** – Contract lawyers and paralegals should pay for their own professional licensing expenses, memberships, fees, CLE requirements, and business licenses.

- **Insurance** – Contract lawyers should maintain legal malpractice insurance.

- **Taxes** – Contract lawyers and paralegals must pay their own income taxes (including estimated taxes) and self-employment taxes; they should request that a Form 1099 be issued reflecting payments for their services.

While there is not a bright-line test for determining whether a lawyer or paralegal is an independent contractor or an employee, carefully defining the terms of the relationship in a written contract may help avoid an obvious misclassification and limit the potential risks associated with this type of business relationship. Although this article describes the basic issues to consider, law firms are encouraged to consult employment counsel with respect to specific situations relating to their contracts with lawyers, paralegals, or other service providers.

LISA BROWN  
BULLARD LAW

*Thanks to Thomas Kramer, Bullard Law, for his assistance with this article, and thanks to Jim Vogeles for his assistance with the prior edition of this article, originally published in Issue 113 of In Brief, July 2012.*

## Independent Contractor Resources

### Federal:

- Internal Revenue Service:  
[www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Self-Employed-or-Employee](http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Self-Employed-or-Employee)
- U.S. Department of Labor Wage and Hour Division – Administrator’s Interpretation No. 2015-1:  
[http://www.dol.gov/whd/workers/misclassification/ai-2015\\_1.htm](http://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm)

### Oregon:

- State Agency Criteria for Independent Contractors Chart:  
<http://www.oregon.gov/IC/Documents/State%20Agency%20Criteria%20TABLE.pdf>
- Department of Revenue / Employment Department / Construction Contractors Board / Landscape Contractors Board: <http://www.oregon.gov/ic/Compliance-and-the-law/Pages/laws.aspx>
- Bureau of Labor and Industries – General:  
[https://www.oregon.gov/boli/TA/pages/t\\_faq\\_independent\\_contractors\\_11-2010.aspx](https://www.oregon.gov/boli/TA/pages/t_faq_independent_contractors_11-2010.aspx)
- Bureau of Labor and Industries – Wage and Hour Division:  
[https://www.oregon.gov/boli/TA/docs/boli-whd\\_test\\_11-2010.pdf](https://www.oregon.gov/boli/TA/docs/boli-whd_test_11-2010.pdf)
- Bureau of Labor and Industries – Civil Rights Division:  
[www.oregon.gov/boli/TA/docs/boli-crd\\_test-11-2010.pdf](http://www.oregon.gov/boli/TA/docs/boli-crd_test-11-2010.pdf)
- Workers’ Compensation Division: [www.cbs.state.or.us/wcd/compliance/indcon.html](http://www.cbs.state.or.us/wcd/compliance/indcon.html)

# Significant Changes to the Federal Rules of Civil Procedure – Effective December 1, 2015

The amendments to the Federal Rules of Civil Procedure (“Rules”) that took effect on December 1, 2015, are the most sweeping changes to the federal civil rules in years. Attorneys must adjust to a significant change in the basic discovery standard and adapt to changes in procedure for discovery matters, sanctions, service of process, default judgments, and court forms. The amendments apply to cases filed after December 1, 2015, as well as to pending cases “insofar as just and practicable.” A complete copy of the amendments and advisory notes can be found at [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)\\_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf). A comprehensive analysis of the amendments can be found on the PLF website at [www.osbplf.org](http://www.osbplf.org) under Practice Management, Publications, *In Brief*, April 2016.

