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### 2017 PLF Assessment

For plan year 2017, the PLF assessment will remain at \$3,500 for the seventh consecutive year.

As in prior years, the actuaries predict that a \$3,500 assessment in 2017 will provide sufficient income during the year to cover the costs of claims and operating expenses. The cost-of-claims figure is based on predictions of the number of cases and the projected cost of those cases.

If you have any questions about the PLF's basic assessment for 2017, please call Jeff Crawford or Emilee Preble at the PLF at 503.639.6911 or 1.800.452.1639.

### PLF Directors Celebrate 30 Years at the Fund

This year, two members of the PLF's management team are celebrating their 30th anniversary at the PLF: Bruce Schafer, Director of Claims, and Barbara Fishleder, Director of Personal & Practice Management Assistance and Executive Director of the Oregon Attorney Assistance Program (OAAP). Their individual and collective contributions to the Oregon legal community and to the success of the Fund over the last 30 years are considerable.



Bruce Schafer



Barbara S. Fishleder

Barbara Fishleder began work at the PLF as a claims attorney in 1986. In 1989, she became the director of the Fund's loss prevention programs. As a result of her support and develop-

ment, the PLF's practice management advisor program (PMA) and personal assistance program (OAAP) are recognized nationally for their confidentiality, scope of services,

and high-quality staff. Her efforts have also made the PLF's services readily available to lawyers, law students, and judges around the state.

Under Barbara's leadership, the PLF's PMA program has made law practice assistance affordable and accessible, through thousands of free office visits, CLEs, practice aids, and publications. In 1999, Barbara authored the first handbook on succession planning for lawyers, *Planning*

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*Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death.* Over the last 17 years, its five editions have been reprinted or adapted by over 40 states and provinces. In addition, in 2014 she created the Oregon Lawyers' Conference Room (OLCR), a free conference room in downtown Portland, which allows Oregon lawyers to meet their clients in a confidential space, even if they don't have an office in the Portland area.

As executive director of the Oregon Attorney Assistance Program, Barbara expanded the services offered by the OAAP to include assistance with mental health issues, career satisfaction, and retirement, in addition to recovery support. Barbara was instrumental in establishing the Oregon statute that protects the program's confidentiality and in creating an amendment to ORPC 8.3(c), which provides an exemption from reporting. She also built on the OAAP's foundation of "lawyers helping lawyers," by creating OAAP attorney counselor staff positions, so that Oregon lawyers would have the opportunity to be helped by a lawyer who is also a professionally trained counselor.

Barbara's contribution to helping Oregon lawyers can also be seen through her creation of the Oregon Lawyer Assistance Foundation (OLAF). OLAF brought to fruition former OAAP attorney counselor Michael Sweeney's vision of a fund that would provide grants and loans to Oregon lawyers who are unable to pay for the mental health and addiction treatment they need.

Through the support of the PLF's CEOs and the PLF and OSB governing board members, Barbara has been able to develop crucial services that both assist Oregon lawyers and advance the mission of the PLF. Her sincere dedication, foresight, and hard work have resulted in the PLF's programs positively impacting the lives and careers of attorneys around the state.

Bruce Schafer joined the PLF Claims staff in 1986 and was appointed Director of Claims in 1991, a position he has held since. Originally from Ohio, Bruce graduated from Vassar College and Emory School of Law. During his years with the PLF, Bruce has handled or overseen the handling of more than 20,000 claims and manages a team of claims attorneys who collectively handle an average of 850 claims per year. Bruce is a frequent writer and speaker, locally and nationally, on the topics of lawyer professional liability and professionalism. In addition to his many volunteer activities, Bruce is a mediator for Small Claims Court in Multnomah County.

## New CLEs Available

The following CLEs, presented or updated in 2016, are now available in multiple formats on the PLF website:

- Client Intake: Streamlining Procedures and Converting Prospects Into Clients
- The Next Stage: Planning Now for the Retirement That You Want
- Top Technology Tools to Streamline Your Practice
- MyCase Demo
- Law Firm Marketing: Build Your Brand With Content, Social Media and SEO
- Introduction to Practice Management Software
- How to Run a Profitable Business: Key Numbers You Need to Know
- Happier Clients, Higher Profits
- Growing a Law Firm With Lean and Agile Practices
- Health Insurance Today, at 65, and in Retirement

To order these or other CLE programs, go to [www.osbplf.org](http://www.osbplf.org), select CLE>Past CLE. If you have questions, call Julie Weber in PLF CLE Resources at 503.639.6911 or 1.800.452.1639.

Over the years, Bruce has earned a reputation as a strong, confident advocate for Oregon lawyers. He combines a deep understanding of Oregon malpractice law and compassion for lawyers facing claims – all the while maintaining the highest standards of integrity and professionalism. Under his leadership, PLF claims handling is highly valued and respected by Oregon lawyers. In post-claim surveys, lawyers consistently rate their experience with Bruce and his claims team as satisfied or very satisfied in the range of 98% to 99%.

