



PLF UPDATES

Message from the CEO

By Carol J. Bernick, PLF Chief Executive Officer

After five of the most professionally satisfying years of my career, I am leaving the PLF in the next few months. I am re-joining my former colleagues at Davis Wright Tremaine. I will serve as a strategic partner in a variety of ways, with a focus on mentoring, training, and career development of associates, especially women and lawyers of color. Closing the gender and race gap present in the partnership track of large law firms has been a passion of mine my entire professional life. The opportunity to have a real impact is too important for me to pass up. Yet the decision to leave the PLF was not easy: the quality of work performed by the entire staff is its hallmark. It has been my privilege to work with the PLF's talented and dedicated staff and defense panel and to witness the impact the PLF has on Oregon lawyers. I thank the PLF Board and everyone at the PLF for giving me this opportunity. Because of your dedication, I am confident that the PLF will continue to serve Oregon lawyers well for years to come.

PLF Chief Executive Officer Position

The Professional Liability Fund is seeking a new CEO with a desired start date of December 1, 2019. As an independently managed subdivision of the Oregon State Bar, the PLF has a staff of 50 and annual budget of \$28 million. Reporting to the PLF's board, the CEO provides strategic leadership and management for the PLF. Primary responsibilities include policy development, personnel management, claims management, overseeing the budget and investments, and cultivating relationships with the PLF's stakeholders. Preference will be given to Oregon lawyers with management and litigation experience. The successful candidate must possess excellent communication skills and be able to lead the organization in a collaborative but decisive way, instilling confidence in all stakeholders.

In addition to the uniquely rewarding nature of the job, we offer a competitive salary and excellent benefits, including participation in Oregon PERS. The deadline to apply is October 16. For a complete position profile and instructions on applying, visit the PLF website at www.osbplf.org, and click on Job Opportunities under About PLF.

EQUAL OPPORTUNITY EMPLOYER



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LAW PRACTICE

Protect Your Data by Using Encryption

By Hong Dao

This article is a continuance of our cybersecurity series. It focuses on encryption as a way to protect your data from physical loss or cyberattacks.

Encryption is a critical step in adopting and implementing a security policy in any law office. It transforms information so it is unintelligible to an unintended recipient. It uses specific algorithms to scramble the data into jumbled unreadable codes. The recipient needs to unscramble the data using an encryption key in order to decrypt the information.

You do not need to know how encryption technically works to use it. Your "usage" of encryption typically involves turning on the native encryption program built into your computing devices. Or it may involve downloading and following instructions to install and set up a third-party encryption software program.

You may need technical assistance with implementing both types of usage.

Encryption protects two types of data: in transit and at rest. Data in transit refers to data moving between browsers, via emails, and through the cloud. Data at rest is data stored on computer hard drives, servers, databases, and mobile devices. Lawyers deal with both types of data. This article will focus on hard drive, file/folder, smart device, cloud, and email encryption.

FULL DISK ENCRYPTION – ENCRYPTING COMPUTER HARD DRIVE

Your computer contains client information as well as your personal information that you want to protect from unauthorized access. If the computer is lost, stolen, or hacked, there is a high risk that the data will be compromised if it's not secure. Encrypting the entire hard drive on your computer (called full

disk encryption) ensures that no one can access anything on it. The encryption makes all data on your computer unreadable unless it is decrypted with a key (password) that only you have.

Computers running on Microsoft Windows have a free built-in full disk encryption program called BitLocker Drive Encryption. They also have BitLocker to Go that can be used to encrypt external drives like USB flash drives and other portable hard drives. However, both BitLocker programs are only available in the Professional or Enterprise editions of Windows 8 or 10, or the Ultimate version of Windows 7. (Beginning January 14, 2020, Microsoft will no longer support Windows 7. Computers running on unsupported operating systems are more vulnerable to malware and other types of attacks.)

Instructions to turn on BitLocker are available on the Microsoft website here: <https://support.microsoft.com/en-us/help/4028713/windows-10-turn-on-device-encryption>. Once BitLocker is enabled with a strong password or passphrase, the contents of the hard drive are automatically encrypted when the authorized user logs off and are decrypted when the user logs on.

