



LAW UPDATES

Potential Malpractice Trap in the OTCA

By Marilyn Heiken

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

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

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

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



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Message from the CEO

As we begin 2019, we are excited to successfully complete our second year having a fully paperless assessment and exemption process with the lowest assessment since 2011. For the first time, we also fully automated the excess application and binding of coverage process.

I am often asked how a lawyer should determine whether to obtain excess coverage. Quite simply: look at your files. If you are involved in litigation in which the prayer in any case is at or near \$300,000, then the answer is yes. If you are involved in transactions in which the potential loss to your client is at or near \$300,000, the answer is yes. Even if the answer to those questions is no, remember that the \$300,000 mandatory limit is in the aggregate for the entire year. Mistakes happen. Even when the lawyer does not make a mistake, losses are difficult for clients to absorb, and they often look to their lawyers as responsible. While the mandatory PLF

coverage includes a \$50,000 expense allowance, if that is exhausted, the \$300,000 limit begins to erode. Lawyers often tell me that the cost of excess coverage, either through the PLF or on the commercial market, is far cheaper than they expected. I urge you to consider whether you or your firm is adequately protected.

2019 also marked the first year in which lawyers will need to comply with Oregon's new Mental Health and Substance Use one-hour MCLE requirement. The OAAP, the PLF, and the Oregon State Bar partnered to present a free CLE on January 9, 2019. That CLE is available on the Bar's website. If we all help to take the stigma out of mental health impairment and care, then more lawyers may seek and get the help they need. The PLF has additional CLEs on its website that also qualify for the new MCLE category. I urge you to review these and all the other resources available to you.

ABA TECHSHOW February 27 - March 2, 2019 Register with PLF Discount Code

The ABA TECHSHOW Conference and EXPO is where lawyers, legal professionals, and technology all come together. For three days, attendees learn about the most useful and practical technologies available. The variety of CLE programming offers a great deal of education in just a short amount of time.

But there's more to ABA TECHSHOW than the educational programs; attendees also get access to the EXPO Hall where legal technology vendors are eager to demonstrate their helpful products and services. Touch, Talk, and Test your way through more than 100 technology products.

Mark your calendars for February 27-March 2, 2019, at the Hyatt Regency Chicago for ABA TECHSHOW,

the best conference for bringing lawyers and technology together.

SAVE ON REGISTRATION FEES:

Use the Professional Liability Fund Program Promoter Code EP1904 to receive an exclusive discount on the standard registration rate.

Be an "Early Bird" and register by January 24, 2019 and receive additional savings. Visit www.techshow.com for details.

Large group discounts are available. Contact lauren.krauth@americanbar.org.

For more information, visit: www.techshow.com.

PLF Coverage Plan Changes

The PLF Board of Directors recommended changes to the Primary and Excess Coverage Plans for 2019 to the Oregon State Bar Board of Governors, which approved the changes on November 17, 2018. You

can read a summary of the changes on the PLF website at <https://www.osbplf.org/news-and-events/plan-changes-for-the-2019-primary-and-excess-plans/view/>.

PLF Board of Directors

The Oregon State Bar Board of Governors has appointed two new members to the PLF Board of Directors. Gina Johnnie and Patrick Hocking (public member) began their terms January 1, 2019. They join current PLF board members Saville Easley (Chair), Molly Jo Mullen (Vice Chair), Tom

Newhouse (Secretary-Treasurer) (public member), Robert Raschio, Holly Mitchell, Megan Livermore, and Susan Marmaduke. We extend our warmest thanks to outgoing board members Tim Martinez and Dennis Black for their years of excellent service.

New CLEs Available

The following CLEs, presented or updated in 2018, are now available in multiple formats on the PLF website:

- Learning The Ropes 2018
- The Career of A Lawyer: Creating Success at Each Stage
- Technology Fair PLUS CLEs: Efficiency and Productivity Solutions for Your Law Practice

- To order these or any other CLE program, go to the PLF website at <https://www.osbplf.org/cle/past.html>. If you have questions call Julie Weber in PLF CLE resources at 503.639.6911 or 1.800.452.1639.

