

2023 LEGISLATION ALERTS

This issue features legislation alerts from the 2023 Oregon Legislature. The alerts begin on page 14.



Exploring ChatGPT's Capabilities, Limits, and Risks for Lawyers—Part II

By Hong Dao

EDITOR'S NOTE: THIS ARTICLE IS PART II OF A TWO-PART SERIES.

In Part I of this two-part series, we looked at ChatGPT's capabilities and concerns about its limitations that can affect its reliability and limit its usefulness for lawyers. Part II focuses on the potential risks legal professionals face when using ChatGPT and offers some guidance on how to safely use this tool in their practice.

Risks of Using ChatGPT

In light of the concerns discussed in Part I, let's look at a few malpractice and ethical risks for lawyers relying on ChatGPT or similar generative AI tools in the practice of law.

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Professional
Liability Fund

inBRIEF IS PUBLISHED BY

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Message from the CFO

By Betty Lou Morrow

The PLF Board of Directors and the OSB Board of Governors approved a return to a \$3,500 PLF assessment for 2024. This represents a \$200 (6%) increase over the 2023 assessment and is the first increase in 13 years. The last time the assessment was raised was in 2011, when it increased from \$3,200 to \$3,500.

The financial sustainability of the PLF and a stable assessment are guiding principles when the PLF determines the assessment. The practical factors affecting the financial health, and therefore sustainability, of the PLF include:

- The number of new claims;
- The need for sufficient reserves to fund the expense and settlement costs of claims;
- Investment portfolio performance; and
- Upward inflationary pressure on the cost of settled claims, and operations.

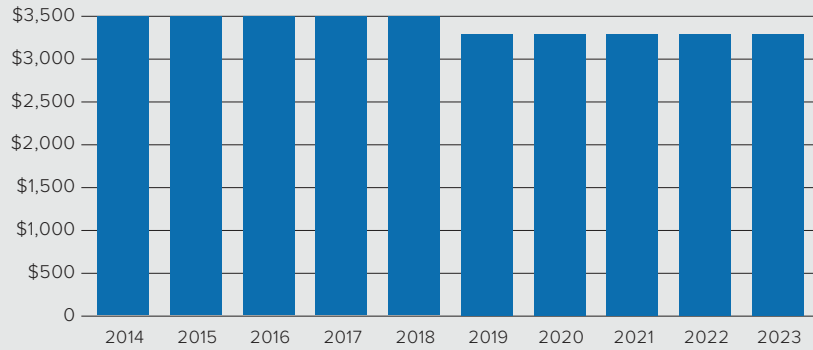
The fiduciary responsibilities of the PLF board and staff require that these factors are continually analyzed to best inform the PLF's financial needs currently and over an extended time period. Inflation and a volatile stock market had a substantial impact on the PLF's financial results in 2022. In 2022, the PLF recognized a loss of -\$12.4 million, reducing net position from \$30.2 million to \$17.8 million.

For an historical perspective, the following graphs indicate over the past 10 years (2014 – 2023) the cost of settled claims has kept pace with inflation, but the primary assessment has not. During this 10-year time period aggregated national inflation was 28.1% and the aggregated increase to the cost of settled claims was 31.1%. Assessments actually decreased by -5.71% during the same period.

CONTINUED ON PAGE 5

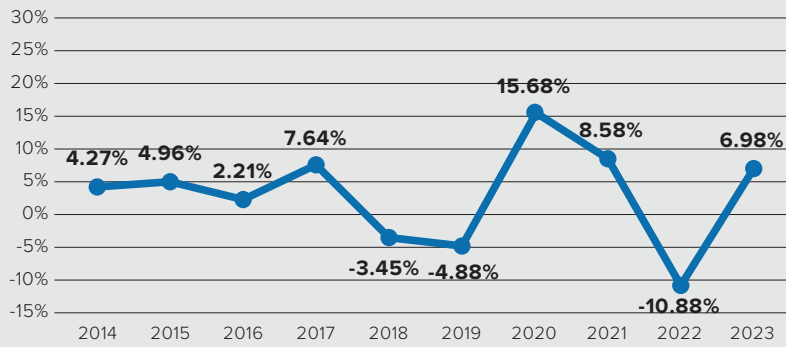
PLF Assessment Year on Year Change

Aggregated Total of -5.71%



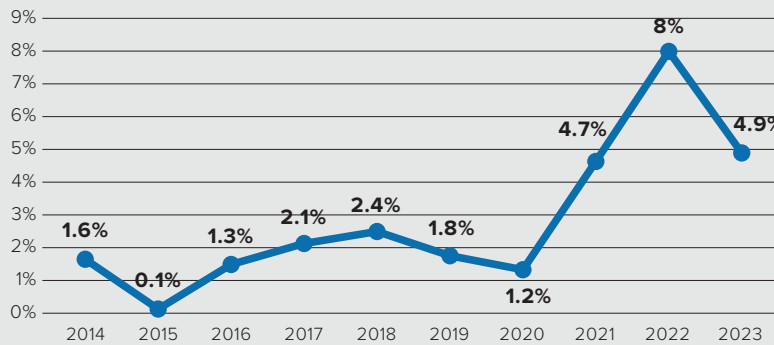
Cost of Settled Claims Year on Year Percentage Change

Aggregated Total of 31.11%



National Inflation Year on Year Percentage Change

Aggregated Total of 28.1%



After considering the financial results from 2022 in conjunction with PLF budget requirements for 2024, the PLF Board of Directors approved the \$3,500 assessment at its August 16, 2023, meeting. The OSB Board of Governors approved the \$3,500 assessment at its September 22, 2023, meeting.

To provide financial relief to attorneys in their first 36 months of private practice in Oregon, the PLF discounts the assessment as follows (based on the 2024 assessment):

	Full Assessment	Discount	Discounted Assessment
1-12 months in practice	\$3,500	40%	\$2,100
13-36 months in practice	\$3,500	20%	\$2,800

We also offer payment of the assessment through installments. Please visit the following links on the PLF website for details about paying your assessment through installments; and coverage qualification/exemption details. Please visit our website for details: www.osbplf.org > Coverage.

For more details regarding the PLF’s finances and activities, we recommend you review our Annual Report: www.osbplf.org > About > Annual Reports.

If you have further questions, please contact PLF Chief Financial Officer Betty Lou Morrow at 503.639.6911, 800.452.1639, or bettyloum@osbplf.org. ■



Betty Lou Morrow is the PLF Chief Financial Officer.

Bundle Up This Winter With Excess Coverage Through the PLF

By *Melanie Hughes*

We've made it to December! The leaves have magically cycled through their awe-inspiring fall colors, and the discarded foliage now dots our sidewalks and lawns. The days of high heat advisories are behind us, and we excitedly check the extended forecast for those little snowflake icons. Apple, cinnamon, and gingerbread-spiced items like tea and candles abound to get us into the seasonal spirit.

As we transition to winter, the last quarter of the year also brings an opportunity to examine your firm's profile and how it might have changed over the past year. Have you added staff, expanded into new practice areas, or opened an additional office? Has your firm's revenue grown due to an increase in clients or higher-value cases? If the answer to any of these questions is yes, it might be time to explore excess coverage.

The PLF Excess Coverage application for 2024 is now available online at <https://www.osbplf.org/excess/how-to-apply.html>. Please note that you will need to set up an account to access the application. Renewing firms desiring a January 1 start date must submit their applications by January 2, 2024. Applications will be underwritten in the order received, with the

possibility of a gap in coverage for renewing firms who submit applications after this date.

Whether you are a first-time applicant or a renewing firm, it's best to get your application in as soon as possible to avoid the rush. Underwriting turnaround time is heavily dependent on the volume received during renewal season, and the application queue increases dramatically as the year-end approaches. Submitting your firm's excess application early will minimize processing delays and allow extra time to provide supplemental information, if requested.

If you have questions about excess coverage or the application, email excess@osbplf.org or contact an Excess Underwriter at 503.639.6911.

Warm winter wishes to you and yours! We hope you find the time to meet with family or friends, or simply cozy up with a blanket in front of a warm fire.

Additional information about PLF Excess Coverage is available on the PLF website. ■



Melanie Hughes is a PLF Professional Liability Underwriter.

PLF Board of Directors

The Oregon State Bar Board of Governors has appointed two new members to the PLF Board of Directors: Lawyer members John Bachofner of Camas and Mark Johnson Roberts of Portland. Mr. Bachofner will serve out the remainder of Akeem Williams' term that will expire on December 31, 2025. Mr. Johnson Roberts will serve a 5-year term ending December 31, 2028. They begin their terms January 1, 2024 and join current PLF board members Steve Hill

(Chair, Pendleton), Chris Karlin (Secretary-Treasurer, Portland), Gina Anne Johnnie (Salem), Valerie D. Saiki (Public Member, Salem), Michelle Johansson (Portland), Ali Hilsher (Eugene), and Harshi M. Waters (Portland).

We extend our warmest thanks to outgoing lawyer board member Oren Haker (Portland) and former lawyer board member, Akeem Williams (Portland).

EXPLORING CHATGPT... (CONTINUED FROM PAGE 1)

1. INACCURATE LEGAL INFORMATION

Consider this scenario: A lawyer working on a complex contract law matter uses ChatGPT to research relevant case precedents that deal with similar contractual disputes. ChatGPT provides two case citations and a summary of the opinions. The lawyer then uses those citations in their legal argument during a court proceeding. After the opposing party argues that those decisions do not support the lawyer's position, it's discovered that one of the cases does not exist, and the other does not address the legal principles or facts relevant to the lawyer's case. The lawyer has unintentionally presented incorrect information to the court, undermined their own credibility, and weakened their client's argument.

