

Introducing the PLF's New Blog

inPractice

Practical Advice for Oregon Lawyers

The PLF is pleased to introduce our new blog, *inPractice*, which provides practical advice and information to Oregon lawyers. To view our blog, go to www.osbplf.org and click on Blog in the top navigation bar. To receive notifications of new posts, enter your email address and click subscribe.

Our four practice management advisors, Sheila Blackford, Jennifer Meisberger, Hong Dao, and Rachel Edwards, regularly post practice management tips and information. Periodically, *inPractice* will also offer information about the PLF assessment, coverage tips, and malpractice traps. For additional practice management information, follow us on Twitter: @OregonPLF.

Be sure to check your spam filter to make sure you receive *inPractice* posts!

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PLF Board Positions

The Board of Directors of the Professional Liability Fund is looking for one lawyer member and one public member, each to serve a five-year term on the PLF Board of Directors beginning January 1, 2018. Directors attend approximately six one- to two-day board meetings per year, plus various committee meetings. Directors are also required to spend 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. The BOD recognizes that the Bar members are diverse in perspective and background, and we highly encourage individuals from a diverse background to apply.

Interested persons should send a brief résumé by July 7, 2017, to:

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Immigration Resources

The PLF provides resources for immigration lawyers and for lawyers who are seeking opportunities to volunteer in the area of immigration.

Resources for Immigration Lawyers

The PLF offers the following checklists for immigration lawyers:



Resources for Immigration Lawyers



Immigration Consequences of Criminal Activity – Immigration Attorney Referral Checklist

You can download these resources at www.osbplf.org >Practice Management>Forms>Immigration.

Resources and Opportunities for Volunteers

If you are not experienced in immigration law and want to help, consider volunteering for the following programs that will provide mentoring and supervision by experienced immigration attorneys:

Catholic Charities Immigration Legal Services

2740 SE Powell Blvd #2

Portland, OR 97202

Contact: Emily Gumper 503.688.2716 (to take a pro bono case)

Sheridan Rueter 503.688.2707 (to volunteer in office)

Email: egumper@ccoregon.org, srueter@ccoregon.org

- **OPPORTUNITIES:** A wide variety of immigration cases, including family-based petitions, self-petitions by battered spouses, U visas, and others. Opportunities to take pro bono U visa or VAWA cases or to volunteer in office.
- **TRAINING:** Mentoring and supervision by experienced immigration attorneys. Extensive library of training materials. Regular trainings offered twice a year and ongoing support and mentoring for attorneys taking pro bono cases.
- **OTHER:** Spanish (or other) language skills greatly appreciated but not required. Catholic Charities Immigration Legal Services is a certified pro bono program offering free PLF coverage to pro bono practitioners.

American Immigration Lawyers Association

Contact: Chanpone Sinlapasai 503.607.0444

Email: chanpone@mshpc-law.com

- **OPPORTUNITIES:** The American Immigration Lawyers Association, in collaboration with the Voluntary Resettlement and Refugee Assistance Agencies (Catholic Charities, SOAR [Sponsors Organized to Assist Refugees], Lutheran Family, and IRCO [Immigrant & Refugee Community Organization]), is working to help refugee families. Assist families in adjusting their status from “Refugee Status” to “green card holder.”

AILA - Oregon Chapter

Contact: Caroline van der Harten 503.384.2482

Email: cvanderharten@emoregon.org

- **OPPORTUNITIES:** Assist refugees who have green cards in applying for citizenship.
- **TRAINING:** The Oregon AILA chapter will be putting together a series of training and naturalization workshop opportunities throughout Oregon.
- P **OTHER:** The chapter will apply for CLE credits for everyone who attends the training.

Changes to the 2017 Primary and Excess Plans

Last year, the PLF completely overhauled the Primary and Excess Coverage Plans. The Plans were significantly reorganized and reformatted, but the substantive changes were limited. Some, but not all, of the revisions are discussed below. In order to understand the scope of coverage under the 2017 Plans, it is important to read them in their entirety.

The revised Primary and Excess Plans are reorganized to eliminate unnecessary or repetitive language and to make it easier to find and identify related provisions. For instance, all Plan language relating to who qualifies as a Covered Party is integrated into Section II of the revised Primary Plan. By making this change, we were able to eliminate current Plan Exclusion 14 (Government Lawyers) and Exclusion 15 (Other Lawyers Not in Private Practice). Under the new language, an attorney is simply not a Covered Party regarding work that was within the scope of these previous exclusions. Similarly, everything relating to covered activities under the Plan, including language that previously appeared only in Comments and Examples, is integrated into Section III of the revised Primary Plan, Covered Activity. We believe these changes make the Plan clearer and eliminate the need for extensive explanations in the form of Comments or Examples.