PLF Blog - *inPractice*

Visit the PLF website at <https://www.osbplf.org/inpractice/> to subscribe to *inPractice* or read posts.

Here is what the PLF's Practice Management Advisors have been blogging about in *inPractice*

in the latter half of 2018: tips for accepting credit card payments; CLE credits; resources for the OSB; options for redaction; vision and mission statements; get ready for any disaster; and notetaking outside the office.

Oregon Statutory Time Limitations Handbook

The 2018 edition of the Oregon Statutory Time Limitations Handbook is now available to download from the PLF website at <https://www.osbplf.org/practice-management/publications.html>.

Malpractice Risk Factors and How to Avoid Them Part II

By Hong Dao, PLF Practice Management Advisor

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

CLIENT RELATIONS

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

Providing quality legal services is simply not enough to protect against malpractice risk. Of course, getting the desired outcome is important to clients. Just as important, however, is how they are treated during the course of representation. If your communication and interaction with clients leave them feeling dissatisfied, unhappy, or disrespected,

the good outcome you obtained may still not be satisfactory to them. These feelings will affect how forgiving they are toward you. Clients who feel they are treated poorly are less likely to refer prospective clients to you and may be more likely to bad mouth you, file a malpractice claim against you, or complain about you to the Bar.

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

- Not returning clients’ phone calls or emails;
- Not responding to their requests for information;
- Not actively listening to their concerns;
- Allowing phone calls or staff to interrupt client meetings;
- Being late for appointments;
- Rescheduling their appointments too many times.

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

Set expectations and boundaries for communicating with you

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

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

Treat clients with common business courtesies

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

- **Promptly return clients' telephone calls** – You can also ask staff to call clients to explain your delay in returning their calls. If their calls or emails are not urgent or important, then respond on the days you've set aside to communicate with clients.
- **Be on time for their appointments** – Don't make clients wait more than 5 minutes to meet with you. Give them the courtesy of meeting

them on time. Reschedule their appointment only if it is absolutely necessary. A client whose appointment is frequently rescheduled may feel like you don't respect their time.

- **Give clients your undivided attention** – When you meet with them, tell staff not to interrupt you. Put your office phone on "Do Not Disturb" and silence your cell phone. Refrain from constantly looking at the clock.
- **Be responsive** – If clients ask you for something related to their matter, provide the requested information to them in a reasonable amount of time. Your failure to fulfill your commitment may affect your relationship with the client and lead to more serious issues.
- **Be a good listener** – Actively listen to what the client has to say, and communicate back to the client what you hear the client say. This verbal assurance lets the client know that you understand what the client is saying and makes him or her feel heard. Delay asking questions or offering advice or comments until the client has had the opportunity to talk about her or his problem without interruption.
- **Be available** – Staff play an important role as a conduit between the lawyer and client. But don't let staff be a barrier between you and the client. Be personally available to communicate important issues or developments in the matter to the client.

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

CONFLICT CHECKING SYSTEMS

Another malpractice risk factor for lawyers is not using a conflict checking system. The failure to properly screen can result in representing clients with conflicting interests. This creates legal malpractice problems as well as ethical issues with serious consequences.

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

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

BILLING ISSUES

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

- **Only take clients who can afford your legal services** – This advice harkens back to my previous article on client screening. Clients who express an inability or unwillingness to pay for your services may find fault in your work and avoid paying their bills.
- **Use a written fee agreement** – Clearly explain how your legal fees are determined and your billing procedures, such as when clients will be billed and the procedures for withdrawing funds. Document the billing process and withdrawal procedures in a written fee agreement. Follow the terms of the fee agreement. If you and the client agree that you will bill monthly, make sure you send the monthly statement out on time.
- **Review statements before sending** – Make sure you review all billing statements before sending them to clients. In addition to looking for errors, also review billing practices that may cause confusion to the client, such as block billing or vague entries (e.g., "legal research"). It's also an opportunity to reassess whether the charges reflect the value that clients receive from your work. If not, consider writing off some time. If you're discounting your hourly rate as a promotion or a favor to the client, include your normal rate so the client can see the actual value of your service.
- **Enter time contemporaneously or at least daily** – To avoid under- or over-billing clients, it's best to track and enter time contemporaneously with the task. If that is not possible, then enter your time at the end of every day. You can do this with a notepad or using time-tracking software. Recording time daily prevents the frantic search for emails you sent or documents you drafted to recreate a list of billable tasks. Lawyers who do not record time on a daily basis end up losing many billable hours, resulting in undercharging for their legal services or padding their bills.