This scenario is the summary of a long response ChatGPT generated when I asked it to give me an example of how a lawyer might face malpractice exposure for relying on ChatGPT.

Legal research and writing seem like a perfect use for ChatGPT as it can explain legal concepts, summarize information, and write briefs, memos, or correspondence. Due to its limited world knowledge and propensity for hallucination, however, ChatGPT will make up legal authorities or case precedents

if it doesn't have the requested information in its dataset. The unfortunate scenario above played out for a lawyer who was in the news for citing fictitious authorities provided by ChatGPT in court.¹

At this stage in development, it is not advisable for lawyers to depend on ChatGPT to conduct legal research and write legal documents without scrutinizing and verifying the information provided to ensure accuracy. The potential for malpractice exposure for a lawyer who relies on incorrect information cannot be overstated.

2. NEGLIGENT ADVICE

Let's consider another scenario: A lawyer representing a client in a personal injury case uses ChatGPT to determine the value of the client's claim. ChatGPT provides an estimate of damages based on general information but fails to consider specific factors relevant to the client's case. The lawyer relies on this estimate and provides negligent advice to the client regarding the potential value of the claim, likely influencing the client's decision to accept a settlement offer or take the case to trial.

This scenario is also a summary of a response from ChatGPT to my prompt on how a lawyer could commit malpractice for relying on ChatGPT.

The challenge here is that ChatGPT has trouble responding accurately to ambiguous queries or overly general prompts. This difficulty is exacerbated by a lawyer’s ethical obligation to maintain client confidentiality. This means when lawyers interact with ChatGPT, they may need to communicate in a general manner, use vague language, and omit crucial context and facts. When ChatGPT receives incomplete information, it will generate responses based on its limited understanding of the given input. Lawyers might counsel their clients or make strategic case decisions relying on these incomplete answers, creating a risk of inaccurate advice that can lead to an unfavorable outcome for or harm to the clients.

3. ETHICAL RISKS

Relying on unverified responses from ChatGPT may give rise to other risks that implicate a lawyer’s ethical obligations. These include duties of competence (ORPC 1.2) and diligence (ORPC 1.3) for failing to verify the accuracy of the information before using it in their legal work. They also include the duty of communication (ORPC 1.4) when a lawyer uses incomplete or inaccurate information in communicating with clients. The duty of confidentiality (ORPC 1.6) could be implicated if a lawyer inputs client data into ChatGPT without obtaining the client’s informed consent or taking appropriate measures to protect confidentiality. Additional rules such as ORPC 5.1 and 5.3 (staff supervision) and 3.3 (candor to the court) may also come into play.

“...ChatGPT has trouble responding accurately to ambiguous queries or overly general prompts... This means when lawyers interact with ChatGPT, they may need to communicate in a general manner, use vague language, and omit crucial context and facts.”

Save the Date: ABA Techshow 2024

Celebrate over 38 years of legal technology and innovation at the ABA TECHSHOW. Network with legal technology experts from around the globe from February 14 – 17, 2024, at the Hyatt Regency Chicago.

As a member of the OSB Professional Liability Fund, you can register for ABA TECHSHOW 2024

and save \$100. Register online and include the code EP2410 at checkout to receive the discount.

Visit www.techshow.com for current information on ABA TECHSHOW 2024, the best place for bringing lawyers and technology together.



Tips on Using ChatGPT

Given these significant risks, is there a safer way for legal professionals to use this technology in their law practice?

Consider the following tips when interacting with ChatGPT to reduce your exposure.



1. VERIFY THE OUTPUT

Lawyers need to conduct further research to determine the accuracy and reliability of ChatGPT's responses. You should cross-reference responses with primary and secondary legal authorities such as statutes, regulations, case law, and legal treatises by using established legal research tools like Fastcase, LexisNexis, or Westlaw. Lawyers must also conduct their own independent research to delve deeper into the legal issues, which can help confirm or disprove the information received from ChatGPT. With a more thorough understanding of the topic, you can identify gaps or inconsistencies in the answers provided. These are not the only ways to verify ChatGPT's responses, but they are crucial to the process.

2. ANCHOR TO A SOURCE OF TRUTH

At the ABA TECHSHOW in March 2023, AI expert Pablo Arredondo of Casetext repeated a key phrase in the context of using ChatGPT: "We must anchor it to a source of truth." This refers to the practice of providing ChatGPT with reliable and authoritative sources of information to ensure that its responses align with accurate and verifiable facts. Lawyers using generative AI need to specify the source of truth and guide the technology to generate responses that are reliable, by including specific references or citing reputable sources directly in your prompt. You can also explicitly instruct ChatGPT to consider a particular source as a basis for its responses, mitigating the risk of inaccurate or misleading information by grounding its answers in verified and trusted knowledge or facts.

3. SAFEGUARD CONFIDENTIAL AND PROPRIETARY INFORMATION

To safeguard client and firm data, lawyers and law offices should prohibit inputting client information and proprietary data into ChatGPT or similar tools. This precaution is crucial to prevent staff from inadvertently disseminating information, because ChatGPT incorporates user input into its training. Samsung's case serves as a cautionary example: Business Insider reported that Samsung banned its employees from using generative AI tools after its engineers accidentally leaked internal source code to ChatGPT.² Firms should have a written policy on AI usage, including these prohibitions.

Additionally, lawyers can enhance data protection by disabling their chat history to opt out of contributing to OpenAI's model training. Go to ChatGPT settings, click on "Data Controls," and toggle off the "Chat history & training" option.

4. USE FOR NON-LEGAL AND ADMINISTRATIVE TASKS

Delegating non-legal and administrative tasks to ChatGPT is a safer way for legal professionals to use the tool. For example, lawyers can use ChatGPT to generate content for marketing or social media; draft routine office emails; proofread documents for errors and inconsistencies; create checklists for client onboarding or office procedures; produce office forms and client satisfaction questionnaires; brainstorm ideas for event planning, team building, or employee engagement; and even generate agenda items for meetings. None of these tasks require ChatGPT to rely on legal authorities, case precedents, intimate knowledge of legal matters, or client information to provide reliable and accurate responses.

5. INTEGRATE VIA AN API

Another safe way to interact with ChatGPT is to use an application, product, or service that integrates with this AI technology. The integration occurs through an application programming interface (API), which allows software developers to access ChatGPT's functionality.

Integration offers a significant advantage over using ChatGPT in its raw form. Software developers can leverage their external databases, knowledge sources, or structured data to supplement or refine the answers generated by ChatGPT. When ChatGPT retrieves information from these verified sources—rather than relying solely on its pre-trained knowledge—it provides more accurate and relevant responses. Acting as a form of guardrail, integration addresses some of the limitations discussed in Part I.

While it's not practical for lawyers to build their own software, you can explore tools like CoCounsel (by Casetext), Copilot (by LawDroid), Alexi, and Spellbook (by Rally) to harness ChatGPT's capabilities for document review, legal research, drafting, and contract analysis. These applications and services offer a valuable and more accessible way to use ChatGPT or similar AI technology for legal tasks. Even with these advanced tools, the lawyer still bears the ultimate responsibility for ensuring accuracy, legal applicability, and ethical compliance.

6. OTHER TIPS

While not all lawyers use ChatGPT, it's likely that their clients do. Clients, like many consumers, turn to the internet for answers, including seeking legal advice through AI. They may not realize, however, that the information could be incorrect or contextually flawed. You must educate clients about the tool's limitations and foster open discussions to emphasize that it can't replace your expertise, judgment, and counsel. Clients need to recognize the importance of critically assessing ChatGPT's responses and relying on your guidance in their legal matters.

Regardless of your awareness about your clients' ChatGPT usage, document your advice through emails

or letters. A paper trail clarifies the source of advice and helps clients differentiate between AI-generated responses and your professional legal counsel.

Conclusion

Whether lawyers like it or not, ChatGPT is here to stay and will likely reshape the legal profession. Products powered by generative AI will become as ubiquitous as email or Westlaw, with technology like Microsoft's Bing and 365 Co-Pilot already integrating ChatGPT into everyday tools. It's just a matter of time before other programs commonly used in law offices today follow suit. Legal professionals must educate themselves as generative AI becomes integral to our professional landscape. ■



Hong Dao is the Director of the PLF Practice Management Assistance Program.

ENDNOTES



i “ABA Journal, “Judge finds out why brief cited nonexistent cases—ChatGPT did research,” (5/30/23),

<https://www.abajournal.com/news/article/judge-finds-out-why-brief-cited-nonexistent-cases-chatgpt-did-the-research>

ii Business Insider, “Samsung bans employees from using AI tools like ChatGPT and Google Bard after an accidental data leak, report says,” (May 2, 2023), <https://www.businessinsider.com/samsung-chatgpt-bard-data-leak-bans-employee-use-report-2023-5>

OTHER WORKS BY HONG DAO

- Exploring ChatGPT’s Capabilities, Limits, and Risk for Lawyers: Part I (*inBrief*, August 2023)
- Plugging the “Knowledge Drain:” How to Retain Knowledge to Ensure Your Firm’s Continued Success (*inPractice* blog post, September 13, 2022)
- Don’t Wait Until the Last Minute to File and Serve Your Complaint (*inPractice* blog post, June 15, 2021)
- Tommy and the Secure Tunnel: Virtual Private Networks (*inPractice* blog post, April 23, 2021)



The Professional Liability Fund is pleased to announce Kalia Walker has joined the PLF as a practice management attorney. Prior to joining the Professional Liability Fund, Ms. Walker was in private practice for seven years. Her practice focused primarily on employment and general commercial litigation matters throughout the Pacific Northwest. She is a member of the Oregon State Bar and previously served as a Board Member for Oregon Women Lawyers and the University of Oregon Law School Alumni Association.