Explanation of Substantive Changes to Primary Plan

1. Legally Obligated.

The Primary Plan has long included language that coverage is provided only for Damages that the Covered Party is “legally obligated” to pay. The new Plan includes, for the first time, a definition of “Legally Obligated.” This definition is added to the 2017 Plan in response to a ruling in *Brownstone Homes Condominium Association v. Brownstone Forest Heights, LLC*, 358 Or 223 (2015). In *Brownstone*, the Court ruled that the words “legally obligated,” as used in a liability policy, are ambiguous. The new definition in the Plan is intended to remove any ambiguity as to the PLF’s intended meaning of these words. Under the definition of Legally Obligated, the PLF has no obligation to pay a settlement or Stipulated Judgment where the attorney has no actual obligation to pay money Damages and/or is protected or absolved from actual payment of Damages by reason of any covenant not to execute, a contractual agreement, or a court order, preventing the ability of the claimant to collect such

Damages directly from the attorney. However, the bankruptcy of a Covered Party, standing alone, does not affect the PLF’s duties under the Plan.

2. Damages Definition.

The 2017 Plan revises the Damages definition and clarifies, but does not change, the PLF’s intent as to what types of damages are covered under the Plan. The Plan applies only to monetary damages arising from a legal malpractice claim. Under the Damages definition, the Plan does not apply to fines; penalties; punitive or exemplary damages; statutorily enhanced damages; rescission; injunctions; accountings; equitable relief; restitution; disgorgement; set-off of any fees, costs, or consideration paid to or charged by a Covered Party; or any personal profit or advantage to a Covered Party.

3. Defense Provisions.

A. Arbitration Agreements.

The revised Plan Section I.B.1 adds language to make clear that the PLF is not bound by fee agreements entered into by any Covered Party that call for arbitration of malpractice claims. The PLF does not want to be restricted by the terms of these agreements.

B. Nature and Scope of Defense.

The PLF has long had a practice of attempting to repair “mistakes” before they become claims. Repair efforts by the PLF are not a right or duty under the Plan. Section I.B.2. makes clear that the PLF has sole discretion to decide whether to undertake a repair.

C. Defense Regarding Certain Excluded Claims.

The revised Plan adds a specific defense provision stating that the PLF will defend, but not indemnify, claims for malicious prosecution, abuse of process, wrongful initiation of legal proceedings, and sanctions claims subject to Exclusion 4 of the Plan. The Plan language reflecting this policy and practice is relocated and clarified.

4. Addition of Definitions for “Private Practice” and “Principal Office.”

The revised Plan adds two new definitions, one for Private Practice and one for Principal Office. These definitions clarify the PLF’s meaning and are now stated as qualifications for who is a Covered Party, rather than being in the Covered Activity section, as in the previous Plan.

5. Related Claims.

The concept of “Same or Related” has been renamed Related Claims, and clarifying language has been added. The

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revised Plan also contains examples that demonstrate how limits work when there are Related Claims against multiple Covered Parties.

6. Exclusions.

There are some substantive changes to exclusions in the Plan. These include, but are not limited to, Exclusion 4 relating to punitive damages and sanctions, and Exclusion 11 relating to family members.

In the 2016 Plan, Exclusion 4 excluded coverage for all amounts awarded as sanctions “intended to penalize” certain types of conduct, but provided for a defense regarding such claims. The previous Plan Exclusion applied whether or not the sanction was awarded against the Covered Party or the Client. There are, however, numerous kinds of sanctions, not all of which necessarily require bad faith, malicious or dishonest conduct, or misrepresentation on the part of an attorney. Moreover, it is not always clear whether a sanction

awarded is “intended to penalize” because the court may or may not include findings or other language to allow the Fund to assess the intent of the sanction.

The 2017 Revised Plan excludes imposition of attorney fees, costs, fines, penalties, or remedies imposed as sanctions against the attorney regardless of whether there was an allegation or a finding of bad faith by the attorney or a finding of such by a court. Under the new language, vicarious liability for the sanction against the Covered Party is also excluded. However, if a sanction is imposed against a Client, there is coverage for a resulting claim against the Covered Party or those vicariously liable for the Covered Party, but only if the Covered Party establishes that the sanction was caused by mere negligence. The burden of proof is therefore on the Covered Party.

The Family Member Exclusion is expanded to include additional family members and to exclude work done by family members of those who reside in the household in a spousal equivalent relationship with the Covered Party.

A chart showing changes to the exclusions between the 2016 Primary Plan and the Revised 2017 Primary Plan is available at www.osbplf.org/assets/documents/news_events/PRIMARY%20Comparison%20Chart.pdf.

May 16 CLE: Technology Tips & Practice Pointers

On May 16, 2017, the PLF will present “Technology Tips & Practice Pointers” at the OSB Center, 16037 SW Upper Boones Ferry Rd, Tigard, Oregon 97224, from noon to 1:30 p.m. The program will be presented by PLF Practice Management Advisors, Sheila Blackford and Hong Dao. The cost is \$15 (including materials and lunch) and 1.5 MCLE General or Practical Skills credits are pending. We welcome lawyers, judges, and staff to attend.