Most of us buy PCs with the Home edition of Windows, which does not have BitLocker encryption. Check to see which version you have. If you need help with this, go to the Microsoft website here: <https://support.microsoft.com/en-us/help/13443/windows-which-version-am-i-running>.

For those using the Home edition, consider using a third-party encryption software program like VeraCrypt, DiskCryptor, or BestCrypt to encrypt your hard drive. Common computer security vendors like Symantec and McAfee also have their own lines of encryption software.

Mac computers with OS X Lion or later have a full disk encryption program called FileVault 2 available in the System Preferences. Instructions to turn on FileVault 2 are available here: <https://support.apple.com/en-us/HT204837>.

LIMITED ENCRYPTION—ENCRYPTING FILES/FOLDERS

Encryption can also be performed on a limited basis — at the individual file or folder level on your

computer. Limited encryption provides another layer of security on your encrypted hard drive. It addresses a concern with the full disk encryption: the hard drive is not always encrypted. When a user turns on the computer and enters the decryption key (password), the entire drive is decrypted. It remains decrypted until it is turned off or logged off again. During the time the computer is turned on and in its decrypted state, your data is vulnerable if left unattended. Limited encryption helps make those files inaccessible during that period.

For those looking for extra security by encrypting selected files and folders, you have a few options.

- **Windows Users**

Windows has an encryption method called “encrypting file system” (EFS) that allows users to encrypt files or folders. EFS is only available on Professional and Enterprise editions of Windows. More information on how to use this feature is available here: <https://www.thewindowsclub.com/encrypt-files-efs-encryption-windows-10>.

- **Mac Users**

Mac OS Disk Utility tool can encrypt files and folders. More information on how to use this function is available here: <https://tinyurl.com/y7wshet4>.

- **Encrypt Office documents and Adobe PDFs**

If your computer doesn't have any built-in file/folder encryption program, you may consider putting a password on the document as a way to encrypt it. Microsoft has instructions on encrypting Office documents here: <https://tinyurl.com/yuf64c29>. Instructions for encrypting Adobe PDF documents are available here: <https://helpx.adobe.com/acrobat/using/securing-pdfs-passwords.html>.

- **Paid programs**

Paid file/folder encryption software programs offer the capability to encrypt only parts of a file or the entire file or folder. A list of paid file/folder encryption software is available here at PC Magazine: <https://www.pcmag.com/article/347066/the-best-encryption-software>.

If you have to choose between full disk or limited encryption, go with full disk encryption. With full disk encryption, you don't have to think about what files to encrypt. Everything is encrypted automatically. Make sure you set your computer or laptop to log off automatically after a period of inactivity so unencrypted data is not exposed.

DEVICE ENCRYPTION – ENCRYPTING SMARTPHONES AND TABLETS

All smartphones and tablets, which are essentially small computers, should also be protected with encryption, as they can be easily lost or stolen.

Newer versions of Android devices have encryption enabled by default. Other versions require the user to set up a password or PIN to enable the encryption program. More information on how to do this can be found here: <https://www.androidauthority.com/how-to-encrypt-android-device-326700/>.

All iPhones and iPads have encryption built into their operating systems, but they need to be enabled by setting up a lockscreen password: <https://support.apple.com/en-us/HT204060>. Once you set a password, all files are automatically encrypted when the device is locked and decrypted when it's unlocked.

CLOUD ENCRYPTION—ENCRYPTING BEFORE UPLOADING TO THE CLOUD

Some lawyers also store files and other types of data on the cloud through providers like Dropbox, OneDrive, and Google Drive. Although your data is encrypted by the provider against hackers, it is not encrypted against the provider itself. This means that the provider has the ability to access your files or give backdoor access to the government in response to a subpoena or warrant.

Programs like Boxcryptor, ODrive, and Cryptomator allow users to encrypt their files first before uploading them to the cloud. This makes the data unreadable by the provider because it doesn't have the encryption key. Those programs create an encrypted drive on your computer. When you transfer files to the encrypted drive, those files will be automatically encrypted and then uploaded to your cloud provider through file synchronization.