PLF Announcements: Assessment Deadline

2024 PLF ASSESSMENT - DUE JANUARY 10, 2024

The deadline to pay your assessment or file a request for exemption is January 10, 2024. You can pay your bill online, file an exemption request, or set up installment payments on the PLF website: <https://osbplf.org/coverage/pay-assessment.html>.

If sending payment through the mail, please ensure enough time to arrive by 1/10/24; postmark dates are not applicable. If you have any questions, please call the PLF Accounting Department at 503.924.1771.





Brave New World: The New Federal Reporting Law for Business Owners

By Anderson Beals and Steve Elzinga

Big Brother is watching you . . . starting in 2024.

Any individual who owns a minimum 25% interest in or who exercises “substantial control” over a small- or medium-sized business will soon be required to file reports with the federal government that include a photo image of a qualifying ID, along with other personal and business information. Codified at 31 USC 5336 and 31 CFR 1010.380, the law takes effect in January 2024. Failure to timely file an initial or updated report (on the website that does not yet exist) may result in civil and/or criminal penalties.

Despite its name, the “Corporate Transparency Act” applies to most types of LLCs, partnerships, corporations, PCs, and other entities that are formed by filing a document with a state secretary of state or similar office. The general rule is that the obligation to report applies to all companies unless an exception applies, such as for nonprofits, certain business

categories, and large businesses. The exceptions generally apply to highly regulated organizations and industry sectors, like financial institutions and publicly traded companies. Entities required to report are called “reporting companies.”

Reports must be filed with the U.S. Department of Treasury’s Financial Crimes Enforcement Network (FinCEN) by anyone with at least 25% ownership or control, and by various business leaders and officers. Reports are due within 30 days of business formation or changes in ownership or control. FinCEN is considering extending the deadline to make an initial report following formation to 90 days. Reporting companies that existed prior to 2024 will have until January 1, 2025, to file an initial report.

Additionally, individuals who form the entity (including lawyers) must submit information with the initial report with similar personal information. A person forming a new reporting company in 2024 is referred to as a “company applicant.” For any new

reporting company, there may be up to 2 people who would both be required to report information about themselves as a “company applicant”: (1) a person who directs the process of forming a reporting company (such as a lawyer giving instructions to a paralegal); and/or (2) the person who physically does so (such as a paralegal who actually electronically files formation paperwork with a secretary of state or similar office).

Starting in 2024, any person may apply for a FinCEN identification number to avoid having to repeatedly provide the same information if they are involved in the formation of multiple reporting companies or if they are a beneficial owner of a reporting company.

Numerous nuances and exceptions exist. The exact format of reports and the mechanics of reporting is as-yet unknown because FinCEN has not yet created its portal for receiving reports. The Act imposes burdens that lawyers must be aware of if they represent small or medium-sized entities or individuals with an ownership interest in such entities. ■

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Info: 503.639.6911

Anderson Beals and Steve Elzinga are attorneys at Sherman, Sherman, Johnnie & Hoyt LLP: <https://shermlaw.com/>

Corporate Transparency Act Resources



The Financial Crimes Enforcement Network (FinCEN) has created the following resources for the Beneficial Ownership Information Reporting Rule promulgated under the Corporate Transparency Act:

Home Page—www.fincen.gov/boi

Frequently Asked Questions—www.fincen.gov/boi-faqs

Reference Materials—www.fincen.gov/boi/Reference-materials

Small Business Resources—www.fincen.gov/boi/small-business-resources

Small Entity Compliance Guide—www.fincen.gov/boi/small-entity-compliance-guide

Quick References—www.fincen.gov/boi/quick-reference

The following statement appears at the top of the FinCEN home page:

Alert: FinCEN has been notified of recent fraudulent attempts to solicit information from individuals and entities who may be subject to reporting requirements under the Corporate Transparency Act. The fraudulent correspondence may be titled "Important Compliance Notice" and asks the recipient to click on a URL or to scan a QR code. Those e-mails or letters are fraudulent. FinCEN does not send unsolicited requests. Please do not respond to these fraudulent messages, or click on any links or scan any QR codes within them.



2023 LEGISLATION ALERTS

This issue of *inBrief* features some of the significant changes made by the 2023 Oregon Legislature. Bills are listed by area of law. Some bills pertain to more than one practice area, so practitioners are encouraged to read through all the sections. The new legislation takes effect January 1, 2024, unless otherwise noted.

Resources



To view legislation online, visit

https://www.osbar.org/_docs/lawimprove/2023LegislationHighlights.pdf

The 2023 Oregon Legislation Highlights, published by the Oregon State Bar, is a comprehensive discussion of the new legislation. It is available to download, free of charge, from the Legislative/Public Affairs home page. Go to www.osbar.org/pubaffairs and look for 2023 Oregon Legislation Highlights under Quick Links.

Business Law and Insurance Regulation

Wildfires and Insurance Regulation

2023 Oregon Laws Ch. 67 (SB 82)

SB 82 makes several changes to statutes regulating insurance that covers damage from wildfire. The bill requires insurance companies to provide additional disclosures to policy holders if a residential insurance policy is cancelled, nonrenewed, or the premium is increased due to wildfire risks. The insurer is required to provide several pieces of information, including property-specific reasons for the decision and an explanation of risk mitigation measures the policy holder could take to help the insurability of the property. The bill also amends ORS 737.310 to require information on mitigation efforts that may decrease risk and improve insurability be made available on the insurer's website. SB 82 also amends ORS 742.270 to prohibit insurance companies from using the state wildfire risk map as the basis for cancellations, nonrenewals, or premium increases.

SB 82 takes effect on January 1, 2024.

Business Filings

2023 Oregon Laws Ch. 34 (HB 2108)

HB 2108 amends ORS 56.080 to address how the Secretary of State must handle business filings that are deficient. The bill removes the existing requirement that the Secretary of State must issue a written notification and wait 20 days before a document submitted for filing. In its place, the bill creates a requirement that the Secretary of State specify the reasons for any document so withdrawn. The bill also provides that any document filed between January 1, 2020, and September 24, 2023 is not invalid because it was filed without the declaration required under ORS 60.004 (2)(b), 63.004 (2)(b) or 65.004 (2)(b).

HB 2108 took effect on September 24, 2023.

Insurance Payouts Following Natural Disasters

2023 Oregon Laws Ch. 85 (HB 2982)

HB 2982 amends ORS 742.053 to provide that if an individual holds a policy for personal insurance, as defined in ORS 746.600 (33)(b) and (C), and the individual suffers a total loss of the contents of a residence as a result of a major disaster, an insurer must offer the insured a payout of no less than 70% of the coverage the insured previously purchased for the contents of the residence, without requiring the insured to complete an inventory of the loss.

Instead, the insured must provide documentation to the Department of Consumer and Business Services that the residence was furnished, and that the loss was attributable to a major disaster. DCBS may specify the manner in which this is demonstrated by rule. For the purposes of HB 2982, "major disaster" means a state of emergency that the Governor declares pursuant to ORS 401.165 "that involves or threatens to involve widespread loss of life, injury to persons or property, human suffering or financial loss."

HB 2982 took effect on September 24, 2023.

Civil and Appellate Law

Uniform Public Expression Protection Act

2023 Oregon Laws Ch. 71 (SB 305)

SB 305 modifies ORS 31.150, Oregon's Anti-SLAPP, and models the new provisions after the Uniform Public Expression Protection Act. This bill was the product of the Oregon Law Commission and the Uniform Laws Commission. Among the new provisions, the bill provides that an Anti-SLAPP may not be made against a claim against a person primarily engaged in the business of selling or leasing goods or services, if the claim arises out of a communication related to the person's sale or lease of goods or services.

Under existing law, discovery proceedings are stayed upon the filing of an Anti-SLAPP motion. The new bill clarifies what motions a judge may rule on while the stay is in effect, including that the judge may hear and rule on a motion for reasonable attorney fees.

SB 305 takes effect on January 1, 2024.

Oregon False Claims Act

2023 Oregon Laws Ch. 104 (SB 311)

SB 311 makes several changes to ORS 180.760, Oregon's False Claims Act. The bill increases the possible financial penalties for violations of the act and extends the statute of limitations for violations from three years to five years. The bill also creates new provisions requiring that evidence in the possession of the Attorney General must be kept confidential, subject to several exceptions provided in the bill.

SB 311 takes effect on January 1, 2023.