This CLE will help you learn how to instantly organize bills and paperwork; research new technology; detect and prevent malware; annotate PDF documents with searchable handwritten notes; avoid common eCourt traps; authenticate images; share files instantly across all platforms using simple drag and drop; turn your phone into a portable scanner; create instant inventories of your client files; and save money on software, services, and ABA resources.

To register for the upcoming program, go to www.osbplf.org>CLE>UpcomingCLE.

Explanation of Substantive Changes to the Excess Plan

Some of the exclusions described above also apply to the Excess Plan. The primary change to the Excess Plan is to eliminate redundant provisions. A new Section IV regarding when a claim is First Made has been added to the Excess Plan. The new language clarifies that when a claim is First Made under the Excess Plan may not be the same plan year as when the claim is First Made for the Primary Plan. There is also a new Section V clarifying which claims are Related and subject to the same Claim Year Limit. The intent is to clarify the distinction between when Claims are Related for Primary purposes versus Excess purposes.

Finally, we have made relevant exclusions identical in both Plans.

A chart showing changes between the 2016 Excess Plan and the Revised 2017 Excess Plan is available at www.osbplf.org/assets/documents/news_events/EXCESS%20Comparison%20Chart.pdf.

IRS 1099 Reporting Requirements for Attorneys

This article explains why attorneys might receive a Form 1099 reporting certain amounts paid to them in the course of their practice, and why it is a “Big Deal.”

What Is a Form 1099?

A Form 1099 is an “Information Return” used to report payments of certain items of income. This form notifies the recipient that the specified amounts paid to them during the calendar year are being reported to the IRS. There are 20 different types of 1099 forms used to report various items of income. A common example is Form 1099-INT, which reports interest earned by the recipient during the calendar year.

When Is a Form 1099 filed?

Form 1099 reporting is based on a calendar year. The reporting entity must issue a copy (1) to the recipient by January 31 following the calendar year-end or February 15 following the calendar year-end for gross proceeds paid to attorneys; and (2) to the IRS on paper by the last day in February following the calendar year-end, March 31 following the calendar year-end if filing electronically, or January 31 following the calendar year-end if any payments for nonemployee compensation are reported in Box 7 on Form 1099-MISC. Electronic filing may be mandated, depending on several factors concerning the quantity of the reporting entity’s other required filings with the IRS.

Who Must File 1099-MISC Forms?

Any individual, corporation, partnership, limited liability company, or limited liability partnership *engaged in a trade or business* must file a Form 1099-MISC for certain payments made in the course of its trade or business to another person or a noncorporate business entity in any calendar year. However, a reporting entity must also file a Form 1099-MISC for *payments to all attorneys*, even if the attorney’s law practice is incorporated.

What Types of Payments to Attorneys Must Be Reported?

Payments of \$600 or more in a calendar year strictly for legal services must be reported by the payor (business entity) on Form 1099-MISC (in Box 7). Payments of \$600 or more in a calendar year to an attorney that contain any amount of settlement proceeds must be reported on Form 1099-MISC (in Box 14).

So What’s the Big Deal?

The big deal concerns settlement payments (gross proceeds) payable to attorneys. Pursuant to Internal Revenue Code Section 6045(f), when an attorney or law firm is the payee on a payment containing gross proceeds in connection with legal services, (i.e., a payment containing settlement proceeds in addition to legal services) the payor (usually an insurance company) must report the entire amount in Box 14 of Form 1099-MISC as gross proceeds paid to the attorney/recipient. This is required even if the attorney is not the sole payee. Consequently, the attorney must carefully track the receipt and disposition of these types of combined payments to clearly reflect on the firm’s tax return the proper amount of income. One possible approach is to show the gross amount received as income, corresponding to the amount reported on the Form 1099-MISC in Box 14, and then show the amounts disbursed to the client and others as either Returns and Allowances or as a specific line item of Expense. Another option is to have the insurance company issue two separate checks – one to the attorney for attorney fees and costs, and the other to the claimant for the settlement award.

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Tips and Takeaways from ABA Techshow 2017

Popular blog “Attorney at Work” shares highlights from the 2017 ABA Techshow, featuring top practice management technology pros sharing their personal favorite tips, takeaways, and apps from the programs and presentations. Here are the presentations they summarize:

- Sharon Nelson and John Simek: Security at Home and Abroad
- Jim Calloway: Time to Try Some New Apps
- Natalie Kelly: Checking All the Boxes
- Darla Jackson: G Suite or Office 365?
- Tom Labotte: The Big Picture
- Reid Trautz: Reality Check on “Robot Lawyers”
- Nora Regis: A Little Marketing Help

www.attorneyatwork.com/tips-takeaways-aba-techshow-2017

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A third possibility is to have the insurance company issue only one check payable to the claimant, out of which the claimant pays the attorney for legal services rendered and costs advanced.

