

Oregon State Bar
Meeting of the Board of Governors

April 25, 2014

Open Session Minutes

The meeting was called to order by President Tom Kranovich at 12:40 p.m. on April 25, 2014. The meeting adjourned at 5:30 p.m. Members present from the Board of Governors were James Chaney, Patrick Ehlers, Hunter Emerick, R. Ray Heysell, Matthew Kehoe, Theresa Kohlhoff, John Mansfield, Audrey Matsumonji, Caitlin Mitchel-Markley, Joshua Ross, Richard Spier, Timothy L. Williams and Elisabeth Zinser. Staff present were Sylvia Stevens, Helen Hierschbiel, Rod Wegener, Susan Grabe, Mariann Hyland, Judith Baker, Dawn Evans, Kateri Walsh, Dani Edwards and Camille Greene. Also present was Ben Eder, ONLD Chair; Ira Zarov, PLF CEO, Bruce Schaffer, PLF Director of Claims, Betty Lou Morrow, PLF CFO, and Cindy Hill, PLF Executive Assistant; Tim Martinez, Guy Greco, John A. Berge, Dennis Black, Theresa Statler, and Valerie Saiki, PLF Board of Directors; Mark Wada, Sandra Hansberger and David Thornburg, Campaign for Equal Justice; Michael Mason, Legal Aid; Norman Williams, Oregon Law Foundation; Dean Curtis Bridgeman, Willamette University College of Law, Dean Robert Klonoff, Lewis & Clark Law School, and Dean Michael Moffitt, University of Oregon School of Law. Honored guest, Chief Justice Thomas Balmer, was in attendance for the second half of the meeting.

1. Call to Order/Adoption of the Agenda

Motion: Mr. Kehoe moved, Ms. Mitchel-Markley seconded, and the board voted unanimously to accept the agenda as presented.

2. Report of Officers & Executive Staff

A. Report of the President

Mr. Kranovich reported on several activities not included on his written report, including his participation in ABA Lobby Day and at the swearing-in of Judge Chris Garrett to the Oregon Court of Appeals.

B. Report of the President-elect

As written.

C. Report of the Executive Director

Ms. Stevens introduced Dawn Evans, new Director of Regulatory Services and Disciplinary Counsel. She announced that Amber Bevacqua-Lynott has been appointed to a new position in the discipline department: Chief Assistant Disciplinary Counsel & Deputy Director of Regulatory Services. She reminded the BOG that the ABA will be conducting its evaluation of the OSB disciplinary system during the week of June 9. . Finally, Ms. Stevens announced that she will be retiring effective January 1, 2016.

D. Director of Regulatory Services

As written. Ms. Evans updated the board on her activities during her first week at the Oregon State Bar.

E. Director of Diversity & Inclusion

Ms. Hyland reported that the annual OLIO Spring Social at Willamette was a success. The Diversity & Inclusion department has noticed a drop in student applications to participate in their program.

F. MBA Liaison Reports

Ms. Kohlhoff attended the March 5, 2014 MBA board meeting and Mr. Spier attended the April 2, 2014 MBA meeting. Mr. Spier reported that the MBA is discussing the future viability of the group health insurance. Ms. Kohlhoff reported that the MBA is always interested in what is happening at the bar.

G. Oregon New Lawyers Division Report

Mr. Eder briefly reported on a variety of ONLD projects and events described in his written report.

3. Professional Liability Fund [Mr. Zarov]

Mr. Zarov submitted a general update on the PLF's financial status **[Exhibit A]** and Ms. Morrow reported that the annual audit went well. The PLF does not anticipate seeking an increase in the assessment for 2015. The long-term goal is to lower the assessment. Mr. Greco outlined the profile for the open CEO position and the hiring process. September 1 is the target date for the new CEO to begin. **[Exhibit B]**

4. CEJ and OLF Presentations

Appearances were made by Mark Wada and Sandra Hansberger (CEJ), David Thornburg (Oregon Law Center), Michael Mason (President, Legal Aid Services of Oregon Board of Directors), and Norman Williams (Oregon Law Foundation). Mr. Wada congratulated the bar on its long history of supporting funding for Legal Aid. CEJ is a support arm for Oregon's legal aid programs. The Task Force on Legal Aid Funding was formed this year to take a comprehensive look at legal aid funding and how other states were funding their legal aid programs. Their goal is to double their funding. Mr. Williams explained how IOLTA funds are dispersed in the form of grants to direct service providers and to programs educating the public on the rule of law and diversity. IOLTA income has declined precipitously since 2008. Mr. Mason thanked Ms. Grabe for her lobbying work in Salem on behalf of legal aid and Kateri Walsh for her PR efforts.

5. Law School Deans Presentations

Mr. Kranovich introduced honored guest, Chief Justice Thomas Balmer.

Mr. Kranovich expressed the board's concern about the changes taking place in the profession and the impact the changes have had and will continue to have on the career prospects for Oregon's law school graduates, the pressure for law schools to modify their curriculums to produce "practice ready" graduates, and the reality that solutions to the current employment drought are not so simple.

Dean Curtis Bridgeman, Willamette University College of Law, talked about how Willamette emphasizes the importance of students getting practical experience while they are in law

school. Their academic programming is creative with adjusted rules to encourage participation in externships. Full-time externship programs are encouraged and enrollment has tripled over the past year. They have boosted their mentoring program for 2L and 3L students. They teach their students to understand clients and be business-minded. Dean Bridgeman asked the board to continue its outreach to young lawyers and law students. He also invited the board to let him know how he can help the board.

Dean Robert Klonoff, Lewis & Clark Law School, addressed the current crisis in legal education. There have been massive cuts in big law firm jobs, associate programs and new hires. The government jobs have been cut back and replaced by volunteers. Outsourcing of jobs and internet services are replacing jobs in the U.S. The high cost of tuition is adding to the crisis by causing enormous debt loads. In the past four years they have seen applications drop by 50%. They have nine practice areas that they teach through clinics. They have over 200 externships per year all over the world. These programs and the bar's mentoring have helped the law students upon graduation. To help reduce their budget they cut costs through the use of adjunct professors, reducing staff through attrition and reducing class size. He suggested that the bar could establish scholarships and encourage big firms, agencies and the courts to hire Oregon law school graduates.

Dean Michael Moffitt, University of Oregon School of Law, stated that all three Oregon law schools face the same difficulties, admit similar students, and are up against the same job market. The fundamental changes in the profession are causing them to look at their current funding models. The incoming students' skill sets and aptitudes are very different from years past, requiring additional training. It is troubling that fewer students of diversity are applying, nationwide. Skills classes are required at law schools by the ABA. The average student graduating from U of O has over four skills classes in their second and third year. Dean Moffitt had five requests for the board: help the law schools make relevant connections in the legal community; balance the desire for experiential learning against affordability; help make practical experiences available earlier in the educational process; continue UBE discussions; and help make access to education available to a broader population.

Chief Justice Balmer made two observations: we need to make more radical changes than have been discussed, such as less-expensive night school, two-year law schools, and a broader range of legal education; and the great irony is law schools are giving good students scholarships so they graduate with no debt and have an easier time finding a job, yet the other students who struggle to quickly find a good job will graduate with a high debt burden. He indicated a willingness to consider a student appearance rule that would allow students to get real courtroom experience earlier in their legal education. Mr. Kranovich asked the three deans to send rule proposals to the board for consideration.

6. OSB Committees, Sections and Councils

A. Client Security Fund

Ms. Stevens withdrew the request for the board to consider the Client Security Fund Committee's recommendation that Claim No. 2013-48 BERTONI (Monroy) be approved in the amount of \$5,000. Ms Stevens will be present the request at a future board meeting.

CSF Committee Response to BOG Workgroup Recommendations

Mr. Emerick asked the board to consider the recommendations of the BOG CSF Workgroup to revise the CSF operating policy to enhance the integrity and sustainability of the Fund.

[Exhibit C]

Motion: Mr. Hunter moved, Mr. Ross seconded, and the board voted unanimously to approve the rule changes as recommended by the work group.

B. MCLE Committee

Ms. Hirschbiel presented the committee's proposed amendment to MCLE Rule 5.2(d) to include participation on the Oregon Judicial Conference Judicial Conduct Committee to the list of activities that qualify for legal ethics credit. **[Exhibit D]**

Motion: Mr. Heysell moved, Mr. Mansfield seconded, and the board voted to approve MCLE Rule 5.2(d) changes as requested.

Ms. Hirschbiel presented the committee's proposed amendments to MCLE Regulation 7.200(a) regarding late fees. **[Exhibit E]**

Motion: Mr. Mansfield moved, Ms. Mitchel-Markley seconded, and the board voted unanimously to approve MCLE 7.200(a) regulation changes as requested.

C. Legal Ethics Committee

Ms. Hirschbiel asked the board to decide whether to adopt the proposed amendments to the formal ethics opinions. **[Exhibit F]**

Motion: Ms. Mitchel-Markley moved, Mr. Spier seconded, and the board voted unanimously to approve the various proposed amendments as requested.

D. Legal Services Program Committee

Ms. Baker asked the board to approve disbursing the annual unclaimed client funds for 2014 as outlined in the chart titled 2014 Distribution. This includes approving the current reserve policy. Ms. Baker asked the board to approve disbursing the unclaimed client funds from the Strawn v Farmers class action as outlined in the chart titled 2014 Distribution. **[Exhibit G]**

Motion: Ms. Mitchel-Markley moved, Mr. Williams seconded, and the board voted unanimously to approve the disbursement of funds as outlined.

E. Unlawful Practice of Law Committee

Ms. Hirschbiel asked the board to approve the Unlawful Practice of Law Committee's advisory opinion regarding unlawful practice of law issues that arise in the context of non-lawyer representation of friends and family. **[Exhibit H]**

Motion: Mr. Spier moved, Mr. Heysell seconded, and the board voted unanimously to approve the advisory opinion as requested.

7. **BOG Committees, Special Committees, Task Forces and Study Groups**

A. Board Development Committee

Ms. Mitchel-Markley updated the board on the committee's actions and discussed the HOD election results, public member recruitment and the BOG outreach packet. She encouraged the board to take a packet and fill out their quarterly activity report.

B. Budget and Finance Committee

Mr. Wegener updated the board on bar-related financial matters and reported that he had selected a consultant to assist with the selection of a database vendor. **[Exhibit I]**

C. Governance and Strategic Planning Committee

Mr. Spier presented the committee motion to amend the standard section bylaws to clarify acceptable spouse and guest reimbursements. **[Exhibit J]**

Motion: The board voted to approve the committee motion to adopt the policy language as presented. Ms. Kohlhoff was opposed.

Mr. Spier presented the committee motion to amend the Diversity Action Plan by adding a new Strategy 9 for Goal 7 which addresses accessibility. **[Exhibit K]**

Motion: The board approved the committee motion on a unanimous vote.

Mr. Spier presented the committee motion to amend the Diversity & Inclusion Department's diversity definition to include evolving language and distinctions used to describe the concepts of sex, gender, gender identity and expression. **[Exhibit L]**

Motion: The board approved the committee motion on a unanimous vote.

D. Public Affairs Committee

Mr. Emerick asked the board to approve the committee's Law Improvement Legislation Package Recommendations. **[Exhibit M]**

Motion: The board approved the committee motion on a unanimous vote.

E. Appointments to CLNS Committee

Mr. Kranovich informed the board of the members of the newly formed committee. Mr. Ehlers and Mr. Prestwich will co-chair the committee composed of board members Jenifer Billman, Theresa Kohlhoff, Tim Williams and Josh Ross. The committee will be charged with finding a notice system everyone can agree upon, who will run it, and who will build the political coalition necessary to make it work.

F. Indigent Defense Practitioners

Mr. Emerick asked the board to adopt proposed changes to the Standards for Representation in Adult Criminal and Juvenile Delinquency Cases to provide guidance to practitioners. **[Exhibit N]**

Motion: The board voted unanimously to adopt the proposed changes as recommended by the Public Affairs Committee.

8. Other Action Items

Ms. Edwards asked the board to approve the appointments to various bar committees and boards. **[Exhibit O]**

Motion: Ms. Mitchel-Markley moved, Mr. Ehlers seconded, and the board voted unanimously to approve the various appointments.

9. Consent Agenda

Motion: Ms. Mitchel-Markley moved, Mr. Mansfield seconded, and the board voted unanimously to approve the consent agenda of past meeting minutes.

10. Closed Sessions – see CLOSED Minutes

- A.** Judicial Session (pursuant to ORS 192.690(1)) – Reinstatements
- B.** Executive Session (pursuant to ORS 192.660(1)(f) and (h)) - General Counsel/UPL Report

11. Good of the Order (Non-action comments, information and notice of need for possible future board action)

None.

**Oregon State Bar
Board of Governors Meeting
April 25, 2014
Executive Session Minutes**

Discussion of items on this agenda is in executive session pursuant to ORS 192.660(2)(f) and (h) to consider exempt records and to consult with counsel. This portion of the meeting is open only to board members, staff, other persons the board may wish to include, and to the media except as provided in ORS 192.660(5) and subject to instruction as to what can be disclosed. Final actions are taken in open session and reflected in the minutes, which are a public record. The minutes will not contain any information that is not required to be included or which would defeat the purpose of the executive session.

A. Unlawful Practice of Law

The UPL Committee has successfully negotiated a cease and desist agreement with Wanda Abioto. Pursuant to bar bylaw § 20.702(c), the UPL Committee asks the Board to approve the agreement.

Motion: Mr. Mansfield moved and Ms. Mitchel-Markley seconded to accept the recommendation that the Board approve the cease and desist agreement. The board unanimously approved the motion.

B. Pending or Threatened Non-Disciplinary Litigation

The BOG received status reports on the non-action items.

C. Other Matters

Ms. Hirschbiel asked the board to decide whether to approve William Wade Burns' claim for the return of \$26,259.07.

Motion: Ms. Mitchel-Markley moved and Mr. Emerick seconded to approve the claim as recommended.

Ms. Hirschbiel asked the board to decide whether to approve the proposed Operating Principles for the Oregon State Bar ("OSB") and the Board of Bar Examiners ("BBX") relating to attorney admissions. **[Exhibit P]**

Motion: Mr. Spier moved and Ms. Mitchel-Markley seconded to approve the proposed Operating Principles as recommended.

**Oregon State Bar
Professional Liability Fund
Financial Statements
12/31/2013**

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**Oregon State Bar
Professional Liability Fund
Combined Primary and Excess Programs
Balance Sheet
12/31/2013**

<u>ASSETS</u>		
	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Cash	\$3,354,491.17	\$2,931,542.67
Investments at Fair Value	44,675,979.03	42,396,004.86
Due from Reinsurers	1,685,944.28	1,378,613.35
Other Current Assets	280,612.93	265,996.39
Net Fixed Assets	866,682.61	980,612.12
Claim Receivables	36,258.04	66,271.00
Other Long Term Assets	<u>9,825.00</u>	<u>13,919.48</u>
TOTAL ASSETS	<u>\$50,909,793.06</u>	<u>\$48,032,959.87</u>
 <u>LIABILITIES AND FUND EQUITY</u>		
	<u>THIS YEAR</u>	<u>LAST YEAR</u>
Liabilities:		
Accounts Payable and Other Current Liabilities	\$155,314.46	\$193,841.75
Due to Reinsurers	\$18,893.00	\$17,381.00
Deposits - Assessments	9,794,480.00	10,128,861.50
Liability for Compensated Absences	370,817.99	445,620.51
Liability for Indemnity	11,100,000.00	14,200,000.00
Liability for Claim Expense	14,000,000.00	12,500,000.00
Liability for Future ERC Claims	2,400,000.00	2,700,000.00
Liability for Suspense Files	1,500,000.00	1,400,000.00
Liability for Future Claims Administration (AOE)	<u>2,300,000.00</u>	<u>2,400,000.00</u>
Total Liabilities	<u>\$41,639,505.45</u>	<u>\$43,985,704.76</u>
Fund Equity:		
Retained Earnings (Deficit) Beginning of the Year	\$4,047,255.11	(\$781,169.42)
Year to Date Net Income (Loss)	<u>5,223,032.50</u>	<u>4,828,424.53</u>
Total Fund Equity	<u>\$9,270,287.61</u>	<u>\$4,047,255.11</u>
TOTAL LIABILITIES AND FUND EQUITY	<u>\$50,909,793.06</u>	<u>\$48,032,959.87</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Income Statement
12 Months Ended 12/31/2013**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<u>REVENUE</u>					
Assessments	\$25,042,532.75	\$25,049,000.00	\$6,467.25	\$24,803,325.67	\$25,049,000.00
Installment Service Charge	391,097.00	390,000.00	(1,097.00)	394,631.00	390,000.00
Other Income	45,191.02	0.00	(45,191.02)	69,868.17	0.00
Investment Return	<u>4,319,796.86</u>	<u>2,462,823.00</u>	<u>(1,856,973.86)</u>	<u>4,295,120.04</u>	<u>2,462,823.00</u>
TOTAL REVENUE	<u>\$29,798,617.63</u>	<u>\$27,901,823.00</u>	<u>(\$1,896,794.63)</u>	<u>\$29,562,944.88</u>	<u>\$27,901,823.00</u>
<u>EXPENSE</u>					
Provision For Claims:					
New Claims at Average Cost	\$18,274,500.00			\$20,760,000.00	
Actuarial Adjustment to Reserves	(133,446.01)			(2,435,227.40)	
Net Changes in AOE Liability	(100,000.00)			100,000.00	
Net Changes in ERC Liability	(300,000.00)			0.00	
Net Changes in Suspense File Liab.	100,000.00			0.00	
Coverage Opinions	151,309.11			141,424.92	
General Expense	82,748.77			68,234.72	
Less Recoveries & Contributions	16,935.88			(161,352.20)	
Budget for Claims Expense		<u>\$20,725,920.00</u>			<u>\$20,725,920.00</u>
Total Provision For Claims	<u>\$18,092,047.75</u>	<u>\$20,725,920.00</u>	<u>\$2,633,872.25</u>	<u>\$18,473,080.04</u>	<u>\$20,725,920.00</u>
Expense from Operations:					
Administrative Department	\$2,191,872.31	\$2,283,201.00	\$91,328.69	\$2,215,883.07	\$2,283,201.00
Accounting Department	809,275.63	786,223.00	(23,052.63)	748,742.02	786,223.00
Loss Prevention Department	1,829,742.96	1,902,969.00	73,226.04	1,824,647.59	1,902,969.00
Claims Department	2,538,325.19	2,681,914.00	143,588.81	2,398,157.09	2,681,914.00
Allocated to Excess Program	<u>(1,105,104.00)</u>	<u>(1,105,104.00)</u>	<u>0.00</u>	<u>(1,099,825.92)</u>	<u>(1,105,104.00)</u>
Total Expense from Operations	<u>\$6,264,112.09</u>	<u>\$6,549,203.00</u>	<u>\$285,090.91</u>	<u>\$6,087,603.85</u>	<u>\$6,549,203.00</u>
Contingency (4% of Operating Exp)	\$0.00	\$306,172.00	\$306,172.00	\$23,693.21	\$306,172.00
Depreciation and Amortization	\$166,574.10	\$208,000.00	\$41,425.90	\$175,500.35	\$208,000.00
Allocated Depreciation	<u>(30,056.04)</u>	<u>(30,056.00)</u>	<u>0.04</u>	<u>(35,996.04)</u>	<u>(30,056.00)</u>
TOTAL EXPENSE	<u>\$24,492,677.90</u>	<u>\$27,759,239.00</u>	<u>\$3,266,561.10</u>	<u>\$24,723,881.41</u>	<u>\$27,759,239.00</u>
NET INCOME (LOSS)	<u>\$5,305,939.73</u>	<u>\$142,584.00</u>	<u>(\$5,163,355.73)</u>	<u>\$4,839,063.47</u>	<u>\$142,584.00</u>

**Oregon State Bar
Professional Liability Fund
Primary Program
Statement of Operating Expense
12 Months Ended 12/31/2013**