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

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

at <https://www.osbplf.org/assets/forms/pdfs/Billing%20and%20Time%20slips.pdf>.

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

File Retention and Destruction Procedures: Additional Safeguards to Protect Your Firm from Lost or Exposed Client Data

By Rachel Edwards, PLF Practice Management Advisor

File retention and destruction procedures are one potential safeguard to help reduce your firm’s risk of data loss or exposure from a cyberattack. They can also protect your firm from non-cyber incidents, such as a natural disaster or loss due to stolen or misplaced files. So whether you have all paper files, all electronic files, or a combination, creating file retention and destruction procedures is an important step towards protecting your firm from lost or exposed client data.

The procedures should encompass not only retention and destruction of client files after closure of the matter, but also retention procedures while the matter is open, such as handling and storage of incoming documents. This allows for improved file organization and consistency, increasing your firm’s efficiency when handling files while open and when preparing files for storage upon closure of the matter.

Before creating file retention and destruction procedures, it is important to understand your obligations and the reasoning behind our recommendations for handling client files. Lawyers have a right to retain a copy of their client files.

Generally, the PLF recommends that you keep client files for a minimum of 10 years after closure of the matter to ensure the file will be available to defend you against a malpractice claim. This is based on statute of ultimate repose. ORS 12.115(1). You may need to keep some files longer than 10 years. You may also be required to retain certain original documents. See our “File Retention and Destruction Guidelines” for additional information, available at www.osbplf.org > *Practice Management* > *Forms* > *Category* > *File Management*.

Lawyers must also take reasonable steps to prevent the inadvertent disclosure of, or unauthorized access to, client information. This is both while the file is open and after closure of the matter. ORPC 1.6(c). As for storage of client data electronically, lawyers may use electronic systems to store client files as long as they take reasonable steps to ensure the security and availability of electronic documents during appropriate time periods, including following the completion of the matter or termination of the representation. OSB Formal Ethics Opinion 2016-191.

Each firm has different needs and circumstances when it comes to file retention and destruction. Listed below are general tips for developing procedures that fit your firm's needs:

- **Create a written procedures manual** – A written procedures manual encompassing all of the firm's policies regarding file retention and destruction allows for inclusion of all procedures in one location. The manual should comply with your ethical and legal obligations and set forth the procedures for retention and destruction of both electronic and paper data. See our practice aid titled "Creating an Office Procedures Manual" for helpful information and sample language, available at www.osbplf.org > [Practice Management](#) > [Forms](#) > [Category](#) > [Office Manuals](#).

Below are factors to consider when drafting your procedures manual:

- *Client file defined* – In accordance with OSB Formal Ethics Opinion 2017-192, a client file is the "sum total of all documents, records or information (either in paper or electronic form) that the lawyer maintained in the exercise of professional judgment for use in representing the client." Include language in the manual specifically addressing what types of documents must be stored as part of the client file, and in what format. Remember this includes emails and text messages, with limited exceptions. Include procedures for how these types of electronic documents will be stored as part of the client file.
 - *Client consent* – It is also recommended that attorneys enter into reasonable agreements with clients regarding how the lawyer will maintain the file both during and after representation. This includes client consent to retain, destroy, and return files as part of the written fee agreement. See our sample engagement letters and fee agreements for specific language at www.osbplf.org.
- *File organization* – Develop a procedure for how files will be organized in both paper and electronic form. For example, consider setting up a template for each type of file upon opening, specifying the name of the file, file subfolders, and naming conventions for each type of document.
 - *Handling of incoming documents* – Include procedures regarding how to handle incoming documents. For example, who opens and processes incoming mail? Are paper documents scanned and shredded? If so, by whom and where will the scanned documents be stored? Are emails stored electronically? If so, what is the procedure for storage of the emails while the case is open and after closure of the file?
 - *File storage* – Develop procedures regarding where the files are being stored while open and after closure. For example, do you want to maintain the file electronically from the start, utilize a combination of paper and electronic, paper both while open and after closure, or paper while open and then scan into electronic form for storage after closure? There are a multitude of options. Find what works best for your firm. Before drafting file storage procedures, first consider what steps it will take to accomplish these goals. If you want to maintain electronic files, develop and implement procedures making it easier to do so, such as requesting that clients provide documents to you in electronic form if possible. Also consider whether maintaining a file in electronic form may be difficult for particular clients if they request a copy of their file. For example, if a client has no access to a computer, an electronic file may create a hardship for the client.
 - *File backup* – Be sure to include procedures

[org](#) > [Practice Management](#) > [Forms](#) > [Engagement Letters and Fee Agreements](#).

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for properly backing up your data. Backup is the process of creating and keeping a copy of your files in a location different from where they are stored. See our practice aid titled “How to Backup Your Computer” for additional information, available at www.osbplf.org > *Practice Management* > *Forms* > *Category* > *Hardware and Software*.

- *File security* – You must take reasonable steps to ensure the security and availability of client files during the representation and after closure of the matter. OSB Formal Opinion 2016-191. Determine appropriate methods for storage of files, paper and electronic, in accordance with your duties to maintain client confidentiality. For example, consider the use of password protection, encryption, or some other type of security for protecting electronic documents. Paper files need to be stored in a locked cabinet or storage facility, protected from environmental hazards such as fire and water. See our practice aid titled “Protecting Yourself and Your Law Firm from Data Breach Checklist” for additional information, available at www.osbplf.org > *Practice Management* > *Forms* > *Category* > *Cybersecurity and Data Breach*.
- *File closure* – When you close the file, return all original client documents and property to clients after making copies for storage. If you want to store files electronically, establish and document your storage method. Harddrives or servers are preferred over CDs, DVDs, or USB drives, which are easily misplaced and can become damaged over time. See our practice aid titled “Checklist for Scanning Client Files” for additional information, available at www.osbplf.org > *Practice Management* > *Forms* > *Category* > *Paperless Office and Cloud Computing*. Also develop a tracking system to determine the proper date of destruction for each closed file. It is recommended that you organize closed files by the year in which they were closed. And if you choose to convert paper files to electronic-only after closure of a matter, confirm that doing so will not violate the terms of the retention agreement with the client, and be careful not to destroy paper documents that have intrinsic significance or are valuable originals, such as securities, negotiable instruments, deeds, and wills. OSB Formal Ethics Opinion 2016-191.
- *File destruction* – Be sure files are properly destroyed after being stored for the requisite period of time. If you have paper files, reasonable measures for destruction include shredding, pulverizing, or burning. Proper destruction of electronic data can require special expertise. For more information, see our inPractice article titled “Unwanted Data: How to Properly Destroy Data in Hardware.” Retain a permanent inventory of files destroyed showing the matter and the destruction date. Also retain proof of the client’s consent to destroy the file. This can easily be done by including the client’s consent in your fee agreement or engagement letter and retaining those documents with your inventory of destroyed files. Allow your staff to assist in retention and destruction, but a managing attorney should review and approve before any files are destroyed.
- **Mandate employee training and cooperation** – Disseminate the procedures manual to all firm members and require everyone to sign an affirmation of understanding and agreement of compliance.
- **Review the procedures manual on a regular basis** – Review your file retention and destruction procedures manual on a regular basis, at least annually.

Even if you don’t necessarily have the time or resources to create a formal procedures manual, the act of simply writing down your basic file retention and destruction procedures can increase efficiency and reduce the risk of loss or exposure of your clients’ data.