Here are some examples to help illustrate these points:

Example 1. Attorney (A) receives a settlement check for \$300,000 from Payor (P) jointly payable to (A) and Client/Claimant (C). From this amount, A will subtract her fee and case costs and will pay the balance to C as net settlement proceeds. P will report the entire amount of \$300,000 on Form 1099-MISC (in Box 14) as paid to A. On A's records and tax returns, A will separately reflect the entire proceeds received and the related disbursements. The net income resulting should equal the fees retained for the matter. If the award is taxable income to C, then P will also issue a Form 1099-MISC in the amount of \$300,000 to C. C will then account for the income and related legal expense on C's tax return. If the settlement is a nontaxable award for personal physical injuries, then P will not issue a Form 1099-MISC to C.

Example 2. At A's request, P issues two checks that are delivered to A. One check is payable solely to A for \$100,000, representing compensation for legal services. The other check is payable solely to C in the amount of \$200,000. P will report only the \$100,000 on Form 1099-MISC (in Box 7) as paid to A. A only needs to record this amount on the firm's records and tax returns. P will also file a Form 1099-MISC reporting \$300,000 as paid to C. (Current law requires the claimant to report the entire amount of the settlement payment – \$300,000 in this case – as income, and then deduct the attorney fees as an itemized deduction, to the extent allowable.)

Example 3. P delivers a check in full payment of the settlement to A's office. The check is payable solely to C. P does not file a Form 1099-MISC reporting payment to A because A is not a payee. P will, however, file a Form 1099-MISC reporting the full amount of the payment to C.

More complicated situations, such as those involving multiple attorneys as payees, are beyond the scope of this article. You should consult with your tax advisor regarding any scenarios involving receipt of settlement proceeds and related fees.

RICHARD W. WINGARD, CPA
CRAIG T. FREEMAN, CPA

Richard Wingard is a partner and Craig Freeman is a senior tax manager with Maginnis & Carey LLP, a Portland CPA and business advisory firm.

Defend Trade Secrets Act of 2016

The Defend Trade Secrets Act of 2016 (DTSA), Pub. L. No. 114-153 creates a separate federal cause of action for misappropriation of trade secrets. The law preserves the three-year statute of limitations in the Oregon Uniform Trade Secrets Act (ORS 646.471) and authorizes remedies similar to those available under state law. 18 USC 1836(b)(3). It does not preempt state law.

Among other provisions, the DTSA contains whistleblower immunity provisions that provide civil and criminal immunity for employees who disclose trade secrets to the government or an attorney solely for the purpose of reporting or investigating a suspected violation of law, or who disclose trade secrets in a court filing if such filing is made under seal. 18 USC 1833(b). Of particular practical significance to employers, the DTSA requires employers to provide notice of the whistleblower immunity in any agreement entered into with an employee that governs the use of trade secrets. 18 USC 1833(b)(3).

Failure to provide the required notice will prohibit employers from accessing the full scope of remedies available under the DTSA if the employee misappropriates a trade secret, including exemplary damages (up to twice the amount of actual damages) and attorney fees in the case of willful or malicious violations. The notice may be provided in the agreement itself or the agreement may reference a whistleblower policy that contains the required notice. The notice requirements apply to all agreements entered into or updated after the DTSA date of enactment, May 11, 2016. Employers should consider updating their employment policies and agreements to notify employees of the whistleblower immunity to preserve the remedies available to them under the DTSA.

BERIT L. EVERHART
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This article was adapted with permission from "New Federal Legislation: Defend Trade Secrets Act of 2016," by Berit L. Everhart, Associate, with Arnold Gallagher, P.C., Oregon Business Law Section Newsletter, Volume 1, No. 1, October 2016.

Medicare Secondary Payer Update

Paris Blank LLP, a Richmond, Virginia, plaintiff's firm, is a defendant in a precedent-setting Medicare Secondary Payer ("MSP") compliance case potentially affecting your practice. Humana Health Care Systems is suing Paris Blank for double damages pursuant to 42 USC 1395y(b)(3)(A), "Private Cause of Action." *Humana v. Paris Blank LLP*, 2016 WL 2745297 (E.D. Va., May 10, 2016). Paris Blank LLP's client received \$109,612.09 from the client's Medicare Advantage Plan ("MAP") through Humana Medicare Advantage. The funds were paid as a result of the client's Medicare-covered injury-related claim. Humana was not paid a portion of the settlement proceeds. If Humana prevails, Paris Blank is liable to Humana for \$328,836.27. Your firm and any other entity/person receiving compensation from an injury settlement, judgment, or award could be exposed to joint and several liability for MSP Conditional Payment Recovery and double damages under the statute.

Paris Blank settled a motor vehicle accident case for \$475,000. Its client's Medicare coverage was not traditional Medicare combined with a Medicare Supplement plan. Instead, the Medicare coverage was under a Medicare Part C MAP. MAP plans are decoupled from Medicare and Centers for Medicare & Medicaid Services ("CMS") when it comes to recovery of presettlement injury medicals. CMS has no idea of the MAP conditional payments made and has no role in recovery of the medical reimbursement. Case law clearly establishes a MAP's right of recovery. Some jurisdictions limit a MAP's recovery action to state court actions only, while other jurisdictions allow recovery in federal courts.