	<u>CURRENT</u> <u>MONTH</u>	<u>YEAR</u> <u>TO DATE</u> <u>ACTUAL</u>	<u>YEAR</u> <u>TO DATE</u> <u>BUDGET</u>	<u>VARIANCE</u>	<u>YEAR</u> <u>TO DATE</u> <u>LAST YEAR</u>	<u>ANNUAL</u> <u>BUDGET</u>
<u>EXPENSE:</u>						
Salaries	\$335,757.69	\$4,145,085.93	\$4,148,175.00	\$3,089.07	\$3,984,099.59	\$4,148,175.00
Benefits and Payroll Taxes	38,239.58	1,382,384.15	1,576,202.00	193,817.85	1,410,430.61	1,576,202.00
Investment Services	7,119.00	28,017.75	28,000.00	(17.75)	27,718.50	28,000.00
Legal Services	2,304.00	13,738.00	16,000.00	2,262.00	13,240.50	16,000.00
Financial Audit Services	0.00	22,600.00	22,600.00	0.00	21,700.00	22,600.00
Actuarial Services	0.00	19,731.25	19,000.00	(731.25)	18,900.00	19,000.00
Claims MMSEA Services	0.00	0.00	0.00	0.00	3,850.00	0.00
Information Services	2,372.50	136,221.29	96,000.00	(40,221.29)	86,814.17	96,000.00
Document Scanning Services	3,205.09	47,085.77	75,000.00	27,914.23	52,034.79	75,000.00
Other Professional Services	11,439.84	63,733.95	57,400.00	(6,333.95)	65,375.04	57,400.00
Staff Travel	1,946.78	17,375.84	12,450.00	(4,925.84)	16,159.55	12,450.00
Board Travel	10,197.62	35,514.23	39,000.00	3,485.77	38,011.15	39,000.00
NABRICO	0.00	10,958.51	10,500.00	(458.51)	9,996.13	10,500.00
Training	607.49	19,211.29	24,500.00	5,288.71	20,496.94	24,500.00
Rent	42,145.08	521,137.51	520,741.00	(396.51)	511,782.29	520,741.00
Printing and Supplies	7,779.16	59,290.46	79,000.00	19,709.54	60,187.24	79,000.00
Postage and Delivery	6,642.04	33,399.94	36,750.00	3,350.06	37,715.25	36,750.00
Equipment Rent & Maintenance	1,445.79	40,879.11	36,200.00	(4,679.11)	38,624.51	36,200.00
Telephone	4,879.82	48,674.50	43,000.00	(5,674.50)	36,563.64	43,000.00
L P Programs (less Salary & Benefits)	56,379.29	373,907.75	433,560.00	59,652.25	389,833.69	433,560.00
Defense Panel Training	0.00	9,969.91	23,100.00	13,130.09	0.00	23,100.00
Bar Books Grant	16,666.63	200,000.00	200,000.00	0.00	200,000.00	200,000.00
Insurance	32,593.49	71,471.49	90,129.00	18,657.51	70,792.93	90,129.00
Library	5,448.93	32,659.42	33,000.00	340.58	31,047.06	33,000.00
Subscriptions, Memberships & Other	3,618.96	36,168.04	34,000.00	(2,168.04)	42,056.19	34,000.00
Allocated to Excess Program	<u>(92,092.00)</u>	<u>(1,105,104.00)</u>	<u>(1,105,104.00)</u>	<u>0.00</u>	<u>(1,099,825.92)</u>	<u>(1,105,104.00)</u>
TOTAL EXPENSE	<u>\$498,696.78</u>	<u>\$6,264,112.09</u>	<u>\$6,549,203.00</u>	<u>\$285,090.91</u>	<u>\$6,087,603.85</u>	<u>\$6,549,203.00</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Income Statement
12 Months Ended 12/31/2013**

	YEAR TO DATE <u>ACTUAL</u>	YEAR TO DATE <u>BUDGET</u>	<u>VARIANCE</u>	YEAR TO DATE <u>LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<u>REVENUE</u>					
Ceding Commission	\$747,993.00	\$746,750.00	(\$1,243.00)	\$733,700.00	\$746,750.00
Prior Year Adj. (Net of Reins.)	7,912.66	1,500.00	(6,412.66)	1,478.20	1,500.00
Profit Commission	32,068.81	0.00	(32,068.81)	32,599.34	0.00
Installment Service Charge	41,433.00	38,000.00	(3,433.00)	37,180.00	38,000.00
Investment Return	<u>330,352.47</u>	<u>185,374.00</u>	<u>(144,978.47)</u>	<u>429,190.42</u>	<u>185,374.00</u>
TOTAL REVENUE	<u>\$1,159,759.94</u>	<u>\$971,624.00</u>	<u>(\$188,135.94)</u>	<u>\$1,234,147.96</u>	<u>\$971,624.00</u>
<u>EXPENSE</u>					
Operating Expenses (See Page 6)	\$1,212,611.13	\$1,222,559.00	\$9,947.87	\$1,208,790.86	\$1,222,559.00
Allocated Depreciation	<u>\$30,056.04</u>	<u>\$30,056.00</u>	(\$0.04)	<u>\$35,996.04</u>	<u>\$30,056.00</u>
NET INCOME (LOSS)	<u>(\$82,907.23)</u>	<u>(\$280,991.00)</u>	<u>(\$198,083.77)</u>	<u>(\$10,638.94)</u>	<u>(\$280,991.00)</u>

**Oregon State Bar
Professional Liability Fund
Excess Program
Statement of Operating Expense
12 Months Ended 12/31/2013**

	<u>CURRENT MONTH</u>	<u>YEAR TO DATE ACTUAL</u>	<u>YEAR TO DATE BUDGET</u>	<u>VARIANCE</u>	<u>YEAR TO DATE LAST YEAR</u>	<u>ANNUAL BUDGET</u>
<u>EXPENSE:</u>						
Salaries	\$56,197.34	\$672,433.78	\$669,654.00	(\$2,779.78)	\$675,415.08	\$669,654.00
Benefits and Payroll Taxes	20,929.02	250,994.01	253,531.00	2,536.99	238,810.28	253,531.00
Investment Services	381.00	1,982.25	3,000.00	1,017.75	2,281.50	3,000.00
Office Expense	0.00	0.00	0.00	0.00	0.00	0.00
Allocation of Primary Overhead	23,239.50	278,874.00	278,874.00	0.00	275,634.96	278,874.00
Reinsurance Placement & Travel	0.00	369.49	5,000.00	4,630.51	3,933.47	5,000.00
Training	0.00	0.00	500.00	500.00	0.00	500.00
Printing and Mailing	0.00	4,035.46	5,000.00	964.54	5,300.86	5,000.00
Program Promotion	0.00	3,922.14	5,000.00	1,077.86	6,069.71	5,000.00
Other Professional Services	0.00	0.00	2,000.00	2,000.00	1,345.00	2,000.00
Software Development	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
TOTAL EXPENSE	<u>\$100,746.86</u>	<u>\$1,212,611.13</u>	<u>\$1,222,559.00</u>	<u>\$9,947.87</u>	<u>\$1,208,790.86</u>	<u>\$1,222,559.00</u>

**Oregon State Bar
Professional Liability Fund
Combined Investment Schedule
12 Months Ended 12/31/2013**

	CURRENT MONTH <u>THIS YEAR</u>	YEAR TO DATE <u>THIS YEAR</u>	CURRENT MONTH <u>LAST YEAR</u>	YEAR TO DATE <u>LAST YEAR</u>
Dividends and Interest:				
Short Term Bond Fund	\$512.95	\$131,162.54	\$18,087.07	\$202,322.79
Intermediate Term Bond Funds	137,191.32	316,670.35	291,236.92	519,527.14
Domestic Common Stock Funds	107,399.45	347,873.97	83,747.53	110,842.17
International Equity Fund	131,330.99	131,330.99	156,700.72	156,700.72
Real Estate	40,971.75	178,276.84	45,383.33	183,008.94
Hedge Fund of Funds	0.00	0.00	0.00	0.00
Real Return Strategy	<u>140,219.50</u>	<u>253,902.86</u>	<u>169,213.58</u>	<u>270,621.57</u>
Total Dividends and Interest	<u>\$557,625.96</u>	<u>\$1,359,217.55</u>	<u>\$764,369.15</u>	<u>\$1,443,023.33</u>
Gain (Loss) in Fair Value:				
Short Term Bond Fund	(\$3,092.46)	(\$134,069.00)	(\$14,502.23)	\$284,635.31
Intermediate Term Bond Funds	(188,678.41)	(452,026.16)	(271,144.05)	248,701.30
Domestic Common Stock Funds	97,259.77	2,033,310.53	17,556.80	798,337.84
International Equity Fund	25,863.88	1,596,716.97	150,355.69	1,165,630.65
Real Estate	42,400.73	309,270.62	46,772.44	170,959.52
Hedge Fund of Funds	0.00	296,132.24	45,268.48	286,587.61
Real Return Strategy	<u>(84,399.24)</u>	<u>(358,403.42)</u>	<u>(134,459.99)</u>	<u>326,434.90</u>
Total Gain (Loss) in Fair Value	<u>(\$110,645.73)</u>	<u>\$3,290,931.78</u>	<u>(\$160,152.86)</u>	<u>\$3,281,287.13</u>
TOTAL RETURN	<u>\$446,980.23</u>	<u>\$4,650,149.33</u>	<u>\$604,216.29</u>	<u>\$4,724,310.46</u>
Portions Allocated to Excess Program:				
Dividends and Interest	\$21,022.50	\$81,847.63	\$48,002.38	\$107,876.77
Gain (Loss) in Fair Value	<u>(4,171.34)</u>	<u>248,504.84</u>	<u>(10,057.60)</u>	<u>321,313.65</u>
TOTAL ALLOCATED TO EXCESS PROGRAM	<u>\$16,851.16</u>	<u>\$330,352.47</u>	<u>\$37,944.78</u>	<u>\$429,190.42</u>

**Oregon State Bar
PROFESSIONAL LIABILITY FUND**

Chief Executive Officer Profile

POSITION SUMMARY:

The CEO reports to the PLF Board of Directors for overall management and operation of the organization. Key responsibility areas include organization and staffing, claims management, budgeting, investments, and relationships with the organization's constituencies (covered attorneys, the Oregon State Bar, and reinsurers).

KEY RESPONSIBILITIES:

1. **Internal Management:** Through subordinate managers, provide direction in the following areas: administration; underwriting; claims; accounting and investments; claim prevention and personal and practice management services.
2. **Stakeholder Relations and Communications:** As part of the OSB, maintain relationships with covered attorneys, the courts, the state legislature, and other Oregon legal institutions. Build and maintain a high level of professional credibility with the legal profession in Oregon.
3. **Staff:** Maintain and positively influence PLF staff morale and productivity.
4. **Coverage:** Review and propose revisions to the Coverage Plan as needed, including actuarial reviews and assessment adjustments.
5. **Excess Program:** Oversee operation of the excess program, including underwriting and maintaining relationships with and reporting to reinsurers. Personally participate in reinsurance negotiations.
6. **Oregon State Bar Relationships:** Maintain positive working relationships with the PLF Board of Directors, the OSB Board of Governors, and the OSB staff. Staff all committees of the PLF Board of Directors. Research and organize material for presentation to the Board of Directors and, on behalf of the Board of Directors, to the Board of Governors.
7. **Asset Management:** Assure proper control and management of PLF assets, particularly monetary assets.
8. **Productivity:** Develop and implement management programs to assure optimum productivity and efficiency within the organization, with particular attention to claims management and defense.
9. **Projects:** Perform special projects as assigned by the Board of Directors.

CANDIDATE QUALIFICATIONS:

Candidate qualifications will be considered in relation to the unique characteristics of the Professional Liability Fund.

1. **Management Experience:** The PLF's size and complexity require high-level professional management capability. The organization manages considerable assets, has multiple operating departments, and requires well-conceived systems and procedures for operations. Management expertise is essential, and should include personnel, budget, supervision of professional staff, effective delegation, communications, and maintenance of relationships.
2. **Familiarity with the PLF and the Oregon Legal Community:** PLF covered parties are Oregon attorneys, and most PLF business issues relate to malpractice coverage for Oregon attorneys engaged in private practice. Candidates must be capable of establishing personal and professional credibility in this environment.
3. **Understanding of Coverage Issues:** While the primary PLF product is professional liability coverage, the organization is not a traditional insurance company. Instead, it is part of a public corporation and a specialized provider and processor of professional liability coverage. Because the PLF is a part of the OSB, it is not subject to usual insurance regulation, but an understanding of basic coverage issues, underwriting, and reinsurance is important.
4. **Communication Skills:** The PLF CEO is in a highly visible position. He/she spends extensive time in communication with individual attorneys, and with the Oregon State Bar and its components. Excellent communication skills with both large and small groups are essential.

CEO candidates will be evaluated against the ideal qualifications listed below. Final candidates will be selected based on judgment of their ability to perform the CEO position.

1. **Professional Experience:** Candidates must have proven leadership skills and management experience involving business planning, selection of key personnel, organization development, financial control, and workflow management. Successful experience in senior management is important whether acquired in a law practice, in a business enterprise, in a public organization or in some other relevant organization.

Preference will be given to lawyers, particularly with an Oregon connection, who have private practice and litigation experience. Knowledge of the insurance industry, specifically professional liability coverage, is desirable but not mandatory.

2. **Personal Characteristics:** Candidates must be capable of representing the PLF in public, including speaking engagements. Excellent communication skills are required. Candidates should display leadership and diplomatic abilities and be able to address conflict and perform under pressure. Strong analytical and strategic thinking skills are needed.

Judgment, integrity, and objectivity must be at high levels. Candidates must be capable of establishing credibility with the legal profession in Oregon.

Existing organizational culture is characterized by openness, informality, flexibility, collaboration, and strong support for the staff. The ideal candidate will have a management and leadership style characterized by patience, an ability to listen, an ability to delegate, mutual confidence and trust, and an ability to deal with diversity.

Client Security Fund Rules

(As approved by the Board of Governors through February 22, 2013)

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Section 1. Definitions.

For the purpose of these Rules of Procedure, the following definitions shall apply:

- 1.1 “Administrator” means the ~~person designated by the~~ OSB Executive Director or other person designated by the Executive Director to oversee the operations of the Client Security Fund.
- 1.2 “Bar” means the Oregon State Bar.
- 1.3 “Committee” means the Client Security Fund Committee.
- 1.4 “Fund” means the Client Security Fund.
- 1.5 “Lawyer” means one who, at the time of the act or acts complained of, was an active member of the Oregon State Bar and maintained an office for the practice of law in Oregon.
- 1.6 “Client” means the individual, partnership, corporation, or other entity who, at the time of the act or acts complained of, had an established attorney-client relationship with the lawyer.
- 1.7 “Claimant” means one who files a claim with the Fund.
- 1.8 “Dishonest conduct” means a lawyer’s willful act against a client’s interest by defalcation, by embezzlement, or by other wrongful taking.

Section 2. Reimbursable Losses.

A loss of money or other property of a lawyer’s client is eligible for reimbursement if:

- 2.1 The claim is made by the injured client or the client’s conservator, personal representative, guardian ad litem, trustee, or attorney in fact.
- 2.2 The loss was caused by the lawyer’s dishonest conduct.
 - 2.2.1 In a loss resulting from a lawyer’s refusal or failure to refund an unearned legal fee, “dishonest conduct” shall include (i) a lawyer’s misrepresentation or false promise to provide legal services to a client in exchange for the advance payment of a legal fee or (ii) a lawyer’s wrongful failure to maintain the advance payment in a lawyer trust account until earned.
 - 2.2.2 A lawyer’s failure to perform or complete a legal engagement shall not constitute, in itself, evidence of misrepresentation, false promise or dishonest conduct.
 - 2.2.3 Reimbursement of a legal fee will be allowed only if (i) the lawyer provided no legal services to the client in the engagement; or (ii) the legal services that the lawyer actually provided were, in the Committee’s judgment, minimal or insignificant; or (iii) the claim is supported by a determination of a court, a fee arbitration panel, or an accounting acceptable to the Committee that establishes that the client is owed a refund of a legal fee. No award reimbursing a legal fee shall exceed the actual fee that the client paid the attorney.
 - 2.2.4 In the event that a client is provided equivalent legal services by another lawyer without cost to the client, the legal fee paid to the predecessor lawyer will not be eligible for reimbursement, except in extraordinary circumstances.
- 2.3 The loss was not covered by any similar fund in another state or jurisdiction, or by a bond, surety agreement or insurance contract, including losses to which any bonding agent, surety or insurer is subrogated.
- 2.4 The loss was not to a financial institution covered by a “banker’s blanket bond” or similar insurance or surety contract.
- 2.5 The loss arose from, and was because of:
 - 2.5.1 an established lawyer-client relationship; or

2.5.2 the failure to account for money or property entrusted to the lawyer in connection with the lawyer's practice of law or while acting as a fiduciary in a matter related to the lawyer's practice of law.

2.6 As a result of the dishonest conduct, either:

2.6.1 The lawyer was found guilty of a crime;

2.6.2 A civil judgment was entered against the lawyer, or the lawyer's estate, and that judgment remains unsatisfied; or

2.6.3 In the case of a claimed loss of \$5,000 or less, the lawyer was disbarred, suspended, or reprimanded in disciplinary proceedings, or the lawyer resigned from the Bar.

2.7 A good faith effort has been made by the claimant to collect the amount claimed, to no avail.

2.8 The claim was filed with the Bar within two years after the latest of the following: (a) the date of the lawyer's conviction; or (b) in the case of a claim of loss of \$5,000.00 or less, the date of the lawyer's disbarment, suspension, reprimand or resignation from the Bar; or (c) the date a judgment is obtained against the lawyer, or (d) the date the claimant knew or should have known, in the exercise of reasonable diligence, of the loss. In no event shall any claim against the Fund be considered for reimbursement if it is submitted more than six (6) years after the date of the loss.

2.9 A claim approved by the Committee shall not include attorney's fees, interest on a judgment, prejudgment interest, any reimbursement of expenses of a claimant in attempting to make a recovery or prevailing party costs authorized by statute, except that a claim may include the claimant's actual expense incurred for court costs, as awarded by the court.

2.10 ~~No attorney's fees shall be paid directly from the Fund for services rendered by an attorney in preparing or presenting a claim to the Fund.~~ Members of the Bar are encouraged to assist claimants without charge in preparing and presenting a claim to the Fund. Nevertheless, a member of the Bar may contract with a claimant for a reasonable attorney fee, which contract must be disclosed to the Committee at the time the claim is filed or as soon thereafter as an attorney has been retained. The Committee may disapprove an attorney fee that it finds to be unreasonable. No attorney shall charge a fee in excess of the amount the Committee has determined to be reasonable, and ~~no the~~ attorney fee shall be paid ~~from, and not~~ in addition to, the award. In determining a reasonable fee, the Committee may refer to factors set out in ORS 20.075.

2.11 In cases of extreme hardship or special and unusual circumstances, the Committee, ~~in its sole discretion,~~ may ~~approve or~~ recommend for payment a claim that would otherwise be denied due to noncompliance with one or more of these rules.

Section 3. Statement of Claim for Reimbursement.

3.1 All claims for reimbursement must be submitted on the form prepared by the Bar.

3.2 The claim form shall require, as minimum information:

3.2.1 The name and address of the lawyer alleged to have engaged in "dishonest conduct."

3.2.2 The amount of the alleged loss.

3.2.3 The date or period of time during which the alleged loss occurred.

3.2.4 A general statement of facts relative to the claim, including a statement regarding efforts to collect any judgment against the lawyer.

3.2.5 The name and address of the claimant and a verification of the claim by the claimant under oath.

3.2.6 The name of the attorney, if any who is assisting the claimant in presenting the claim to the Client Security Fund Committee.

3.3 The Statement of Claim shall contain substantially the following statement: ALL DECISIONS REGARDING PAYMENTS FROM THE CLIENT SECURITY FUND ARE DISCRETIONARY. Neither the Oregon State Bar nor the Client Security Fund are responsible for the acts of individual lawyers.

Section 4. Processing Statements of Claim.

4.1 All statements of claim shall be submitted to Client Security Fund, Oregon State Bar, 16037 SW Upper Boones Ferry Rd., P. O. Box 1689, Tigard, Oregon 97281-1935.

4.2 The Administrator shall cause each statement of claim to be sent to a member of the Committee for investigation and report. Such member shall be reimbursed by the State Bar for reasonable out of pocket expenses incurred by said attorney in making such investigation. A copy of the statement of claim shall be sent by regular mail to the lawyer who is the subject of the claim at the lawyer's last known address. Before transmitting a statement of claim for investigation, the Administrator may request of the claimant further information with respect to the claim.

4.3. A Committee member to whom a statement of claim is referred for investigation shall conduct such investigation as seems necessary and desirable to determine whether the claim is for a "reimbursable loss" and is otherwise in compliance with these rules in order to guide the Committee in determining the extent, if any, to which such claim shall be reimbursed from the Fund.

4.4 Reports with respect to claims shall be submitted by the Committee member to whom the claim is assigned for investigation to the Administrator within a reasonable time after the referral of the claim to that member. Reports submitted shall contain criteria for payment set by these rules and shall include the recommendation of the member for the payment of any amount on such claim from the Fund.

4.5 The Committee shall meet from time to time upon the call of the chairperson. At the request of at least two members of the Committee and with reasonable notice, the chairperson shall promptly call a meeting of the Committee.

4.6 At any meeting of the Committee, claims may be considered for which ~~a report~~ an investigation has been completed. In determining each claim, the Committee shall be considered the representative of the Board of Governors and, as such, shall be vested with the authority conferred by ORS 9.655.

4.7 Records of the Client Security Fund are public records within the meaning of the Public Records Law and Meetings of the Committee are public meetings within the meaning of the Public Records-Meetings Law. The claimant, the claimant's attorney, the lawyer or the lawyer's attorney may attend meetings and, at the discretion of the chair, be allowed to present their respective positions on a claim regarding the claim at a meeting called to consider a claim.

4.8 No reimbursement shall be made to any claimant if the claim has not been submitted and reviewed pursuant to these rules. No reimbursement shall be made to any claimant unless approved by a majority of a quorum of the Committee.

~~The Committee, in its sole discretion, shall determine the amount of loss, if any, for which any claimant shall be reimbursed from the Fund. The Committee may, in its sole discretion, allow further reimbursement in any year to a claimant who received only a partial payment of a "reimbursable loss" solely because of the balance of the Fund at the time such payment was made.~~

4.9 The Committee shall determine the amount of loss, if any, for which any claimant shall receive an award from the Fund. The Committee may give final approval to an award of less than \$5,000 and shall submit regular reports to the Board reflecting all awards finally approved by the Committee since the last Board meeting.

~~No reimbursement shall be made to any claimant if the claim has not been submitted and reviewed pursuant to these rules. No reimbursement shall be made to any claimant unless approved by a majority of a quorum of the Committee. The Committee shall be authorized to accept or reject claims in whole or in part to the extent that funds are available to it, and the Committee shall have the discretion to determine the order and manner of payment of claims.~~

4.10 The ~~denial of a claim by the~~ Committee's denial of a claim shall be final unless a claimant's written request for review by the Board ~~of Governors~~ is received by the Executive Director of the Bar within 20 days of the Committee's decision. The 20 days shall run from the date the Committee's decision is sent to the claimant by mail, exclusive of the date of mailing.