Following is a table summarizing these changes:

Rule	Amendment
FRCP 1	Parties now share responsibility with the court to secure just, speedy, and inexpensive determination of action.
FRCP 4	Reduces time for service to be effected from 120 days to 90 days after the complaint is filed. Appends notice and waiver of service forms directly to FRCP 4 (formerly Forms 5 and 6).
FRCP 16(b)(1)	Encourages in-person scheduling conferences with the court (rather than by phone or mail).
FRCP 16(b)(2)	Reduces the time to issue scheduling order to the earlier of 90 days (down from 120 days) after any defendant is served or 60 days (down from 90 days) after any defendant appears. Recognizes that the court may find good cause to extend the time to issue scheduling order.
FRCP 16(b)(3); FRCP 26(f)(3)	Scheduling orders may (1) provide for preservation of ESI; (2) include agreements reached under Federal Rule of Evidence (FRE) 502; (3) direct parties to request a court conference before moving for a discovery order.
FRCP 26(b)(1)	Narrows scope of discovery by: <ul style="list-style-type: none"> <li>● Providing that information is discoverable if it is relevant to a party’s claim or defense and proportional to the needs of the case.</li> <li>● Deleting language permitting discovery of information “reasonably calculated to lead to the discovery of admissible evidence.”</li> </ul>
FRCP 26(c)(1)(B)	Codifies use of protective orders to allocate discovery costs.
FRCP 26(d)(2)	Parties may deliver requests for production under FRCP 34 before the FRCP 26(f) conference. The requests will be deemed served at the first FRCP 26(f) conference.

## 2016 Oregon Legislative Session

The 2016 Oregon Legislature passed a small number of bills that may be of interest to practitioners. You can find the list on the PLF website at [www.osbplf.org](http://www.osbplf.org) under Practice Management, Publications, *In Brief*, April 2016.

The descriptions of the bills are taken from the Senate and House Staff Measure Summaries and are not intended as complete analyses of the bills. The PLF has not independently researched or verified the accuracy of the descriptions. Attorneys should use the list as a starting point for their research. Bills are effective January 1, 2017, unless otherwise noted.

To view the full text of a bill or a measure’s history, go to [www.oregonlegislature.gov](http://www.oregonlegislature.gov) and click on 2016 Regular Session. You can search by specific measure number.

FRCP 26(d)(3)	Parties may stipulate to sequencing of discovery.
FRCP 26(f)	Discovery plans must address issues regarding ESI preservation and may include agreements reached under FRE 502.
FRCP 30(a)(2)(A)(i); FRCP 30(d); FRCP 31(a)(2); FRCP 33(a)(1)	Amended to reflect the emphasis on proportionality.
FRCP 34(b)(2)	Parties must respond to requests for production made before the FRCP 26(f) conference within 30 days after the conference. Parties must make specific objections and state whether withholding any responsive documents on basis of objection. Amended to reflect the practice of producing copies rather than permitting inspection.
FRCP 37(a)(3)(B)(iv)	Amended to reflect the practice of producing copies rather than permitting inspection.
FRCP 37(e)	New standard for sanctions for failure to preserve ESI that permits relief only where ESI was lost because a party failed to take reasonable steps to preserve it and it cannot be replaced through additional discovery. The new rule allows the court to craft relief that is “no greater than necessary to cure” any prejudice suffered where there was no intent to deprive, and permits drastic sanctions only on finding that a party acted with intent to deprive.
FRCP 55(c)	Clarifies that FRCP 60(b) applies only when seeking relief from final default judgment.
FRCP 84	Eliminates sample forms in Appendix of Forms.

KATHRYN M. PRATT  
PRATT LAW OFFICE LLC

## Accepting Credit Cards

Lawyers frequently ask whether they can accept credit card payments from clients and, if so, whether they can pass on to clients the credit card surcharges assessed by banks and credit card processors. Accepting credit cards requires extra attention to bookkeeping, particularly when trust funds are involved. Most banks and private credit card processors charge set-up fees, monthly fees, and annual fees in addition to the convenience fee surcharged on each transaction. These fees must be accounted for ethically, in compliance with applicable substantive law and in accordance with your client fee agreement.

Lawyers who accept credit card payments from clients should carefully review OSB Legal Ethics Op No 2005-172. Any credit card payments deposited to the trust account for services already rendered must be withdrawn as soon as possible from the trust account and transferred to the general or office account to avoid commingling earned fees with unearned fees. [See OSB Legal Ethics Op No 2005-172 and George Riemer, “Charge It? Credit Cards and Lawyer Trust Accounts,” *Oregon State Bar Bulletin* 60, no. 9 (July 2000).]