In addition to excellence in claims handling, Bruce has created a legacy within the PLF Claims Department and among the attorneys and firms that defend Oregon lawyers. Besides mentoring a seasoned group of claims attorneys at the PLF, he has also cultivated a knowledgeable and dedicated panel of outside lawyers in various claim specialty areas. His efforts have reached across generations through training initiatives designed to ensure that knowledge and experience are passed on to a younger and more diverse group of defense lawyers. When Oregon attorneys have a claim, they can be confident that they will be matched with

defense counsel of the highest caliber who share in the values and mission of the PLF.

When the PLF was formed in the late 1970s, part of the vision was a structure in which local expertise in handling malpractice claims would result in fairer outcomes for Oregon lawyers and the public they serve. No longer would the specter of malpractice claims and coverage be a source of uncertainty. With a stable institution to handle claims, Oregon lawyers could focus on the practice of law. More than an insurer, the PLF would improve the quality of the practice of law in Oregon by improving standards of care through consistent and thoughtful claims handling. This proactive approach has allowed the use of creative claims handling techniques, such as claim repair, things rarely seen in the commercial insurance context. Perhaps more than anyone else, Bruce has been responsible for making this vision real. Observers from across the country and Oregon lawyers themselves now recognize the beneficial effect that the PLF has had on the legal culture in Oregon.

Oregon lawyers – and ultimately the public – have benefited because of the work of Barbara Fishleder and Bruce Schafer. Congratulations to Barbara and Bruce for their 30 years at the PLF! Thank you both for your dedicated service and for your continued invaluable contributions to the legal profession in Oregon.

## P.I. Settlements and Welfare

Your client has been in a car accident, and you are representing her on a personal injury claim. If she is also receiving Temporary Assistance to Needy Families (TANF) (formerly Aid to Families with Dependent Children [AFDC]) or medical assistance (i.e., Medicaid or Oregon Health Plan), you need to consider two important issues before you enter into a settlement. First, the State will attach a lien on the settlement to the extent of all assistance (cash and medical) it has provided since the date of the injury. Second, the client's net settlement may affect eligibility for TANF and medical assistance.

### State Lien on Settlement

ORS 416.540(1) provides: “[T]he Department of Human Services and the Oregon Health Authority shall have a lien upon the amount of any judgment in favor of a recipient or amount payable to the recipient under a settlement or compromise for all assistance received by such recipient from the date of the injury of the recipient to the date of satisfaction of such judgment or payment under such settlement or compromise.”

This provision grants the Department of Human Services (DHS) and the Oregon Health Authority (OHA) a lien against any judgment on or settlement of a claim for damages for personal injuries. ORS 416.510(5), 416.540(1). This provision does not include SAIF (State Accident Insurance Fund) or workers' compensation claims. It also excludes claims that are not for personal injuries, such as claims for violations of the Fair Housing Act (without emotional distress damages).

TANF and medical assistance applicants and recipients are required to report to DHS,<sup>1</sup> the OHA, and their coordinated care organization (CCO) that they have made a claim for damages for personal injuries or they have begun an action to enforce a claim. They must do so within 10 days of initiating the claim or beginning the action to enforce the claim. This notification must include the names and addresses of all parties against whom the action or claim is brought, a copy of each claim or demand, and, if an action has been brought, the case number and county where the action is filed. ORS 416.530; OAR 461-195-0310. If the TANF or medical assistance recipient fails to report the claim for personal injuries and the claim is settled before DHS, the OHA, or the CCO has the opportunity to satisfy its lien, the State will have a claim against your client to the extent of the lien. OAR 461-195-0310; ORS 416.610.<sup>2</sup>

Although a lien could exceed the amount of the personal injury claim, DHS rules permit the recipient to keep enough

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of the net settlement to pay for attorney fees, medical costs, and other costs and expenses. OAR 461-195-0305. A presumption exists that the proceeds are for payment of medical expenses, unless otherwise identified. OAR 461-195-0305. A certain amount also may be set aside for future medical expenses, especially if the injured party is a minor. ORS 416.590, 416.600; OAR 461-195-0320.

If a child in a TANF family is injured, the State will assert a lien only to the extent of medical assistance provided for that child. The State will not assert a lien for the cash assistance received. However, if an adult in the family is injured, the State will attempt to attach a lien for the amount of both cash and medical assistance that can be attributed to the personal injury. For medical assistance, it will be the amount paid for the injured individual. For TANF, depending on the circumstances, it may include assistance that has been provided to the entire family. If the family has medical coverage through a CCO, the OHA may assign its lien to the CCO for recovery. ORS 416.540(3); OAR 461-195-0321.

### **Effect of Settlement on Eligibility for Assistance**

Once the matter of the lien has been settled, it is essential to consider the effect of the final settlement on your client's eligibility for public assistance programs.