~~4.11. Claims for which the award is less than \$5,000 may be finally approved by the Committee. All other claims approved by the Committee shall be reviewed by the Board of Governors prior to final action being taken thereon. The Committee shall provide reports to the Board of Governors reflecting all awards finally approved by the Committee since the last Board meeting.~~

~~4.12-11~~ Claims for which the committee finds an award should be for \$5,000 or more shall be submitted to the Board for approval. Recommendations and dDecisions of the Committee which are reviewed by the Board ~~of Governors~~ shall be considered under the criteria stated in these rules. The Board shall approve or deny each claim presented to it for review, or it may refer a claim back to the Committee for further investigation prior to making a decision.

4.12 Awards from the Fund are discretionary. The Board may deny claims in whole or in part for any reason. The Board may determine the order and payment of awards; may defer or pro-rate awards based on CSF funds available in any calendar year; and may allow further reimbursement in any subsequent year to a claimant who received only partial payment of an award. In exercising its discretion, the Board shall be guided by the following objectives:

4.12.1 Timely and complete payment of approved awards;

4.12.2 Maintaining the integrity and stability of the Fund; and

4.12.3 Avoiding frequent or significant fluctuations in the member assessment.

~~4.13-13~~ A finding ~~The Committee, in its sole discretion, may make a finding of "dishonest conduct" by the Committee shall be~~ for the sole purpose of adjudicating/resolving a claim. ~~Such a determination and~~ shall not be construed to be a finding of unprofessional_misconduct for purposes of discipline or otherwise.

~~4.14-14~~ The Committee may recommend to the Board of Governors that information obtained by the Committee about a lawyer's conduct be provided to the appropriate District Attorney or to the Oregon Department of Justice when, in the Committee's opinion, a single serious act or a series of acts by the lawyer might constitute a violation of criminal law or of a civil fraud or consumer protection statute.

Section 5. Subrogation for Reimbursements Made.

5.1.1 As a condition of reimbursement, a claimant shall be required to provide the Bar with a pro tanto transfer of the claimant's rights against the lawyer, the lawyer's legal representative, estate or assigns, and of the claimant's rights against the person or entity who may be liable for the claimant's loss.

5.1.2 Upon commencement of an action by the Bar as subrogee or assignee of a claim, it shall advise the claimant, who may then join in such action to recover the claimant's unreimbursed losses.

5.1.3 In the event that the claimant commences an action to recover unreimbursed losses against the lawyer or another person or entity who may be liable for the claimant's loss, the claimant shall be required to notify the Bar of such action.

5.1.4 The claimant shall be required to agree to cooperate in all efforts that the Bar undertakes to achieve restitution for the Fund.

5.2 A claimant shall not release the lawyer from liability or impair the Bar's assignment of judgment or subrogated interest without the prior approval of the Board of Governors.

5.3 The Administrator shall be responsible for collection of Fund receivables and shall have sole discretion to determine when such efforts would be futile. The Administrator may undertake collection efforts directly or may assign subrogated claims to a collection agency or outside counsel. The Administrator may authorize the expenditure of money from the Client Security Fund for reasonable costs and expenses of collection.

Section 6. General Provisions.

6.1 These Rules may be changed at any time by a majority vote of a quorum of the Committee subject to approval by the Board of Governors of the Oregon State Bar. A quorum is a majority of the entire Committee membership.

6.2 No reimbursement from the Fund on any one claim shall exceed \$50,000.

6.3 A member of the Committee who has or has had a lawyer-client relationship or financial relationship with a claimant or lawyer who is the subject of a claim shall not participate in the investigation or review of a claim involving the claimant or lawyer.

6.4 These Rules shall apply to all claims pending at the time of their enactment.

6.5 The Administrator shall prepare an annual report to the membership and may from time to time issue press releases or other public statements about the Fund and claims that have been paid. The annual report and any press releases and other public statements shall include the name of the lawyer, the amount of reimbursement, the general nature of the claim, the lawyer's status with the bar and whether any criminal action has been instituted against the lawyer for the conduct giving rise to the loss. If the claimant has previously initiated criminal or civil action against the lawyer, the press release or public statement may also include the claimant's name. The annual report, press release or other public statement may also include general information about the Fund, what claims are eligible for reimbursement, how the Fund is financed, and who to contact for information.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 25, 2014
From: MCLE Committee
Re: Amendment to MCLE Rule 5.2(d)

Issue

The MCLE Committee recommends amending MCLE Rule 5.2(d) to include participation on the Oregon Judicial Conference Judicial Conduct Committee to the list of activities that qualify for legal ethics credit.

Options

Option 1 – Make no change to Rule 5.2(d) and leave as set forth below:

MCLE Rule 5.2(d) Legal Ethics Service. A member serving on the Oregon State Bar Legal Ethics Committee, Client Security Fund Committee, Commission on Judicial Fitness & Disability, Local Professional Responsibility Committees, State Professional Responsibility Board, and Disciplinary Board or serving as volunteer bar counsel or volunteer counsel to an accused in Oregon disciplinary proceedings may earn two ethics credits for each twelve months of service.

Option 2 - Amend Rule 5.2(d) to include service on the Oregon Judicial Conference Judicial Conduct Committee to the list of activities that qualify for legal ethics credit.

MCLE Rule 5.2(d) Legal Ethics Service. A member serving on the Oregon State Bar Legal Ethics Committee, Client Security Fund Committee, Commission on Judicial Fitness & Disability, Oregon Judicial Conference Judicial Conduct Committee, Local Professional Responsibility Committees, State Professional Responsibility Board, and Disciplinary Board or serving as volunteer bar counsel or volunteer counsel to an accused in Oregon disciplinary proceedings may earn two ethics credits for each twelve months of service.

Discussion

Judge David Schuman recently suggested that participation on the Judicial Conduct Committee be added to the list of activities that qualify for ethics credit under MCLE Rule 5.2(d). The Judicial Conduct Committee gives formal and informal advisory opinions to judges. It is basically the equivalent of the OSB's Legal Ethics Committee.

Pursuant to Judge Schuman's suggestion, the MCLE Committee recommends amending MCLE Rule 5.2(d) as set forth in Option 2 above.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 25, 2014
From: MCLE Committee
Re: Amendment to MCLE Regulation 7.2(a)

Issue

The MCLE Committee recommends amending Regulation 7.2(a) regarding late fees.

Options

Option 1 – Make no change to Regulation 7.2(a) and leave as set forth below:

Regulation 7.200 Late Fees.

(a) The late fee for curing a failure to timely file a completed compliance report is \$50 if the report is filed and the late fee is paid within 30 days of the filing deadline and \$100 if the report is filed and the late fee is paid more than 30 days after the filing deadline but within the 60 day cure period; if additional time for filing is granted by the MCLE Administrator, the fee shall increase by \$50 for every additional 30 days or part thereof.

Option 2 – Amend Regulation 7.2(a) per recommendation of the MCLE Committee:

Regulation 7.200 Late Fees.

(a) The late fee for curing a failure to timely file a completed compliance report is \$50 if the report is filed and the late fee is paid ~~within 30 days of the filing deadline~~ after the filing deadline and no more than 30 days after the mailing of the notice of noncompliance and \$100 if the report is filed and the late fee is paid more than 30 days after the mailing of the notice of noncompliance ~~filing deadline~~ but within the 60 day cure period; if additional time for filing is granted by the MCLE Administrator, the fee shall increase by \$50 for every additional 30 days or part thereof.

Discussion

At its July 2013 meeting, the Board of Governors approved amending various MCLE regulations regarding filing deadlines and notices to members. MCLE Regulation 7.200(a), (see Option 1 above), was amended to align with MCLE Rule 7.5 regarding curing noncompliance issues.

While preparing the Notices of Noncompliance for the 2013 reporting period, staff realized that the way Regulation 7.200(a) currently reads, the late fee for failure to timely file a completed compliance report would have already increased to \$100 before the member was notified that a late fee was due. Therefore, the MCLE Committee recommends amending Regulation 7.200(a) as set forth in Option 2 above.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 25, 2014
From: Legal Ethics Committee
Re: Updating Formal Ethics Opinions

Issue

The Board of Governors must decide whether to adopt the proposed amendments to the formal ethics opinions.

Options

1. Adopt the proposed amendments to the formal ethics opinions.
2. Decline to adopt the proposed amendments to the formal ethics opinions.

Discussion

In the last year, the Oregon Supreme Court has adopted numerous amendments to the Oregon Rules of Professional Conduct. The Legal Ethics Committee is in the process of reviewing all of the formal ethics opinions to determine whether and how the opinions need to be amended to bring them into conformance with the new rules. The attached is the first batch of opinions that require amendments.

This first batch of amended opinions consists of pure housekeeping amendments. All amendments consist of swapping out the relevant prior rule and replacing it with the amended rule. There are otherwise no changes to the analysis or substance of the attached opinions.

Staff recommends adopting the proposed amended opinions.

Attachments: OSB Formal Ethics Op Nos: 2005-23, 2005-25, 2005-39, 2005-50, 2005-55, 2005-81, 2005-95, 2005-96, 2005-117, 2005-129, 2005-133, 2005-136, 2005-148, 2005-155, 2005-157, 2005-167, 2006-176

FORMAL OPINION NO. 2005-23

[REVISED 2014]

**Information Relating to the Representation of a Client:
Retired and Former Lawyer**

Facts:

Lawyer, who has retired, would like to give some files to an educational institution for historical purposes. The files to be given contain confidential information that Lawyer has obtained from clients over the years.

After Lawyer has retired, the new lawyer for one of Lawyer's former clients approaches Lawyer and asks for information about the prior representation.

Questions:

1. May Lawyer give the files to the educational institution?
2. May Lawyer convey client confidences or secrets to the new lawyer?

Conclusions:

1. No, qualified.
2. No, qualified.

Discussion:

These questions are governed by Oregon RPC 1.6, which provides, in pertinent part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by law

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from

~~changes in the composition or ownership of a firm to provide . . . information in discussions preliminary to the sale of a law practice under Rule 1.17. . . .~~

~~(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. . . .~~

~~(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.~~

See ORS 9.460(3), which requires a lawyer to “[m]aintain the confidences and secrets of the lawyer’s clients consistent with the rules of professional conduct.”¹

Absent informed consent from the affected clients or some other applicable exception, it would be improper for Lawyer either to turn over files to an educational institution or to inform a new lawyer for the same client about any prior confidences or secrets.

Approved by Board of Governors, ~~August 2005~~ April 2014.

¹ Former DR 4-101 also used the phrase *confidences and secrets* to describe the information that a lawyer is ethically required to protect. The definition of *information relating to the representation of a client* in Oregon RPC 1.0(f) encompasses the definitions of *confidences* and *secrets* in former DR 4-101.

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §6.1 et seq. (Oregon CLE 2003); OEC 503 (general lawyer-client privilege); LAIRD C. KIRKPATRICK, OREGON EVIDENCE §503.01 et seq. (4th ed 2002); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §59 et seq. (2003); and ABA Model Rule 1.6.

FORMAL OPINION NO. 2005-25

[REVISED 2014]

Fee Agreements:

Suspended and Disbarred Lawyers, Fees and Division of Fees

Facts:

Lawyer *A* has been suspended or disbarred. When the suspension or disbarment order took effect, Lawyer *A* had several open matters, including both hourly and contingent fee cases, which were subsequently taken over by Lawyer *B*. The suspension or disbarment was unrelated to the work that Lawyer *A* had done on behalf of any of the clients whose work was taken over by Lawyer *B*.

Questions:

1. Is Lawyer *A* entitled to be paid for the work done by Lawyer *A* before the suspension or disbarment took effect?
2. May Lawyer *B* share fees with Lawyer *A* in the contingent fee case?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.

Discussion:

Oregon RPC 1.5(a) states that “[a] lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.” The mere fact that Lawyer *A* was suspended or disbarred would not mean that the collection of a fee would automatically violate this rule, and it would be proper for Lawyer *A* to seek to collect an ethically appropriate fee for past work.

The matter of the sharing of fees between Lawyer *A* and Lawyer *B* is covered by Oregon RPC 1.5(d):

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the client gives informed consent to the fact that there will be a division of fees, and
- (2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

Also relevant is Oregon RPC 5.4(a), which provides:

A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

During the period of suspension or disbarment, a suspended or disbarred lawyer is a nonlawyer within the meaning of Oregon RPC 5.4(a).¹ *Cf. Parquit Corp. v. Ross*, 273 Or 900, 901, 543 P2d 1070 (1975) (treating suspended lawyer as nonlawyer); OSB Formal Ethics Op No 2005-24. Consequently, Lawyer *B* could not share any fee for Lawyer *B*'s own work with Lawyer *A*. On the other hand, there is no prohibition against Lawyer *B* forwarding to Lawyer *A* the portion of any fee to which Lawyer *A* was entitled by reason of work performed before the suspension or disbarment. *Cf. In re Griffith*, 304 Or 575, 748 P2d 86 (1987) (refusing to find violation of *former* DR 3-102(A) when nonlawyer simply acted as conduit for payment of fees to counsel).

Approved by Board of Governors, April 2014 August 2005.

¹ See, e.g., *State ex rel Oregon State Bar v. Lenske*, 284 Or 23, 31, 34–35, 584 P2d 759 (1978) (employment of disbarred or suspended lawyer is permitted under same unauthorized practice limitations that govern nonlawyers generally).

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§3.38–3.41 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §10 (2003); and ABA Model Rules 1.5(e), 5.4.

FORMAL OPINION NO. 2005-39

[REVISED 2014]

Lawyer as Pro Tem Judge

Facts:

Lawyer A and Lawyer B are partners. Lawyer B is occasionally asked to serve as a pro tem judge or hearing officer. Both Lawyer A and Lawyer B would like to continue representing clients with matters pending before other judges or hearing officers of the same court or body for which Lawyer B acts on a pro tem basis.

Questions:

1. May Lawyer A and Lawyer B do so?
2. What special disclosure and consent requirements, if any, apply in such circumstances?

Conclusions:

1. Yes, qualified.
2. See discussion.

Discussion:

Pursuant to Oregon RPC 3.5(a), a lawyer shall not “seek to influence a judge, juror, prospective juror or other official by means prohibited by law.” There is no indication on the facts presented above, however, that such conduct is intended or is likely to occur.

Similarly, there is no particular reason to believe that there will be a violation of either Oregon RPC 1.12(a)¹ or Oregon RPC 1.11(d).² Lawyer A and Lawyer B may proceed as planned if they do not violate these rules.

¹ Oregon RPC 1.12(a) provides:

Except as stated in paragraph (d) and Rule 2.4(b), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing. ~~Except as stated in Rule 2.4(b) and in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.~~

² Oregon RPC 1.11(d) provides:

Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

With respect to disclosure and consent requirements, Oregon RPC 1.7(a)(2) provides that a current conflict of interest exists if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

On these facts, there is no reason to believe that the representation of any of Lawyer A's or Lawyer B's clients will be materially limited by Lawyer B's obligations as a pro tem judge. Accordingly, it is not necessary for Lawyer A or Lawyer B to make special disclosure to, or obtain consent from, their clients. *Cf. In re Zafiratos*, 259 Or 276, 486 P2d 550 (1971) (lawyer disciplined for bringing civil action for property damage arising out of motor vehicle collision when accused had acted as judge in related proceeding); *In re Lemery*, 7 DB Rptr 125 (1993) (former district attorney disciplined for representing private client adversely to state in matter significantly related to matter he worked on while serving as district attorney, without first obtaining state's consent).

Approved by Board of Governors, ~~April 2014~~August 2005.

(1) is subject to Rules 1.7 and 1.9; and

(fn 1 cont'd)

(2) shall not:

...

(ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client. . . .

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§14.28–14.30 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§133, 135 comment f (2003); and ABA Model Rules 1.11–1.12. See also OSB Formal Ethics [Op Nos 2005-7](#), [2005-38](#), [2005-102](#).

FORMAL OPINION NO. 2005-50

[REVISED 2014]

**Conflicts of Interest, Current Clients:
Office Sharers Representing Opposing Parties**

Facts:

Lawyer *A* and Lawyer *B*, who maintain independent practices, share office space. Both lawyers handle personal injury litigation.

Questions:

1. May Lawyer *A* represent the plaintiff in a lawsuit in which Lawyer *B* represents the defendant?
2. Would the answer be different if Lawyer *A* and Lawyer *B* share a common employee who is in possession of confidences and secrets of both Lawyer *A*'s clients and Lawyer *B*'s clients?

Conclusions:

1. Yes, qualified.
2. Yes.

Discussion:

If Lawyer *A* and Lawyer *B* were part of the same firm, the simultaneous representation of a plaintiff and a defendant in the same litigation would give rise to a prohibited, nonwaivable conflict of interest. See, e.g., Oregon RPC 1.7,¹ discussed in OSB Formal Ethics Op No 2005-28.

¹ Oregon RPC 1.7 provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client;
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
 - (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.
- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

Nevertheless, and as long as Lawyer A and Lawyer B (1) do not hold themselves out to the public as members of the same firm through joint advertising, a joint letterhead, or otherwise; (2) respect the confidentiality of information relating to the representation of their respective clients and cause their employees to do so; and (3) keep their respective files separately, there is no reason why Lawyer A and Lawyer B cannot represent opposite parties. *See also* Oregon RPC 1.0(d).²

We do not believe that these requirements prohibit office sharers from using the same telephone system or the same file room as long as the files are physically separated and the appropriate limitations on access to files are made clear to, and are observed by, the lawyers and their employees. If a common telephone system is used, however, office sharers may not represent adverse parties unless they have taken steps to assure that telephone messages that contain confidential client information or legal advice (i.e., information relating to the representation of a client³) are not given to or transmitted by shared personnel. Similarly, mail must not be opened by shared personnel.

-
- (2) the representation is not prohibited by law;
 - (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
 - (4) each affected client gives informed consent, confirmed in writing.

² Oregon RPC 1.0(d) provides:

“Firm” or “law firm” denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

³ Oregon RPC 1.6 provides, in pertinent part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer’s compliance with these Rules;

If, on the other hand, Lawyer A and Lawyer B share a secretary or other employee who is in possession of the confidences or secrets of both Lawyer A's clients and Lawyer B's clients, or if any of the other steps outlined above are not taken, the simultaneous representations of the plaintiff and the defendant would be prohibited by either if not both Oregon RPC 1.6 and Oregon RPC 1.7. *See also* Oregon RPC 1.0(f).⁴ *Cf.* OSB Formal Ethics Op Nos 2005-44, 2005-28, 2005-12.

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(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) ~~in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17. . . .~~

~~(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. . . .~~

~~(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.~~

⁴ Oregon RPC 1.0(f) provides:

Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested by held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§2.19, 9.23, 12.3–12.5 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §123 (2003); and ABA Model Rules 1.6, 1.7. *See also* Barbara Fishleder, *Office Sharing*, 52 OSB BULLETIN 23 (June 1992). *Cf. State v. Charlesworth/Parks*, 151 Or App 100, 951 P2d 153 (1997) (*former* DR 4-101(D) imposed duty to exercise reasonable care to prevent employees from disclosing client secrets; but this rule is not ground to suppress evidence obtained as result of the disclosure).

FORMAL OPINION NO. 2005-55

[REVISED 2014]

Lawyer as Escrow Agent

Facts:

Lawyer has a substantial business practice.

Questions:

1. May Lawyer act as escrow agent in a transaction in which Lawyer represents none of the parties?
2. May Lawyer act as escrow agent in a transaction in which Lawyer represents one of the parties?
3. If the answer to the second question is no, may Lawyer nonetheless hold client funds, documents, or other property pursuant to the terms of an agreement between Lawyer's client and the other party to the agreement?

Conclusions:

1. Yes.
2. No.
3. Yes, qualified.

Discussion:

The word "escrow" by definition means 'neutral,' independent from the parties to the transaction." *Banif Corp v. Black*, 12 Or App 385, 388, 507 P2d 49 (1973); ORS 696.505(3). There is no reason that a lawyer cannot play this role in a transaction in which the lawyer does not represent any of the parties. Cf. ORS 696.520(2), which exempts from the definitions and restrictions of the statute a lawyer "rendering services in the performance of duties as attorney at law." See also Oregon RPC 2.4, permitting lawyers to act as mediators.¹

¹ Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
 - (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
 - (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.
- (b) A lawyer serving as a mediator:
 - (1) may prepare documents that memorialize and implement the agreement reached in mediation;

On the other hand, a lawyer cannot simultaneously be both counsel to a party to a transaction and a neutral escrow agent for the transaction. *Cf. In re Phelps*, 306 Or 508, 510 n 1, 760 P2d 1331 (1988); *In re Barrett*, 269 Or 264, 524 P2d 1208 (1974). The obligation of neutrality is in direct contradiction to the obligations that a lawyer has to a client. The simultaneous role would constitute a situation in which there is a significant risk that the representation of the client will be materially limited by the lawyer's responsibilities as a neutral escrow, in violation of Oregon RPC 1.7(a)(2). This self-interest conflict can be waived only if the lawyer has the informed consent of the client as required by Oregon RPC 1.7(b). Moreover, the lawyer's failure to disclose the dual role to the other party would be tantamount to "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law" in violation of Oregon RPC 8.4(a)(3).²

There is no reason, however, a lawyer cannot hold client funds, documents, or other property as part of a transaction involving a client as long as the lawyer is not described as an

(2) shall recommend that each party seek independent legal advice before executing the documents; and

(3) with the consent of all parties, may record or may file the documents in court.

~~(e) — Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.~~

~~—(cd)~~ The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

² Because of these conclusions, it is unnecessary to consider the potential applicability of Oregon RPC 1.8 and 5.4(c). For opinions discussing these rules, see, e.g., OSB Formal Ethics Op Nos 2005-10, 2005-22, and 2005-30.

“escrow agent” and the lawyer’s role is not otherwise misdescribed or misrepresented. With regard to the duty to hold client funds in trust accounts, see OSB Formal Ethics Op No 2005-48.