If the bank requires that you designate a single merchant account for all credit card transactions and you accept credit

card payments for earned and unearned fees, your merchant account should be a trust account. If you accept credit card payments for earned fees only, designate your business account as the merchant account. OSB Legal Ethics Op No 2005-172.

Credit card surcharges are of special concern. In 2013, the U.S. District Court for the Eastern District of New York approved the “Payment Card Interchange Fee Settlement,” a class action suit among merchants, Visa, MasterCard, and other defendants involving allegations of excessive credit card surcharges. (For more information, visit the settlement website, <https://www.paymentcardsettlement.com/en>).

Some Oregon law firms have taken the position that the “Payment Card Interchange Fee Settlement” (PCIFS) permits them to pass Visa and MasterCard surcharges through to clients. The PLF does not advise lawyers on substantive law. This includes interpreting the applicability of the PCIFS. Additionally, lawyers should take note of the following comment in OSB Legal Ethics Op No 2005-172: “Some jurisdictions suggest that a lawyer can pass the credit card transaction fee on to the client, if the client agrees.

*Continued on page 8*

*Continued from page 7*

Interpretation of federal and state law on this issue is beyond the scope of this opinion, but we note that charging the client for the transaction fee may implicate Regulation Z of the Truth in Lending Act, 12 CFR pt 226, requiring that the lawyer make certain specific disclosures to the client and offer cash discounts to all clients.” The opinion cites *Consumer Law in Oregon* ch 14 (Oregon CLE 1996 & Supp 2000).

If you elect to pass on credit card surcharges to clients, proceed at your own risk. Keep these suggestions in mind:

- An appeal of the “Payment Card Interchange Fee Settlement” is now pending before the Second Circuit Court of Appeals. For more information, visit the settlement website referred to on the prior page.
- Credit card surcharges are presently illegal in ten states. Some experts predict this number will grow.
- Conduct your own legal research regarding Regulation Z.
- Conduct your own legal research regarding the prerequisites and limitations that apply to surcharging under the “Payment Card Interchange Fee Settlement.”

For additional background on this issue, see Beverly Michaelis, “Passing on Credit Card Surcharges to Clients,” *Oregon Law Practice Management* (March 2016), available online at <http://oregonlawpracticemanagement.com/2016/03/14/passing-on-credit-card-surcharges-to-clients/>.

The safest practice when accepting credit card payments is to treat the merchant fee or surcharge as a business expense. Arrange for the merchant fee to be deducted from your general office account and the client funds to be deposited in your trust account. If the bank will not deduct fees from your general account, you have two options. First, permit the use of credit cards only for earned fees that you can deposit immediately in the general account. Banks will usually not deposit credit card payments into multiple accounts, so it is important to limit acceptance of such payments to earned fees if you are using the general account.

If you receive retainers or other unearned costs and fees by credit card, the trust account is the proper account for deposit of these payments. You then face the problem of accounting for the merchant fee. One correct but very cumbersome method is to calculate the merchant fee on each transaction and deposit that fee into the trust account on the same day the credit card payment is made. Another approach is to consider using a private credit card processor. Private credit card processors are often more flexible than banks and will usually allow you to deduct merchant fees

from the general account for all your transactions, regardless of which account receives your deposit. Many companies offer this service. Choose wisely. Evaluate each company’s reputation, references, rates, and services. If possible, find a credit card processor experienced in serving the legal profession.

Set-up fees, monthly fees, and annual fees assessed by banks and credit card processors are an expense of the law firm and the lawyer’s responsibility. You can choose to build these costs into your billable fee along with credit card surcharges. For a discussion of billing client costs, see David J. Elkanich, Peter R. Jarvis, Roy Pulvers, and Allison D. Rhodes, “Billing Costs,” *Fee Agreement Compendium* (2007). The handbook is included in BarBooks™ and available at no charge on the OSB website at [www.osbar.org](http://www.osbar.org).