If you're looking for a more secure alternative to Dropbox or other common cloud storage providers, consider these "zero-knowledge" providers: SpiderOak, Tresorit, Sync.com, pCloud, or MEGA. All your files are encrypted on your computer first before they are transferred to the provider's servers. You keep the encryption key and a copy is not shared with the provider, so it has "zero knowledge" of your key. Without knowledge of your key, the provider cannot access your data stored on its server.

EMAIL ENCRYPTION – ENCRYPTING BEFORE SENDING EMAILS

Emails are by default not encrypted. If you're sending confidential or sensitive client information, you may want to take steps to secure the message and its attachments. Below are a few options to secure emails.

- **For Gmail and Outlook users**

Gmail Confidential Mode does not use encryption but still provides a little bit of security for your emails. It lets you put an expiration date on a message and lock it with a password sent to the recipient's phone via SMS messaging (text). Emails sent with Confidential Mode cannot be forwarded, copied, downloaded, or printed, but recipients can still take screenshots. Those emails are automatically deleted from the recipient's inbox after the expiration period but remain in the sender's Sent folder. To learn how to use Confidential Mode: <https://support.google.com/mail/answer/7674059?hl=en&co=GENIE.Platform=Desktop>.

Outlook users can encrypt Outlook emails using Digital ID. The process to create a Digital ID can be cumbersome, but once it's created, you can use it to encrypt your email message or prevent it from being tampered with. More information is available here: <https://support.office.com/en-us/article/get-a-digital-id-0eaa0ab9-b8a2-4a7e-828b-9bded6370b7b>.

- **Email encryption software**

Third-party email encryption services like Trustifi, Citrix ShareFile, TitanFile, Zix, and Virtru can be purchased and downloaded as an

add-on to most existing email programs. It's fairly easy to encrypt an email and attachments using any of these programs. Users just click on the encryption icon whenever they want to encrypt a message. How the recipient receives and opens the encrypted email will depend on the program.

- **Encrypted webmail**

An encrypted email service is an easy way to secure your emails without having to download and set up anything. Web-based email services like Hushmail, Protonmail, and StartMail let you send encrypted emails to anyone. They have the added benefit of providing anonymity because the provider cannot read the messages in your inbox. These services can be used on any computer browser or iOS and Android devices.

PASSWORD IS IMPORTANT

Most encryption programs are tied to the password or passphrase you choose. Make sure it's strong, complicated, yet still easy to remember. Our *inPractice* blog has tips on how to create strong passwords available here: <https://www.osbplf.org/inpractice/passphrases--an-enhanced-level-of-security/>. Make sure you keep your password in a secure location, as a forgotten password means complete loss of your data.

Hong Dao is an attorney and practice management advisor at the PLF.

LAW UPDATES

Business Breakups: Terminating Ownership Interests in Closely Held Businesses

**By Robert J. McGaughey
and Aurelia Erickson**

When minority owners become dissatisfied with those in corporate control of a publicly traded corporation, they can simply sell their shares and immediately terminate the corporate relationship. Such is not the case for closely held businesses.

The market for minority interests in closely-held businesses is negligible. Often, the only persons interested in acquiring a minority ownership interest are the business's majority owners.

When majority owners become unhappy with minority owners, there are only a few recognized methods for forcing the minority owners to relinquish their ownership interests in the business entity.

This article will explore some aspects related to

terminating the relationship between majority and minority owners in closely-held businesses.

1. NEGOTIATED RESOLUTION

The simplest and least costly method for severing the business relationship is through negotiations. Many of the methods discussed in this article are very costly in terms of legal fees, as well as in terms of the time and emotional involvement of the owners themselves. Negotiating an acceptable deal between the parties – even though the end result may not be fully satisfactory to either party – is often quicker and less costly than resorting to litigation. There are a number of mediators and professional organizations that deal with closely-held businesses and who can facilitate these negotiations.

Even in a negotiated resolution, there are technical legal, tax, and accounting issues which should be addressed fairly early in the negotiation process. It is important to involve legal, tax, and accounting assistance early, particularly when the parties are negotiating directly with each other.

2. BUY-SELL AGREEMENTS AND OTHER CONTRACTS

In the event of a falling out between business owners, contracts between those business owners – buy-sell agreements, the operating agreement, bylaws – should be reviewed to see if there is a contractual mechanism for resolving the dispute, or for giving one owner the right to force the other owner to buy or sell his/her ownership interest.