Paris Blank properly reported its case to the CMS Benefits Coordination and Recovery Center ("BCRC"). BCRC indicated that no conditional payments were made by traditional Medicare. BCRC has no information regarding a MAP's conditional payments. Paris Blank did not investigate to see if its client had ever been enrolled in a MAP. The proceeds were distributed. Months later, Humana sent a demand for \$109,612.09. Paris Blank requested a lien waiver. Humana denied the waiver, then filed a Private Cause of Action claim against Paris Blank with a demand for double damages on top of the \$109,612.09. Paris Blank

moved to dismiss, arguing that 42 USC 1395y(b)(3)(A) did not apply to MAPs. The court ruled in favor of Humana, allowing its Private Cause of Action claim to proceed. Most likely the trial court's ultimate ruling will be appealed.

To protect all parties to any injury action, determine when a client first became Medicare-eligible. Submit a SSA-3288 (www.ssa.gov/forms/ssa-3288.pdf) to the nearest Social Security office after checking boxes 2, 3, 4, and 5. Have your client sign it. If your client is a minor or an incapacitated adult, a conservator in Oregon or guardian of the estate in Washington will be required to sign the form. When asked for dates, use the range of the actual date of the injury to the present.

Then determine whether your client was enrolled in traditional Medicare or a MAP from the date of the injury to the date of settlement. Sometimes during the course of an injury action, the client switches from traditional Medicare to a MAP and vice versa. This means you have to report the case to BCRC and then look for evidence of MAP enrollment. Ask your client or his or her family/significant others for all Medicare identification cards. If you see the term "Med Advantage" on a membership card issued by an insurance carrier, then a MAP is involved. Ask for all Explanation of Benefits ("EOB") statements received from either Medicare or a MAP from the date of injury forward. Medicare EOBs have Medicare's name on them. MAP EOBs have the insurance carrier's name on them, and most often the term "Med Advantage" or "Medicare Advantage" will be near the top of the EOB.

Expect defense counsel and carriers to be asking for this information because conditional payment recovery and double damages may also be demanded of them as well as you and any party receiving remuneration from the injury settlement, judgment, or award. Don't make Paris Blank's mistake. If BCRC says it made no conditional payments in response to your submission of the "Final Settlement Detail Document" and you know your client received injury-related medical care, continue your due diligence to find out who paid for the care and negotiate repayment.

TIM NAY
LAW OFFICES OF NAY & FRIEDENBERG LLC

Unwanted Data: How to Properly Destroy Data in Hardware

If you have old computers and other office equipment in your law office or home, there is a good reason they are still with you and not in the dumpster. This article will discuss why you should be concerned about the data in your devices and the proper way to dispose of them.

Why It Matters

Oregon Rule of Professional Conduct 1.6(c) requires lawyers to take reasonable steps to prevent the inadvertent disclosure of or unauthorized access to client information. To comply with this rule, you need to make sure client data stored in your computer and other media aren't compromised when you get rid of the devices. This requires you to ensure that data stored on these devices cannot be reconstituted after they leave your control. It's necessary that you permanently wipe data from the devices before donating or recycling them. Disposing of office equipment or devices without first permanently deleting data is an ethical and malpractice risk.

Deleting Files Is Not Enough

When you delete files on your computer and then empty the recycle bin, that operation does not permanently erase the files. Although you can no longer see the files, they are still in the operating system. The files aren't completely gone until you override the space with something else. Even reformatting or partitioning the hard drive will not permanently delete data. That task only erases the location of the data but not the data itself. You need to do more. Unless data on your computer is permanently deleted, it is recoverable using a low-level disk editor or a recovery tool.

Options for Permanent Data Erasure

You have two ways to completely destroy data: (1) use specialized software to overwrite the data or (2) physically destroy the hard drive.

Using Data Sanitization Software

Specialized software tools permanently delete files from your computer by overwriting the information with random data. When this "data sanitization" method is used, overwritten data can never be un-deleted with a file recovery tool. Software programs that permanently delete selected files are called file shredder programs. Software programs that completely erase the entire hard drive, not just selected files, are called data destruction programs. Both programs use different data sanitization methods (such as Secure Erase, DoD 5220.22-M, Gutmann, Random Data) to overwrite data. Some software programs overwrite deleted data only once; others overwrite three, seven, or more times. The more overwrite passes a program makes, the longer the sanitization process will take.

Whether you should use a file shredder program or a data destruction program depends on your needs. If you are planning to recycle, refurbish, or donate your computer, then use a data destruction program to completely wipe the hard drive. If you are still using your computer but want to permanently delete unwanted files, then a file shredder program is appropriate.

Below is a list of sample file shredder and data destruction programs for Windows.