BEVERLY MICHAELIS  
PLF PRACTICE MANAGEMENT ADVISOR

*Excerpted and adapted from the PLF handbook, A Guide to Setting Up and Using Your Lawyer Trust Account, newly updated in 2016. Also see PLF practice aid “Accepting Credit Cards” at [www.osbplf.org](http://www.osbplf.org) under Practice Management, Forms, Category: Trust Accounting.*

## Coverage Corner

**Q:** I claim an exemption from PLF coverage but would like to do volunteer legal work – is that possible?

**A:** Yes, provided the volunteer legal work is done through an OSB/PLF Certified Pro Bono Program. The Oregon State Bar and the Professional Liability Fund jointly certify pro bono programs across the state of Oregon whose missions meet specific criteria, including serving the legal needs of underserved populations. The PLF provides coverage for exempt attorneys when they volunteer for these programs, and this coverage is provided at no cost to the attorney or to the program. This coverage, outlined in the 2016 PLF Pro Bono Claims Made Plan, extends only to legal work done by an exempt attorney through the certified pro bono program. All other legal work, regardless of whether it is pro bono, requires coverage under the PLF Primary Claims Made Plan. For a complete list of OSB/PLF Certified Pro Bono Programs, please visit [www.osbar.org/probono/certified.html](http://www.osbar.org/probono/certified.html).

If you have questions about PLF coverage, call Emilee Preble or Jeff Crawford at 503.639.6911.



# What to Do After a Data Breach

A data breach is a traumatizing event, regardless of how it occurs, and last year was a particularly active summer for thieves and scammers. In 2015, Oregon lawyers reported home and office break-ins, stolen laptops and mobile devices, and malware security intrusions. If you experience a data breach, here are the key steps you must take:

- **Contact the Professional Liability Fund.** Call the PLF immediately and ask to speak to a PLF claims attorney, even if you don't have Excess Coverage. Knowing about cyber liability claims enables the PLF to better assist Oregon attorneys with this expanding area of liability. See sidebar on page 10.

- **Contact the Oregon State Bar.** The OSB General Counsel's office can give you advice about the ethical implications of a data breach.

- **Contact an IT expert NOW before you pass go.** The scope of the intrusion may reach beyond your stolen mobile device or the infected computer. Until you know better, assume that all connected devices are part of the data breach. This might include your desktop computer, your assistant's computer, your server, mobile devices used to access your network, and your home computer if you connect remotely to your office. Fixing security issues will require sleuthing, finding a solution, protecting existing data and devices not affected by the breach, testing security solutions, and potentially preserving forensic evidence. Don't try to fix it yourself!

- **Change user names and passwords.** At the first indication of a data breach, you won't know exactly what went wrong – only that your information, or your clients' information, has been compromised. Using an uninfected computer, change user names and passwords for your online accounts. (If you modify your login credentials while a keylogger (a type of spyware) resides on your system, you've made the situation worse by supplying the hacker with your newly replaced credentials.) If necessary, get help from your IT expert.

- **Freeze or place fraud alerts on credit accounts.** A freeze literally locks down your credit. No credit transactions can be authorized until you lift the freeze, temporarily or permanently. Fraud alerts inform you if someone is attempting to obtain new credit in your name. Learn more about credit freezes and fraud alerts at <https://www.consumer.ftc.gov/articles/0497-credit-freeze-faqs>.

- **Protect bank accounts, credit cards, and debit cards.** If banking, credit card, or debit card information was exposed in conjunction with the data breach, you may want to freeze your bank accounts (personal, general, IOLTA), arrange for fraud protection services, or close your accounts

altogether. Talk to your banks and credit or debit card providers. If you have automated payments tied to former bank accounts, credit cards, or debit cards, be sure to update your information. This includes payment accounts associated with federal or state court eFiling systems. Continue to monitor statements for unauthorized transactions.

- **File a police report.** Realistically, this isn't likely to help. However, it may be required under the Oregon Consumer Identity Theft Protection Act (ORS 646A.600-646A.628) or the terms of your insurance/coverage policy.