3. SQUEEZE-OUT MERGERS AND REVERSE STOCK SPLITS

If the majority owners wish to force the minority to sell their shares, there are forms of corporate reorganization that can accomplish this goal. These include squeeze-out mergers and reverse stock splits.

Squeeze-out mergers. In a classic squeeze-out merger, the majority owners contribute their shares in OldCo to a new corporation (NewCo). After this transfer, NewCo becomes the majority owner of OldCo's shares. Next, the two corporations adopt a plan of merger, merging OldCo into NewCo and requiring all individual shareholders (i.e., the minority owners) to be cashed out at the "fair value" of their shares.

Such mergers give those in control the ability to choose those shareholders staying on and those cashed out. These mergers are not usually available for S corporations as they will cause termination of S corporation status and are usually prohibited by internal contracts.

Prior to the adoption of the plan of merger, the majority owners usually engage a business valuation firm to determine a "fair value" of the shares. The statute requires those in control to offer a fair price

for the minority's shares only a short time into the process, so a stock valuation is often the first step undertaken. This is also true because soon after the process begins, those in control will be irrevocably committed to buying out the minority at a fair price, making it important to know the cost of cashing out the minority.

Generally, the majority owners and the corporation retain independent counsel.

Reverse Stock Splits. In a reverse stock split, the corporation adopts a plan proportionately reducing the number of shares held by each shareholder, leaving the minority shareholders with less than one share each. The plan calls for the corporation to redeem all fractional shares for cash, forcing the minority shareholders to sell their fractional shares back to the corporation. This mechanism does not work if there are shareholders the company wants to keep who own less shares than the shareholder being ousted.

Both squeeze-out mergers and reverse stock splits give rise to "dissenter's rights" and a process covered by statute.¹

4. ACTIONS ARISING OUT OF OPPRESSION AND DEADLOCK

ORS 60.661(2) has long permitted a shareholder to seek judicial dissolution of a corporation when the majority's conduct is "illegal, oppressive or fraudulent" or when there is a voting deadlock.

A similar provision exists in the newer ORS 60.952, which applies only to nonpublic corporations. However, unlike ORS 60.661(2), ORS 60.952 gives the corporation and/or the controlling shareholders the right to force the complaining shareholder to sell all of his/her shares at a price and on terms set by the court. This non-revocable election to buy-out must be made within 90 days after the lawsuit is filed by the unhappy shareholder.

Although ORS 60.661 only provides for dissolution as a remedy, courts usually fashion other remedies for oppressive conduct – relying on their traditional equitable power to protect minority owners.

¹ ORS 60.551 et seq.

The remedy commonly imposed by courts in oppression cases is an order requiring the controlling shareholders to purchase the shares of the oppressed minority at the “fair value” of those shares.

Usually, in order to trigger a remedy under ORS 60.661 or 60.952, the corporation must engage in some pattern of wrongful conduct or a single instance of wrongful conduct that is particularly egregious.

Courts will usually not intervene in the case of alleged director incompetence and mismanagement. Usually, either bad faith or fraud must be present in order for a court to intervene in internal corporate affairs.

Forced buyout. ORS 60.952(6) provides that within 90 days after a minority shareholder initiates an oppression lawsuit, either the corporation or one or more of its controlling shareholders may elect to force the plaintiff to sell his/her shares. Should such an election be made, the minority’s oppression lawsuit is suspended and the court need only determine the “fair value” of the minority’s shares and the terms of that purchase.

ORS 60.952(6) likely takes away the court’s ability to fashion a remedy other than the buy-out of the unhappy shareholder. If the corporation or controlling shareholders elect to repurchase the plaintiff’s shares, the court then determines price and terms. When setting payment terms, the court may take into consideration the impact of the bad acts on the share value and the ability of the corporation to pay.

5. BREAK-UPS AMONG MEMBERS IN AN LLC

Courts in Oregon and other states have often interpreted LLC statutes in a manner consistent with corporate law.

Expulsion. While there may be roundabout methods of doing so, generally a corporation cannot expel a shareholder. An LLC, however, can expel a member, unless the operating agreement provides otherwise. The LLC statute gives the LLC the right to

expel a member who is acting wrongfully, either as defined in the operating agreement or as defined in ORS 63.209.