When the family receives a personal injury settlement, the net proceeds after payment of the lien, costs, attorney fees, etc., will be compared with the TANF resource limit. The family will be ineligible for TANF only for so long as they retain proceeds in excess of that limit. Once the family spends the money down to the resource limit, the family will again be eligible for TANF benefits. If the client has other resources, those resources, along with the personal injury settlement proceeds, will count toward the resource limit for all public assistance programs.

TANF families participating in Oregon's Job Opportunities and Basic Skills (JOBS) program have a resource limit of \$10,000. For all others, the resource limit is \$2,500.<sup>3</sup> Thus, those families participating in the JOBS program can receive net personal injury settlement proceeds of up to \$10,000 before it affects their TANF benefits.<sup>4</sup> OAR 461-160-0015. As long as they receive TANF, they will continue to qualify for medical assistance.

For Supplemental Nutrition Assistance Program (SNAP) benefits (formerly food stamps), the personal injury settlement proceeds are not counted at all if the family is "categorically eligible." A family is categorically eligible if the family is also receiving TANF or Supplemental Security



## **ABA Techshow 2017**

On March 15-18, 2017, the ABA will sponsor its annual legal technology conference and expo. The ABA Techshow includes over 50 educational and training sessions in 15 different tracks and a two-day expo of more than 100 technology companies. For more information, go to [www.techshow.com](http://www.techshow.com)

Register using the PLF's program promoter code EP1717 and receive an exclusive discount on the standard registration rate. Call DeAnna Z. Shields for more information at 503.639.6911.

Be an "early bird" and save another \$200 if you register by January 30, 2017. Large group discounts are available if registering before Feb. 6, 2017.

Income (SSI),<sup>5</sup> has a household member working under a JOBS Plus agreement, or has income less than 185 percent of the federal poverty level and does not have liquid assets (assets that are easily accessible and do not need to be sold to access their value) in excess of \$25,000 and has received a pamphlet about Information and Referral Services. OAR 461-135-0505.

For families who receive SNAP benefits but do not fit into one of the categories listed above, the personal injury settlement proceeds are considered a resource and will be compared with the SNAP resource limits.<sup>6</sup> OAR 461-140-0120. If the proceeds exceed those limits, the family will be ineligible until the proceeds are spent to below the SNAP resource limit. Categorical eligibility lasts only as long as the family is eligible for the other assistance program that makes the family categorically eligible. Alternatively, if the eligibility is based on income less than 185 percent of the federal poverty level, having liquid assets not in excess of \$25,000, and receipt of the Information and Referral Services pamphlet, then categorical eligibility lasts only for the duration of the SNAP certification period of one year. Once the client is no longer categorically eligible, the client will have to spend down to be below the SNAP resource limit before reapplying for SNAP benefits.

For SSI, the personal injury settlement proceeds are considered income in the month received and re-

sources in the following months. 20 CFR §§416.1121(f), 416.1207(d). The individual will be ineligible for SSI in the month the settlement is received if it exceeds the income limits. In the following months, the individual will be ineligible as long as the remaining funds, along with the individual's other countable assets, exceed the resource limit of \$2,000 for an individual and \$3,000 for a couple. 20 CFR §416.1205. Once the money is spent down to below the resource limits, the individual or couple will re-qualify. An overpayment for the month in which the money was received is likely, but that overpayment should be waived as long as the client promptly reports to the Social Security Administration (SSA) that he or she received the settlement. As with TANF, as long as the client receives SSI, the client will continue to qualify for medical assistance (i.e., Medicaid).

Each of these programs (TANF, SNAP, and SSI) has limits on the value of noncash resources that the individual can retain. Therefore, the client should be cautious about how money is spent to reduce it below the resource limits. Some items, such as motor vehicles, have separate value limits; and some or all of the equity value may be excluded. The rules are different for each program. Other resources are excluded regardless of value, such as the client's home, furniture, household goods, and personal belongings. See OAR Chapter 461, Division 145; 20 CFR §416.1216.

The client cannot give away the proceeds of the settlement in most cases. The client must receive some value in return. Most programs have a transfer-of-assets disqualification period, which may be lengthy depending on the benefit and the amount transferred.

There is no resource limit for Social Security Disability Insurance (SSDI) benefits. Thus, a personal injury settlement will not affect those benefits. However, some clients may receive a combination of SSDI and SSI benefits. The settlement could affect the SSI portion of the benefits. Many people confuse SSDI and SSI benefits. A client may know that he or she is on "disability" but may not know which program is involved. Since the income and resource

rules are very different, it is important to verify whether the client receives SSDI, SSI, or both.<sup>7</sup>

If you are representing a client on a personal injury claim who receives public assistance benefits, it is advisable to call your local Legal Aid or Oregon Law Center office for advice before finalizing the terms of the settlement.

BETH ENGLANDER  
OREGON LAW CENTER

*Thanks to Lorey H. Freeman and Karen Berkowitz for their assistance with a previous version of this article.*

<sup>1</sup> They must report to the Personal Injury Liens Unit, PO Box 14512, Salem, OR 97309, 503.378.4514, FAX: 503.378.2577. OAR 461.195.0310.