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COMMENT: For more information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §11.1 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§4 comment c, 44 comment b, 48 comment d (2003); and ABA Model Rules 2.6, 8.4(c). *See also In re Benjamin*, 312 Or 515, 823 P2d 413 (1991) (disbarring lawyer for spending \$1,900 of client’s money while acting as escrow agent and for withholding in lawyer’s trust account \$480 that belonged to client).

FORMAL OPINION NO. 2005-81

[REVISED 2014]

**Communicating with Represented Persons: Information Relating to the
Representation of a Client,
Second Opinions**

Facts:

Lawyer A is approached by Potential Client. Potential Client tells Lawyer A that Potential Client is unhappy with work being done for Potential Client by Lawyer B. Potential Client asks Lawyer A for a second opinion.

Questions:

1. May Lawyer A provide the second opinion?
2. May Lawyer A inform Lawyer B of Potential Client's request?

Conclusions:

1. Yes.
2. No, qualified.

Discussion:

Oregon RPC 4.2 provides:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so; or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

This rule applies when a lawyer is representing a client or the lawyer's own interests in a matter, but not when the lawyer is approached by a prospective client. Neither this rule or its predecessor, *former* DR 7-104, has ever been interpreted to prohibit a lawyer from providing a

second opinion to a represented party. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS¹ and ABA Model Rule 4.2.²

Whether Lawyer A can inform Lawyer B of Potential Client's request depends on ORS 9.460(3)³ and Oregon RPC 1.6.⁴ *Cf. State v. Keenan/Waller*, 307 Or 515, 771 P2d 244 (1989).

¹ A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §99 comment c (2003).

² “[T]his Rule [does not] preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.” ABA Model Rule 4.2 comment [4] (2002).

Other jurisdictions have issued ethics opinions similar to the Oregon position. *See, e.g.*, Florida Ethics Op No 02-5; South Carolina Ethics Op No 97-07; Utah Ethics Op No 110 (1993); Philadelphia Ethics Op Nos 91-32 and 2004-1; Kentucky Ethics Op No E-325 (1987); Michigan Ethics Op No CI-883 (1983).

³ ORS 9.460(3) provides that a lawyer shall “[m]aintain the confidences and secrets of the lawyer’s clients consistent with the rules of professional conduct established pursuant to ORS 9.490.”

⁴ Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer’s compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

Potential Client's request for a second opinion would be information relating to the representation of the client. Consequently, Lawyer A cannot reveal this request to Lawyer B unless Potential Client consents or one of the other exceptions to the duty of confidentiality within Oregon RPC 1.6 applies. *Cf.* OSB Formal Ethics Op No 2005-23.

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~~(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.~~

~~(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.~~

~~(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client, to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to the representation by the purchasing lawyer.~~

COMMENT: For additional resources on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§5.1–5.3, 5.10, 6.1–6.5, 6.8, 7.42–7.43, 7.46 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§99–100, 102 (2003); and ABA Model Rules 1.6, 4.2.

FORMAL OPINION NO. 2005-95

[REVISED 2014]

Duty to Report Misconduct

Facts:

During the course of representing Client, Lawyer A learns that Lawyer B, who formerly represented Client, and Lawyer C, who never represented Client, have violated the Oregon RPCs.

When Lawyer A discusses these observations with Client, Client informs Lawyer A that Client does not wish Lawyer A to report these violations to the Oregon State Bar because doing so could embarrass Client or could otherwise harm Client.

Questions:

1. May Lawyer A report Lawyer B's or Lawyer C's violations?
2. If no information relating to the representation of a client is involved, when must a lawyer report another lawyer's violation of an Oregon RPC?

Conclusions:

1. No.
2. See discussion.

Discussion:

Oregon RPC 8.3 provides, in pertinent part:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Oregon State Bar Client Assistance Office.

....

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3). . . .

Pursuant to this rule, a lawyer may not report another lawyer's Oregon RPC violation if the source of knowledge of the violation is protected by Oregon RPC 1.6 or ORS 9.460(3), unless one of the exceptions permitting disclosure is present. In the present circumstance, it appears that no exception permitting disclosure is available. *Cf.* OSB Formal Ethics Op No 2005-81; ORS 9.460(3);¹ Oregon RPC 1.6.²

¹ ORS 9.460(3) requires a lawyer to "[m]aintain the confidences and secrets of the lawyer's clients consistent with the rules of professional conduct established pursuant to ORS 9.490." For a discussion of the relationship between ORS 9.460(3) and *former* DR 4-101 (current Oregon RPC 1.6), see *State v. Keenan/Waller*, 307 Or 515, 771 P2d 244 (1989).

² Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client, to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of

Even if Client authorizes or consents to the report to the Oregon State Bar,³ Lawyer would be required to report a violation only if Lawyer knows,⁴ rather than merely suspects, that the violation occurred and if the violation raises “a substantial question as to [the reported] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” This language in Oregon RPC 8.3(a) is identical to the language in ABA Model Rule 8.3. The official comment to ABA Model Rule 8.3 provides, in pertinent part:

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. *The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.* A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct. [Emphasis supplied.]

See 2 GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §64.3 (3d ed 2001) (“the rule [applies] to cases of known violations that directly implicate the integrity of the legal profession. . . . Merely technical violations of the conflict of interest rules, for example, would not qualify, whereas destruction of evidence under subpoena, suborning perjury, or self-dealing with trust funds would.”). *See also* Arizona State Bar Op No 87-26, 4 ABA/BNA Lawyers’ Manual on Professional Conduct 449 (1988 & supps) (willful failure to file tax returns meets “substantial question” test).

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~~such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

³ If Client directs Lawyer to report a rule violation to the bar, Lawyer must do so. *Cf.* OSB Formal Ethics Op No 2005-26.

⁴ Oregon RPC 1.0(h) defines *knows* as “actual knowledge of the fact in question. . . . A person’s knowledge may be inferred from circumstances.”

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§6.2–6.4, 6.8, 6.11–6.12, 12.23, 13.2–13.8, 20.1–20.15 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§5, 78 (2003); and ABA Model Rules 1.6, 8.3. *See also* Washington Formal Ethics Op No 175; Washington Informal Ethics Op Nos 1247, 1633, 1701 (unpublished).

FORMAL OPINION NO. 2005-96
[REVISED 2014]
Information Relating to the Representation of a Client:
Notarial Journals

Facts:

Pursuant to ORS 194.152, an Oregon notary must keep a journal that contains the name, address, and signature of the person who signs certain notarized documents, as well as a notation of the type of document signed. When lawyers or members of their office staff are notaries, the persons whose documents are notarized may be clients.

Question:

What steps, if any, must a lawyer take or cause the lawyer's staff to take to protect subsequent signers of the notarial journal from reviewing prior entries?

Conclusion:

See discussion.

Discussion:

ORS 9.460(3) provides that a lawyer must “[m]aintain the confidences and secrets of the lawyer’s clients consistent with the rules of professional conduct established pursuant to ORS 9.490.” Oregon RPC 1.6 also offers broad protection to information relating to the representation of a client.¹ *See also State v. Keenan/Waller*, 307 Or 515, 771 P2d 244 (1989); OSB Formal Ethics Op Nos 2005-81, 2005-141.

¹ Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer’s compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against

If the information pertaining to a prior notarization constitutes or contains protected client information, lawyers must prohibit, and cause their office staff to prohibit, subsequent signers from reviewing these confidences or secrets. Presumably, this can be done either by covering over the names and signatures of other clients at the time of the subsequent signing or by having a separate page of the journal for notarial actions in which protected information relating to the representation of a client is involved.

the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

~~-to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to the representation by the purchasing lawyer.~~

COMMENT: For additional information relating to this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§6.1–6.8, 15.21 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§59–60, 68–72, 77, 80 (2003); and ABA Model Rule 1.6. *See also* Washington Formal Ethics Op No 175.

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FORMAL OPINION NO. 2005-117

[REVISED 2014]

**Trust Accounts:
Funds Held in IOLTA or Non-IOLTA Account,
Types of Depository Institutions**

Facts:

Lawyer represents Defendant in litigation. In aid of settlement negotiations, Defendant forwards a substantial sum to Lawyer so that Lawyer will be in a position to effect payment promptly if a settlement is reached in the future. Defendant would like to see to it that the maximum possible rate of return is earned on the funds while the funds are held by Lawyer.

Question:

What limits exist on the type of institution or type of account in which Lawyer can place Defendant's funds?

Conclusion:

See discussion.

Discussion:

Oregon RPC 1.15-1(a) provides, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to Rule 1.15-2. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Oregon RPC 1.15-2 provides, in pertinent part:

(a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest ("net interest") shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. A lawyer or law firm establishing an IOLTA account shall so advise the Oregon Law Foundation in writing within 30 days of its establishment.

(b) All client funds shall be deposited in the lawyer's or law firm's IOLTA account unless a particular client's funds can earn net interest. All interest earned by funds held in the IOLTA account shall be paid to the Oregon Law Foundation as provided in this rule.

(c) Client funds that can earn net interest shall be deposited in an interest bearing trust account for the client's benefit and the net interest earned by funds in such an account shall be held in trust as property of the client in the same manner as is provided in paragraphs (a) through (d) of Rule 1.15-1 for the principal funds of the client. The interest bearing account shall be either:

(1) a separate account for each particular client or client matter; or
(2) a pooled lawyer trust account with subaccounting which will provide for computation of interest earned by each client's funds and the payment thereof, net of any bank service charges, to each client.

(d) In determining whether client funds can or cannot earn net interest, the lawyer or law firm shall consider the following factors:

(1) the amount of the funds to be deposited;
(2) the expected duration of the deposit, including the likelihood of delay in that matter for which the funds are held;
(3) the rates of interest at financial institutions where the funds are to be deposited;
(4) the cost of establishing and administering a separate interest bearing lawyer trust account for the client's benefit, including service charges imposed by financial institutions, the cost of the lawyer or law firm's services, and the cost of preparing any tax-related documents to report or account for income accruing to the client's benefit;
(5) the capability of financial institutions, the lawyer or the law firm to calculate and pay income to individual clients; and
(6) any other circumstances that affect the ability of the client's funds to earn a net return for the client.

(e) The lawyer or law firm shall review the IOLTA account at reasonable intervals to determine whether circumstances have changed that require further action with respect to the funds of a particular client.

(f) If a lawyer or law firm determine that a particular client's funds in an IOLTA account either did or can earn net interest, the lawyer shall transfer the funds into an account specified in paragraph (c) of this rule and request a refund for the lesser of either: any interest earned by the client's funds and remitted to the Oregon Law Foundation; or the interest the client's funds would have earned had those funds been placed in an interest bearing account for the benefit of the client at the same bank.~~any interest earned by the client's funds that may have been remitted to the Oregon Law Foundation.~~

(1) The request shall be made in writing to the Oregon Law Foundation within a reasonable period of time after the interest was remitted to the Foundation and shall be accompanied by written verification from the financial institution of the interest amount.

(2) The Oregon Law Foundation will not refund more than the amount of interest it received from the client's funds in question. The refund shall be remitted to the

financial institution for transmittal to the lawyer or law firm, after appropriate accounting and reporting.

(g) No earnings from a lawyer trust account shall be made available to a lawyer or the lawyer's firm.

(h) A lawyer or law firm may maintain a lawyer trust account only at a financial institution that:

(1) is authorized by state or federal banking laws to transact banking business in the state where the account is maintained;

(2) is insured by the Federal deposit Insurance Corporation or an analogous federal government agency;

(3) has entered into an agreement with the Oregon Law Foundation:

(i) to remit to the Oregon Law Foundation, at least quarterly, interest earned on the average daily balance in the lawyer's or law firm's IOLTA account, less reasonable service charges, if any; and

(ii) to deliver to the Oregon Law Foundation a report with each remittance showing the name of the lawyer or law firm for whom the remittance is sent, the number of the IOLTA account as assigned by the financial institution, the average daily account balance for each month for which the remittance is made, the rate of interest applied, the period for which the remittance is made, and the amount and description of any service charges deducted during the remittance period; and

(4) has entered into an overdraft notification agreement with the Oregon State Bar requiring the financial institution to report to the Oregon State Bar Disciplinary Counsel when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored.

Because the amount of money involved is substantial and is expected to be held for enough time that it could earn net interest, Defendant's funds must be placed in an interest-bearing trust account in one of the institutions identified in Oregon RPC 1.15-2(h), with the interest accruing to the benefit of the client. Oregon RPC 1.15-2(c).

Nothing in Oregon RPC 1.15-2 prohibits Defendant from waiving the right to interest earned on funds held by Lawyer and authorizing the payment of the interest to the Oregon Law Foundation. There may be tax implications in Defendant's waiver of interest income and the corollary charitable contribution. Lawyer should inform Defendant of that possibility and recommend that Defendant seek independent tax advice before deciding how to proceed. If Lawyer chooses to advise Defendant on this point, Lawyer may have a self-interest conflict under Oregon RPC 1.7(a)(2) in giving such advice and, if so, must obtain Defendant's informed consent pursuant to Oregon RPC 1.7(b). If those steps are followed, Lawyer may, with Defendant's agreement, deposit Defendant's funds into Lawyer's IOLTA trust account.¹

¹ Although the client is not required to give "informed consent" to the waiver, we believe that Oregon RPC 1.4(b) applies to this situation: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Approved by Board of Governors, ~~August 2005~~April 2014.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§11.1–11.5, 11.7, 11.9, 11.11–11.13 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§44–45 (2003); and ABA Model Rule 1.15. *See also* Washington Formal Ethics Op Nos 174, 193.

FORMAL OPINION NO. 2005-129

[REVISED 2014]

**Competent Representation,
Information Relating to the Representation of a Client:
Responsibilities on Death of a Sole Practitioner**

Facts:

Lawyer is a sole practitioner with no partners, associates, or employees. Lawyer's files contain information relating to the representation of clients.

Questions:

1. Must Lawyer take steps to safeguard the interests of Lawyer's clients, and the information relating to their representations, if Lawyer dies or is disabled?
2. If Lawyer makes arrangements for a successor lawyer to disburse his or her files if Lawyer dies or becomes disabled, what steps must or may the successor lawyer undertake?

Conclusions:

1. See discussion.
2. See discussion.

Discussion:

Oregon RPC 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Oregon RPC 1.6(a) provides:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).¹

¹ Oregon RPC 1.6(b) provides:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer's compliance with these Rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

~~to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of~~

ORS 9.705–9.755 set forth a statutory scheme pursuant to which a nonperforming lawyer’s law practice may be placed under the jurisdiction of the court and steps taken to protect the interests of the nonperforming lawyer’s clients. For a lawyer who has no partners, associates, or employees, however, there could well be a significant lapse of time after the lawyer’s death or disability during which the lawyer’s telephone would go unanswered, mail would be unopened, deadlines would not be met, and the like.

The duty of competent representation includes, at a minimum, making sure that someone will step in to avoid client prejudice in such circumstances. The person may, but need not, be a lawyer. Depending on the circumstances, it may be sufficient to instruct the person that if the lawyer dies or becomes disabled, the person should contact the presiding judge of the county circuit court so that the procedure set forth in ORS 9.705–9.755 can be commenced.² The person also should be instructed, however, about the lawyer’s duties to protect information relating to the representation of a client pursuant to Oregon RPC 1.6. *Cf.* OSB Formal Ethics Op Nos 2005-50, 2005-44, 2005-23.

A lawyer may, however, go further than this and may specifically arrange for another lawyer to come in and disburse the lawyer’s files if the lawyer dies or becomes disabled. Nothing in ORS 9.705–9.755 makes it the exclusive means of handling such circumstances. Like a court-

~~such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

See also Oregon RPC 5.3:

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

² There may be circumstances, however, in which the lawyer must do more. This would be true if, for example, a client were to request that particular steps be taken. It would also be true if the lawyer learns in advance that he or she would be able to continue practicing law for only a limited additional time. In this event, the lawyer should begin the process of notifying the lawyer’s clients as soon as possible to inquire how each client wishes to have his or her files handled.

appointed custodial lawyer, a voluntary lawyer must be mindful of the need to protect the client's confidential information. Also like a court-appointed custodial lawyer, the voluntary lawyer must promptly inform the clients of the sole practitioner that the voluntary lawyer has possession of the client's files and must inquire what the clients wish the voluntary lawyer to do with the files.

Unlike the court-appointed custodial lawyer, however, the voluntary lawyer may offer in writing to take over the work of the lawyer's clients, if the voluntary lawyer complies with Oregon RPC 7.3 on solicitation of clients.³ *Cf.* ORS 9.730; OSB Formal Ethics Op No 2005-127.

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³ The voluntary lawyer could not do so if, for example, the voluntary lawyer is not qualified to handle the work in question or if doing so would create conflict of interest problems under Oregon RPC 1.7. *Cf.* Oregon RPC 1.1; OSB Formal Ethics Op Nos 2005-119, 2005-110. With regard to the sale of a law practice, see Oregon RPC 1.17.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§7.2–7.5 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§16, 59–60 (2003); and ABA Model Rules 1.1, 1.6.

FORMAL OPINION NO. 2005-133

[REVISED 2014]

**Attorney Fees:
Financing Arrangement**

Facts:

A company owned by nonlawyers (“Company”) offers a plan in Oregon (“the Financing Plan”) to enable clients to finance legal fees through Company. Under the Financing Plan, participating lawyers negotiate fee agreements with their clients in accordance with their customary practice. In appropriate circumstances, however, Lawyer may inform Client of the availability of the Financing Plan. If Client is interested, Lawyer will describe the Financing Plan in greater detail.¹ If Client is interested in using the Financing Plan, Client will complete Company’s written credit application at Lawyer’s office, and Lawyer will forward to the application Company.²

Company will review the credit application and, if it is approved, establish a “credit facility” for Client to pay Lawyer’s legal fees up to the credit limit established by Company.

¹ It is assumed that either Company or Lawyer will provide Client full disclosure regarding the interest rate charged and all other material terms and conditions of the credit agreement used in connection with the Financing Plan. It is also assumed that all disclosures required under Regulation Z and Oregon consumer lending laws will be properly given and that the terms of the Financing Plan and the documents used in connection with the Financing Plan will be consistent with all applicable credit laws. Failure to comply with these requirements could involve Lawyer’s violation of applicable substantive law as well as Oregon RPC 8.4(a)(3), which provides that it is professional misconduct for a lawyer to “[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

² It is assumed that the Financing Plan will not be actively marketed to the public by either Company or Lawyer and that in discussing the Financing Plan option with Client, Lawyer will present the option in a low-key, factual manner, as a convenience to Client without attempting to induce Client to choose this option. Public advertising of the Financing Plan could raise issues under Oregon RPC 7.1–7.3 (advertising and solicitation).

Lawyer will submit a voucher to Company as services are rendered. Only vouchers for uncontested services will be submitted to Company. Before Lawyer submits a voucher to Company, Client must confirm that the amount of the voucher is appropriate for the services.³ Vouchers will be submitted only for services actually rendered.⁴

On receipt of a voucher, Company will pay to Lawyer the amount of the voucher (up to Client's unused credit limit), minus a service charge of 10%.

Client must repay the amount of each voucher plus interest, on an installment basis. Interest will be charged at a rate that is comparable to the rates of interest charged on bank credit cards. Company will require Client to deposit a substantial reserve to reduce Company's collection risks.

Company will be responsible for collecting amounts owed by Client and, with certain limited exceptions, Company will have no recourse against Lawyer for uncollected amounts.

Question:

May Lawyer participate in the Financing Plan?

Conclusion:

Yes, qualified.

Discussion:

The Financing Plan is designed to serve the interests of both Lawyer and Client. The Financing Plan enables Lawyer to reduce the risk of nonpayment by Client and to reduce the delay and expense involved in collecting client accounts. At the same time, it enables Client to finance legal fees through a credit facility offered by Company.

³ If such approvals result in Client's waiver of his or her rights to contest the legal fee at a later point in the representation, the Financing Plan would create a conflict of interest under Oregon RPC 1.7. See discussion at 2.a below.

⁴ If payments are received for future services, Lawyer may be required to deposit such payments in his or her trust account. *See* Oregon RPC 1.15.

Discussed below are potential issues raised under the Oregon RPC by each of these aspects of the Financing Plan.

1. *Collection Aspect.*

Oregon RPC 5.4(a) provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

Because Company will deduct 10% as a service charge from loan proceeds used to pay the legal fees, an issue arises whether such arrangement constitutes an impermissible division of legal fees by Lawyer and a nonlawyer. The purpose of Oregon RPC 5.4(a), however, is to protect Lawyer's professional independence of judgment. It does not prohibit Lawyer from using a nonlawyer to collect legal fees, even when the nonlawyer is paid from the collected fees. *See In re Griffith*, 304 Or 575, 611, 748 P2d 86 (1987).

2. *Financing Aspect.*

As a general matter, the financing aspect of the Financing Plan is analogous to Client's using a credit card to finance legal fees. See OSB Formal Ethics Op No 2005-97, which recognizes that lawyers may accept credit cards for payment of legal fees. In addition, that opinion sanctioned a rate of interest comparable to that charged on "many credit cards."⁵

⁵ If the Financing Plan involves an excessive interest rate, it is possible that Lawyer's fee could be deemed excessive. *See* Oregon RPC 1.15. *See also* OSB Formal Ethics Op No 2005-98 (lawyer could enter into flat fee arrangement that might result in more or less fees than what lawyer would earn under hourly billing rate; question is not whether lawyer would earn more than permissible hourly billing rate with respect to particular case but "whether agreement, as a whole, provides excessive compensation"); OSB Formal Ethics Op No 2005-54 (agreement that transforms contingent fee into hourly fee if client rejects settlement offer that lawyer

Nevertheless, the financing aspect of the Financing Plan raises two potential issues that should be considered:

a. *Conflict of interest.*

Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

...