Although an LLC may expel a member, fiduciary duty considerations may apply.

Withdrawal. The LLC statute permits a member to withdraw from the LLC, unless prohibited by the operating agreement (which it often does). There is no similar provision under corporate law. The withdrawal may subject the withdrawing member to liability.

Even though a member may “withdraw” as a member, this does not mean that the LLC is obligated to cash out the withdrawing member’s interest.² Absent provisions in the operating agreement addressing this issue, the withdrawing member loses the right to participate in management, but retains his/her economic interest (much like an assignee).

Dissolution. An LLC can be dissolved upon the occurrence of those events specified in the articles of organization or by vote of the members. An LLC may also be dissolved by the court.

Unlike the corporate statutes, the LLC statute contains no provisions for dissolution in the event of deadlock or where the corporation acts in a manner that is “illegal, oppressive or fraudulent.”

The LLC statute uses the phrase: “if it is established that it is not reasonably practicable to carry on the business.”

There are no Oregon cases interpreting this language and no consistent interpretation by other courts interpreting this “reasonably practicable to carry on the business” language.

Despite the absence of a statutory basis for judicial intervention in the case of “oppressive” conduct, Oregon courts have long held that they have traditional equitable powers to protect minority owners and to fashion appropriate remedies. It is an open question whether this equitable power will also be applied to LLCs.³

Robert J. McGaughey and Aurelia Erickson are attorneys at McGaughey Erickson.

² ORS 63.265

³ See Rowlett v. Fagan, 262 Or App 667, 327 P3d 1 (2014), rev’d on other grounds, 358 Or 639, 369 P3d 1132 (Or., 2016) (2016).

client so she will be willing to present certain arguments during the settlement conference. It's important to give the client a realistic assessment of the case;

- Explain to your client that your role will be to collaborate rather than confront, because the process involves settling differences. The settlement process seeks a solution, not a judgment;
- Inform your client about the weak points of his case and confirm everything in writing. Resist the temptation to soften the impact of the negative aspects of a case. The relationship of trust implies that you must have the courage to tell the client things she may not necessarily want to hear. In this way, she will be in a position to make informed decisions and will not be surprised to hear the other side's arguments;
- Get clear instructions from your client. These instructions should be in writing so as to avoid any ambiguities. This will minimize the risk of misunderstandings. You should establish realistic objectives and have the client accept and confirm them in writing before the settlement conference. Imagine what will happen if you don't do this and your client sues you, alleging you acted against his wishes. It will be up to you to prove you followed his instructions. If you have nothing in writing to support your position, you'll find yourself in a very difficult situation in which everything will hinge on the credibility of the parties;
- Don't let your desire to please the client cloud your professional judgment. Be honest and realistic. Nothing will be gained by trying to keep up unrealistic hopes;
- Discuss the possible solutions with your client and, especially, what she expects if no settlement is reached: the length and cost of a trial, the inability to enforce the judgment if the other party is insolvent, etc.

During the Settlement Conference

- During the settlement conference, the other

party's attitude or strategy, or the discovery of new facts, can require you to rethink your position. If this happens, you have to discuss it with your client, explain what is at stake, and get his approval of this reassessment.

- Be flexible with your negotiating strategy. Being unnecessarily stubborn can have regrettable consequences and result in a lost opportunity to settle the case;
- Provide the client with all the necessary explanations allowing her to make informed decisions which, after all, are hers to make;
- Take notes regarding your client's settlement instructions;
- Plan ahead and bring draft settlement documents with you;
- If a settlement is reached, put it in writing immediately, and have the parties and their lawyers sign the settlement documents;
- Be calm and keep your cool!

The Day After the Settlement Conference

- Make sure you're available if your client has questions. By taking the time to answer questions, you may avoid your client having second thoughts about the settlement agreement and suing you for malpractice.

Remember this rule: The lawyer's role is essential, and failing to prepare means preparing to fail.

Don't run the risk of "settler's remorse." After all, as a lawyer, it's your liability that is at risk!

This article appeared in the May 2019 issue of Praeventio, the Loss Prevention Bulletin published by the Professional Liability Insurance Fund of the Barreau du Quebec. Adapted and reprinted with permission.