File Shredder Programs

- **ZDelete** (www.zdelete.com) – Has free and paid versions. The paid version offers more features for \$29.00 per license. When you download the program and install it on your computer, a ZDelete Bin will appear on your desktop and replace the Windows Recycle Bin. You simply drag and drop files in the ZDelete Bin, and that document will be completely deleted. User instructions are available at: <http://www.zdelete.com/downloads/ZDelete-User-Guide-11-25-2016.pdf>.

- **Eraser** (<https://eraser.heidi.ie>) – Freeware. Once the software is downloaded and installed on your computer, an Eraser icon will be automatically added to the Windows contextual menus. Just right-click on the file, select the "Eraser" option, and then click on "Erase." You can also schedule an erasing task to wipe out data on a recurring basis. The default data sanitization method that Eraser uses is Gutmann-35-passes, so it overwrites the deleted data 35 times. This means if you have many files to delete, it might take a while.

- **Freeraser** (www.freeraser.com) – Freeware. Once downloaded and installed, a Freeraser trash bin icon will appear on the desktop. Drag and drop files into the folder to permanently delete them.

- **Other free programs:** Securely File Shredder, File Shredder, Secure Eraser, WipeFile.

Data Destruction Programs

- **DBAN (Darik's Boot and Nuke)** (<https://dban.org>) – Freeware. Erases hard disk drives (HDDs) in PC laptops, desktops, or servers. Download the program to a CD or flash drive, then boot from it. Follow the instructions on DBAN's menu interface. The paid version, Blancco Drive Eraser, complies with the Department of Defense data sanitization guidelines, provides a certificate of data removal, and offers more options, including data erasure for solid state drives (SSDs).

- **HDDEraser** (<http://cmrr.ucsd.edu/people/Hughes/secure-erase.html>) – Freeware. You can use HDDEraser in

two ways after you download the program to your computer. The first is to burn the .iso file to a CD and boot from it to erase your hard drive. The download folder includes a HD-DEraseReadMe file that has instructions on how to create the boot disk. The second is to install the .exe file in Windows and use it to securely erase data from different devices, such as a USB drive, another internal hard drive, or an external hard drive.

- **CBL Data Shredder** (www.cbldatarecovery.com/data-shredder) – Freeware. You can burn CBL Data Shredder directly to a CD and boot from it to erase the hard drive. You can also install the program in Windows like a regular program and run it to delete other devices, such as flash drives or another internal hard drive.

- **Other data destruction programs:** KillDisk, MHDD, Format Command with Write Zero Option.

For Mac OS

The Macintosh has built-in secure data sanitization features that permanently delete selected files or wipe the entire hard drive. Secured Empty Trash, available in the Finder menu, deletes selected files and overwrites them with a single pass of zeroes. The hard drive can be wiped out using the “Secured Erase Options” in Disk Utility. There are different security options for erasure depending on the version of Mac OS you are using. Always select the most secure option.

Physically Destroying the Hard Drive

You can also permanently destroy your hard drive by brute force. You would need to open the computer to locate the hard drive, then locate and access the disk platter inside the hard drive. It is the platter (the device that stores most of the data on your computer) that you need to physically destroy. Take the drive outside and use a hammer to smash it to pieces. You could also drill a few holes in the platter just to be safe. Once the drive is physically obliterated, take the parts to any place that recycles electronics.

Alternatively, take your computer to an electronic recycling facility to physically destroy the hard drive. Some vendors allow you to witness the onsite destruction. Two vendors in the Portland Metro area provide this service:

- **SBK Green Century Electronic Recycle**

<http://www.greencenturyonline.net/destruction.html>

2950 NW 29th Ave., Portland, OR 97219, 503.764.9963

- **R.S. Davis Recycling**

<http://portlandrecycling.com/electronics-recycling>

10105 SE Mather Road, Clackamas, OR 97015

503.655.5433

Data in Your Office Equipment

In addition to computers, lawyers also use copiers, scanners, printers, and fax machines in their law practices. It is

unlikely that your personal scanner or printer has a hard drive inside. But many multi-functional printers retain an image of the printed, scanned, or copied document and store them in the hard drive.

If you are leasing office equipment, ask the leasing company if the machine has a hard drive and what happens to the data stored on that drive. Also ask whether the machine has a wipe-disk function that can be used to erase data when decommissioning the machine. Review the contract to verify whether and how data are destroyed once the machine is returned to the leasing company.

If you want to get rid of your own office equipment, it's a good idea to open the machine and search for anything that looks like a disk. If there is a disk, remove it from the machine and smash it into pieces with a hammer. Recycle the pieces appropriately.

Data in Cloud Storage and Mobile Devices

Let's not forget data you store in the cloud, your smartphones, and on tablets. Similar to a computer, the cloud server doesn't erase files from its system when you right-click to delete them. These files are merely hidden from you but are still somewhere in the cloud server. Major cloud storage providers like Google Drive, OneDrive, and DropBox have options that purport to permanently delete files from their servers. Some providers will automatically purge deleted files after a certain period of time. It's hard to know whether their “Permanently Delete” (DropBox) or “Delete Forever” (Google) options truly expunge the files from their servers. Make sure you review the provider's user agreement or privacy policy to understand what happens to the files you “delete” or “permanently delete.”