<sup>2</sup> ORS 416.610 only gives the OHA, not DHS, the right to file a claim against an individual who fails to give notice and settles a claim before the OHA can satisfy its lien for medical assistance. DHS, by rule, grants itself and CCOs this authority with respect to TANF benefits and recipients of Medicaid benefits through a CCO. OAR 461-195-0310(6).

<sup>3</sup> OAR 461-160-0015.

<sup>4</sup> Includes receipt by the attorney representing the client, so long as the attorney has settled all claims and can disburse the money to the client.

<sup>5</sup> Supplemental Security Income (SSI): a federally funded disability program for low-income individuals who do not qualify for Social Security Disability Insurance (SSDI) or whose monthly SSDI benefit payment, and other income, is \$733 or less.

<sup>6</sup> \$3,250 for households with at least one member who is age 60 or over and \$2,250 for all other households. OAR 461-160-0015.

<sup>7</sup> You can get this information directly from the Social Security Administration (SSA) with a written release, or you can call SSA's toll-free number (1.800.772.1213) with the client present. SSA will verify the client's identification and will give the client the necessary information.

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# Preserving Claims of Attorney-Client Privilege in Discovery

The Oregon Rules of Civil Procedure nowhere explicitly address claims of attorney-client privilege or the creation of privilege logs. Cf. Fed R. Civ. P. 26(b)(5). Because of this lack of a specific provision in the rules and the time and expense involved in preparing a log, Oregon lawyers frequently do not prepare one. However, when a discovery dispute involving claims of attorney-client privilege arises, it may be impossible to adjudicate the dispute in the absence of a log. Some Oregon state-court trial judges look for guidance to a 2005 Ninth Circuit case, *Burlington Northern & Santa Fe Railway Co. v. U.S. District Court*, 408 F.3d 1142, to answer the question of whether a log is required to preserve privilege claims. *Burlington* charts a commonsense approach to privilege claims and logs that is worth considering if you believe that privileged documents may be implicated in one of your cases.

In *Burlington*, plaintiffs brought an environmental contamination action against a railroad. As is often the case, discovery was “characterized by delay, misunderstandings, and increasing acrimony between the parties.” The railroad responded to plaintiffs’ first document requests within the 30 days contemplated by Federal Rule of Civil Procedure 34 but did not produce a privilege log at that time (although both parties expected that one would be produced). No documents were produced, but plaintiffs were invited to inspect docu-

ments at the railroad’s premises. Over time, plaintiffs became convinced that documents were being improperly withheld and eventually moved to compel. Before the motion was ruled on, the railroad produced a privilege log, which in turn was modified several times as the parties sparred over discovery for over a year. On plaintiffs’ second motion to compel, the trial court ordered all withheld documents produced, reasoning that the railroad waived its privilege objections by not producing a log at the time it responded to the document requests.

On mandamus, the Ninth Circuit affirmed the trial court but rejected a per se rule that a privilege log must be produced at the time discovery responses are served. The court at the same time held that boilerplate objections or blanket refusals in discovery responses were insufficient to preserve a privilege claim. The court set forth several factors to be applied “in the context of a holistic reasonableness analysis” to determine whether privilege claims were waived if a log was not produced at the time discovery responses were served, including (1) the degree to which the objection or claim of privilege is sufficient to enable the opposing party and the court to evaluate whether a withheld document is privileged; (2) the timeliness of the objection; (3) the scope of document production; and (4) other circumstances of the case that make responding to discovery easy or difficult.

Although *Burlington* derives from the Federal Rules of Civil Procedure, Oregon state court trial judges have nonetheless referred to it in discovery disputes – no doubt because the case suggests sensible practices that will help courts to evaluate privilege claims. Because mere boilerplate objections may ultimately be deemed insufficient to preserve a privilege claim or to provide sufficient information for an adverse party or the court, a log is advisable and, depending on the circumstances, may need to be produced at an early stage of discovery. Oregon practitioners should therefore consider at the very outset of document production whether they will withhold documents as privileged, and whether the magnitude of discovery will permit early compilation and production of a log. Although serving a log with initial discovery responses may not be a requirement, practitioners should be wary of delaying too long in producing a log. Oregon judges have noted at local CLE events that they are unlikely to uphold a claim of privilege absent a disclosed privilege log.

## PLF Directors

The Oregon State Bar Board of Governors has appointed two new members to the PLF Board of Directors. Attorneys Megan Livermore from Eugene and Holly Mitchell from Portland begin their terms in 2017. They join current PLF board members Teresa Statler (Chair, Portland), Dennis Black (Vice-Chair, Medford), Tom Newhouse (Secretary-Treasurer, Portland) (public member), Tim Martinez (Salem) (public member), Saville Easley (Portland), Robert Raschio (Canyon City), and Molly Jo Mullen (Portland).

We extend our warmest thanks to outgoing board members Robert Newell of Portland and Julia Manela of Eugene for their years of excellent service.