- **Report the breach to your property manager.** If the breach occurred in connection with an office break-in, inform the property manager as soon as possible. Broken windows and locks should be fixed immediately to avoid further loss. If you believe inadequate security may have played a role in the break-in, it may be appropriate to assert a claim against the management or building owner. Research the issue or speak to outside counsel. Document your property loss and consider getting a commitment in writing about security improvements.

- **File claims with commercial carriers.** Submit claims to any applicable insurance carriers: cyber liability and data breach, commercial liability, or others.

- **Report identity theft to the Federal Trade Commission.** If you are the victim of identity theft, file a report with the FTC as soon as possible. Review the FTC website for other steps not discussed here (e.g., reporting a misused Social Security number, removing bogus credit charges, replacing government-issued identification cards). See [www.identitytheft.gov/#what-to-do-right-away](http://www.identitytheft.gov/#what-to-do-right-away).

- **Notify clients.** This is never easy, but clients must be informed if confidential information has been compromised. A sample notification letter is available on the PLF website at [www.osbplf.org](http://www.osbplf.org). Select Practice Management > Forms > Client Relations > "Notice to Clients re Theft of Computer Equipment." If you have questions about your ethical duties toward clients, speak to OSB General Counsel (see above). Additionally, client notification may be a statutory responsibility under the Oregon Consumer Identity Theft Protection Act (ORS 646A.600-646A.628).

- **Begin reconstructing files if needed.** Lawyers who are straightforward about an office break-in or theft often find that clients are sympathetic, understanding, and more than willing to help. With a bit of luck, you should be able to reconstruct most or all of your files from your backup or documents supplied by clients.

*Continued on page 10*

Continued from page 9

- **Monitor your credit report.** Check your credit reports at [www.annualcreditreport.com](http://www.annualcreditreport.com) for signs of fraud. This is the only official source for free credit reports authorized by the Federal Trade Commission.

- **Monitor Craigslist.** If you believe a thief has posted your property for sale, inform the police.

- **Start using encryption.** Read “Encryption Made Simple for Lawyers” as a starter (ABA GPSolo Magazine, November/December 2012), which is now a book: [http://www.americanbar.org/publications/gp\\_solo/2012/november\\_december2012privacyandconfidentiality/encryption\\_made\\_simple\\_lawyers.html](http://www.americanbar.org/publications/gp_solo/2012/november_december2012privacyandconfidentiality/encryption_made_simple_lawyers.html). Then check out [www.lawtechnologytoday.org](http://www.lawtechnologytoday.org) and the resources from the ABA Legal Technology Resource Center at [www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources.html). For reviews of encryption products, check out <http://www.lawsitesblog.com/>. If you want an encrypted password manager – a very good idea – see the top picks for 2016 at [www.pcmag.com](http://www.pcmag.com). Shopping for a new laptop? Don’t forget that hard drive encryption is automatically built into the Mac OS. Using Windows OS? Sorry, you’ll need to buy your own encryption software. If all this seems overwhelming, talk to your IT expert.

- **Backup, backup, backup!** Online backup services are a great way to automatically back up data. Read more about backup protocols and available resources on the PLF website. Select Practice Management > Forms > Technology > “How

to Backup Your Computer” and “Online Data Storage.”

- **No cyber liability or data breach coverage?** Buy it! If your claims weren’t covered, purchase cyber liability and data breach insurance to protect against future loss – privately or through the PLF as part of our Excess Program. Beginning in 2013, the PLF added a Cyber Liability and Breach Response Endorsement to all Excess Coverage plans. The Endorsement covers many claims that otherwise would be excluded. (See sidebar below.)

- **Stay vigilant.** Fixing a data breach does not mean that scammers or hackers will stop. Watch out for phishing attempts. Don’t click on suspicious links in emails, texts, or social media messages. I’ve written over 20 blog posts on the subject of scams. To find the posts, visit my blog’s landing page at <http://oregonlawpracticemanagement.com/>. In the search box in the upper right corner, enter “scam.” You’ll also find seven *In Brief* articles on the PLF website at [www.osbplf.org](http://www.osbplf.org). Select Practice Management > Publications > In Brief, and enter “scam” in the search by keyword or year box. See also Jennifer Meisberger, “Sophisticated Scams: Protect Your Clients’ Money,” *Oregon State Bar Bulletin* (June 2015), and the PLF CLE, “Protecting Your Firm and Your Client from Scams, Fraud, and Financial Loss.”