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer;

....

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

Oregon RPC 1.0(b) and (g) provide:

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

....

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

deems reasonable could "very well turn an otherwise lawful fee into a 'clearly excessive fee'").

Although negotiation of fee arrangements with clients does not, in general, involve a conflict of interest under Oregon RPC 1.7, certain features of the Financing Plan might not be in a particular client's best interest, which could create a conflict of interest for Lawyer's offering the Financing Plan to Client. For example, Lawyer may have an incentive to encourage Client to participate in the Financing Plan to accelerate Lawyer's receipt of fees or to avoid the risk and expense of collecting fees. If there is a significant risk that Lawyer's professional judgment will be materially limited by Lawyer's own financial interest in having Client choose this payment option, then Lawyer should not offer the Financing Plan to Client without obtaining Client's consent to acceptance or continuation of the employment relationship based on informed consent, confirmed in writing. Oregon RPC 1.7(a)(2), (b).⁶

b. *Preservation of information relating to the representation of a client.*

Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

⁶ If the Financing Plan were structured so that Client's obligation to repay Company is not subject to all the claims and defenses arising in connection with the legal representation that Client could assert against Lawyer, the Financing Plan could significantly diminish Client's rights. Under such circumstances, disclosure of this fact would be required to meet the requirements of Oregon RPC 1.7 and 1.0.

(6) ~~_____ in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.~~

~~(7) _____ to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.~~

~~(c) _____ A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

It is possible that the Financing Plan could involve disclosure of information relating to the representation of Client through the submission of detailed billing vouchers. Either appropriate permission to disclose must be obtained from Client or the vouchers must not disclose protected information.

Approved by Board of Governors, ~~August 2005~~ April 2014.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§3.22, 3.32 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§10, 59–62, 125 (2003); and ABA Model Rules 1.6–1.7, 5.4.

FORMAL OPINION NO. 2005-136

[REVISED 2014]

**Information Relating to the Representation of a Client:
Lawyer's Wrongful Termination Claim**

Facts:

Lawyer is in-house counsel and general manager of Company. In the course of applying for a patent on behalf of Company, Lawyer learned that the product was not invented by Company, but was in fact invented by Company's customer. The patent application required Lawyer to swear on behalf of Company that Company was the "original and first inventor." A person who makes a misrepresentation on a patent application is subject to criminal prosecution. Lawyer refused to make the representation that Company was the original and first inventor, and was fired. Lawyer wishes to pursue a civil action for wrongful termination in which it will be necessary to disclose information about these events.

Question:

May Lawyer bring a civil action for wrongful termination if bringing the action requires disclosure of information relating to Lawyer's representation of Company?

Conclusion:

Yes, qualified.

Discussion:

Relying on the general rule that "a client may terminate the relationship between himself and his lawyer with or without cause,"¹ some courts decline to recognize the tort of wrongful discharge in the case of in-house counsel. Some courts reach that conclusion, in part, because recognizing the claim would permit lawyers to disclose client confidences and secrets. *Balla v. Gambro, Inc.*, 585 NE2d 104, 109, 145 Ill2d 492 (1991); *Eckhous v. Alfa-Laval, Inc.*, 764 F Supp 34, 37 (SDNY). There are presently no dispositive Oregon Supreme Court cases on this issue.

¹ *Herbster v. North American Co. For Life & Health Insurance*, 501 NE2d 343 (Ill 1986). See generally D. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO J LEGAL ETHICS 553 (1988).

A discussion of whether, or under what circumstances, a former in-house counsel can state a claim for wrongful termination is a matter of substantive law, and beyond the scope of this opinion. For purposes of discussion, however, we assume that such a claim can be stated.

In asserting such a claim, Lawyer is bound by Oregon RPC 1.6, which provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

~~to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the~~

~~legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

See also ORS 9.460(3). Lawyer is bound to protect information relating to the representation of Company even after termination of employment. OSB Formal Ethics Op No 2005-23.

Because the information at issue here is protected from disclosure by Oregon RPC 1.6, Lawyer may not use it in the claim for wrongful termination unless one of the applicable exceptions is satisfied. Oregon RPC 1.6(b)(4) applies to a “claim or defense on behalf of a lawyer in a controversy between the lawyer and the client.” If a legally viable and nonfrivolous claim exists, disclosure may be made. Nevertheless, there are limits on how much Lawyer may reveal and the circumstances of the revelation. The information that Lawyer seeks to disclose must be reasonably necessary to establish the claim asserted. *See* OSB Formal Ethics Op No 2005-104. Lawyer must ensure that any confidential information is revealed in the least public manner, including insistence on an appropriate protective order. *Cf. In re Huffman*, 328 Or 567, 983 P2d 534 (1999) (lawyer disciplined for making disclosures of confidential information that were not required for lawyer to assert viable defense).

Approved by Board of Governors, ~~August 2005~~April 2014.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§4.3, 6.13 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§59–60, 64–65 (2003); and ABA Model Rule 1.6.

FORMAL OPINION NO. 2005-148

[REVISED 2014]

**Conflicts of Interest, Former Clients:
Representing One Spouse in Dissolution
aAfter Joint Estate Planning**

Facts:

Lawyer previously represented Wife and Husband in family estate-planning matters. Wife now has asked Lawyer to represent her in the dissolution of the parties' marriage. Neither Husband nor Wife is still a current client of Lawyer.

Question:

May Lawyer undertake the representation of Wife against Husband in the dissolution proceedings?

Conclusion:

See discussion.

Discussion:

1. *Former Client Conflicts Generally.*

Oregon RPC 1.9(a) and (c) provide:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

....

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Oregon RPC 1.0(b) and (g) provide:

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

. . . .

(g) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be give

Finally, Oregon RPC 1.6(a) provides:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).¹

¹ The exceptions in Oregon RPC 1.6(b) do not apply here:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer’s compliance with these Rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;
- (5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client’s identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

In this scenario, Wife is a potential current client and Husband is a former client. It is necessary to determine whether the proposed representation would constitute a former client conflict under Oregon RPC 1.9(a). We do this by determining whether the current and former matters are the same or substantially related within the meaning of the rule. As with former client conflicts under *former* DR 5-105(C), matters are substantially related if there is either a matter-specific conflict as discussed in OSB Formal Ethics Op No 2005-11 or an information-specific former client conflict as discussed in OSB Formal Ethics Op No 2005-17. If either type of former client conflict exists, Lawyer may proceed only if both Wife and Husband give their informed consent and the consent is suitably confirmed in writing. If neither type of former client conflict exists, Lawyer may proceed without the consent of either Husband or Wife.

On the limited facts presented, it does not appear that Lawyer would be in possession of information relating to the representation of Husband that would not already be known to Wife or to which Wife would not otherwise have access. *Cf. In re Brandsness*, 299 Or 420, 702 P2d 1098 (1985); OEC 503(4)(e) (no privilege as between jointly represented clients who have a falling-out); OSB Formal Ethics Op No 2005-17. If this is so, no information-specific former client conflict would exist.

Are the estate planning and the marital dissolution the same or substantially related matters because they are “matter-specific”? Without more, it cannot be said that estate planning on the one hand and marital dissolution on the other constitute the same matter. *See, e.g., PGE v. Duncan, Weinberg, Miller & Pembroke*, 162 Or App 265, 986 P2d 35 (1999); *cf.* OSB Formal Ethics Op No 2005-11.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer’s clients, except to the extent reasonably necessary to carry out the monitoring lawyer’s responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

~~to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client’s identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.~~

The key question, then, is whether Lawyer's representation of Wife in the marital dissolution is a matter-specific conflict because it will work to Husband's injury or prejudice in connection with the estate planning that Lawyer did for him. Even though it may generally be true, pursuant to ORS 112.315, that a divorce revokes all provisions in a will in favor of the testator's former spouse, the revocation of wills in that manner is not sufficient to create a conflict of interest unless the parties are legally bound not to revoke or change their wills. *Cf.* ABA Formal Ethics Op No 05-434 (absent additional factors, there is no conflict in representing testator in disinheriting beneficiary who is also client, because testator is free to change will at any time).

If, however, Wife and Husband had legally bound themselves not to change their wills or if Lawyer's representation of Wife would require Lawyer to try to wrest control away from Husband of business or estate planning entities that Lawyer had formed while representing Wife and Husband, a matter-specific former client conflict would exist. *In re Brandsness, supra.* In this case, Lawyer could not represent Wife adversely to Husband in the marital dissolution without first obtaining informed consent from both Wife and Husband that is confirmed in writing.

Approved by Board of Governors, ~~August 2005~~ April 2014.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§9.3–9.6 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121, 132 (2003); and ABA Model Rule 1.9.

FORMAL OPINION NO. 2005-155

[REVISED 2014]

**Conflicts of Interest:
Multiple “Of Counsel” Relationships**

Facts:

Lawyer *A* operates Law Firm 1 as a sole practitioner. Lawyer *A* is also Of Counsel to Law Firm 2 and is listed as such on Law Firm 2’s letterhead. Lawyer *B* is a sole practitioner who wishes to be Of Counsel to Law Firm 1.

Question:

What conflict-of-interest issues are implicated by the proposed arrangement?

Conclusion:

See discussion.

Discussion:

The Oregon RPC do not provide a precise definition of the “Of Counsel” relationship, but such relationships clearly are permitted. Oregon RPC 1.0(d) provides:

(d) “Firm” or “law firm” denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

Oregon RPC 7.5(~~be~~) provides in part:

(~~eb~~) A lawyer may be designated “Of Counsel” on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as ~~a~~ partner or associate. ...

As Of Counsel, Lawyer *B* is a member of Law Firm 1 and Lawyer *A* is a member of Law Firm 2. As a result, Law Firm 1, Law Firm 2, and Lawyer *B*’s sole practice will be treated as a single unit for conflict-of-interest purposes. The clients of Law Firm 2 are deemed to be clients of Law Firm 1 (through the Of Counsel relationship of Lawyer *A* and Law Firm 2) while the clients of Law Firm 1 (including the clients of Law Firm 2), will be deemed to be clients of Lawyer *B*.

The Of Counsel relationship can and should be distinguished from the situation in which law firms, or a lawyer and a law firm, associate with each other or are employed as co-counsel

on specific cases. An occasional collaboration with no indicia sufficient to establish a de facto law firm among the lawyers will avoid the implication that they are members of the same firm.

Approved by Board of Governors, ~~August 2005~~ April 2014.

COMMENT: *See* OSB Formal Ethics [Op Nos 2005-50](#), [2005-44](#), [2005-12](#). For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §2.19 (Oregon CLE 2003) and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§9, 123 (2003).

FORMAL OPINION NO. 2005-157

[REVISED 2014]

**Information Relating to the Representation of a Client:
Submission of Bills to Insurer's Third-Party Audit Service**

Facts:

Lawyer represents Client whose insurance carrier is paying the bills. The insurance carrier asks Lawyer to submit Client's detailed bills to a third-party audit service.

Questions:

1. May Lawyer submit Client's bills to a third-party audit service at the request of Client's insurance carrier?
2. May Lawyer ethically seek Client's consent to submit Client's bills, which contain information relating to the representation of a client, to a third-party audit service?

Conclusions:

1. No, qualified.
2. Yes, qualified.

Discussion:

Absent an agreement to the contrary, an Oregon lawyer who represents an insured in an insurance defense case will generally have two clients: the insurer and the insured. OSB Formal Ethics Op Nos 2005-121, 2005-77, 2005-30. Both the Oregon RPCs and insurance law as interpreted in Oregon require that a lawyer hired by the insurer to defend an insured must treat the insured as "the primary client" whose protection must be the lawyer's "dominant" concern. OSB Formal Ethics Op No 2005-121.

One of a lawyer's most important duties is the preservation of information relating to the representation of a client. Oregon RPC 1.6 provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
 - (2) to prevent reasonably certain death or substantial bodily harm;
 - (3) to secure legal advice about the lawyer's compliance with these Rules;
 - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil

claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

1. *Submission of Bills to Third Party.*

If the bills contain no information protected by Oregon RPC 1.6, Lawyer may submit the bills to the third-party audit service. On the other hand, if the bills contain such information, Lawyer may not disclose them unless one of the exceptions contained in Oregon RPC 1.6 applies. In effect, this means that absent Client's consent, Lawyer must not reveal the information. Depending on the facts of the matter and the substantive law applicable to such situations, Lawyer may need to discuss with Client the risks, if any, that the submission of the detailed bills to the third-party audit service may entail. This might include, for example, a risk

of inappropriate disclosure of protected information, a risk of waiver of the lawyer-client privilege,¹ or a risk of adverse effects on the insurer-insured relationship.

2. *Seeking Consent to Disclose Bills.*

Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
- (4) each affected client gives informed consent, confirmed in writing.

Oregon RPC 1.0(b) and (g) provide:

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

....

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

¹ For a discussion regarding the waiver of lawyer-client privilege on the disclosure of bills to a government auditor, see *U.S. v. Massachusetts Institute of Technology*, 129 F3d 681 (1st Cir 1997).

Whether an insurer's demand for Lawyer to provide confidential client information to a third party would give rise to a conflict and, if so, whether the conflict would be waivable or nonwaivable, will depend on the specific facts of the matter. *Cf.* Washington Formal Ethics Op No 195 (1999) ("it is almost inconceivable that it would ever be in the client's best interests to disclose confidences or secrets to a third party"). *See also* New York Formal Ethics Op No 716 (1999); Massachusetts Informal Ethics Op No 1997-T53 (1997) (auditor must take steps to protect confidentiality of disclosed information). Unless a conflict exists that cannot be waived, it is permissible for Lawyer to ask Client for consent.

Approved by the Board of Governors, ~~August 2005~~ April 2014.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§6.10, 9.17 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§59–60, 62, 121, 128 (2003); and ABA Model Rules 1.6–1.7.

FORMAL OPINION NO. 2005-167

[REVISED 2014]

**Lawyer as Mediator:
Attempted Fraud by One Party**

Facts:

Lawyer-Mediator is retained by parties to mediate a domestic relations matter. During the mediation, Party A discloses to the mediator the existence of assets that are unknown to Party B. Lawyer-Mediator knows that the assets are important to decision-making by Party B. Party A instructs Lawyer-Mediator to withhold these facts from Party B.

Questions:

1. May Lawyer-Mediator continue to mediate the matter to conclusion?
2. Does it make any difference if Lawyer-Mediator is unfamiliar with the substantive law of the matter?

Conclusions:

1. No.
2. No.

Discussion:

Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
 - (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
 - (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.
- (b) A lawyer serving as a mediator:
 - (1) may prepare documents that memorialize and implement the agreement reached in mediation;
 - (2) shall recommend that each party seek independent legal advice before executing the documents; and
 - (3) with the consent of all parties, may record or may file the documents in court.

~~(c) Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.~~

~~(d)~~ The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

In light of Oregon RPC 2.4(a)(1), Lawyer-Mediator cannot have a lawyer-client relationship with a mediating party with respect to the mediation. Oregon RPC 2.4(a)(1) does not, however, prohibit Lawyer-Mediator from mediating a matter involving persons who are represented by Lawyer-Mediator in other separate matters.

Whether or not Lawyer-Mediator represents either of the parties on other matters, Lawyer-Mediator is bound by the applicable rules of professional conduct, including Oregon RPC 8.4(a)(3) (prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation”), Oregon RPC 8.4(a)(4) (prohibiting “conduct that is prejudicial to the administration of justice”), and Oregon RPC 3.3(a)(5) (prohibiting illegal conduct generally). Thus, a lawyer who is also a mediator cannot engage in a knowing misrepresentation or concealment of a material fact. *See, e.g., In re Williams*, 314 Or 530, 840 P2d 1280 (1992). It follows that Lawyer-Mediator cannot complete a mediation based in whole or in part on the fraud of a mediating party.¹

At a minimum, Lawyer-Mediator must inform Party A that as a result of Party A’s nondisclosure, Lawyer-Mediator will be obligated to withdraw from the mediation. *Cf.* OSB Formal Ethics Op No 2005-34. Lawyer-Mediator may also go one step further and inform Party A that if Party A does not allow disclosure, Lawyer-Mediator will inform Party B that no further reliance should be placed on any statements that may theretofore have been made to Party B. ABA Formal Ethics Op No 92-366.²

The remaining question is whether Lawyer-Mediator may go still further and inform Party B of the attempted fraud. ORS 36.220 provides:

- (1) Except as provided in ORS 36.220 to 36.238:
 - (a) Mediation communications are confidential and may not be disclosed to any other person.

Unless the disclosure falls within a statutory exception, the mediator is bound to keep the communication confidential. The exceptions include communications that the mediator or a party reasonably believes must be disclosed “to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person.” ORS 36.220(6). Neither this exception nor any other exception permits disclosure to prevent a commercial or monetary fraud. Alternatively stated, the mediation privilege statute lacks the broad exception for future criminal conduct of all types that is contained in Oregon RPC 1.6(b)(1) (permitting disclosure of a client’s “intention . . . to commit a crime and the information necessary to prevent the crime”). In other words, Lawyer-Mediator may not disclose Party A’s intended fraud. *Cf. Rojas v.*

¹ For a discussion of a lawyer’s duty when the lawyer’s client has lied in the course of a proceeding or intends to perpetrate a fraud, see OSB Formal Ethics Op Nos 2005-131 and 2005-132.

² In the context of a lawyer-client relationship, this kind of withdrawal-plus-disclaimer is known as a “noisy withdrawal.” *See, e.g.,* ABA Formal Ethics Op No 92-366; THE ETHICAL OREGON LAWYER §§21.11, 21.15 (Oregon CLE 2003).

Superior Ct., 33 Cal4th 407, 93 P3d 260, 15 Cal Rptr3d 643 (2004) (declining to create exception to parallel California statute when legislature did not create one).

We reject the argument that Lawyer-Mediator could make the disclosure if, in fact, Party A happened to be a client in one or more other matters. At least in the absence of contrary holdings by courts of competent jurisdiction, the statutory nondisclosure obligation appears to us to predominate over the right of permissive disclosure contained in Oregon RPC 1.6(b)(1).

Approved by Board of Governors, ~~August 2005~~April 2014.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.19, 7.35, 7.39 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§94, 130 (2003); and ABA Model Rule 2.4.

FORMAL OPINION NO. 2006-176

[REVISED 2014]

**Conflicts of Interest:
Lawyer Functioning in Multiple Roles
in Client's Real Estate Transaction**

Facts:

Client informs Lawyer that Client would like to buy or sell real estate. Lawyer is willing to represent Client in the transaction and does not represent any other party in the transaction. Lawyer would, however, like to act not only as lawyer but also as a real estate agent or broker and as a mortgage broker or loan officer in the transaction.

Question:

May Lawyer serve in all three capacities?

Conclusion:

Yes, qualified.

Discussion:

1. *Potential Limitations of Substantive Law.*

This Committee is authorized to construe statutes and regulations pertaining directly to lawyers but not to construe substantive law generally. We therefore begin with the observation that if this joint combination of roles is prohibited by substantive law pertaining to real estate agents or brokers, mortgage brokers, or loan officers, Lawyer could not play multiple roles. Similarly, Lawyer would be obligated to meet in full any licensing, insurance, disclosure, or other obligations imposed by the substantive law pertaining to these lines of business. In the discussion that follows, therefore, we assume that there are no such requirements or, alternatively, that Lawyer will meet all such requirements.

2. *Lawyer-Client Conflicts of Interest.*

These facts present the potential for conflicts of interest between the client and the lawyer. Oregon RPC 1.7 states, in part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3)

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
- (4) each affected client gives informed consent, confirmed in writing.

Under Oregon RPC 1.7, Lawyer's other business interests in the real estate transaction would give rise to a conflict under Oregon RPC 1.7(a)(2) since there is a significant risk that these other roles would interfere with Lawyer's representation of Client. This would be true whether Lawyer plays the nonlawyer roles as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. In either instance, Lawyer's interest in fees or income from these other roles, if not also Lawyer's liability concerns from those other roles, would create a significant risk that Lawyer's ability to "exercise independent professional judgment and render candid advice" (Oregon RPC 2.1) would be compromised.

It follows that Lawyer can undertake multiple roles only if Lawyer can and does comply with each of the requirements of Oregon RPC 1.7(b).¹ Before we turn to the requirements of Oregon RPC 1.7(b), however, we note that since Lawyer will be doing business with Client in Lawyer's additional roles, it is also necessary to consider the conflict-of-interest limitations in Oregon RPC 1.8(a):

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

¹ As noted above, we have assumed that the multiple roles are legally permissible under applicable substantive law and thus need not consider Oregon RPC 1.7(b)(2). And since it is assumed that Lawyer represents Client and only Client, we need not consider Oregon RPC 1.7(b)(3).