ANDY MCSTAY  
DAVIS WRIGHT TREMAINE LLP

# What's Backing Up Your Data?

Data is essential to a law office. Theft or loss of data can devastate both clients and lawyers, making proper storage and backup of data critical to the operation of a law firm. Most lawyers have no problem storing their data. Data back-up, on the other hand, may not be at the forefront of lawyers' minds for many reasons.

The importance of data backup cannot be overstated. Imagine your laptop or desktop suddenly stops working or is lost or stolen. All the data you once took for granted is now gone. Some files can be recreated while others cannot.

Additionally, a defective or stolen computer means all the software applications and programs installed on your computer are also gone. You may be able to reinstall some software and programs but may need to repurchase others. The time, money, and energy put into restoring your computer – data and all – may cost more than the price of backing it up in the first place.

While a full computer backup done by disk imaging or disk cloning is preferable to just data backup, the latter is a first step for many lawyers. This article will focus on best practices to back up your data. First, let's distinguish between data storage and data backup.

## Data Storage

Storage is the location where your files are saved. For small firms and solos, this location is usually the internal hard drive of a desktop or laptop computer. For bigger firms, it's probably a file server. Other devices that store data include USB memory sticks, external hard drives, external solid-state drives, optical media like CDs, other portable or desktop external drives, and cloud data storage providers such as Drop-Box and Google Drive.

## Data Backup

Backup is the act of creating and keeping a copy of your saved files in a device different from where they are stored. After you work on a file, you save it to your normal storage location (e.g., computer's internal hard drive or file server). You then periodically make a copy of these saved files or other data to a separate device. The words "different" and "separate" are crucial. You cannot use the same device to both store and back up your data. Some storage devices mentioned above can be used to back up data, while others are not suitable for the task.

## Best Practices to Back Up Data

The best way to back up your data is to use both onsite backup and offsite backup together.

## Onsite Backup

Onsite backup is periodically backing up your data to a separate local device. The local device is usually kept in your office or home. Below are a few options for local onsite backup devices.

- **USB Flash Drive:** A universal serial bus (USB) flash drive, also known as a thumb drive, is a small portable device that plugs into the USB port of a computer. It is used to store and transfer information from one computer to another. This device is good for temporary storage of data, but it should not be used as a backup tool for several reasons.

One, it's not big enough. A thumb drive simply does not have enough storage density to back up all data on your computer. Two, it's prone to data loss. Improperly removing the device from your computer can cause complete data loss. It could also fail due to temperature fluctuation. Three, it's easily misplaced or lost. Its small size makes it vulnerable to slip out of your briefcase, pocket, or purse. You may plug it into one device and then forget to retrieve it.

- **External Hard Drive:** An affordable and easy-to-use storage device that can be used to back up your data is an external hard drive. This is a device you plug into your computer, usually with a USB cord. It allows you to store the backed-up data in a location separate from the computer's internal hard drive. You can buy a 2-terabyte external hard drive for about \$100 at most retail stores and even cheaper online.

One disadvantage of using an external hard drive is that it can be connected to only one computer at a time. A firm with two or three attorneys with their own separate computers wishing to share or use only one external hard drive must wait for one computer to be backed up before another computer can be plugged in. It is better for each attorney to use his or her own separate external hard drive to back up the data on his or her own individual computer.

- **External Solid-State Drive:** Another device that can back up data is an external solid-state drive (SSD). SSD is different from a hard drive in that SSD uses a memory microchip to store information rather than a spinning disk. Because it has no moving parts, SSD is faster and more durable than a hard drive. SSD is better at resisting shock and handling motion, so it's less likely to crash or fail when dropped or moved around. However, SSD offers less capacity per drive and is much more expensive than an external hard drive. A 1-terabyte SSD costs about \$400 to \$500. However, considering the benefits it offers, it may be worth the price.

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● **Network Attached Device:** Law offices with a computer network might consider using a network attached storage (NAS) as a way to back up their data. NAS is a hard-disk storage device that connects to your network rather than to your computer like an external hard drive. Therefore, it can back up all computers on the network at regular intervals. All contents – including settings, programs, and files – of all computers can be copied onto the NAS.

This device uses one or more internal hard drives to store data. You can add more drives for extra storage space. If two or more hard drives are used, the NAS can be set to automatically copy the content of one drive to another. This redundancy helps ensure your data will continue to be backed up even if one drive fails. As a storage device, NAS allows attorneys to store all files in a single secured location. You can then access and share files from any device connected to the network.

One notable drawback of using a NAS is that it is harder to set up than an external hard drive. You may need an IT person to set up the NAS for proper backup.

Onsite backup is necessary but not a long-term backup solution. Your NAS or external hard drive will come in handy when your computer fails. You can easily restore your computer using the backup. However, these onsite backup devices can be destroyed in a fire or flood or stolen in a house or office robbery. Onsite backup is just the first step to fully protecting your data.

## **Offsite Backup**

Your backup strategy is incomplete without an offsite or remote backup plan. It is the offsite backup that will protect your data from cataclysmic events.