CASES *of* NOTE

PERSONAL INJURY/UNINSURED MOTORIST/ATTORNEY FEES: In the case of *Lizama v. Allstate Fire and Casualty Ins. Co.*, 292 Or App 611 (July 5, 2018), the Oregon Court of Appeals decided the issue of plaintiff's entitlement to attorney fees on his UM claim under ORS 742.061(1). Plaintiff argued that the defendant's "safe harbor" letter did not track the language of the statute, and did not convey defendant's willingness to arbitrate the case; instead it merely expresses plaintiff's ability to seek arbitration. The court held that the trial court erred in concluding that defendant's letter complied with the requirement of ORS 742.061(3)(b) that the insurer consent to submit the case to binding arbitration. The court reversed and remanded the ruling on summary judgment denying plaintiff's request for attorney fees on his UM claim.
<https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll5/id/15293/rec/1>

RESIDENTIAL EVICTION In the case of *Kailash Ecovillage, LLC v. Santiago*, 292 Or App 640 (July 5, 2018), the Oregon Court of Appeals decided the issue of whether the landlord's pretermination notice gave tenant the statutorily required amount of time to remedy the defects identified in the notice. The resolution of that issue turns on whether landlord met the requirements under ORS 90.155(1) for serving tenant by first class mail and attachment, known commonly as "nail and mail" service. The court held that it is the landlord's responsibility to supply a tenant with a valid and effective mailing address that allows the tenant to serve the landlord by first class mail. Because that did not happen here, landlord was not entitled to use nail and mail service, and was required to give tenant a longer compliance period than that stated in the notice.
<https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll5/id/15300/rec/1>

WRONGFUL DEATH/SERVICEMEMBERS CIVIL RELIEF ACT/TOLLING OF LIMITATIONS PERIOD: In the case of *Wilcox v. Les Schwab Tire Centers of Oregon*, 293 Or App 452 (August 22, 2018), the Oregon Court of Appeals held that the Servicemembers Civil Relief Act (SCRA) tolled the limitations period for the wrongful-death action during the time that plaintiff was on active duty with the Air Force. As such, plaintiff's action in his capacity as the personal representative of his wife's estate was timely filed.
<https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll5/id/15642/rec/1>

NONCOMPETITION AGREEMENTS: In the case of *Oregon Psychiatric Partners, LLP v. Henry*, 293 Or App 471 (August 22, 2018), the Oregon Court of Appeals concluded that plaintiff's evidence supported an inference that defendant's patients would reasonably have been expected to return to OPP for treatment at the time of defendant's departure and were therefore "customers of the employer" under ORS 653.295(4)(b). As a result, the court held that, under ORS 653.295(4)(b), the agreement is at least in part enforceable as a "covenant not to solicit or transact business with customers of the employer" and that the trial court erred in dismissing the complaint.
<https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll5/id/15645/rec/1>



LAW PRACTICE

Tips, Traps, and Resources

UNIFORM TRIAL COURT RULES

The UTCR were amended effective August 1, 2018. You can find the current rules, interim Chief Justice Orders, rules amended out of cycle, and request for public comment on proposed changes for 2019 at <https://www.courts.oregon.gov/programs/utcr/pages/currentrules.aspx>.

CYBERSECURITY RESOURCES

The Federal Trade Commission Bureau of Consumer Protection has published cybersecurity resources for small businesses. You can find them at <https://www.ftc.gov/news-events/blogs/business-blog/2018-10-cybersecurity-resources-your-small-business>.

OREGON RULES OF CIVIL PROCEDURE

You can find the 2018 proposed amendments to the Oregon Rules of Civil Procedure on the Council on Court Procedure's website at <http://www.counciloncourtprocedures.org/Content/Publications/2018%20Proposed%20Amendments%20to%20the%20ORCP.pdf>

MCCC ATTORNEY REFERENCE MANUAL

Multnomah County Circuit Court has updated its Attorney Reference Manual as of 2018. You can find it at <https://mbabar.org/assets/attorney%20reference%20manual%202018.pdf>.