Notices of Appeal

2023 Oregon Laws Ch. 14 (HB 2324)

House Bill 2324 amends ORS 19.260 to clarify the class of delivery and proof of service requirements for the filing of a notice of appeal in order to be consistent with a recent Oregon Supreme Court ruling. Previously, ORS 19.260 required appellants to use registered or certified mail to satisfy the proof of mailing requirements. However, in *State v Chapman* (367 Or 388 (2022)), the Oregon Supreme Court found that the use of first-class mail through the U.S. Postal Service could satisfy the proof of mailing requirement in the statute and that registered or certified mail was not necessary. At the oral argument in the Chapman case, however, members of the Supreme Court expressed concern for the logistical challenges that such a rule might present for the Court of Appeals and the Appellate Commissioner

This bill addresses those concerns by clarifying that first-class mail may be used, and that if it is used the postmarked date on the envelope will serve as the date on which notice was provided. This will alleviate the need for the OJD to come up with a new process for independently tracking dates on which mail filings are derived by the postal service.

HB 2324 takes effect on January 1, 2024.

Commercial and Consumer Law

Court Annexed Arbitration

2023 Oregon Laws Ch. 16 (SB 307)

SB 307 addresses the effect of offers of judgment on attorney fees within Oregon’s court-annexed arbitration process.

In *Mendoza v Xtreme Truck Sales LLC*, 314 Or App 87 (2021), the Court of Appeals held that, based on the language of ORCP 54(E), when a dispute over entitlement to attorney fees or costs arises from an offer of judgment, the arbitrator’s final award—including the attorney fees and costs award, which the arbitrator now makes without knowing about the offer of judgment—must become a final judgment before the offer of judgment is disclosed and the effect of the offer of judgment on the attorney fees and costs award is determined.

This ruling created a conflict with ORS 36.425(3), which stated that “If a written notice is not filed under subsection (2)(a) of this section within the 20 days prescribed, the court shall cause to be prepared and entered a judgment based on the arbitration decision and award. A judgment entered under this subsection may not be appealed.”

Essentially *Mendoza*, required that litigants wait until final judgment before disclosing an offer of judgement and determining the effect of that offer on attorney fees. At the same time the statute held that final judgments were not appealable, meaning that by the time the offer of judgment was revealed it could not be considered.

SB 307 addressed this conflict by modifying ORS 36.425(6) and creating a path forward for litigants to follow during arbitration when an ORCP 54(E) offer of judgment might affect fees and costs. The bill allows the arbitrator to consider and determine any effect of the offer after submitting the arbitration award to the court.

SB 307 applies to arbitrations commenced on or after January 1, 2024.

Antitrust Enforcement

2023 Oregon Laws Ch. 103 (SB 310)

SB 310 increases both the civil and the criminal penalties for violation of Oregon’s antitrust statute. (ORS 646.705 to 646.805)

The bill increases the criminal penalty for violation of ORS 646.725 (restraint of trade) and ORS 646.730 (prohibition on monopolies) from a Class A Misdemeanor to a Class B Felony. The bill also increases the civil penalty that the Attorney General may seek for violation of either those two statutes, or other provisions of the law from \$250,000 to \$1 million.

SB 310 took effect on September 24, 2023.

Sales of Annuities

2023 Oregon Laws Ch. 143 (SB 536)

SB 536 creates professional standards that an individual who sells annuities must adhere to when selling, or recommending the sale of, an annuity to a consumer. In operative part, the bill requires that

“a producer, in making a recommendation of an annuity, shall act in the consumer’s best interest, under the circumstances the producer knows at the time....without placing the producer’s or the insurer’s financial interests ahead of the consumer’s interests.”

The bill also requires the producer to request specific information from a consumer in some circumstances, in order to make a recommendation to the consumer. The bill provides the Department of Business and Consumer Services to enforce provisions of the bill.

SB 536 took effect on September 24, 2023.

Data Brokers

2023 Oregon Laws Ch. 395 (HB 2052)

HB 2052 requires that data brokers who handle the personal information of Oregonians register with Oregon Department of Consumer and Business Services. The bill defines terms that cover what constitutes “brokered personal data” and who is considered a “data broker”. Importantly, consumer reporting agencies and financial institutions are generally not considered data brokers, nor business entities that collect information about their own customers.

The bill provides what steps must be taken to register, and prohibits data brokers collecting, selling or licensing brokered data within Oregon without registering.

HB 2052 took effect on July 27, 2023.

Uniform Voidable Transactions Act

2023 Oregon Laws Ch. 83 (HB 2330)

HB 2330 is the Oregon enactment of the Uniform Voidable Transactions Act (“UVTA”), consisting of an update to the Uniform Fraudulent Transfer Act (“UFTA,” which had been effect since 1985 under Oregon law in ORS chapter 95). The UVTA, like the UFTA before it, provides creditor protections in the form of remedies for certain transactions by a debtor that are unfair to the debtor’s creditors. For example, a remedy is provided to a creditor whose debtor transfers property to a relative or other third party to keep the property out of the creditor’s reach.

The UVTA clarifies the UFTA’s confusing terminology by avoiding the word “fraudulent” in its title and operative provisions, and using “voidable” instead to more accurately describe what the statutes already provide. It adds a clear choice-of-law provision that offers predictability and reduces costs in connection with transfers or the incurrence of obligations that cross state or national boundaries. It refines the rules for determining a debtor’s insolvency, and addresses modern legal developments such as electronic communications and the treatment of business entities used in some states. Finally, it establishes the burden of proof for each party in a UVTA lawsuit, specifying

the “preponderance of the evidence” standard rather than other more heightened standards.

HB 2330 takes effect on January 1, 2024.

Telephone Solicitations

2023 Oregon Laws Ch. 322 (HB 2759)

HB 2759 updates Oregon’s anti-robocall statutes to cover telemarketing companies that carry traffic that may violate the statute. Specifically, the bill makes a person liable for loss and subject to penalties under the existing statute if they know, or consciously avoid knowing, that another person is engaging in an act that is prohibited by the statute, and nonetheless provide substantial support or assistance for the violation.

The bill makes violation an unlawful practice under the Unlawful Trade Practices Act.

HB 2759 took effect on September 24, 2023.

Corroboration Evidence

2023 Oregon Laws Ch. 105 (SB 317)

SB 317 amends Rule 803 of the Oregon Evidence Code (ORS 40.460) to state that the rule requiring corroboration evidence for certain hearsay statements to be admitted applies in juvenile delinquency cases.

SB 317 took effect on May 19, 2023.

Post Conviction Relief and Nonunanimous Juries

2023 Oregon Laws Ch. 368 (SB 321)

SB 321 creates a process that may be used by a person who was convicted or found guilty, except for insanity, by a nonunanimous jury verdict may file a petition for post-conviction relief. The person must file for post-conviction relief no later than December 30, 2024, and must show by a preponderance of the evidence that the conviction was nonunanimous.

SB 321 took effect on July 18, 2023.

Criminal Law

Illegal Cannabis Operations

2023 Oregon Laws Ch. 209 (SB 326)

SB 326 sets higher penalties for illegal cannabis operations that involve large quantities, environmental violations, or certain labor violations. Specifically, the bill prohibits water use for illegal cannabis operations; permits warrants to authorize surveillance tools for illegal cannabis operation enforcement; requires landowners to clean up sites of illegal cannabis production or manufacture; and permits enforcement of cleanup through public nuisance proceedings, liens for costs of cleanup, and injunctions.

SB 326 took effect on June 12, 2023.

Property Crimes

2023 Oregon Laws Ch. 151 (SB 340)

SB 340 modifies ORS 131.315, 137.717, 164.055, 164.098 and 164.115 governing property crimes and organized retail theft, and adds the crime of Organized Retail Theft to the repeat property offender statute.

Among the changes, the bill increases the time period in which prosecutors may aggregate the value of the stolen property, modifies the venue provision, allowing for crimes to be charged in more judicial districts, and specifies that a person commits theft in the first degree if the individual creates a risk of serious physical injury during a theft.

SB 340 takes effect on January 1, 2024.

Expungement

2023 Oregon Laws Ch. 182 (SB 519)

SB 519 expands automatic expungement to include records for youths who are within the jurisdiction of juvenile court for acts that, if committed by an adult, would constitute a violation or misdemeanor. The bill also reduces the number of years a youth must wait before applying for expungement of records that do not qualify for automatic expungement once the youth is 18 years of age.

SB 519 took effect on September 24, 2023.

Use of Force Against Minors

2023 Oregon Laws Ch. 27 (SB 577)

SB 577 modifies ORS 161.205, Oregon use of force law, in order to align provisions related to using force against minors with current law. The bill also deletes language related to using force against incompetent adults. Under the bill, “A parent or legal guardian of a minor child may use reasonable physical force upon the minor child when and to the extent the person reasonably believes the physical force is necessary to maintain discipline or promote the welfare of the child, unless the physical force constitutes abuse as defined in ORS 418.257 or ORS 419B.005.”

Hearsay Evidence

2023 Oregon Laws Ch. 141 (SB 867)

SB 867 amends Rule 804 of the Oregon Evidence Code (ORS 40.465) to permit the proponent of a declarant’s hearsay statement to offer it as substantive evidence if the proponent can show by a preponderance of the evidence that the opposing party caused the declarant to be unavailable and, as a result, the declarant is not present to testify.

Practice Tip: Practitioners should carefully review the definitions of abuse under the above statutes in any situation where SB 577 might apply.

SB 867 takes effect January 1, 2024.

Search Warrants

2023 Oregon Laws Ch. 216 (SB 954)

SB 954 authorizes the issuance of a search warrant in any judicial district where there is interrelated conduct relating to certain controlled substance, psilocybin, or marijuana crimes. The bill also clarifies that a duly authorized senior judge may issue a search warrant, and specifies a non-exclusive list of persons who may accompany law enforcement in the execution of a search warrant.