Offsite backup means backing up data to a different geographic location from where your original stored and onsite backed-up data are physically kept. One simple and affordable offsite backup measure is to have your data backed up to two devices. You keep those two devices in different locations. For example, you could keep one device at your office and take the other one home. If you practice from your home, then you could keep the other device at a trusted family member's home or even in a safe deposit box at the bank.

This offsite backup method seems like a sound plan, but it's not always optimal. You might forget to retrieve it from the offsite location. You or your family member might misplace it. Because it is out of sight, it might be out of your mind. You might end up backing up the offsite device only a few times a year. While this method is better than none,

it still does not provide you with real geographic separation between your original stored data and your backed-up data. What happens if your entire city or town is hit with a natural disaster like a wildfire or earthquake? All of these catastrophic events have occurred in Oregon before and will likely happen again.

## **Cloud Data Backup**

If you are looking for a better offsite backup option with geographic separation, then consider using a cloud data backup service. Cloud backup (also called online backup) is backing up your data to a remote cloud-based server managed and maintained by a service provider. Backed-up data is stored in multiple data centers across the United States or the world. Your data will be safe in the event of a local disaster. One major advantage of using a cloud backup service is that the backup is done automatically and you don't have to worry about doing it on your own. You can set your own backup schedule and go about your practice without having to think about it again. Most providers have continuous backup where changes made to your files are backed up immediately in real time. Reputable vendors have strong three-way encryption that protects data locally, in transit, and at rest. They offer features such as automatic versioning of files and automatic data de-duplication. Some top vendors include SpiderOak, Carbonite, CrashPlan, Mozy, SOS Online Backup, and Box.

Despite the distinct benefits of cloud backup, there are also disadvantages that attorneys should be aware of. First, the initial backup or first full recovery may take a very long time. Second, if you have no Internet connection, you cannot access your data. Third, no data that exists on the Internet can be 100% safe even with the highest form of encryption. However, the drawbacks are still outweighed by the advantages, and you should strongly consider using cloud backup as a part of your overall plan.

It is necessary to vet the vendors by carefully reviewing their user agreements and terms of services. To learn more about how to choose the right cloud data backup provider, please see our practice aid titled "Online Data Storage Providers" available at [www.osbplf.org](http://www.osbplf.org). Select Practice Management>Forms>Technology.

## **Conclusion**

You cannot afford to lose data. By taking a few precautions now and implementing a plan, you will be saved from headaches, anxiety, and lost time and money when a data disaster strikes.

HONG DAO

PLF PRACTICE MANAGEMENT ADVISOR



## Avoiding Unpaid Fee Traps

When a client is faced with a lawyer's bill, some may react by finding dissatisfaction with the lawyer's work and refusing to pay. Attempts to recover unpaid fees, such as sending the client to collections or suing the client, all too often draw a counterclaim for legal malpractice or an ethical complaint. Even if the client is clearly in the wrong for failure to pay, lawyers usually regret having ever initiated the fee collection action. The time, energy, and expense to recover unpaid fees and defend a malpractice claim or ethical complaint make alternatives to the fee collection process much more attractive. A lawyer's efforts are often better spent on preventing the problem of unpaid fees by increasing the probability of payment, and then, if necessary, utilizing alternatives to the fee collection process.

Here are some steps you can take to avoid falling into the most common traps:

### Screen New Clients

- Avoid clients who have unrealistic expectations or have fired attorneys in the past. Clients who are unhappy with their attorney's services are often the same clients who are unhappy with any bill they receive, regardless of the amount.
- In appropriate cases, you may want to consider whether the person will be financially able to pay for your services by inquiring about employment status, monthly income, previous bankruptcies, and/or delinquent finances.

### Document Billing Procedures and Get Your Money Up Front

- Be explicit and clearly explain your fee structure and billing policies with your client from the outset of representation. Clients often don't understand a lawyer's billing methods and are confused when they receive a bill. For example, clients may not understand the actual amount of time spent in terms of tenths of an hour, so explain that 0.5 reflects 30 minutes of work. If you bill for things like copying costs, explain that so clients are not surprised.
- Specify the information in a written fee agreement and engagement letter and provide copies to the client. The PLF website and BarBooks publication "Fee Agreement Compendium" are great resources for sample fee agreements and engagement letters.
- One of the most proactive approaches to avoid collection traps is to utilize "replenishable" ("evergreen") retainers, which require the client to maintain a specified retainer balance rather than setting up "accounts receivable."

### Keep the Client Updated on Your Estimate of Fees and Costs

- Provide your client with an initial estimate of fees and costs and update the estimate regularly. Also provide your client with a general overview of the steps that you will take

throughout the case, such as the filing of certain motions, research, and discovery analysis. This will enhance communication with your client and will help your client to accurately budget. The amount of a bill and the work that went into that bill should not come as a surprise to the client. While it is not always possible to estimate fees and costs up front, certain parts of every case can be estimated with some degree of certainty. Examine your overall fees and costs from similar past cases to develop an estimate.