Service on Attorney General Is a Necessary Step in Filing Claims for Abuse of Vulnerable Person

By Sarah Troutt and Heather Bowman, PLF Claims Attorneys

A malpractice pitfall is presented when representing a vulnerable person in abuse claims pursuant to ORS 124.100. ORS 124.100(6) requires that a person “commencing an action under this section must serve a copy of the complaint on the Attorney General within 30 days after the action is commenced.” According to the Oregon Court of Appeals, the failure to timely serve the Attorney General with a copy of the complaint alleging a claim for abuse of a vulnerable person is a jurisdictional defect requiring the dismissal of the claim. *Bishop v. Waters*, 280 Or App 537 (2016).

Such a pitfall can be difficult to navigate in a manner that will avoid damage to your client, particularly when a trial date is looming and given concerns about exposure to an attorney fee award and potential prejudice to other claims that may be time-barred and difficult or impossible to re-file if dismissed. Although ORS 124.130 provides a seven-year statute of limitations from discovery of the abuse, these claims are often accompanied by claims for negligence, fraud, or other causes of action with a shorter statute of limitations. Ideally, if you are representing a client who is alleging a claim pursuant to ORS 124.100, you will have timely served the Attorney General with a copy of the complaint as required by ORS 124.100(6). If you have not done so and you are confronted with the

potential for the dismissal of a client’s ORS 124.100 claim, we recommend that you immediately contact the Professional Liability Fund to seek input and assistance in navigating a possible solution.

The good news is that a legislative fix to this pitfall is on the horizon. Senate Bill 783, enacted during the 2019 legislative session, amends ORS 124.100(6). Amended ORS 124.100(6) continues to require service of a copy of the complaint on the Attorney General. However, ORS 124.100(6), as amended, no longer imposes a 30-day deadline for the mailing of such notice and no longer requires dismissal of the action as long as the notice is mailed prior to entry of the judgment. In this regard, the amended version of ORS 124.100(6) provides: “A person commencing action under this section shall mail a copy of the complaint or other initial pleading to the Attorney General at the time the action commences. Failure to mail a copy of the complaint or pleading is not a jurisdictional defect and may be cured at any time prior to entry of judgment. A court may not enter judgment for the plaintiff until proof of mailing is filed with the court. Proof of mailing may be by declaration or by return receipt of mailing.” The amended version of ORS 124.100(6) will apply to all actions under ORS 124.100 commenced on or after January 1, 2020.



LAW PRACTICE

Tips, Traps, and Resources

UNIFORM TRIAL COURT RULES

Chief Justice Walters has signed CJO 19-028, which approved changes to the Uniform Trial Court Rules (UTCRR), effective August 1, 2019.

Changes of special note address the certificate of document preparation; streamlined civil jury cases; consumer debt collection cases; family law procedures; exhibits in juvenile cases; filing of the DMV record; extreme risk protection orders; notice of filing expedited matters; and statewide post-conviction relief (PCR) rules. The approved changes are available online at <http://www.courts.oregon.gov/programs/utcr/Pages/currentrules.aspx>. The Preface to the 2019 UTCRR includes detailed explanations of the changes.

TORT CLAIMS ACT LIABILITY LIMITS

Effective July 1, 2019, the Office of the State Court Administrator (OSCA) has calculated the annual adjustment to the limitations on liability of state and

local public bodies for personal injury, death, and property damage or destruction. See ORS 30.271(4), 30.272(4), and 30.273(3), as amended by 2019 SB 186 (effective March 27, 2019). Based on these calculations, the limitations are adjusted as shown in this table:

Public Body	Claimant(s)	Claim	Adjusted Limit
State	single	injury or death	\$2,247,000
State	multiple	injury or death	\$4,494,000
Local	single	injury or death	\$749,000
Local	multiple	injury or death	\$1,498,000
State or local	single	property damage or destruction	\$122,900
State or local	multiple	property damage or destruction	\$614,300

These new limitations became effective on July 1, 2019. They apply to all causes of action arising on or after July 1, 2019, and before July 1, 2020.

OSCA opened a public comment period on the adjustments from March 21, 2019, to May 17, 2019. They received no public comment.