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

There is significant overlap between Oregon RPC 1.7(b) and Oregon RPC 1.8(a). For example, both rules would apply whether Lawyer plays the nonlawyer role (or roles) as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. In addition, both rules require Lawyer to obtain Client's informed consent² and to confirm that consent in a contemporaneous writing.³ See Oregon RPC 1.7(b)(4), 1.8(a)(3).⁴ The informed consent requirements under Oregon RPC 1.8(a)(3) are more stringent, however:

- It is not enough that Lawyer confirm Client's waiver by a writing sent by Lawyer, as would be the case under Oregon RPC 1.7. Lawyer must also receive Client's informed consent "in a writing signed by the client."
- Lawyer's writing must clearly and conspicuously set forth each of the essential terms of each aspect of Lawyer's business relations with Client and the role that Lawyer will play in each such regard, as well as the role that Lawyer will play as Client's lawyer. This would include, for example, the fees that Lawyer or others would earn in each capacity

² Oregon RPC 1.0(g) provides:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

³ Oregon RPC 1.0(b) provides:

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

⁴ For prior formal opinions citing to both Oregon RPC 1.7(a) and Oregon RPC 1.8(a), see OSB Formal Ethics Op Nos 2005-10 (in addition to lawyer's private practice, lawyer also owns a real estate firm and a title insurance company that occasionally do business with lawyer's clients) and 2005-28 (discussing conflict of interest in representing both sides in adoption).

and the circumstances under which each such fee would be payable (e.g., only upon closing or without regard to closing). It would also include a clear explanation of any limitation of liability provisions that might exist regarding Lawyer's other roles.⁵

- In addition to recommending that Client consult independent counsel, Lawyer must expressly inform Client *in writing* that such consultation is desirable and must make sure that Client has a reasonable opportunity to secure the advice of such counsel.
- Communications between Lawyer and Client as part of their lawyer-client relationship are subject to Lawyer's duties of confidentiality under Oregon RPC 1.6.⁶ Communications between Lawyer and Client in other capacities would not be subject to Oregon RPC 1.6, and Lawyer must explain to Client why this distinction is potentially significant.⁷ This explanation must be given whether Lawyer's multiple roles are carried out from a single office or from physically distinct offices.⁸

⁵ For cases and ethics opinions discussing the general level of disclosure requirements when lawyers do business with clients, see, for example, OSB Formal Ethics Op No 2005-32.

⁶ Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. . . . to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17.

⁷ See, e.g., *United States v. Huberts*, 637 F2d 630, 639–640 (9th Cir 1980), *cert. denied*, 451 US 975 (1981) (lawyer as business agent; no privilege); *United States v. Davis*, 636 F2d 1028, 1043–1044 (5th Cir), *cert. denied*, 454 US 862 (1981) (lawyer as tax preparer; no privilege); *Diamond v. City of Mobile*, 86 FRD 324, 327–328 (SD Ala 1978) (lawyer as investigator; no privilege); *Neuder v. Battelle Pacific Northwest Nat'l Lab*, 194 FRD 289, 292–297 (DDC 2000) (when corporate lawyer acts in nonlegal capacity in connection with

Two requirements remain to be discussed. One requirement is that the terms of the business aspects of the transactions between Lawyer and Client be “fair and reasonable” pursuant to Oregon RPC 1.8(a)(1). We assume that this requirement will be met if Client would be unable to obtain the same services from another under more favorable terms. Whether, or to what extent, the “fair and reasonable” requirement could be met if there were other available suppliers at materially lower cost is a subject on which this Committee cannot define any bright-line rule. Other jurisdictions have been more inclined to approve lawyers’ business relations with clients when the client is relatively sophisticated. *See, e.g., Atlantic Richfield Co. v. Sybert*, 441 A2d 1079 (Md Ct Spec App 1982) (lawyers who acted as realty brokers for sophisticated corporate seller were not barred from recovering real estate commission); *McCray v. Weinberg*, 340 NE2d 518 (Mass App Ct 1976) (declining to set aside foreclosure of lawyer’s mortgage loan, one of a series, to knowledgeable and experienced client).

The other requirement is that Lawyer must “reasonably believe[] that [Lawyer] will be able to provide competent and diligent representation to” Client under Oregon RPC 1.7(b)(1). This means not only that Lawyer must have the subjective belief that Lawyer can do so but also that Lawyer’s belief must be objectively reasonable under the circumstances. *See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* §126, comment e (2000). Other state bar ethics committees have split on whether such an objectively reasonable belief can exist if, for example, a lawyer wishes to act both as legal counsel to and insurance agent for a client or as legal counsel to and securities broker for a client.⁹ We cannot say that it will always be unreasonable for a lawyer to conclude that the lawyer can provide competent and diligent legal advice to a client while also fulfilling other roles. We note, however, that there will be times when the lawyer’s conflicting obligations and interests will preclude such roles. *Cf. In re Phelps*, 306 Or 508, 510 n 1, 760 P2d 1331 (1988) (lawyer cannot be both counsel to

employment decisions, communications between lawyer and corporate representatives not privileged). A variant could arise if Lawyer’s role were ambiguous, resulting in Client’s inability to carry the burden of proof on lawyer-client privilege. *See Groff v. S.I.A.C.*, 246 Or 557, 565–566, 426 P2d 738 (1967) (person asserting privilege has burden of showing that one asserting privilege and nature of testimony offered are both within ambit of privilege); ORS 40.030(1) (OEC 104(1)).

⁸ The explanation about privilege and confidentiality issues might, for example, include a discussion about the effect that a lack of confidentiality could have on an opposing party’s ability to call Lawyer as a witness in any subsequent litigation and thus on Lawyer’s ability to represent Client in that litigation in light of the lawyer-witness rule, Oregon RPC 3.7.

⁹ *See, e.g., Cal Formal Ethics Op No 1995-140* (lawyer as insurance broker); *NYSBA Formal Ethics Op No 2002-752* (lawyer may not provide real estate brokerage services in the same transaction as legal services); *NYSBA Formal Ethics Op No 2005-784* (lawyer also acting in entertainment management role).

a party in a transaction and escrow for that transaction); OSB Formal Ethics Op No 2005-55 (same).

3. *Additional Caveats and Concluding Remarks.*

Given these numerous and delicate potential issues, one might fairly conclude that multidisciplinary practice means having multiple opportunities to be disciplined. *See generally In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (36-month suspension for violation of multiple provisions in former Code of Professional Responsibility in connection with program to help insurance agents sell insurance products to lawyer's estate planning clients and share in resulting commissions). Nevertheless, it will sometimes, but not always, be permissible for Lawyer to play these multiple roles. The answer will depend on factors including the fairness and reasonableness of the multiple roles, whether it is objectively reasonable to believe that Lawyer can provide competent and diligent representation while playing multiple roles, and whether Lawyer can and does obtain Client's informed consent in a writing signed by the client. Before concluding this opinion, however, we note three caveats:

- If someone other than Client were to pay Lawyer for the provision of legal services to Client, Lawyer would also have to comply with Oregon RPC 1.8(f).¹⁰
- If Lawyer were to endeavor to use Lawyer's role as real estate broker or agent or mortgage broker or loan officer to obtain clients for Lawyer's practice of law, Lawyer would have to comply with applicable advertising and solicitation requirements in Oregon RPC 7.1 et seq.¹¹
- Lawyers covered by the Oregon State Bar Professional Liability Fund who do not wish to risk losing potentially available legal malpractice coverage should review Form ORPC 1 and Exclusions 5 and 8 of the PLF 2006 Claims Made Plan, which can be found at page 66 of the 2006 Oregon State Bar Membership Directory, or any later amendments thereto.

Approved by Board of Governors, ~~July 2006~~April 2014.

¹⁰ Oregon RPC 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information related to the representation of a client is protected as required by Rule 1.6.

For an ethics opinion discussing this rule, see OSB Formal Ethics Op No 2005-30 (legal fees paid by insurer).

¹¹ For the present text and prior formal ethics opinions addressing these requirements, see OSB Formal Ethics Op Nos 2005-106 (lawyer who purchases tax advice business may not use that business to engage directly or indirectly in improper solicitation of legal clients), 2005-101 (lawyer and psychologist may market a joint "Family Mediation Center"), and 2005-108 (lawyer may advertise family mediation service in marriage and family therapy section of Yellow Pages).

OREGON STATE BAR

Legal Services Program Committee

Meeting Date: April 25, 2014

Memo Date: April 11, 2014

From: Legal Services Program Committee

Re: Disbursing Unclaimed Client Funds from the Legal Services Program

Action Recommended

1) Approve disbursing the annual unclaimed client funds for 2014 as outlined in the chart below titled 2014 Distribution. This includes approving the current reserve policy.

2) Approve disbursing the unclaimed client funds from the Strawn v Farmers class action as outlined in the chart below titled 2014 Distribution.

Background

Unclaimed or abandoned client funds held in a lawyers' trust account are sent to the Oregon State Bar (OSB), pursuant to ORS 98.386. Revenue received is used for the funding of legal services by the legal aid providers, the payment of claims and the payment of expenses incurred by the OSB in the administration of the Legal Services Program.

In 2012 the committee and subsequently the BOG approved a recommendation regarding the distribution method of the unclaimed client funds. The distribution method was that the LSP hold \$100,000 in reserve to cover potential claims and distribute the revenue that arrives each year above that amount. The amount of funds disbursed changes from year to year depending on the unclaimed funds received and claims made each year. In addition, the OSB entered into an agreement with the legal aid providers in which the legal aid providers agreed to reimburse the OSB if the allotted reserve gets diminished or depleted. This disbursement method and reserve policy was approved again in 2013.

2014 Disbursement Recommendation Unclaimed Funds Received 2013/14

There is currently about \$161,000 funds available for distribution in 2014. The LSP Committee recommends that the reserve policy remain the same allowing \$100,000 to be held in reserve and \$61,000 disbursed to the legal aid providers. The legal aid providers are recommending that the amount be disbursed according to the formula used last year (6% CNPLS, 11% LCLAC, 1% CCLA, 41% LASO, 41% OLC). The amounts each provider will receive are outlined in the chart below.

Distribution of Unclaimed Client Funds Strawn v Farmers Class Action

The LSP Program received approximately \$520,000 in one time unclaimed client funds from the Strawn v Farmers Class Action on January 31, 2014. It is recommended that the funds be distributed as follows:

- Disburse the one-time funds in equal amounts over three years with 1/3 of the funds being disbursed in 2014 and the remainder of the funds held in

reserve. Disbursing the one-time funds over three years is more sustainable and allows the legal aid providers to make the most efficient and effective use of the funds. It will also allow time to understand the amount of funds that may be claimed in the future.

- Disburse the funds by poverty population with 6% going to the Center for Nonprofit Legal Services (CNPLS), 11% to Lane County Legal aid and Advocacy Center (LCLAC), and 1% to Columbia County Legal Aid (CCLA). The remaining 82% which is usually divided by Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC) for statewide services shall be allocated entirely to LASO. This is pursuant to legal aid’s strategic plan that calls for using new funds to add new staff positions on a prioritized list. The highest priority positions in the strategic plan are to be located at LASO.
- Allow the CNPLS to receive its full share of the distribution in 2014. CNPLS has lost both county and city funds. Allowing them to get their full three year allocation will prevent them from having to lay off staff.

	Annual Unclaimed Fund	Farmers Class Action Fund
Total Received to Date	\$ 454,221	\$518,900
Claims	\$(31,118)	\$(6,363)
Previous Distributions to Programs	\$(262,000)	
Subtotal	\$161,103	\$ 512,537
Reserve Policy	\$100,000	\$321,190
Funds Available for Distribution	\$61,103	\$191,347
Total Funds Available	\$673,640	
Number of Properties Received	1138	476
Number of Properties Claimed	16	7

2014 Distribution		
Center for Non Profit Legal Services	\$3,666	\$30,752
Lane County Law & Advocacy	\$6,721	\$17,665
Columbia County Legal Aid	\$611	\$1,606
Legal Aid Services of Oregon	\$25,052	\$141,324
Oregon Law Center	\$ 25,052	\$ -
Total Distribution	\$61,103	\$191,347

UPL ADVISORY OPINION NO. 2014 - 3

REPRESENTATION OF FAMILY AND FRIENDS

FACTS:

1. Mother graduated from law school but is not licensed to practice law in Oregon or any other state. She would like to defend her son in a criminal matter in circuit court.
2. A contractor with no background in law would like to represent his friend in a construction dispute with a homeowner in a county justice court.
3. A contractor with no background in law would like to represent his friend in a construction dispute with a homeowner before the small claims department of a circuit court.
4. Friend, who has worked as a legal assistant, would like to assist her acquaintance, wife, with selecting pleading forms and drafting pleadings to file in a pending divorce case in circuit court.

QUESTIONS:

1. Can mother represent her son in circuit court?
2. Can contractor represent his friend in justice court?
3. Can contractor represent his friend in small claims court?
4. Can friend assist wife with selecting pleading forms and drafting pleadings to file in a divorce case?

ANSWERS:

1. No.
2. Yes.
3. No.
4. No.

DISCUSSION:

- I. Question No. 1 (Non-lawyer Parent Representing Child in Circuit Court)

A non-lawyer mother who tries to represent her child in circuit court would very likely engage in the unlawful practice of law.¹ Although people may represent themselves *pro se* in circuit court, only active members of the Oregon State Bar and out-of-state lawyers admitted *pro hac vice* may represent other persons. ORS 9.320 (a party may only prosecute or defend a lawsuit *pro se* or through an attorney).²

It makes no difference that mother seeks to represent her own child. As a general rule, non-lawyer parents do not have a right to provide legal advice to their children or serve as their children's lawyers.³ Because mother is not an active member of the Oregon State Bar or any other state bar, she may not defend son in a criminal matter in circuit court. Mother's legal education does not give her the right to defend son. Attending law school or having a law degree does not give a person the right to represent others in court.⁴

II. Question No. 2 (Non-lawyer Representation of Friend in Justice Court)

Non-lawyers such as contractor may represent other people in justice courts. ORS 52.060 states "[a]ny person may act as attorney for another in a justice court, except a person or officer serving any process in the action or proceeding, other than a subpoena." Therefore, in this example, the contractor would likely be able to represent his friend in justice court regarding the construction dispute with the homeowner.

III. Question No. 3 (Non-lawyer Representation of Friend in Small Claims Department)

Non-lawyer contractor would likely be engaging in the unlawful practice of law if he tried to represent his friend in a small claims department of a circuit court. Generally, people must represent themselves in small claims courts unless the court orders otherwise. ORS 46.415(4) (in small claims proceedings, no "person other than the plaintiff and defendant . . . shall appear on behalf of any party").⁵

IV. Question No. 4 (Non-lawyer Selecting Forms and Drafting Pleadings for Friend)

¹ ORS 9.160(1).

² Accord ORS 9.160(2); see *Oregon Peaceworks Green, PAC v. Sec'y of State*, 311 Or 267, 270-71, 810 P2d 836, 837 (1991) ("ORS 9.160 unequivocally prohibits a nonattorney from practicing law. ORS 9.320 states the key exception to the ORS 9.160 prohibition: representation of oneself. Neither statute empowers a nonattorney to represent another in state court, a fundamental aspect of law practice.").

³ In some cases involving minor children, parents may have independent, enforceable rights to prosecute on their own behalf. See e.g., *Winkelman v. Parma City School District*, 550 US 516 (2007) (holding parents have authority to bring an action under the Individuals with Disabilities Education Act (IDEA) as an aggrieved party with independent rights).

⁴ But see Rules for Admission of Attorneys in Oregon 13.05 (Law School Appearance Program allowing limited court appearances by eligible law students who are certified by the court and supervised by an active member of the bar).

⁵ Exceptions may apply when a party is a government entity (e.g., the State of Oregon) or a party obtains permission from the court to be represented by an attorney. ORS 46.415.

Non-lawyer friend may not select legal forms or draft pleadings for wife's divorce case because to do so would very likely be the unlawful practice of law. ORS 9.160 (1). As a general rule, non-lawyers may not select legal forms or draft pleadings for others to file in circuit court, because such activity would amount to the unlawful practice of law.⁶ Even though friend has some limited training and experience as a legal assistant, she may not give legal advice to another person.

⁶ *Oregon State Bar v. Security Escrows, Inc.*, 233 Or 80, 89, 377 P2d 334 (1962) (holding that the practice of law "includes the drafting or selection of documents and the giving of advice in regard thereto any time an informed or trained discretion must be exercised in the selection or drafting of a document to meet the needs of the persons being served").

REPORT

BOG Budget & Finance Committee

Report Date: April 25, 2014
Location: Oregon State Bar Center
Chair: Hunter Emerick
Vice-Chair: Matthew Kehoe
Members: Jim Chaney, Patrick Ehlers, Ray Heysell, Theresa Kohlhoff, Joshua Ross, Richard Spier, Charles Wilhoite, Elisabeth Zinser. Staff Liaison: Rod Wegener

INFORMATION ITEMS/REPORTS

1. This is a Report Only

There is no Budget & Finance Committee meeting scheduled for April 25 except a joint meeting with the Governance & Strategic Planning Committee to review CLE Seminars and other program matters scheduled for 11:00am.

The purpose of this report is to update the Committee and BOG on bar-related financial matters.

2. Financial Report – March 31, 2014

With the personnel change in the Accounting Department near the end of the fiscal year and the audit preparation, the monthly financial statements have been delayed. Each month statement is prepared and the March statements and report will be finalized and sent to the board before the meetings on April 25.

The data for the first quarter is very promising for a financially successful 2014. The preliminary Net Operating Revenue (NOR) through March 31 is \$313,098. This compares favorably with the \$277,918 Net Operating Revenue at March 31, 2013.

The very positive NOR is generally due to expenses well below budget (but not likely to continue through the rest of the year). An item that will be addressed in the report is Membership Fee revenue which is 1.4% less than a year ago, and the reasons for that decline.

For more information contact:

Rod Wegener, rwegener@osbar.org

503-431-6313, 1-800-452-8260, ext. 313

3. Investment Portfolio Reports

At the April meeting typically the first quarter benchmarks and reports from the two investment firms are presented. However, the bar has not received either except the detail of the first quarter transactions from Becker Capital. Washington Trust Bank is in the process of creating a new online system, but has had delays and neither the first quarter or March 2014 reports are available.

The March 31 financial statements will report the Becker Capital portfolio balance is \$2,648,768. The balance at December 31, 2013 was \$2,633,534, so there has been little gain on that portfolio so far in 2014.

If a member wants a copy of the Becker March 31 statement, call or send me an email.

4. Other Business

- The bar's CFO and Controller are finishing the draft of the report for the auditors' review and acceptance. The report is expected to be presented to the Committee at its May 23 meeting.
- Jennifer Walton, who had served as the temporary Controller since mid November, accepted the regular position at the bar on March 17.
- The bar's IT manager and CFO interviewed three IT consulting services firms and their references and narrowed the list to one candidate. Bar's general counsel is currently reviewing the agreement. More will be shared once the agreement is executed.

5. Next Committee meeting

The next meeting is scheduled for May 23, 2014 at the bar center. Here are the key topics for the next upcoming meetings:

May 23 Review and accept the 2012-2013 audit report

June 27 Discussion of items, changes for the 2015 budget

July 25 Review the 2015 Executive Summary Budget report – a report based on trends, estimates, and program considerations for the 2015 budget

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 25, 2014
From: Rich Spier, Chair, Governance & Strategic Planning Committee
Re: Section Guest Expense Reimbursement Request

Issue

During the November 23, 2013 meeting the BOG voted to amend the standard section bylaws to prohibit executive committee guest reimbursements except as specifically approved by the Board of Governors. After notifying all section chairs of the bylaw amendment the Business Law Section and the Real Estate and Land Use Section requested exception to the bylaw.

The Governance & Strategic Planning Committee reviewed these requests during the February meeting and directed staff to draft policy language allowing guest expense reimbursements in limited situations.

Discussion

When the BOG amended the section bylaws last November three reasons were offered as the basis for the change:

1. Bring the section bylaws into alignment with OSB Bylaw 7.500,
2. Proactively prevent violations of the Oregon Government Ethics Laws and prevent a perception of unfairness,
3. Eliminate the administrative cost associated with tracking guest reimbursement amounts to ensure compliance with tax laws because guest expenses are not a business expense.

An exception is made to Bylaw 7.500 which allows reimbursement of BOG guests in certain situations. Taking this exception into account, as well as the Oregon Government Ethics Laws, the following policy wording is offered to allow sections the option of reimbursing guest expenses:

With prior approval from a Section's Executive Committee, guest expenses will be reimbursable under the following conditions:

1. **Guests must be a spouse, domestic partner, or household member of an executive committee member;**
2. **Reimbursement is only allowed for official executive committee meals (not including alcohol) which the spouse, domestic partner, or household member is expected to attend. Reimbursement is not allowed for guest transportation or lodging expenses separate and above the executive committee member's expense, and;**
3. **Reimbursement of guest expenses made to an executive committee member must be less than \$600 per calendar year.**

Goal 7: Expand public and bar member education, outreach, and service

Strategy 9 - Identify and remedy barriers to accessibility experienced by individuals with disabilities who access bar programs, services, activities and premises			
Action Items	Target Measures	Lead	Timeline
9.1 Establish an assessment review team and implement an assessment process to identify barriers to accessibility experienced by individuals with disabilities.	Assessment team established and assessment of bar's programs, services, activities and premises complete	General Counsel; Director of Communications and Public Services	2014
9.2 Develop and implement a plan to remedy identified accessibility barriers.	Prioritize action items and implement plan with steady progress toward remedying identified barriers	General Counsel; Director of Communications and Public Services	Yearly for 2014-16
9.3 Develop and implement a process to facilitate reporting and tracking of accessibility concerns. Communicate with constituents when barriers addressed.	Reporting and feedback process established	General Counsel; Director of Communications and Public Services	Yearly for 2014-16



OSB Diversity & Inclusion Definition, Business Case Statement and Tag Line

Definition: Diversity and inclusion mean acknowledging, embracing and valuing the unique contributions our individual backgrounds make to strengthen our legal community, increase access to justice, and promote laws and creative solutions that better serve clients and communities. Diversity includes, but is not limited to: age; culture; disability; ethnicity; gender and gender identity or expression; geographic location; national origin; race; religion; sex; sexual orientation; and socio-economic status.

Business Case Statement: A diverse and inclusive bar is necessary to attract and retain talented employees and leaders; effectively serve diverse clients with diverse needs; understand and adapt to increasingly diverse local and global markets; devise creative solutions to complex problems; and improve access to justice, respect for the rule of law, and credibility of the legal profession.