- If it is not possible to provide an estimate for a particular aspect of a case, explain why an estimate is not possible and inform clients that you will provide them with that information if it becomes available.
- Give the client an anticipated overall timeframe for the case as well as the proposed strategy. When clients feel informed about their case, they are often happier with your representation and less inclined to be unhappy about their bill.

### Bill and Collect on a Regular Basis

- Create and send out detailed bills on a regular basis, preferably monthly. Most people receive their paychecks the 1st and 15th of the month, so it is recommended that you send out bills by the 25th of the month so that clients receive the bill before or soon after they are paid at the beginning of the month. When bills are sent out regularly, clients see it as a positive sign that you are working on their case and that you maintain an organized practice. Regular bills also act as an additional form of communication, allowing clients to see the work being done and the progress being made on their case.
- Include a detailed narrative in each bill, specifying the date the work was completed, the amount of time spent, each individual charge, and the total amount due. If you were paid a retainer up front, also specify the amount remaining, if any. If you entered into an agreement for a replenishable retainer, specify the initial retainer balance, fees and costs incurred, total funds disbursed from the retainer, balance remaining, and the amount due in order to maintain the original balance.
- If you anticipate that a bill will be significantly higher than the previous month – for example, if you were preparing for trial – notify the client beforehand so the client is not surprised at a bill for such a large amount. Also consider including an additional "trial deposit" in the original fee agreement that must be paid prior to the trial date if you anticipate that preparation for and participation in trial will cost more than the original retainer amount.
- Specify the due date on all bills and establish a collection procedure that follows a timeline. For example, if you require payment within 30 days of receipt of the bill, set up a procedure to send past-due notices to clients on day 31. If

*Continued on page 10*

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a client still has not paid by day 40, send another notice or give the client a call. Institute a system that automatically sends statements and past-due notices at regular intervals, or enter a repeat tickler on your calendar reminding you or your staff to take the necessary actions in each case. Confronting clients with large unpaid bills may provoke hostile feelings, and they will be less inclined and possibly unable to pay. Be sure to consistently follow the procedure. Clients may take advantage of an opportunity to avoid payment if they think there are no consequences.

### **Actions to Take Before You Sue or Pursue Debt Collection**

- Call the client. If the client still has not paid by the second notice, first call the client to determine the reason for nonpayment, whether it is due to personal circumstances or to the client's being upset with you. If the client is unhappy, you can address the issues early on. Things will only get worse with time.
- Suggest alternative payment options. If a client is unable to pay the full amount due, suggest installment payments as an alternative, with a clear expectation of installment amounts and due dates. Or offer an incentive, such as a discount if paid within 10 days.
- Consider withdrawing from the case. If you have taken all of the suggested steps and the client is still either unable or unwilling to pay the bill, consider withdrawing from the case, if possible. Follow the necessary ethical and procedural requirements, and begin the process sooner rather than later.

In the interim you must continue to perform legal services for your client even if the client has not paid.

Most lawyers gain clients through happy clients. Fee collection actions and suits rarely result in anything but unhappy clients, which can hurt your practice in the long run. Even if the judgment might be collectible, the pursuit of collection can result in your client badmouthing you to others and can also cause the upset or angry client to file a malpractice claim or ethical complaint against you. Even though these statements and claims lack merit, they can cost you goodwill, time, energy, and sometimes even money. Avoiding fee dispute litigation is worthwhile. Instead, explore alternatives, such as the Oregon State Bar Fee Dispute Resolution Program or some other alternative dispute resolution method, to get your fees paid and also keep a happier client. For more information about the bar programs, go to [www.osbar.org/feedisputeresolution](http://www.osbar.org/feedisputeresolution).

If you still decide to send a delinquent fee out for collection, we suggest that you have another attorney review your file to help you objectively assess whether you have made any mistakes. This review will also help you make a more informed choice whether to proceed with collections.

Ultimately, the risks often outweigh the benefits when sending the client to collections or suing for fees, and your time and energy are better spent developing a system to avoid the collections process altogether. The alternatives require careful planning and diligent monitoring, but generally won't make a bad situation worse.

RACHEL EDWARDS  
PLF PRACTICE MANAGEMENT ADVISOR

*For more practice management information, call 503.639.6911, or go to [www.osbplf.org](http://www.osbplf.org).*

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## Proposed Amendments to ORCP

On September 10, 2016, the Council on Court Procedures voted to publish proposed amendments to eight of the Oregon Rules of Civil Procedure (ORCP). The amendments being published are to Rules 9, 22, 27, 36, 43, 45, 47, and 57, including proposed amendments regarding service by email, grounds for limiting discovery, and production of electronically stored information (ESI).

Written comments regarding the proposed amendments may be sent by mail or email to:

Council on Court Procedures  
c/o Lewis and Clark Law School  
10015 SW Terwilliger Blvd.  
Portland, OR 97219

ccp@lclark.edu  
[www.counciloncourtprocedures.org](http://www.counciloncourtprocedures.org)

The Council will hear oral comments and will take final action on the proposed amendments at its December 3, 2016, meeting, beginning at 9:30 a.m., at the Oregon State Bar Center, 16037 SW Upper Boones Ferry Road, Tigard, OR 97224.