SB 954 took effect on June 12, 2023.

Sexual Abuse by Fraudulent Representation

2023 Oregon Laws Ch. 200 (SB 974)

SB 974 creates a new crime of sexual abuse by fraudulent representation. An individual commits the crime if the person is a medical professional and knowingly subjects another individual to sexual contact and falsely or fraudulently represents that the

sexual contact serves a legitimate medical purpose.

SB 974 took effect on June 7, 2023.

Involuntary Servitude

2023 Oregon Laws Ch. 217 (SB 1052)

SB 1052 significantly expands the crime of Involuntary Servitude to include acts such as forcing another person to continue to engage in service by engaging in any of a number of acts. These include debt bondage, withholding medical care or instilling a fear that medical care will be withheld, controlling access to controlled substances and fraud. The bill defines a number of previously undefined terms and creates limited affirmative defenses.

SB 1052 takes effect on January 1, 2024.

Evidence of Physical Injury

2023 Oregon Laws Ch. 205 (SB 1060)

SB 1060 modifies evidence that can be considered to substantiate a “physical injury” under the Oregon Criminal Code, and specifies types of physical injuries that constitute “physical trauma.” Under the bill, evidence of physical injury includes but is not limited to:

- Testimony by the person alleged to have been injured;
- Evidence of physical trauma;
- Testimony from witnesses indicating that the person alleged to have been injured experienced substantial pain or impairment of physical condition; or
- Expert testimony addressing the effect of the type and amount of force used by the defendant.

SB 1060 applies to conduct occurring on or after January 1, 2024.

Firearms

2023 Oregon Laws Ch. 229 (HB 2005)

HB 2005 makes several changes to Oregon law further restricting the purchase or transfer of unfinished or undetectable firearms.

HB 2005 defines an “undetectable firearm” as one that is entirely made of a non-metal substance, including if the firearm had been 3D printed, or one that after disassembly would not generally be readily detectable by a walkthrough metal detector. Practitioners should review the new statute for a complete understanding of the important definitions of “undetectable firearm” and of “unfinished frame or receiver”.

The bill prohibits a person from manufacturing, importing, selling or transferring an undetectable firearm, and classifies violation as a Class B Felony. The bill also makes the possession of an undetectable firearm a Class A misdemeanor.

The bill creates a new Class B Violation prohibiting the sale or transfer of any firearm that has not been imprinted with a serial number by a federally licensed firearm manufacturer. This prohibition does not apply to antique firearms, or to any firearm produced before October 22, 1968. This crime may be treated as a Class A Misdemeanor if the defendant has a prior conviction for an offense under this bill, and as a Class B Felony if the defendant has two or more prior convictions.

The bill similarly makes it a Class B Violation to sell or transfer an unfinished frame or receiver. The bill again permits that this offense may be treated as a Class A Misdemeanor if the defendant has a prior conviction under this bill, or as a Class B Felony if the defendant has two or more prior convictions.

HB 2005 took effect on July 13, 2023. Provisions related to transferring unfinished receivers and provisions related to transferring firearms without a serial number take effect on September 1, 2024.

Illegally Recorded Telecommunications

2023 Oregon Laws Ch. 234 (HB 2129)

HB 2129 modifies the prohibitions under ORS 165.540 against obtaining telecommunications illegally. The bill exempts individuals from prosecution who receive or use an illegally recorded communication about a matter of public concern, but who did not participate in initially obtaining the recording. The bill would not change the law for an individual who recorded such a conversation.

HB 2129 takes effect on January 1, 2024.

Driving Under the Influence of Intoxicants

2023 Oregon Laws Ch. 498 (HB 2316)

HB 2316 creates a new definition of the term “intoxicant” within the Oregon Vehicle Code. Under the bill an intoxicant is:

- An intoxicating liquor,
- A controlled substance,
- An inhalant,
- Cannabis,
- Psilocybin, or
- Any drug, as defined in ORS 475.005, that, when used either alone or in combination with one of the above adversely affects a person’s mental or physical faculties to a noticeable or perceptible degree.

The bill creates an affirmative defense when the intoxicating substance is only charged as another drug under ORS 475.005. The affirmative defense may be asserted only if the drug was taken pursuant to a prescription, or if the substance was available without a prescription, and in either case only if the defendant consumed the prescribed or recommended dosage of the drug, and if the defendant then

experienced a reaction to the drug that could not have been reasonably anticipated. The defense must provide notice of their intent to use this affirmative defense at least 45 days in advance of trial.

The bill also lowers the statutory fines applicable to a DUII conviction if the current offense was committed while riding a (non-electric) bicycle.

HB 2316 takes effect on January 1, 2024.

Fentanyl

2023 Oregon Laws Ch. 413 (HB 2645)

HB 2645 establishes a Class A misdemeanor penalty for possession of certain amounts of fentanyl and adds a user unit measurement of fentanyl to calculate the crime category level for certain offenses involving possession, delivery, or manufacture of fentanyl.

HB 2645 took effect on July 27, 2023.

Domestic Terrorism

2023 Oregon Laws Ch. 608 (HB 2772)

HB 2772 creates two new crimes of Domestic Terrorism in the first and second degrees. These new crimes are Class B and Class C felonies respectively.

A person commits Domestic Terrorism in the first degree if the person:

- Intentionally destroys or substantially damages critical infrastructure; or
- Intentionally introduces, releases or disperses a toxic substance into widespread contact with human beings.

- A person commits Domestic Terrorism in the second degree if the person:
- Intentionally possesses a toxic substance with the intent to introduce the substance into widespread contact with human beings;
- Intentionally possesses a destructive device with the intent to destroy or substantially damage critical infrastructure;
- Intentionally attempts to destroy or substantially damage critical infrastructure; or
- Intentionally attempts to introduce, release or disperse a toxic substance into widespread contact with human beings.

HB 2772 takes effect on January 1, 2024.

Statutes of Limitation

2023 Oregon Laws Ch. 265 (HB 3632)

HB 3632 amends ORS 131.125(1) to increase the statute of limitations from 12 years to 20 years for sex abuse offenses in the first degree. The measure applies to offenses committed before, on, or after the effective date of the bill, but does not apply to those offenses if the statute of limitations expired before passage of the bill.

HB 3632 takes effect on January 1, 2024.

Family Law

Employer Child Support Reporting

2023 Oregon Laws Ch. 101 (SB 184)

ORS 25.101(6) defines an “employer” for child support purposes as “any entity or individual who engages an individual to perform work or services for which compensation is given in periodic payments or otherwise.” Under current law, employers are required by federal and state law to report their newly hired employees to state child support programs. However, this requirement does not extend to employers and businesses reporting independent contractors and non-traditional workers.

SB 184 amends ORS 25.790 and 25.793 to require that, in addition to new employees, employers must also report to the Oregon Child Support Program any independent contractors with whom they engage. This change is designed to increase opportunities for the Oregon Child Support Program to collect child support from independent contractors. Without receiving reports from employers, the Oregon Child Support Program is unlikely to know when an obligor parent is working as an independent contractor and has the ability to pay their child support obligation but simply chooses not to.

Simple Estate Affidavit

2023 Oregon Laws Ch. 17 (SB 308)

SB 308 renames the Small Estate Affidavit as the Simple Estate Affidavit and clarifies when and how it may be used.

Under the bill, the Simple Estate Affidavit may be used when:

- Not more than \$75,000 of the fair market value of the estate is attributable to personal property and not more than \$200,000 of the fair market value of the estate is attributable to real property, OR

- The decedent died testate and:

- Not more than \$75,000 of the fair market value of the estate is attributable to specifically devised personal property;
- Not more than \$200,000 of the fair market value of the estate is attributable to specifically devised real property; and
- The balance of the fair market value of the estate is attributable to property that is devised to the trustee of a trust of which the decedent was the settlor and which came into existence before the decedent’s date of death.

The bill does not require a “revokable trust”. The trust may be an irrevocable trust that was created before the decedent’s date of death.

The bill does not change who may file the affidavit – the trustee of a trust that is the beneficiary of decedent’s will may file the affidavit. Likewise the bill does not change the timing for filing the affidavit.

SB 308 amends ORS 238.390(2) and (5) to provide that if a PERS member dies before retiring, did not name a beneficiary or named a beneficiary who predeceased the member or died before the distribution is made, and a simple estate affidavit has been filed, then PERS may pay the amount to the affiant if the decedent’s estate remains within the \$75,000 limit after consideration of the amount of money credited at the time of death to the member’s account or the estate meets the requirements for the distribution to the trust.

SB 308 takes effect on January 1, 2024.

Publication of Notice in Estate Proceedings

2023 Oregon Laws Ch. 18 (SB 309)

SB 309 amends ORS 113.155 which specifies the manner of publishing notice to interested persons of the initiation of estate proceedings.

Under the bill, notice must be published a single time in either:

- a newspaper published in the county in which the estate proceed is pending; or
- if no newspaper is published in the county in which estate proceeding is pending, a newspaper designated by the court.

Prior law required publication on three separate dates. The bill also updates statutory provisions that refer to the “first date of publication” to simply the “date of publication”, since only a single publication is now required.

Practice Tip: Note that the definition of “newspaper” is modified by HB 3167.

SB 309 takes effect on January 1, 2024.