Tag Line: Diversity and Inclusion: Making us Stronger.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 25, 2014
From: Travis Prestwich, Public Affairs Committee Chair
Re: 2015 Law Improvement Program package

Issue

Should the Board of Governors approve all or part of proposed 2015 Law Improvement Program package?

Options

- 1) Approve the 2015 Law Improvement Program package with the expectation that bar groups will continue to refine their proposals while working with internal and external stakeholders and relevant state agencies. The PAC has identified concerns regarding five of the proposals, specifically:
 - a. The Family Law section's proposal to allow for the exchange of financial documents without a modification proceeding,
 - b. The Consumer Law section's proposal to transfer the responsibility for homeowner association fees,
 - c. The Estate Planning and Administration section's proposal to update the Uniform Trust Code,
 - d. The Military and Veterans Law section's proposal regarding service member diversion, and
 - e. The proposal from the Unlawful Practice of Law Committee regarding legal entities appearing through counsel.

For each of the identified proposals, the PAC recommends that the board allow the section or committee to move forward with their proposal with the expectation that each group will implement the suggestions of the PAC and report back on its progress. The five concepts should be monitored and evaluated by the PAC as they move through the process.

- 2) Approve the 2015 Law Improvement Program package, in toto.
- 3) Approve a 2015 Law Improvement Program package containing a subset of the proposals.

Discussion

Every long session, the Oregon State Bar submits proposed legislation as part of the Law Improvement Program to the Oregon State Legislature for passage. On April 17, 2014, the Public Affairs Committee hosted the Oregon State Bar Legislative Forum. This year seventeen Oregon State Bar sections, workgroups, and committees submitted twenty-three law improvement

proposals for consideration by the Board of Governors to be included as part of the 2015 law improvement program package.¹

Law improvement concepts are proposed legislation that clarify statutory ambiguities, remove unnecessary procedural requirements, modify unforeseen glitches in previous legislation, or otherwise improve the practice of law. Policy changes are also included in the bar package of legislation when deemed appropriate. In order for a legislative concept to be considered at the Legislative Forum, it must be approved by a majority of the executive committee (we encourage executive committees to be representative of the diverse views on the section). Bar groups are encouraged to be mindful of differing viewpoints in the practice area.

The proposals were reviewed by the Public Affairs Committee to ensure that they meet the criteria established by both the Oregon State Bar bylaws and the U.S. Supreme Court case, *Keller v. State of California*, 499 US 1, 111 S.Ct 2228 (1990).²

What is the Keller Rule?

In 1990, the United States Supreme Court ruled in *Keller v. State Bar of California*, 499 US 1, 111 SCt 2228 (1990) that an integrated (mandatory) bar's use of compulsory dues to finance political and ideological activities violates the 1st Amendment rights of dissenting members when such expenditures are not germane to the bar's purpose, which the court identified as regulating the legal profession and improving the quality of legal services.

Keller does not prohibit integrated bars from using member dues to advance political or ideological positions that are not germane to the bar's purpose; however, it requires that dissenting members receive a refund of the portion of dues attributable to the non-germane activity.

If the BOG approves the Law Improvement Program package, there are still several opportunities for the board to review the legislative concept before filing. The legislative concepts are not submitted to the legislature until the fall of 2014. Throughout this process, the board will have the ability to ask questions, review the process and proposals, and, if necessary, pull a concept from the package at any point.

Attached is the list of legislative proposals from bar groups reviewed by the PAC. If approved by the board, these legislative concepts will be submitted to Legislative Counsel's office to be drafted, introduced through the Judiciary Committee, and pre-session filed for the 2015 legislative session. The Public Affairs Department will continue to monitor these bills and address any concerns.

Direct link to proposals: <http://osblip2015.homestead.com/OSB-2015-Law-Improvement-Package.html>

¹ The Public Affairs Committee is still considering a chapter 9 placeholder as well.

² For more information on the Oregon State Bar bylaws and the *Keller* case, please visit http://www.osbar.org/leadership/bog/bog_resources.html.

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 25, 2014
From: Travis Prestwich, Public Affairs Committee Chair
Re: Best Practices for Indigent Defense Providers

Issue

Whether to adopt proposed changes to the Standards for Representation in Adult Criminal and Juvenile Delinquency Cases to provide guidance to practitioners.

Options

Adopt proposed changes to the Standards for Representation in Adult Criminal and Juvenile Delinquency Cases and include a foreword with a statement of intent that these guidelines are not intended to establish a legal standard of care.

Adopt proposed changes to the Standards for Representation in Adult Criminal and Juvenile Delinquency Cases to provide guidance to practitioner.

Decline to adopt proposed changes to the Standards for Representation in Adult Criminal and Juvenile Delinquency Cases.

Discussion

The Oregon State Bar has a history of concern for the quality of representation provided to persons, in criminal, delinquency, dependency, civil commitment, and post-conviction proceeding. There have been at least four OSB task forces devoted to this subject. Adoption of the performance standards by the Bar was a key recommendation of the first task force in 1996. They have become a critical component of training and education efforts for lawyers practicing in the areas addressed by the standards. Oregon Public Defense Services Commission considers them an essential part of its mission to "ensure the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice." ORS 151.216(1)(a). Public defense services have improved significantly since the first OSB task force in 1996, but further improvement is still needed in criminal, delinquency and dependency representation. Keeping the OSB standards updated and relevant is important.

Nonetheless, concerns have been raised that the standards might create a standard of care and create a malpractice trap for indigent defense practitioners. One suggestion in light of the last Public Affairs Committee discussion is to include a statement similar to what is contained in the 2006 version as follows:

"These guidelines are not rules of practice and are not intended to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however, which are mandatory."

Identical language was included in the foreword to the standards for post-conviction relief practitioners, which the BOG adopted in 2009.

In the 18 years since the standards were originally adopted malpractice claims against criminal defense attorneys have been rare. This is due to case law in Oregon holding that a malpractice claim against a criminal defense trial attorney does not accrue unless "that person has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise." *Stevens v. Bispham*, 316 Or 221, 238, 851 P2d 556 (1993).

Background

In 1996, the Oregon State Bar Board of Governors approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. In 2006, the Board revised the 1996 standards. In 2012, two separate task forces revised the standards in criminal, delinquency and dependency cases. One group focused on juvenile dependency standards (expected to be completed soon). The other revised adult criminal and juvenile delinquency standards.

Proposed Revised Adult Criminal and Juvenile Delinquency Standards

Attached are new standards produced by the criminal workgroup which replace what is published on the OSB website as "Specific Standards for Representation in Criminal and Juvenile Delinquency Cases". These changes, when combined with the proposed revisions to the third specific standard (juvenile dependency – expected to be completed soon) will make the "general standards" in Section 1 unnecessary.

The task force included academia, the bench, private practice, and public defender offices. Task force members were Margie Paris, Professor of Law, University of Oregon; Shaun McCrea, in private practice in Eugene; the Honorable Lisa Grief, Jackson County Circuit Court; Lane Borg, Executive Director, Metropolitan Public Defender; Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shawn Wiley, Chief Deputy Defender, Appellate Division, Office of Public Defense Services. Paul Levy, General Counsel, Office of Public Defense Services, served as chair of the task force.

The task force examined existing standards and reviewed other state and national standards. The task force found that although Oregon's standards are grounded in the

standards promulgated by the National Legal Aid and Defender Association (NLADA) in 1994, Oregon's standards differed.

The variations from the NLADA standards were good and bad. On the positive side, they recognized that the role of a juvenile defender is highly specialized and complex, requiring skills unique to delinquency cases in addition to those required in adult criminal cases. The standards emphasized the collateral consequences of criminal convictions, addressed in the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 559 US 356 (2010). Indeed, the existing Oregon standards serve as guideposts to effective criminal and juvenile defense.

The task force decided that the organization of NLADA's standards provided the best structure for our own standards, while preserving the best of Oregon's standards. Thus, within a new structure we keep a format of the short standard, followed by more detailed one. Also included is a revised commentary for the standards which provides additional guidance regarding criminal or delinquency defense.

The task force also benefited from National Juvenile Defense Standards (2012), which present a systematic approach to defense practice in juvenile court. (The NJDC standards are available at <http://www.njdc.info/publications.php>.) While the revision recognizes this work as establishing a national norm for representation in delinquency cases, it melds parts of this work into Oregon standards.

The revision, if approved by the BOG, will serve as a useful tool for both the new and experienced lawyer as a guide on the best practices for diligent and high quality representation. The revision may also serve as a helpful guide for courts, clients, the media and who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

In conclusion, the revised standards may serve to increase Oregon Lawyers' expertise while not increasing exposure to malpractice claims.

Foreword to the 2014 revision of the Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases

The original version of the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (hereafter, the performance standards) was approved by the Board of Governors on September 25th, 1996. Significant changes to the original performance standards were adopted in 2006, and a new set of standards pertaining to representation in post-conviction standards were adopted in 2009.

As noted in the earlier revision, in order for the performance standards to continue to serve as valuable tools for practitioners and the public, they must be current and accurate in their reference to federal and state laws and they must incorporate evolving best practices.

The Foreword to the original performance standards noted that “[t]he object of these [g]uidelines is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.” This continues to be the case, as does the following, which was noted in both the Foreword to the 2006 revision and the Foreword to the 2009 post-conviction standards:

“These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however, which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.”

We hope that the revised Performance Standards, like the originals, will serve as a valuable tool both to the new lawyer or the lawyer who does not have significant experience in criminal and juvenile cases, and to the experienced lawyer who may look to them in each new case as a reminder of the components of competent, diligent, high quality legal representation.

Tom Kranovich
Oregon State Bar President

Oregon State Bar

Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases

April 25, 2014

Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases

Summary and Background

In September of 1996, the Oregon State Bar Board of Governors approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. In May of 2006, the Board accepted revisions to the 1996 standards. In 2012, at the direction of the OSB Board of Governors, the two separate workgroups began meeting to work on significant revisions to the standards in criminal, delinquency and dependency cases. One group focused on juvenile dependency standards, and the other on adult criminal and juvenile delinquency standards.

On the following pages will find new standards produced by the criminal workgroup which are recommended to replace what is currently published on the OSB website as the second specific standard “Specific Standards for Representation in Criminal and Juvenile Delinquency Cases”. These changes, when combined with the proposed revisions to the third specific standard (juvenile dependency – expected to be completed soon) will make the “general standards” in Section 1 unnecessary.

The task force included representative from academia, the bench and from both private practice and public defender offices. Task force members were Margie Paris, Professor of Law, University of Oregon; Shaun McCrea, in private practice in Eugene; The Honorable Lisa Grief, Jackson County Circuit Court; Lane Borg, Executive Director, Metropolitan Public Defender; Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shawn Wiley, Chief Deputy Defender, Appellate Division, Office of Public Defense Services. Paul Levy, General Counsel, Office of Public Defense Services served as chair of the task force.

The task force began its work by conducting a detailed examination of the existing standards and a review of other states' standards and the standards of national organizations. The task force found that although Oregon's standards, like those of most other states, are firmly grounded in the standards first promulgated by the National Legal Aid and Defender Association (NLADA) in 1994, the structure and substance of Oregon's standards had significant changes.

The variations from the NLADA standards were both good and bad. On the positive side, through an earlier revision of the Bar standards in 2005, they reflected a growing recognition that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to delinquency cases in addition to those required in adult criminal cases. The standards also placed emphasis on the collateral consequences of criminal convictions, presaging the U.S. Supreme Court's seminal decision on that subject in *Padilla v. Kentucky*, 559 US 356 (2010). Indeed, overall, the existing Oregon standards serve as strong and valid guideposts to effective criminal and juvenile defense.

But the task force also found that the structure of the standards was confusing and unhelpful. Why, for instance, should we have five "general standards," only to repeat them again in another set of "specific standards"? And is it really necessary to set out in the standards specific provisions of the Oregon Rules of Professional Conduct when those obligations already exist for all attorneys in the state? More fundamentally, since the last revision in 2005, the defense of both criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of accountability in both delinquency and adult criminal cases. Adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to some sentencing proceedings.

The ubiquity of computers and smartphones has dramatically changed the type of evidence lawyers are likely to encounter, as well as how lawyers are likely to do their own work.

The task force decided that the original organization of NLADA's standards provided the best structure for our own standards, while preserving much of the good work that had already been done to update the Oregon standards prior to our revision. Thus, within a new structure we have maintained a format of a short statement of a standard, followed by more detailed implementation language. New for this revision, and in keeping with the NLADA and many other state standards, is commentary following many of the standards, which provides additional background and guidance regarding a particular aspect of criminal or delinquency defense.

The task force also had the benefit of recently published National Juvenile Defense Standards (2012), a work of the highly regarded National Juvenile Defender Center, which present a systematic approach to defense practice in juvenile court. (The NJDC standards are available at <http://www.njdc.info/publications.php>.) While the new revision specifically recognizes this work as establishing a national norm for representation in delinquency cases, it also incorporates specific elements of this work into relevant Oregon standards.

The task force also brought its own considerable expertise and perspective to the review of existing standards and the drafting of revisions, consulting as required with other practitioners with recognized expertise in certain areas of practice. Building on an existing set of very good standards, the revision, if approved by the BOG, will serve as a useful tool for both the lawyer new to criminal and delinquency defense and the experienced lawyer who seeks guidance on the best practices for diligent and high quality representation. As such, the revision should be a useful tool for lawyers and law firms providing training for new lawyers. And they should serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

Introduction to the Revised Standards

Since 2005, when these performance standards were last revised, the defense of criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of the legal status of juveniles under the United States Constitution, as reflected in cases limiting the authority of states to impose the most severe penalties on juvenile offenders¹ and requiring consideration of a youth's age in determining whether *Miranda* warnings should be given.² Likewise, adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to sentencing proceedings³ and expanding the obligations of lawyers to advise clients concerning

¹ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

² *J.D.B. v. North Carolina*, 131 S. Ct. 502 (2011).

³ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

the collateral consequences of guilty pleas.⁴ The performance standards that follow reflect new best practices that have developed in response to these and other developments in the law, science and professional responsibilities of lawyers.

As in earlier versions of these standards, most of the guidance that follows applies in both adult criminal and juvenile delinquency cases. However, this revision reflects a growing recognition, already evident in the 2005 revision, that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to the duties of counsel in delinquency cases in addition to those required to perform most of the functions of counsel in an adult criminal case. In addition, since the last revision, the National Juvenile Defender Center has published the *National Juvenile Defense Standards* (2012), which present a systematic approach to defense practice in juvenile court and establish a national norm for this work. These new standards have informed the standards presented here but should also be consulted directly for detailed guidance on the obligations of counsel in delinquency cases.

The standards that follow do not address the special obligations of counsel in capital cases. While lawyers representing clients facing the death penalty will ordinarily be expected to meet the standards that follow here, additional duties of counsel in capital cases are presented and explained in detail in the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003). Lawyers in death penalty cases should continue to consult the ABA standards as well as the standards in this revision.

As noted in earlier versions of these standards, the guidance here will serve as a valuable tool for both the lawyer new to criminal or delinquency cases but also the experienced lawyer who seeks guidance on the best practices for diligent and high quality legal representation. But these standards should serve others as well. While they are not intended, nor should they be used, to establish a mandatory course of action in every case, they do reflect the current best practices for representation in criminal and delinquency cases. As such, they are a useful tool for lawyers and organizations providing training for new lawyers. They should also serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

Specific Standards for Representation in Criminal and Juvenile Delinquency Cases

⁴ *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010).

STANDARD 1.1 – ROLE OF DEFENSE COUNSEL

The lawyer for a defendant in a criminal case and for a youth in a delinquency case should provide quality and zealous representation at all stages of the case, advocating at all times for the client’s expressed interests. The lawyer shall abide by the Oregon Rules of Professional Conduct and applicable rules of court.

Implementation:

1. In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information.
2. The defense of a delinquency case requires knowledge and skills specific to juvenile defense in addition to what is required for the defense of an adult criminal case. Lawyers representing clients in juvenile court should be familiar with and follow the National Juvenile Defender Center’s *National Juvenile Defense Standards* (2012).
3. In both criminal and juvenile delinquency cases, a lawyer is bound by the client’s definition of his or her interests and should not substitute the lawyer’s judgment for that of the client regarding the objectives of the representation. In delinquency cases, a lawyer should explain to the client and, where appropriate, to the client’s parents that the lawyer may not substitute either his or her own view of the client’s best interests or a parent’s interests or view of the client’s best interests for those expressed by the client.
4. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.
5. A lawyer should consult with the client on the strategy and means by which the client’s objectives are to be pursued and exercise the lawyer’s professional judgment concerning technical and tactical decisions involved in the representation.

Commentary:

The paramount obligation of a lawyer is to advocate for a client’s cause with zeal, skill and devotion. It is wrong to assert that the vague notion that a lawyer’s role as an “officer of the court” should temper a lawyer’s commitment to a client’s cause. “The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the [client’s] counselor and advocate with courage and devotion and to render effective, quality representation.” *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993). Indeed, a former Oregon State Bar General Counsel and Executive

Director has argued convincingly that “the notion that [lawyers] have ethical duties to courts and judges as ‘officers of the court’ is erroneous and confusing.” [Officers of the Court: What does it mean?](#) George Riemer, Bar Counsel Column, Oregon State Bar Bulletin, August 2001.

Especially in criminal and delinquency cases, where lawyers often represent troubled clients accused of conduct that may be widely condemned, the overarching duty of counsel is a “vigorous advocacy of the client’s cause,” guided by “a duty of loyalty” and the employment of the skill and knowledge necessary for a reliable adversarial system of justice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). As a matter of professional responsibility, “[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” *ABA Model Rules of Professional Conduct, Commentary to Rule 1.3*, ABA Center for Professional Responsibility (2007).

The same obligations of counsel in criminal cases apply with equal force in representing youth in juvenile delinquency proceedings. “At each stage of the case, juvenile defense counsel acts as the client’s voice in the proceedings, advocating for the client’s expressed interests, not the client’s ‘best interest’ as determined by counsel, the client’s parents or guardian, the probation officer, the prosecutor, or the judge.” [The Role of Juvenile Defense Counsel in Delinquency Court](#), p. 7, National Juvenile Defender Center (2009). Likewise, “[t]here is no exception to attorney-client confidentiality in juvenile cases for parents or guardians,” nor in service of what counsel or others consider the client’s “best interest.” *Id.*, p. 12. Nor does a juvenile’s minority status “automatically constitute diminished capacity such that a juvenile defense attorney can decline to represent the client’s expressed interests.” *Id.*, p. 10.

In both delinquency and criminal cases, “[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.” *ABA Standards for Criminal Justice, The Defense Function, Standard 4-5.2, Control and Direction of the Case* (3rd ed. 1993). In both circumstances, however, decisions by either the client or lawyer should be made after full consultation between the two. The ABA standards identify decisions for the client as what pleas to enter; whether to accept a plea agreement; whether to waive jury trial; whether to testify in his or her own behalf; and whether to appeal. The ABA standards likewise identify strategic and tactical decisions to be made by the lawyer to include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence should be introduced.

As noted, that allocation of decisional authority applies with equal force in delinquency cases. See, [National Juvenile Defense Standards](#), Standard 2.2, Explain the Attorney-Client Relationship, National Juvenile Defender Center (2012). However, in delinquency cases a lawyer may need to emphasize that the client is “in charge” of the critical decisions in the case. “In

clear, concise, and developmentally appropriate terms, counsel must exercise special care at the outset of representing a client to clarify the scope and boundaries of the attorney-client relationship.” *Id.*

Although Standard 1.1 calls for a strong client-centered model of advocacy, “[d]efense counsel is the professional representative of the accused, not the accused’s alter ego.” *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993). Thus, defense counsel “has no duty to execute any directive of the accused which does not comport with law” or with the lawyer’s obligations under standards of professional conduct. *Id.* Moreover, in those areas of strategic and tactical decision making that are committed to the informed judgment of counsel after consultation with the client, there is no obligation on counsel “to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points.” *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). Indeed, it would be an abdication of counsel’s professional responsibilities to acquiesce to a client’s ill-advised directions in these matters for the sake of expediency or to mollify a difficult client.

Previous versions of these standards often repeated verbatim applicable provisions of the Oregon Rules of Professional Conduct and predecessor rules of professional responsibility. The absence of specific reference to the Rules of Professional Conduct in the current version of these standards should not be taken as reflecting a position that they apply with any less force to defense counsel.

STANDARD 1.2 – EDUCATION, TRAINING AND EXPERIENCE OF DEFENSE COUNSEL

- A. To provide quality representation, a lawyer must be familiar with the applicable substantive and procedural law, and its application in the particular jurisdiction where counsel provides representation. A lawyer has a continuing obligation to stay current with changes and developments in the law, and with changing best practices for providing quality representation in criminal and delinquency cases. Where appropriate, a lawyer should also be informed of the practices of the specific judge before whom a case is pending.**
- B. Prior to handling a criminal or delinquency matter, a lawyer should have sufficient experience or training to provide quality representation.**

Implementation:

1. In order to remain proficient in the law, court rules and practice applicable to criminal and delinquency cases, a lawyer should regularly monitor the work of Oregon and pertinent Federal appellate courts, and the Oregon State Legislature.
2. To stay current with developments in the law and practice of criminal and delinquency cases, a lawyer should maintain membership in state and national organizations that focus on education and training in the practice of criminal and delinquency cases and subscribe to listservs, consult available online resources, and attend continuing legal education programs devoted to the practice of criminal and delinquency cases.
3. A lawyer practicing criminal or juvenile delinquency law should complete at least 10 hours of continuing legal education training in criminal and delinquency law each year.
4. A lawyer practicing in criminal or juvenile delinquency law should become familiar with the basics of immigration law pertinent to the possible immigration consequences of a criminal conviction or an adjudication in a delinquency case for noncitizen clients. At least two hours of a lawyer's mandatory continuing legal education training requirements each year should involve training on such immigration consequences. Lawyers should also be familiar with other non-penal consequences of a criminal conviction or delinquency adjudication, such as those affecting driving privileges, public benefits, sex offender registration, residency restrictions, student financial aid, opportunities for military service, professional licensing, firearms possession, DNA sampling, HIV testing, among others.
5. Before undertaking representation in a criminal or delinquency case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including nonlawyers. A less experienced lawyer should observe and, when possible, serve as co-counsel to more experienced lawyers prior to accepting sole responsibility for a criminal or delinquency case. More experienced lawyers should mentor less experienced lawyers.
6. Lawyers in delinquency cases and, where relevant, in criminal cases, should develop a basic knowledge of child and adolescent development, including information concerning emotional, social and neurological development that could impact effective communication by the lawyer with clients and the defense of charges against the client. Lawyers in delinquency cases should have training in communicating with youth in a developmentally appropriate way.
7. Lawyers representing youth who are prosecuted in the adult criminal system should have the specialized training and experience of a juvenile defender in addition to the training and experience required to handle the most serious adult criminal cases.
8. A lawyer providing representation in criminal and juvenile delinquency cases should be familiar with key agencies and services typically involved in those cases, such as the Oregon Department of Corrections, local community corrections programs, the Oregon Youth Authority, the Department of Human Services, the county Juvenile Department, private treatment facilities

and programs, along with other services and programs available as dispositional alternatives to detention and custody.