As for mobile devices, Apple and Android both have factory reset and remote-wipe functions that erase the devices. Before selling, donating, or recycling your device, make sure you erase all contents and settings. Use the remote-wipe option if the device is lost or stolen.

Conclusion

Protecting client information requires that you securely destroy data stored in old computers and office equipment. You could do this by using software to wipe the hard drive, physically destroying the hard drive, or taking it to a professional to do an onsite destruction for you. Choose a method that is most convenient for you.

HONG DAO
PLF PRACTICE MANAGEMENT ADVISOR

Trust Accounting Demystified

Did you know that . . .

- you can choose from several different types of trust accounts?
- in some states, only a lawyer can be an authorized signatory on an IOLTA account?
- you can use QuickBooks to handle your trust accounting transactions?
- you have an ethical obligation to safeguard your clients' digital property?

These are just a fraction of the things you will learn in *Trust Accounting in One Hour for Lawyers*, a new book recently published by the ABA Law Practice Division and authored by PLF Practice Management Advisor Sheila M. Blackford.

Using both the ABA and Canadian model rules of professional conduct, Ms. Blackford ably tackles this daunting topic with an encouraging, reader-friendly, can-do spirit. She distills complex concepts into easy-to-follow lessons, complete with numerous practical tips for implementing the techniques in your own law practice. Some of the highlights include sections on technology and cybersecurity.

Take a peek inside this small but high-density tome:

- Lesson 1: Ethical Obligations
- Lesson 2: Safeguarding Property
- Lesson 3: Selecting Your Trust Account
- Lesson 4: Understanding the IOLTA Program
- Lesson 5: Accounting Basics
- Lesson 6: Technology for Trust Accounting
- Lesson 7: Managing Your Trust Account
- Lesson 8: Balancing Your Trust Account
- Lesson 9: Providing Reports to Clients and Third Parties
- Lesson 10: Closing Your Trust Account

Ms. Blackford has also included a number of resources and useful appendices, such as a sample chart of accounts, sample client transaction report, sample reconciliation statement form, and sample trust account journal or transaction register, so you can see for yourself the principles in action.

Whether used as a first-time instruction manual or a quick reference guide, this go-to resource is likely to become an indispensable part of your law firm library.

Visit www.osbplf.org > Practice Management > Resources & Discounts to purchase *Trust Accounting in One Hour for Lawyers*. ABA books are available at a 15% discount off the ABA non-member rate. To claim your discount when ordering from the ABA web store, use promotional code OSBPLF.

Why I Use the Oregon Lawyers' Conference Room

The Professional Liability Fund, in collaboration with the Oregon Attorney Assistance Program, offers Oregon lawyers free use of a conference room in downtown Portland. The conference room is located at 520 SW Yamhill Street, Suite 1025, Portland, Oregon 97204.

Here is what one lawyer had to say about using the Oregon Lawyers' Conference Room.

● **Convenient Location:** I've been using the conference room since it became available, and I really like that it's located downtown. The location makes a lot of sense to me because my clients are middle- and low-income individuals who rely on public transportation to meet me. So it's really an access to justice service.

● **Free of Charge:** One of the biggest expenses in running a law practice, especially for solo practitioners and small firms, is a place to meet clients. For me, the hardest thing to do is pay extra rent every month for an office or meeting space. Having access to this conference room essentially allows attorneys to work for themselves and to craft work-life balance. It's a very supportive service from the PLF and the OAAP.

● **Confidential:** The conference room is a confidential space to meet clients. Some lawyers meet clients at coffee

shops, but that's not confidential. Here, you don't have to worry about someone overhearing your conversation.

● **Safe:** I don't feel comfortable having clients come to my home. I need a barrier between my living space and where I meet clients. The conference room is a safe private meeting room in a quasi-public space. It's very different from meeting someone at the library, even when you're in a closed-off room.

● **Amenities:** The room is always clean and well-maintained. It holds about six to eight people, and it has password-protected Wi-Fi.

● **Convenience of Scheduling:** The online scheduling tool is really easy to use. I like that you have a dedicated account. Once you reserve the space, you receive a confirmation email. I also like that the automated system sends me reminders and keeps track of my prior appointments.

● **Questions?** To reserve space through the online calendar system, go to www.osbplf.org > Practice Management > Oregon Lawyers' Conference Room, or contact Jeanne Ulrich, Oregon Lawyers' Conference Room coordinator, at 503.226.1057.

Excess Coverage Corner

Q. My firm has excess coverage with the PLF. What do we do if we hire another attorney during the year?

A. This is a great question, and one that comes up often. Law firms do change shape over time with attorneys coming and going. We refer to these as midyear changes because they are changes that happen once the coverage period has begun for a given year (January 1 or the date of application). The Excess Program has policies designed to be flexible with ordinary staffing changes like these. This means that for most attorney additions, and departures, the firm does not need to notify the Excess Program midyear.