Original Record of Life Birth

2023 Oregon Laws Ch. 157 (SB 573)

Under current law, there is no process for the adult adopted individual to correct an incorrect name of a biological parent if paternity or parentage is later determined. SB 573 creates such a process.

This issue comes up from adult adopted individuals who seek to correct incorrect information on their original (i.e., pre-adoptive) birth certificates or to add a missing parent (presuming that parentage can be shown through sufficient evidence such as a DNA test result).

Oregon law already provides an avenue for non-adopted individuals to amend or correct their birth records related to parentage. The enactment of SB 573 puts adopted and non-adopted people in similar positions when it comes to correcting their birth records in this fashion.

Obligor Life Insurance Modifications

2023 Oregon Laws Ch. 169 (SB 806)

Oregon law provides that a court may order a child support obligor to maintain life insurance to secure their support obligation. In general, modification of a child support obligation requires a showing of a substantial change in economic circumstances of a party or some other substantial change to one of the factors relied on to calculate the award (e.g., parenting time, childcare costs, etc.). SB 806 creates additional avenues for modification of the obligor’s obligation to maintain or purchase life insurance, including:

- When the obligor retires;
- Once every five years after the date the obligor attains 60 years of age;
- If the lowest available life insurance monthly premium for the required life insurance policy costs more than 50 percent of the monthly amount of child support due under the judgment;
- If the life insurance benefits that would be received by the life insurance beneficiary would exceed more than twice the amount of the total remaining support payments due under the child support judgment; or
- If the obligor has established a trust to ensure that upon the obligor’s death the beneficiary of the life insurance will receive at least 125% of the total amount of child support payments that would have been due between the time of the obligor’s death and the date the child support payments under the judgment are scheduled to terminate.

These avenues for modification are sufficient to bring the matter before the court, at which point the court has all the authority it normally has available to maintain, modify, or terminate the life insurance obligation based on the existing circumstances of the case.

SB 806 became effective May 30, 2023.

Family Abuse Prevention Act

2023 Oregon Laws Ch. 140 (SB 816)

Under current law, a Family Abuse Prevention Act (FAPA) protection order that is initially granted or renewed pursuant to ORS 107.710, et. seq. will remain in effect for a period of one year from the date of issuance or until the order is withdrawn, amended, or dismissed. SB 816 extends the duration of FAPA protection orders from one year from the date of issuance or renewal to two years.

SB 816 takes effect on January 1, 2024.

Child Abuse Investigations

2023 Oregon Laws Ch. 195 (SB 901)

Under current law, a Family Abuse Prevention Act (FAPA) protection order that is initially granted or renewed pursuant to ORS 107.710, et. seq. will remain in effect for a period of one year from the date of issuance or until the order is withdrawn, amended, or dismissed. SB 816 extends the duration of FAPA protection orders from one year from the date of issuance or renewal to two years.

SB 901 takes effect on January 1, 2024.

Oregon Family Fairness Act

2023 Oregon Laws Ch. 20 (HB 2032)

HB 2032 removed the requirement that a domestic partnership in Oregon be between two persons of the same sex and allows an opposite sex couple to choose a domestic partnership

For Family Law practitioners, HB 2032 may have unintended consequences in the realm of retirement division in the dissolution context. Kevin Olineck, Oregon PERS Director, testified at a hearing before the Oregon Senate Committee on Rules that as a qualified governmental retirement plan, PERS must comply with specific provisions of federal law to maintain its tax qualified status. Mr. Olineck pointed out that while the Family Fairness Act of 2007 extended all the same rights and privileges of a spouse to a registered domestic partner (RDP), federal law does not recognize domestic partnerships, only marriage. The impact of this distinction is that many provisions and benefits under PERS that are available to a spouse would not be available to an RDP. Examples of these benefits include:

- An RDP cannot elect to delay payment of a pre-retirement death benefit until the member would have been 70;
- An RDP cannot roll over a death benefit payment to a spousal IRA;
- An RDP that is more than ten years younger than the member cannot receive 100% survivor benefit; the member's benefit would be adjusted accordingly;
- Internal Revenue Code section 415 limits the amount of benefits that may be paid from the pension fund; if the member elects a joint and survivor benefit and names their spouse as their beneficiary, the benefit will be tested based on the joint and survivor benefit amount; if the beneficiary is an RDP, the benefit will be tested on a separate basis; that is, a single life annuity; and
- PERS retiree health insurance is available to an RDP of a retired member only if they are a dependent of the retiree.

These distinctions create pitfalls in the dissolution world because dividing PERS benefits and other retirement plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) means there are different benefits – and potentially significantly different values – to attribute based on whether the couple is married or has a registered

domestic partnership. For example, under the federal definition of “alternate payee” only a spouse, former spouse, child, or other dependent can qualify as an alternate payee. Based on the federal definition, an RDP cannot be an alternate payee; therefore, retirement benefits cannot be divided in a dissolution of a registered domestic partnership in the same fashion as they can in a dissolution of marriage. Significant differences include:

- An RDP cannot be awarded a portion of a PERS member’s retirement account or benefits unless they are a dependent of the member;
- A PERS member can elect a survivorship retirement option that allows the member to change their option to a single life benefit if the survivor beneficiary is the member’s spouse and they subsequently divorce; but if the survivor beneficiary is an RDP, the member will not be eligible to change to a single life benefit in the event the registered domestic partnership is dissolved;
- If a PERS member has named their RDP as a survivor beneficiary at retirement, they will not be able to change that designation upon dissolution of the registered domestic partnership;
- A PERS member who has an RDP will not be subject to the default retirement option; and
- An RDP of a PERS member will not be required to consent to the benefit option selection of the member.

These issues between registered domestic partnerships and marriages have existed since passage of the FFA in 2007, so they are nothing new to QDRO specialists. And legislative testimony would suggest that since the US Supreme Court’s ruling of marriage equality in Obergefell was codified in Oregon in 2016, many of the same sex couples that previously opted to register a domestic partnership have instead chosen marriage. In effect, the number of registered domestic partnerships in Oregon has been declining and, as a result, the potential pitfalls

in the practice of divorce and family law have been declining.

HB 2032 will expand the pool of individuals to whom a registered domestic partnership is available which may increase the number of registered domestic partnerships in Oregon. This would theoretically increase the number of cases involving Oregon PERS and other retirement benefits covered by ERISA to which these essential federal/state distinctions apply.

Declaration for Mental Health Treatment

2023 Oregon Laws Ch. 11 (HB 2329)

House Bill 2329 updates two statutory forms – the Declaration for Mental Health Treatment in ORS Chapter 127 and the Appointment of Person to Make Decisions Concerning Disposition of Remains in ORS Chapter 97.

In both cases, existing law required the form to be signed by two qualified witnesses, providing no alternative for authentication. HB 2329 updates the statutes to allow the principal the option of having the forms notarized, in addition to retaining the option for having them signed by two qualified witnesses.

This change makes the authentication requirement consistent with the Advance Directive for Health Care.

This bill takes effect on January 1, 2024.

Government and Judicial Administration Law

OSB Membership, Licensed Paralegals

2023 Oregon Laws Ch. 72 (SB 306)

SB 306 revises language throughout ORS Chapter 9 in order to distinguish between “attorneys” or “lawyers” and “members of the bar.”

In 2024, the Oregon State Bar will enact a new Licensed Paralegal program. This program was approved by the Oregon Supreme Court in 2022. Licensed Paralegals will be members of the Oregon State Bar, but will not be attorneys, and unlike attorneys will only be permitted to practice law within a limited scope. The changes contained within SB 306 make clear when the statute is referring to members of the bar generally, and when it is specifically referring to attorneys.

The bill provides that for the purposes of “ORS 25.501 to 25.556 and ORS chapters 25, 107 and 109 and any other statutes providing for support payments or support enforcement procedures” the term “attorney” includes licensed paralegals who are practicing law within the LP’s licensed scope of practice.

Likewise, the bill provides that for the purposes of ORS 105.105 through ORS 105.168 (Forcible Entry and Wrongful Detainer) as well as for ORS chapter 90, the term “attorney” includes licensed paralegals who are practicing law within the LP’s licensed scope of practice.

SB 306 takes effect on January 1, 2024.

Publication of Notice in Estate Proceedings

2023 Oregon Laws Ch. 18 (SB 309)

SB 309 amends ORS 113.155 which specifies the manner of publishing notice to interested persons of the initiation of estate proceedings. Under the bill, notice must be published a single time in either:

- A newspaper published in the county in which the estate proceed is pending; or
- If no newspaper is published in the county in which estate proceeding is pending, a newspaper designated by the court.

Prior law required publication on three separate dates. The bill also updates statutory provisions that refer to the “first date of publication” to simply the “date of publication,” since only a single publication is now required.

Practice Tip: Note that the definition of “newspaper” is modified by HB 3167, described later in this chapter.

SB 309 takes effect on January 1, 2024.

Disqualification of Judges

2023 Oregon Laws Ch. 289 (SB 807)

SB 807 amends ORS 14.260 to address situations where a party seeks to remove a judge from criminal or juvenile proceedings generally. Under the bill, if a “party, attorney, law firm, district attorney’s office, defense consortium or public defender’s office” files a motion or a series of motions against an elected circuit court judge under ORS 14.260 or ORS 14.270 that effectively deny the judge assignment to a criminal or juvenile delinquency docket, the judge moved against may request a hearing before a disinterested judge.