## 2017 Excess Coverage

Applications are now available for 2017 PLF Excess Coverage. As in the past, coverage is available to Oregon law firms with limits above the \$300,000 mandatory coverage ranging from \$700,000 to \$9.7 million. Included with all Excess Coverage is a Cyber Liability and Breach Response Endorsement. This additional coverage assists law firms in the event of a data breach or other cyber event. To learn more about Excess Coverage, or to download a 2017 Application, please visit [www.osbplf.org](http://www.osbplf.org).

Each year we make changes to the Excess Application to ensure we are keeping up with changes to the practice of law in Oregon and past losses. The most notable shift we have seen over the past several years is the rise in severe claims brought against lawyers under ORS Chapter 59 dealing with Oregon Securities. These claims are complicated and costly. It has been a challenge for us to determine which firms are exposed to this particular risk because the definition of “Securities” in ORS Chapter 59 is so broad that many aspects of general business or real estate practices may be impacted. In our experience, some firms having significant exposure under ORS Chapter 59 are either unaware of that risk entirely or unaware that some lawyers in their firm are practicing in this high-risk area.

For 2017, we are addressing this issue directly by re-drafting the Securities Law Supplement and adding a new Business Law Supplement to the application. It is our hope that these changes will clarify to firms what type of business

and real estate work generates exposure under ORS Chapter 59 and will provide the PLF with better information for evaluating the specific risk exposure a firm may present. We are acutely aware that firms carrying our coverage appreciate a clear and straightforward application process. Although these new and reworked supplements may require a bit more time on behalf of a firm to complete, we think the information they will provide to both firms and underwriters is invaluable.

Nearly all firm premiums will increase in 2017 because of the rise in the number and severity of claims experienced by the Excess Program. This increase is simply an unavoidable consequence of the cost of past claims experienced by the reinsurers backing our program. We anticipate the changes made to the 2017 Application will better identify firms practicing in areas of law with ORS Chapter 59 exposure so that we might better underwrite that risk, and perhaps decrease the number of claims we experience moving forward.

Renewing firms should be aware that the application deadline has been moved to December 12, 2016. This earlier deadline is necessary due to the increased underwriting review necessitated by the updated supplements. New firm applicants may submit an application at any time throughout the year.

If you have questions about the Excess Program, please contact Emilee Preble (ex. 413) or Jeff Crawford (ex. 455) at 503.639.6911.

## IN BRIEF

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## Cases of Note

**UNDERINSURED MOTORIST BENEFITS (UIM):** In *Kiryuta v. Country Preferred Ins. Co.*, 360 Or 1 (July 14, 2016), the Oregon Supreme Court held that the defendant insurer was not entitled to the attorney-fee safe harbor protection of ORS 742.061(3). The defendant's answer in arbitration included a broadly worded affirmative defense that plaintiff's UIM benefits were subject to "all terms and conditions" of the insurance policy. The court ruled that the affirmative defense opened the arbitration to issues beyond motorist liability and damages due.

**TORTS / NEGLIGENCE:** In *Piazza v. Kellim*, 360 Or 58 (July 21, 2016), the Oregon Supreme Court, through a Fazzolari foreseeability analysis, held that the plaintiff alleged facts that were sufficient to permit a reasonable juror to find that plaintiff's death was a reasonably foreseeable result of defendants' conduct. The plaintiff, who was a foreign exchange student under the supervision of defendant Rotary International, was shot and killed while standing in line on a public sidewalk outside a teenage nightclub, which was also a defendant.

**EMPLOYER LIABILITY LAW:** In *Yeatts v. Polygon Northwest Co.*, 360 Or 170 (August 4, 2016), the Oregon Supreme Court held that the plaintiff had presented sufficient evidence to withstand a motion for summary judgment on his Employer Liability Law (ELL) claim (ORS 654.305 to 654.336). The plaintiff, who was an employee of the subcontractor, claimed that the defendant general contractor retained a right to control the method or manner in which the risk-producing activity was performed. The general contractor retained the right to require additional safety measures and to inspect the work site in its entirety, and there was no contractual provision that placed sole responsibility for safety measures on the subcontractor.

**ABUSE OF VULNERABLE PERSONS:** In *Wyers v. American Medical Response Northwest, Inc.*, 360 Or 211 (August 11, 2016), the Oregon Supreme Court held, in a case of statutory construction, that ORS 124.100(5) (action for permitting the physical, including sexual, or financial abuse of a vulnerable person) requires constructive knowledge, not actual knowledge, of a plaintiff's abuse. The court held that the statute applied if an employer such as AMR knowingly schedules an employee to work on an ambulance run under circumstances in which a reasonable person should have known that the sort of abuse inflicted on the plaintiffs (sexual assault) would occur.