Excess Coverage is underwritten based on information providing a snapshot of a law firm as of January 1 (or the application date). Since we review that “snapshot” yearly, we want to allow firms flexibility to work with the changes without imposing strict administrative requirements.

There are always exceptions, however, and the Excess Program does need notice of a midyear change in the following circumstances:

1. The number of firm attorneys more than doubles or decreases by more than 50 percent;
2. The firm merges or splits;
3. An attorney leaving the firm is setting up his or her own law office and will begin purchasing PLF Excess Coverage for that new firm;
4. There is a change in any out-of-state branch office;
5. A non-Oregon attorney joins the firm; or
6. The firm or a firm attorney enters into an of counsel relationship with any other firm or attorney.

If you have any questions, please visit www.osbplf.org/excess-coverage/midyear-changes.html or contact Emilee Preble at emileep@osbplf.org.

Tips, Traps, and Resources

MEASURING CLIENT SATISFACTION: Do you have a client-focused practice? Do you know what your clients think about your delivery of legal services? Do you know what your clients value in the delivery of legal services? Do you know how well your firm is delivering what the client values? Do you know what needs improvement? Find out by surveying your clients via a written survey or using one of the electronic surveys like Survey Monkey to check in on what the client values and how well you are delivering. It is important to collect this information to benchmark the quality of the service that your clients feel they are getting from you.

If you get referrals from other lawyers and referral sources, such as CPAs, financial planners, doctors, and clients, do you send a thank-you card to acknowledge the referral? Do you ever ask your referral sources whether they hear positive feedback from the clients they referred to you?

The client survey, or audit is a critical step in benchmarking the quality of the service that your clients, prospective clients, and referral sources feel that they are getting. The key component in conducting the survey is to focus on the needs of the client. Ask what the client values in the delivery of legal services and how well the firm is delivering what the client values.

ATTORNEY CONTACT INFORMATION: If you sign in to the Oregon State Bar Membership Directory – using your Bar number and password – you can see a member’s full listing, which often has more contact information. Lawyers should be aware, however, that individual members choose what they display to the public. The “full listings mode” enabled when Bar members log in also contains that warning, so lawyers can be cautious about whether and what contact information they share.

TIMEKEEPING: If you find that keeping track of your time for billing purposes is a hassle, consider using Chrometa as a personal timekeeper. The software captures your time as you work on your computer, iPhone, or Android so you don’t have to take notes or use a timer. It silently runs in the background and records how long you’ve worked on a specific file or email in a particular application. The time entries are organized in a time sheet that you can use to invoice your clients.

Thank you to the PLF practice management advisors for these tips.

IN BRIEF

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Cases of Note

INSURANCE/CONSTRUCTION DEFECT: In the case of *Fountaincourt Homeowners' Association v. Fountaincourt Development, LLC*, 360 Or 341 (September 22, 2016), the Oregon Supreme Court reviewed a Court of Appeals decision that upheld a trial court judgment in a garnishment proceeding requiring the insurer to pay a judgment in an underlying construction defect claim. The insurer argued, among other things, that the plaintiff was required to prove the precise amount of damages that occurred during the policy period in order to demonstrate that there had been an "occurrence" that triggered coverage under the policies. The court concluded that the insurer's position was inconsistent with the court's holding in *St. Paul Fire v. McCormick & Baxter Creosoting*, 324 Or 184 (1996), and held that the trial court correctly rejected the insurer's argument as a matter of law. <http://www.publications.ojd.state.or.us/docs/S062691.pdf>

INSURANCE/DUTY TO DEFEND: In *West Hills Development Co. v. Chartis Claims, Inc.*, 360 Or 650 (December 8, 2016), the Oregon Supreme Court rejected the defendant insurer's assertion that there is no duty to defend unless the complaint "rules in" coverage. The court reviewed applicable case law, including *Bresee Homes, Inc. v. Farmers Ins. Exchange*, 353 Or 112 (2012), and held that the question is whether, "[r]egardless of the presence of ambiguity or unclarity in the complaint, . . . the court can reasonably interpret the allegations to include an incident or injury that falls within the coverage of the policy."

<http://www.publications.ojd.state.or.us/docs/S063823.pdf>

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: In *Philibert v. Kluser*, 360 Or 698 (December 22, 2016), the Oregon Supreme Court abandoned the "impact rule" as the test for a bystander's recovery for emotional distress resulting from injury to another. The court also rejected a "zone of danger" rule suggested by plaintiffs. Instead the court adopted the test set out in section 48 of the Restatement (Third) of Torts: A defendant "who negligently causes sudden serious bodily injury to a third person is subject to liability for serious emotional harm caused thereby to a person who (a) perceives the event contemporaneously and (b) is a close family member of the person suffering the bodily injury." <http://www.publications.ojd.state.or.us/docs/S063738.pdf>