The disinterested judge is then directed to inquire as to:

- Whether the motion or series of motions effectively denies the judge assignment to a criminal or juvenile delinquency docket in any county within the judge’s judicial district; and
- Whether there is a reasonable good faith belief that the judge lacks fairness or impartiality.

If the inquiry by the disinterested judge establishes that the motion or series of motions effectively denies the judge assignment to a criminal or juvenile delinquency docket and does not establish a reasonable good faith belief that the judge lacks fairness or impartiality, then the motion to disqualify that judge shall be denied.

SB 807 takes effect on January 1, 2024.

Oregon Judicial Department Omnibus

2023 Oregon Laws Ch. 302 (HB 2225)

HB 2225 was an Oregon Judicial Department omnibus bill that addressed several issues related to the management and functioning of Oregon courts.

The bill increased the per-page transcriber fee from \$3 to \$4.25, and provides the OJD with the authority to raise the fee periodically without legislative approval.

The bill clarifies that the Chief Justice or their designee has the authority to appoint senior judges, rather than “the Supreme Court.” The bill also provides that a senior judge appointed to serve in the circuit court may be appointed to serve in one or more counties or judicial districts during their appointment. Additionally, the bill provides that senior judges assigned to serve in a circuit court, who have approval of the presiding judge of that court, may authorize the execution of search warrants.

Finally, the bill makes a number of changes to remedial contempt proceedings, including creating a new filing fee, provides that documents electronically filed with the court are not subject to public disclosure until those documents are reviewed and accepted by court staff, and the bill corrects out of date citations to the ORCP.

HB 2225 took effect on July 18, 2023. Many provisions have separate operative dates. Practitioners should confirm operative dates that may be applicable to their individual situations.

Public Meetings Definitions, Training Requirements

2023 Oregon Laws Ch. 417 (HB 2805)

HB 2805 creates two new definitions that affect when a public meeting exists and is subject to public meetings law. The bill defines “deliberation” to mean “discussion or communication that is part of a decision-making process”. The bill defines “convening” to mean:

- Gathering in a physical location;
- Using electronic, video or telephonic technology to be able to communicate contemporaneously among participants;
- Using serial electronic written communication among participants; or
- Using an intermediary to communicate among participants.

The addition of serial communication and the use of intermediaries, functions to expand the definition of what constitutes the gathering of at least a quorum of a public body, and thus would make these communications subject to public meetings law.

HB 2805 took effect on September 24, 2023.

Executive Sessions

2023 Oregon Laws Ch. 252 (HB 2806)

HB 2806 amends ORS 192.660 to add to the list of circumstances in which the governing body of a public body may meet in executive session.

Under the bill a governing body may meet in executive session to discuss:

- To consider matters relating to the safety of the governing body and of public body staff and volunteers and the security of public body facilities and meeting spaces.
- To consider matters relating to cyber security infrastructure and responses to cyber security threats.

HB 2806 took effect on July 13, 2023.

Notice by Newspaper

2023 Oregon Laws Ch. 257 (HB 3167)

HB 3167 makes several important changes to the definition of “newspaper” in ORS Chapter 193. This definition is relevant in many situations where legal notices may or must be published in newspapers. The bill also creates a new definition of “digital newspaper.”

Under the new definition, a “digital newspaper” is an online newspaper delivered in an electronic form, that is formatted similarly to a printed newspaper, and that is produced in an archivable format.

The new definition of “newspaper” now explicitly includes both printed and digital format publications. The new definition also provides that to qualify as a newspaper under the definition, the newspaper “conducts consistent, regular coverage of local news

and in which at least 25 percent of the total news content is locally and originally composed by the newspaper, regardless of whether the newspaper is produced or printed in the local area”.

The bill amends the definition of “bona fide subscriber” to include subscribers to digital format newspapers. In addition, the bill modifies the existing requirement that more than half of a newspaper’s distribution be to bona fide subscribers. Under the modified requirement, all printed newspapers, as well as “paid-for digital newspapers” count as distributed for determination of the 50% threshold.

Finally, the bill includes new provisions that come into play when an existing newspaper goes out of business, and which loosen the definition of newspapers in that area for the following 12 months.

HB 3167 took effect on July 13, 2023.

Health Law

Provision of Direct Care Services by Parents to Minor Children

2023 Oregon Laws Ch. 367 (SB 91)

SB 91 directs the Department of Human Services to administer a program to provide attendant care services to the parents' minor children who have been assessed by the department to have very high medical or behavioral needs. Parents must be paid overtime at the same rate and under the same circumstances as direct support professionals.

SB 91 took effect on July 18, 2023.

Disclosure of Individually Identifiable Data

2023 Oregon Laws Ch. 69 (SB 216)

SB 216 prohibits disclosure of individually identifiable data collected by the Oregon Health Authority on race, ethnicity, preferred spoken and written languages, disability status, sexual orientation and gender identity.

SB 216 took effect on September 24, 2023.

Temporary Disability Benefits

2023 Oregon Laws Ch. 142 (SB 418)

Prior to the passage of SB 418, an injured worker was required to leave work for at least four hours for the purpose of receiving compensable medical services before eligibility for temporary disability benefits. The bill removes the minimum absence requirement.

SB 418 took effect on June 1, 2023.

Modification of birth records

2023 Oregon Laws Ch. 157 (SB 573)

SB 573 permits a person, who is age 21 or older and whose original record of live birth was sealed under ORS 432.245 and was later opened under ORS 432.250, to apply to the Center for Health Statistics to add or change the name of a biological parent on the original record of live birth when paternity or parentage has been determined by DNA or other means.

SB 573 requires that the person seeking to add or change the name of a biological parent include in their application evidence of a DNA test or other evidence that shows the person to be added is the biological parent of the applicant as well as an affidavit attesting that the person is the biological parent of the applicant. If the biological parent of the applicant is deceased, the applicant must submit an affidavit from the personal representative or relative of the deceased.

If the name of a biological parent is entered under this section, only a noncertified copy of the record of live birth may be obtained. A notation indicating that the record was amended must be shown on all copies of the record.

SB 573 takes effect on January 1, 2024.

Personal Data Protection

2023 Oregon Laws Ch. 369 (SB 619)

SB 619 permits consumers to obtain certain information about their personal data from a controller that processes such information. It also requires controllers to provide consumers with privacy notices that meet specified requirements.

SB 619 exempts personal health information processed in accordance with HIPAA or the Gramm-Leach-Bliley Act, as well as information that is indistinguishable from or intermingled with

information processed in the manner required by HIPAA or GLBA.

SB 619 takes effect on January 1, 2024.

Erroneous Family and Medical Leave Insurance Program payments

2023 Oregon Laws Ch. 120 (SB 912)

SB 912 authorizes the director of the Employment Department to deduct any payments made in error or overpayments from future benefits otherwise payable to the covered individual.

SB 912 states that the director shall waive recovery if the benefits are only recoverable due to a change in state law.

SB 912 prohibits individuals who have been convicted of fraud from obtaining benefits in the calendar quarter in which the person was convicted. Those individuals are ineligible for benefits until the individual has reimbursed the Paid Family and Medical Leave Insurance Fund.

SB 912 provides civil penalties against employers who violate the requirements of the Paid Family and Medical Leave Insurance Fund.

SB 912 took effect on September 24, 2023.

Insurance Marketplace

2023 Oregon Laws Ch. 585 (SB 972)

SB 972 requires the Oregon Health Authority to transition from healthcare.gov to state-based marketplace by November 1, 2026.

SB 972 took effect on July 31, 2023.

Reproductive Health Rights and Gender-Affirming Care

2023 Oregon Laws Ch. 228 (HB 2002)

HB 2002 further protects access to reproductive health services in Oregon, including creating an enforceable right to make decisions about one's own reproductive health. It modifies an existing prohibition on public-body interference with pregnancy termination to create a prohibition on public-body interference with the exercise of an individual's reproductive health rights. It also adds prohibitions on criminal or civil liability based on the exercise of an individual's reproductive health rights or on the provision of assistance to another individual in exercising their own reproductive health rights.

HB 2002 also provides that a health care provider may not be prohibited from providing reproductive health care information and services to a consenting individual, and that an individual who receives or declines such information and services shall not be subject to the loss of any privilege, immunity, or public benefit.

HB 2002 prohibits health benefit plans from excluding coverage of medically necessary gender-affirming treatments and requires plans and coordinated care organizations to meet network-adequacy standards related to gender-affirming treatment providers. It also requires inclusion of gender-affirming treatment in the Oregon Health Plan.

HB 2002 prohibits adverse actions by malpractice insurers against health care providers for providing lawful reproductive or gender-affirming health care.

Finally, HB 2002 creates a right of action for a person or health care facility aggrieved by interference with a health care facility.

HB 2002 took effect on July 13, 2023.

Data Broker Registration

2023 Oregon Laws Ch. 395 (HB 2052)

HB 2052 provides that a data broker may not collect, sell, or license brokered personal data in Oregon unless they first register with the Department of Consumer and Business Services. It also provides civil penalties for violations.

HB 2052 took effect on July 27, 2023.

Declarations of Deceased Depositors

2023 Oregon Laws Ch. 84 (HB 2447)

HB 2447 requires the Department of Human Services and Oregon Health Authority to provide declarations of deceased depositors to financial institutions between 46-76 days after the death of the depositor.

HB 2447 takes effect on January 1, 2024.

Public Records Disclosure Exemptions

2023 Oregon Laws Ch. 307 (HB 2490)

HB 2490 exempts certain cybersecurity documents, records, and protection plans from public records disclosure.