BEVERLY MICHAELIS  
PLF PRACTICE MANAGEMENT ADVISOR

Originally posted on September 14, 2015, on <http://oregonlawpracticemanagement.com>.

## Cyber Extortion Coverage Added to PLF Excess Coverage!

We are delighted to announce that 2016 PLF Excess Coverage now includes coverage for Cyber Extortion events under the Cyber Liability and Breach Response Endorsement (“Endorsement”) (included in all PLF Excess Coverage plans). There is no additional charge for this coverage enhancement.

Cyber extortion occurs when a business’s computer system is attacked and data stored on the computers or networks is rendered unusable because it is encrypted by extortionists. The only possibility for release of that data (unless it is otherwise backed up on a non-infected drive) is through satisfying a payment demand. Another term for this type of virus or attack is ransomware. The PLF is aware of at least one cyber extortion attack made against an Oregon law firm in 2015. That claim would not have been covered under prior Endorsements, nor is there coverage for these claims under the PLF Primary Claims Made Plan.

Under the 2016 Endorsement, the limit available to cover Cyber Extortion claims is \$10,000, with a \$2,000 deductible. Though cyber extortion demands are often quite small (many would not exceed the deductible), it is important that you notify the PLF of these claims so they can be monitored under the Endorsement. This is particularly valuable if additional claims result from the Cyber Extortion event. We believe this added coverage is of great benefit to Oregon law firms and are pleased to include it in our Excess Coverage for this year.

If you have any questions about the Cyber Liability and Breach Response Endorsement or other aspects of PLF Excess Coverage, please contact Emilee Preble at 503.639.6911 or at [emileep@osbplf.org](mailto:emileep@osbplf.org).

## Tips, Traps, and Resources

**LAWYER TRUST ACCOUNTS:** The PLF has updated its handbook, *A Guide to Setting Up and Using Your Lawyer Trust Account* (2016). You can download a PDF of the handbook or order a print copy online at the PLF website, [www.osbplf.org](http://www.osbplf.org), under Practice Management, Publications, Books from the PLF. The update includes new information about accepting credit cards in your law practice.

**RUNNING YOUR LAW OFFICE:** The PLF has updated its handbook, *A Guide to Setting Up and Running Your Law Office* (2016). You can download a PDF of the handbook or order a print copy online at the PLF website, [www.osbplf.org](http://www.osbplf.org), under Practice Management, Publications, Books from the PLF.

**TECHNOLOGY:** As a law office, you are a small business. Do you have written security policies? How about a disaster recovery plan? Are your computer systems up-to-date with security patches? The PLF has added a new practice aid, “Information Security Checklist for Small Businesses,” courtesy of John Simek, Sensei Enterprises, Inc., to help you evaluate your technology policies, programs, and processes. You can find the checklist on the PLF website at [www.osbplf.org](http://www.osbplf.org), under Practice Management, Forms, Category: Technology. The PLF has over 15 practice aids to assist you with various technology topics, including scanning, digital signatures, email, backing up, going paperless, metadata, and more.

**PORTLAND/MULTNOMAH BUSINESS TAX:** Lawyers who work in the City of Portland or Multnomah County are subject to tax on their law practices. Richard Wingard, CPA, and Craig T. Freeman, CPA, of Maginnis & Carey, LLP, explain and illustrate the applicable rules for who must file and when, how to apportion income, how to calculate the tax, and more. You can find this article on the PLF website at [www.osbplf.org](http://www.osbplf.org), under Practice Management, Publications, *In Brief*, April 2016.

---

*Thanks to Beverly Michaelis and Sheila Blackford, PLF practice management advisors,  
for their assistance with these tips.*

## Cases of Note

**CONSTRUCTION DEFECT:** In *Shell v. Schollander Companies, Inc.*, 358 Or 552 (February 19, 2016), the Oregon Supreme Court held that when a buyer enters into a purchase and sale agreement to buy an existing home – a “spec” home in this case – there is no contract to construct, alter, or repair an improvement to real property and thus no “contractee” whose acceptance will trigger the period of repose. Therefore, ORS 12.135 does not apply. Rather, the more general period of repose set out in ORS 12.115 governs. [www.publications.ojd.state.or.us/docs/S062791.pdf](http://www.publications.ojd.state.or.us/docs/S062791.pdf)

**DAMAGES:** In *State v. Ramos*, 358 Or 581 (February 19, 2016), the Oregon Supreme Court held that (1) a court is precluded from awarding, as “economic damages” under ORS 137.106 (the criminal restitution statute), expenses that the court concludes were not the result of reasonably foreseeable risks of harm; and (2) a victim’s attorney fees and litigation costs may, in an appropriate case, constitute “economic damages” under ORS 137.106. [www.publications.ojd.state.or.us/docs/S062942.pdf](http://www.publications.ojd.state.or.us/docs/S062942.pdf)

**TORTS:** In *Deckard v. Bunch*, 358 Or 754 (March 10, 2016), the Oregon Supreme Court, after reviewing the legislative history of former ORS 30.950 (1979) [renumbered as ORS 471.565 (2001)], and subsequent amendments to the statute, held that ORS 471.565(2) does not provide a right of action against alcohol providers that has elements independent of a claim for common-law negligence. [www.publications.ojd.state.or.us/docs/S062948.pdf](http://www.publications.ojd.state.or.us/docs/S062948.pdf)

## IN BRIEF

Published  
by the  
Professional  
Liability Fund

Carol J. Bernick, CEO

### Editors:

Barbara S. Fishleder,  
*Director of Personal  
and Practice  
Management  
Assistance*  
and  
Tanya Hanson,  
*Loss Prevention  
Attorney*  
tanyah@osbplf.org

503.639.6911  
1.800.452.1639  
www.osbplf.org

OSB

# Professional Liability Fund

P. O. Box 231600 • Tigard, OR 97281-1600

PRSRT STD  
U.S. POSTAGE  
**PAID**  
PORTLAND, OR  
PERMIT NO. 5300

## Professional Liability Fund Board of Directors and Officers

Robert D. Newell  
Portland  
*Chair*

Teresa A. Statler  
Portland  
*Vice Chair*

Tim Martinez  
Salem  
*Secretary-Treasurer  
Public Member*

Julia I. Manela  
Eugene

Dennis H. Black  
Medford

Saville W. Easley  
Portland

Robert S. Raschio  
Canyon City

Molly Jo Mullen  
Portland

Tom Newhouse  
Portland  
*Public Member*

## Thank you!

*The PLF thanks the following people for their assistance with the review  
and updating of PLF practice aids:*

Nellie Q. Barnard

Kelly L. Harpster

Robin E. Pope

Peter L. Barnhisel

Peter R. Jarvis

Emilee S. Preble

Robert H. Beatty-Walters

Philip N. Jones

Phillip C. Querin

Lisa C. Brown

Matthew J. Kalmanson

Randall G. Rice

Franco J. Capriotti III

Tabitha Lundberg Koh

Mark Johnson Roberts

Christine Coers-Mitchell

Thomas I. Kramer

Paul Saucy

Craig P. Colby

Shannon Raye Martinez

Elizabeth (Libby) Schwartz

Craig M. Cowley

Lawrence Matasar

Vivian R. Solomon

David C. Culpepper

Kendra M. Matthews

Jeff R. Tapia

William Keith Dozier

Gail L. Meyer

Bradley F. Tellam

Craig T. Freeman, CPA

Alan L. Mitchell

Patrick W. Wade

Mark J. Fucile

Johnston A. Mitchell

Sherilyn Danielle Holcombe Waxler

Doug L. Gallagher

Janice R. Morgan

Richard W. Wingard, CPA

Robert K. Winger