HB 2490 takes effect on January 1, 2024.

Civil Penalties for Abuse and Neglect by Agency Personnel

2023 Oregon Laws Ch. 506 (HB 2665)

HB 2665 grants the Health Licensing Office the authority to impose civil penalties on temporary staffing agencies if personnel of the staffing agency abuse, neglect, or exploit a patient or client; engage in dangerous conduct that threatens the health, safety, or welfare of others; or do not meet the qualifications for the position.

HB 2665 took effect on September 24, 2023.

Physician Assistants' and Nurse Practitioners' Service in Workers' Compensation Claims

2023 Oregon Laws Ch. 87 (HB 3412)

HB 3412 permits physician assistants to provide compensable medical service to an injured worker for a cumulative total of 180 days.

HB 3412 permits nurse practitioners and physician assistants to provide the same level of services as a primary care physician if the nurse practitioner or physician assistant maintains the injured worker's medical records, has a documented history of treatment with the worker, agrees to refer the worker to the managed care organization for specialized treatment, and agrees to comply with all the rules, terms and conditions regarding services performed by the managed care organization.

HB 3412 takes effect on January 1, 2024.

Housing Law

Rent Increases

2023 Oregon Laws Ch. 226 (SB 611)

SB 611 amends ORS 90.323, 90.324, and 90.600 to limit rent increases to the lesser of 7% plus CPI (the current cap) or 10%. In other words, in high-inflation years, the maximum rent increase for residential tenancies is 10%. In years with lower inflation, the maximum increase would be lower. SB 611 also limits rent increases to once in any 12-month period.

SB 611 does not change existing provisions exempting from the rent-increase cap residential landlords who rent units that have certificates of occupancy less than 15 years old, or units that are subsidized and the increase either does not increase the tenant's portion of the rent or is required by the terms of the subsidy program.

SB 611 took effect on July 6, 2023, and applies to all notices of rent increase issued on or after that date.

Notice by Email

2023 Oregon Laws Ch. 296 (SB 1069)

SB 1069 amends ORS 90.155 and related statutes to permit residential landlords and tenants to serve notices by email, if the parties agree to do so by separate written addendum to the rental agreement.

SB 1069 also allows landlords to return funds to tenants, including security deposits and rent refunds, by electronic means, if the parties have agreed to such electronic delivery in a written agreement. Significantly, however, notices terminating a tenancy, if served by email, must also be served by first class mail.

SB 1069 takes effect on January 1, 2024.

Evictions

2023 Oregon Laws Ch. 13 (HB 2001)

HB 2001 modifies the rights and obligations of landlords and tenants in Oregon. The bill expands the protections afforded to tenants under the Oregon Residential Landlord Tenant Act (ORLTA) and has several effects.

First, the bill allows a tenant to pay any past-due rent to a landlord at any time during an eviction case for non-payment of rent in order to dismiss the case. This functions as a redemption right for the tenant. If it is the day before an eviction trial, the tenant can tender past due rent to the landlord and the case will be dismissed. If this happens, the tenant will not be allowed to recover their attorney fees or costs and the landlord can recover their filing fees. As a practical matter, a dismissal after a tenant tenders past-due rent means neither party will be considered the prevailing party for the purpose of attorney fees and costs under ORS 90.225.

Second, the bill extends the time periods for the right to cure a past-due rent under ORS 90.394. The statute is modified to allow either 10 days or 13 days to cure unpaid rent before an eviction can be filed. Previously, a landlord could issue a 72-hour notice of unpaid rent on the eighth day of the rental period or a 144-hour notice on the fifth day of the rental period. Both are functionally identical in that they require the tenant to cure the unpaid rent by the eleventh day of the rental period.

Under HB 2001, the landlord can give 10 days' notice on the eighth day of the rental period or 13 days' notice on the fifth day of the rental period. This means the tenant can cure unpaid rent up to the 19th day of the rental period. This gives a tenant who falls behind on rent an additional eight days to pay the rent without the landlord being able to file an eviction case.

Third, HB 2001 imposes additional inquiry requirements by the court prior to entering a default judgement against a tenant who declined to appear at an eviction hearing first appearance. Previously, if a tenant did not appear at the initial hearing in an eviction case, the landlord was automatically granted a default judgment for possession. Under the new standard, the court is required to make an independent finding that the complaint complies with certain procedural and technical requirements imposed by law. In addition, the landlord is required to submit an affidavit swearing under oath that the tenant is still in possession of the premises prior to obtaining a default.

Finally, the bill sets up a system for the court to automatically set aside old eviction convictions. The court is required to annually conduct an internal, independent inquiry as to what eviction judgements have been satisfied and seal those records. Qualifying judgments are those where (1) any money award has expired or been satisfied or discharged, and (2) at least five years have passed from the date of judgement, or the judgement was by stipulation of the parties and twelve months have passed from the date of judgement. If an eviction is set aside, any prospective tenant when asked the question, “have you ever had an eviction entered against you?” can truthfully and legally answer, “no.”

HB 2001 took effect on March 29, 2023.

Applicant Screening Charges

2023 Oregon Laws Ch. 319 (HB 2680)

HB 2680 makes several changes to statutes related to landlords accepting applicant screening fees.

First, the bill requires that a landlord provide the applicant with a confirmation that a screening by either a tenant screening company or a credit report agency has occurred, including sending the tenant a copy of a receipt from the screening entity.

Second, the bill provides that a landlord must refund the screening charge within 30 days, if the applicant is not screened.

Bias Crimes

2023 Oregon Laws Ch. 549 (HB 3443)

HB 3443 makes several changes to Oregon law in order to protect Oregonians who are the victim of a bias crime. “Bias Crime” is defined in HB 3443 to include a person who is a victim of the crimes of Bias Crime in either the first or second degree (ORS 166.165 and ORS 166.155 respectively.)

Among other changes, HB 3443 amends ORS Chapter 90 to include victims of bias crimes in several provisions that currently protect victims of domestic violence, sexual assault or stalking. These include providing that residential tenants are not responsible for damage to property that results from a bias crime, and prohibiting landlords from terminating or failing to renew a tenancy because the tenant was the victim of a bias crime. The bill also permits a landlord to more easily evict a tenant who is the perpetrator of a bias crime.

HB 3443 takes effect on January 1, 2024. ■

Acknowledgments

Thank You

These legislation alerts were adapted with permission from the 2023 Oregon Legislation Highlights published by the Oregon State Bar. The Professional Liability Fund sincerely thanks the following people for their assistance with these legislation alerts:

Jennifer Baker	Gillian Fischer	Emily Rena-Dozier	June Wyrick-Flores
Carl Bjerre	Tony Kullen	Matthew Shields	Amy Zubko
Ryan Carty	Tania Manners	Emma Singer	
Brian Cox	Kevin Mehrens	Aly Sneider	
Nadia Dahab	Hon. Mark Peterson	Young Walgenkim	

The PLF would like to express its heartfelt thanks and appreciation to the following individuals, who spent significant time and energy updating the PLF's practice aids in substantive areas of the law:

Dean Alterman	Craig Cowley	Phil Jones	Libby Schwartz
Christopher Ambrose	Tom D'Amore	Dan Keppler	Iayesha Smith
Michelle Bertolino	Keith Dozier	Courtney Kreutz	Vivian Solomon
Gary Blacklidge	Eleanor DuBay	Tony Kullen	Bradley Tellam
Whitney Boise	Dan Eller	Tabitha Lundberg	Amanda Thorpe
Matthew Borrillo	Anne Foster	Adina Matasaru	Clark Williams
Kathryn Bourn	Mark Fucile	Johnston Mitchell	Xin Xu
Lisa Brown	Doug Gallagher	Troy Pickard	Theressa Hollis
Peter Bunch	Francis Gieringer	Phil Querin	Jasmin Kahn
Nik Chourey	Phil Hornik	Julia Rice	Amanda Marshall
Christine Coers-Mitchell	Peter Jarvis	Scott Schnuck	



LAW PRACTICE

Tips, Traps, and Resources

BEWARE OF DATA COLLECTION FOR AI TRAINING PURPOSES



Since the pandemic, many lawyers have turned to Zoom as their go-to platform for communicating with clients, opposing parties, and even with the courts. Recently, Zoom introduced Zoom AI Companion, an artificial intelligence feature designed to assist in various ways, such as generating meeting summaries and helping draft chat messages.

Zoom then changed its terms of service in March 2023 to allow it to use customer content—including audio and video calls and transcripts, chats, and attachments—for AI training purposes. The decision sparked considerable public backlash when it came to light. In response, Zoom revised its terms again in August 2023 to specify that no customer content would be used for AI training.

While Zoom has dialed back its data collection and use policy, this incident is a good reminder that companies may be collecting your data for AI training or other reasons. The data may include confidential client information.

To safeguard client confidentiality and data security, it's crucial to thoroughly vet any software program your firm uses, whether it's for videoconferencing or other purposes. Review your vendor policies, both initially and regularly, to ensure they comply with industry standards for preserving confidentiality and security.

RECENT BLOGS FROM PMAP TEAM

The following blogs posted in 2023 are now available on the PLF website:

- Apps to Help Legal Professionals Stay Organized
- Steer Clear of Mistakes in Your Documents and Forms
- File Management: Tips for Managing the Chaos

To view all blog posts, go to www.osbplf.org > Services > Blogs.