Commentary:

The complexity and seriousness of criminal and juvenile delinquency cases require specialized training and expertise in a broad area of law and practical skills. Moreover, as the practice of law in these areas continues to develop, lawyers must devote a substantial amount of time to on-going training. From complex, ever-changing sentencing schemes to the increased role of scientific evidence and forensic experts, defense lawyers must master not only the skills of trial advocacy but also the complex legal and factual issues attendant to many cases. For instance, recent advances in neuroscience and the understanding of infant and adolescent brain development undermine traditional notions of culpability and blameworthiness for both juvenile and adult offenders, requiring defense lawyers to learn the pertinent scientific principles and present them as evidence in appropriate cases. Likewise, as computers, smartphones and other electronic devices become an integral part of everyday life for most youth and adults, counsel must understand and utilize their evidentiary potential.

As criminal and delinquency cases have become more serious and complex, the collateral consequences of convictions and adjudications have become more numerous and significant. Lawyers must now understand and explain the immigration consequences of a criminal conviction to noncitizen clients in order to fulfill the Sixth Amendment rights of those clients. *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010). Depending upon the particular circumstances of a client, other collateral consequences may be just as important as deportation, requiring a lawyer to understand and seek to mitigate the impact of a conviction on a client's employment, housing, public assistance, schooling and other fundamental life activities.

The increased complexity and seriousness of criminal and delinquency cases require lawyers to take advantage of membership organizations that provide not only seminars and other training but also access to blogs, listservs, videos, motions and memoranda, and other online resources that alert lawyers to the latest developments in a pertinent area of law, provide a forum to seek case-specific guidance, and promote a culture of zealous, client-centered representation. The days of the solo practitioner toiling alone are in the past. In Oregon, the Oregon Criminal Defense Lawyers Association, the Oregon State Bar, National Association of Criminal Defense Lawyers and the National Juvenile Defender Center help provide the tools essential to successful practice in these areas. While direct peer-to-peer consultation, mentoring or guidance remains important, membership in an organization focused on criminal and juvenile defense has become the norm for the best practice in Oregon.

STANDARD 1.3 – OBLIGATIONS OF DEFENSE COUNSEL REGARDING WORKLOAD

Before agreeing to act as counsel or accept appointment by a court, a lawyer has an obligation to make sure that he or she has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a criminal matter or a youth in a delinquency case. If it later appears that the lawyer is unable to offer quality representation in the case, the lawyer should move to withdraw.

Implementation:

1. A lawyer, whether court-appointed or privately retained, should not accept workloads that, by reason of size or complexity, interfere with the ability of the lawyer to meet professional obligations to each client.
2. A lawyer should have access to sufficient support services and resources to allow for quality representation.

Commentary:

In 2007, the Oregon State Bar Board of Governors approved Formal Ethics Opinion No. 2007-178, which was based upon the American Bar Association Formal Ethic Opinion No. 06-441, entitled “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.” The OSB opinion, which makes clear that it speaks to both appointed and retained counsel, commands lawyers to control their workloads to enable them to discharge their ethical obligations “to provide each client with competent and diligent representation, keep each client reasonably informed about the status of his or her case, explain each matter to the extent necessary to permit the client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make.” The opinion observes, quoting the ABA opinion, that for every client a lawyer is required to “keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; and communicate effectively on behalf of and with clients[.]” The opinion observes that a “lawyer who is unable to perform these duties may not undertake or continue with representation of a client.”

STANDARD 2.1 – OBLIGATIONS OF DEFENSE COUNSEL AT INITIAL APPEARANCE

At the initial court appearance in a criminal or delinquency case, a lawyer should inform the client of the offenses alleged in the charging instrument or petition, assert pertinent statutory and constitutional rights of the client on the record and, where appropriate, attempt to secure the pretrial release of detained clients under the conditions most favorable and acceptable to the client.

Implementation:

1. A lawyer should be familiar with the law regarding initial appearance, arraignment, and juvenile detention.
2. A lawyer should be familiar with the local practice regarding case docketing and processing so that the lawyer may inform the client regarding expected case events and the dates for upcoming court appearances.
3. A lawyer should be prepared to enter an appropriate assertion that preserves the client's rights and demands due process, whether that is a not guilty plea or a denial of the allegations in a delinquency petition, demand for preliminary hearing or request for some other further proceeding. A lawyer should make clear that the defendant reserves the following rights in the present and any other matter:
 - a. Right to remain silent under State and Federal Constitutions;
 - b. Right to counsel under State and Federal Constitutions;
 - c. Right to file challenges to the charging instrument or petition;
 - d. Right to file challenges to the evidence;
 - e. Right to file notices of affirmative defenses; and
 - f. Right to a speedy trial.
4. A lawyer should be prepared to object to the court's failure to comply with the law regarding the initial appearance process, such as the statute requiring an ability to confer confidentially with the client during a video arraignment.
5. If the client is in custody, a lawyer should seek release from custody or detention (See Standard 2.3).
6. A lawyer should obtain all relevant documents and orders that pertain to the client's initial appearance.
7. A lawyer may waive formal reading of the allegations and advice of rights by the court, providing the lawyer advises the client what rights are waived, the nature of the charges, and the potential consequences of relinquishing his rights.
8. If the adjudicatory judge is assigned at the initial appearance, the lawyer must be familiar with the law and local practice for filing motions to disqualify a judge, discuss this with the client, and be prepared to timely file appropriate documents challenging an assigned judge.

Commentary:

While substantive law has been largely standardized throughout the state, court procedural rules still vary significantly by county or judicial district. A lawyer should be familiar with the local practice codified in the Supplementary Local Rules (SLRs) but also preserved only as oral tradition (the local unwritten rules). Because Oregon allows for self-bail on posting security, the lawyer should be familiar with local sheriff office practices regarding posting security and when deposited moneys will be available to clients.

Jurisdictions vary on when a trial judge is actually assigned and, therefore, the time for filing motions for change of judge will vary. Some counties require all plea discussions to occur prior to entry of the not guilty plea, but will often set over plea entry to allow for discovery and negotiations. Some counties will stick closely to the time requirements in the Uniform Trial

Court Rules, but constitutional due process rights may trump a jurisdiction's procedural requirements or administrative rules. *State v. Owens*, 68 Or App 343 (1984).

STANDARD 2.2 – CLIENT CONTACT AND COMMUNICATION

A lawyer should conduct a client interview as soon as practicable after representation begins and thereafter establish a procedure to maintain regular contact with the client in order to explain the allegations and nature of the proceedings, meet the ongoing needs of the client, obtaining necessary information from the client, consult with the client about decisions affecting the course of the defense, and to respond to requests from the client for information or assistance concerning the case.

Implementation:

1. A lawyer should provide a clear explanation, in developmentally appropriate language, of the role of both the client and the lawyer, and demonstrate appropriate commitment to the client's expressed interests in the outcome of the proceedings. A lawyer should elicit the client's point of view and encourage the client's full participation in the defense of the case.
2. The initial interview should be in person in a private setting that allows for a confidential conversation. When the client is a youth, a lawyer should not allow parents or other people to participate in the initial meeting with the client, in order to maintain privileges and assure that the client knows the communication is confidential.
3. If the client is in custody and a release or detention hearing is pending, the lawyer should be familiar with the law regarding detention, the criteria for release and discuss with the client release factors and resources available to the client to obtain pretrial release.
4. At the initial meeting the lawyer should review the charges facing the client and be prepared to discuss the necessary elements of the charges, the procedure the client will be facing in subsequent court appearances, and inquire if the client has any immediate needs regarding securing evidence or obtaining release.
5. Prior to all meetings the lawyer should:
 - a. Be familiar with the elements of the charged offense(s) and the potential punishment;
 - b. Obtain copies of any relevant documents that are available, including any charging documents, recommendations and reports made by agencies concerning pretrial release, and law enforcement reports that might be available;
 - c. Be familiar with the legal procedure the client will encounter and be prepared to discuss the process with the client;
 - d. If a client is in custody, be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release, and in a juvenile proceeding be prepared to discuss the process of ongoing detention review;
6. During an initial interview with the client, a lawyer should:
 - a. Obtain information concerning:

- (1) The client's ties to the community, including the length of time he or she has lived at current and former addresses, family relationships, immigration status (if applicable), employment record and history;
- (2) The client's history of service in the military, if any;
- (3) The client's physical and mental health, educational and military services records;
- (3) The client's immediate medical needs;
- (5) The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;
- (6) The ability of the client to meet any financial conditions of release;
- (7) The names of individuals or other sources that counsel can contact to verify the information provided by the client; and the client's permission to contact these individuals;

b. Provide to the client information including but not limited to:

- (1) An explanation of the procedures that will be followed in setting the conditions of pretrial release;
- (2) An explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
- (3) An explanation of the lawyer-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the lawyer;
- (4) The charges and the potential penalties, as well as potential collateral consequences of any conviction and sentence;
- (5) A general procedural overview of the progression of the case, where possible;
- (6) Advice that communication with people other than the defense team is not privileged and, if the client is in custody, may be monitored.

7. A lawyer should use any contact with the client as an opportunity to gather timely information relevant to preparation of the defense. Such information may include, but is not limited to:

- a. The facts surrounding the charges against the client;
- b. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;
- c. Any possible witnesses who should be located;
- d. Any evidence that should be preserved;
- e. Where appropriate, evidence of the client's competence to stand trial and/or mental

state at the time of the offense.

Commentary:

The purpose of the initial contact is to quickly ascertain and identify work that needs to be done to prepare for the defense, including documenting the status or condition of evidence that could be lost, such as injuries to the defendant or crime scene conditions; establishing a relationship with the client; informing the client of the charges against him or her and the possible consequences; and reviewing next steps such as preparing for a release hearing or preliminary hearing. The relationship between a criminal defendant or youth charged with delinquency and a lawyer will be directly affected by the quality of their communication, which starts with the initial interview where the lawyer can provide the client important information and obtain relevant case information from the client. There is a strong correlation between good lawyer/client communication and the lack of complaints from clients about poor representation or requests for substitute counsel. If this correlation is more than coincidence then it is likely that the key to successful representation is good communication that begins with a timely and thorough initial interview.

The duty to communicate is found in Oregon Rule of Professional Conduct 1.4 and forms a core duty that the lawyer owes the client. Aside from addressing the immediate needs of the client to secure release or preserve evidence, the initial interview (along with subsequent meetings) forms the source of another core duty, the duty to investigate. A review of information with the client may assist in determining who needs to be interviewed or what evidence may need expert evaluation.

Communication and contact with the client is an important source for the lawyer to assess the client's mental status to understand the proceedings. The lawyer should make note of concerns and consult appropriate experts regarding concerns over competency.

STANDARD 2.3 – RELEASE OF CLIENT

- A. A lawyer has a duty to seek release from custody or detention of clients under the conditions most favorable and acceptable to the client.**
- B. Release should be sought at the earliest possible opportunity and if not successful a lawyer should continue to seek release at appropriate subsequent hearings.**

Implementation:

1. If the client is in custody or detention the lawyer should review the documents supporting probable cause and, if appropriate, challenge any finding of probable cause, and in all cases where detention continues the lawyer should move for release if appropriate or ask that bail be reduced to an amount the client can afford.
2. If the court will not consider release at initial appearance, the lawyer should request a release hearing and decision within the statutory time requirements. In delinquency proceedings the lawyer should be familiar with the law and procedures for detention hearings and the risk factors that the court is likely or required to consider. In criminal cases, at any release hearing the lawyer should be familiar with the statutory criteria for release and be prepared to address those release factors on the record.

3. In preparation for a release hearing the lawyer should discuss statutory release criteria with the client and be prepared to address the court regarding these factors including residence, employment, compliance with release conditions such as no contact with victims, and any release compliance monitoring.
4. If the client is subject to release on security, the lawyer should be familiar with the rules and requirements to post security, including procedures for client “self-bailing” with funds from an inmate account, posting a security interest in property, or third party posting requirements.

STANDARD 3 - INVESTIGATION

A lawyer has the duty to conduct an independent review of the case, regardless of the client’s admissions or statements to the lawyer of facts constituting guilt or the client’s stated desire to plead guilty or admit guilt. Where appropriate, the lawyer should engage in a full investigation, which should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for trial or hearing, and to best advise the client as to the possibility and consequences of conviction or adverse adjudication. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.

Implementation

1. A lawyer should obtain copies of all charging documents and should examine them to determine the specific charges that have been brought against the client.
2. A lawyer should engage in research, including a review of all relevant statutes and case law, in order to determine:
 - a. The necessary elements of the charged offenses;
 - b. Any defects in the charging instrument, both constitutional and non-constitutional, including statute of limitations and double jeopardy;
 - c. Whether the court’s jurisdiction can be challenged;
 - d. Applicability of defenses, ordinary and affirmative, including defenses based on mental disease or defect, diminished capacity, or partial responsibility, and whether any notice of such defenses is required and specific timelines for giving notice; and
 - e. Potential consequences of conviction or adverse adjudication, including those relating to immigration and possible deportation.
3. A lawyer should conduct an in-depth interview with the client as described in Standard 2.2. The interview should be used to identify:
 - a. Additional sources of information concerning the incidents or events giving rise to the charges and to any defenses;

- b. Evidence concerning improper conduct or practices by law enforcement, juvenile authorities, mental health departments, or the prosecution, which may affect the client's rights or the admissibility of evidence;
- c. Information relevant to the court's jurisdiction;
- d. Information relevant to pretrial or prehearing release and possible pretrial or prehearing disposition; and
- e. Information relevant to sentencing or disposition and potential consequences of conviction or adverse adjudication.

4. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during the course of witness interviews, the lawyer should locate and assess its value to the client. Witness interviews should be conducted by an investigator or in the presence of a third person who will be available, if necessary, to testify as a defense witness at the trial or hearing. When speaking with third parties, the lawyer has a duty to comply with the Oregon Rules of Professional Conduct, including Rule 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing with Unrepresented Persons). The lawyer also has a duty, where appropriate, to comply with statutory rights of victims, such as those embodied in ORS 135.970(2) and (3).

5. A lawyer should attempt to interview all law enforcement officers involved in the arrest and investigation of the case and should obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement, including, where relevant, law enforcement personnel records and documentation of prior officer misconduct. In cases involving child witnesses or victims, the lawyer should seek records of counseling sessions with those children. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.1.

6. Where appropriate, a lawyer should inspect the scene of the alleged offense under circumstances (including weather, lighting conditions, and time of day) as similar as possible to those existing at the time of the alleged incident.

7. Where appropriate, a lawyer should obtain school, mental health, medical, drug and alcohol, immigration, and prior criminal offense and juvenile records of the client and witnesses.

Commentary:

A skilled and knowledgeable lawyer will be of little use to a client without a thorough understanding of the facts of a case. As explained in the Commentary to the *National Juvenile Defense Standards*:

Most cases are won on facts, not legal arguments, and it is investigation that uncovers the facts. The facts are counsel's most important asset, not only in litigating the case at trial, but in every other function counsel performs, including negotiating for reduced or dismissed charges, diversion, or a plea agreement, as well as influencing a favorable disposition.

An investigation is important even when the client has admitted culpability or expresses a desire to plead guilty. An investigation may yield evidence that can lead to suppression of key state evidence, negate or block the admissibility of state evidence, or limit the client's liability. Even if the investigation does not result in an acquittal or dismissal, it may yield evidence that can be useful in negotiating a more favorable plea agreement or mitigation of disposition.⁵

STANDARD 4.1 – DISCOVERY

A lawyer has the duty to pursue formal and informal discovery in a prompt fashion and to continue to pursue opportunities for discovery throughout the case.

Implementation:

1. A lawyer should be familiar with all applicable statutes, rules, and case law governing discovery, including those concerning the processes for filing motions to compel discovery or to preserve evidence, as well as those making sanctions available when the prosecution has engaged in discovery violations.
2. A lawyer should also be familiar with and observe the applicable statutes, rules and case law governing the obligation of the defense to provide discovery. A lawyer should file motions for protective orders or otherwise resist discovery where a lawful basis exists to shield information in the possession of the defense from disclosure.
3. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions, and should continually seek all information to which the client is entitled, especially any exculpatory, impeaching, and mitigating evidence. Discovery should include, but is not limited to, the following:
 - a. Potentially exculpatory, impeaching, and mitigating information;
 - b. Law enforcement reports and notes, 911 recordings and transcripts, inter-officer transmissions, dispatch reports, and reports or notes of searches or seizures and the circumstances in which they were accomplished;

⁵ National Juvenile Defender Center, *National Juvenile Defense Standards*, Sec. 4.1, at 68-69 (citations omitted).

- c. Written communications, including emails, between prosecution, law enforcement, and/or witnesses;
- d. Names and addresses of prosecution witnesses, their prior statements, their prior criminal records, and their relevant digital, electronic, and social media postings;
- e. Oral or written statements by the client, and the circumstances under which those statements were made;
- f. The client's prior criminal or juvenile record and evidence of any other misconduct that the prosecution may intend to use against the client;
- g. Copies of, or the opportunity to inspect, books, papers, documents, photographs, computer data, tangible objects, buildings or places, and other material relevant to the case;
- h. Results or reports of physical or mental examinations, and of scientific tests or experiments, and the data and documents on which they are based;
- i. Statements and reports of experts, and the data and documents on which they are based; and
- j. Statements of co-defendants.

4. A lawyer should consider filing motions seeking to preserve evidence where it is at risk of being destroyed or altered.

STANDARD 4.2 – THEORY OF THE CASE

A lawyer should develop and continually reassess a theory of the client's case that advances the client's goals and encompasses the realities of the client's situation.

Implementation:

1. A lawyer should use the theory of the case when evaluating strategic choices throughout the course of the representation.
2. A lawyer should allow the theory of the case to focus investigation and trial or hearing preparation, seeking out and developing facts and evidence that the theory makes material.
3. A lawyer should remain flexible enough to modify or abandon the theory if it does not serve the client.

Commentary:

The theory of the case is a construct that can guide the preparation and presentation of a case. A theory of the case should explain the facts of the case in such a way that a judge or jury will understand why the client is entitled to a favorable verdict. As such, it is first and foremost a factual narrative that presents the client's story in straightforward common sense terms that

support a favorable verdict under the law applicable to the case. It must be informed by thorough investigation and preparation so that a lawyer will know which facts a judge or jury is likely to accept as proven. It must also account for what fact finders are likely to believe based upon their own life experiences. Finally, a theory of the case must account for the jury instructions and other law applicable to the case. Although a theory of the case should be developed early in the representation of a client and be largely built upon the client's version of events, a lawyer must be able to revisit and revise the theory, in consultation with the client, as investigation and preparation continue to develop the facts that a judge or jury are likely to accept as true at the conclusion of the trial.

STANDARD 5.1 – PRETRIAL MOTIONS AND NOTICES

A lawyer should research, prepare, file and argue appropriate pretrial motions and notices whenever there is reason to believe the client may be entitled to relief.

Implementation:

1. The decision to file a particular pretrial motion or notice should be made after thorough investigation, and after considering the applicable law in light of the circumstances of the case.
2. Among the issues the lawyer should consider addressing in pretrial motions are:
 - a. the pretrial custody of the accused;
 - b. the competency or fitness to proceed of the accused (see Standard 5.3);
 - c. the constitutionality of relevant statutes;
 - d. potential defects in the charging process or instrument;
 - e. the sufficiency of the charging document;
 - f. the severance of charges and/or co-defendants for trial;
 - g. change of venue;
 - h. the removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice;
 - i. the discovery obligations of both the prosecution and the defense, including:
 - (1) motions for protective orders;
 - (2) *Brady v. Maryland* motions;
 - (3) motions to compel discovery;

j. violations of federal and/or state constitutional or statutory provisions, including:

- (1) illegal searches and/or seizures;
- (2) involuntary statements or confessions;
- (3) statements obtained in violation of the right to counsel or privilege against self-incrimination;
- (4) unreliable identification evidence;
- (5) speedy trial rights; and
- (6) double jeopardy protections;

k. requests for, and challenges to denial of, funding for access to reasonable and necessary resources and experts, such as:

- (1) interpreters;
- (2) mental health experts;
- (3) investigative services; and
- (4) forensic services;

l. the right to a continuance in order to adequately prepare and present a defense, or to respond to prosecution motions;

m. matters of trial evidence that may be appropriately litigated by means of a pretrial motion *in limine*, including:

- (1) the competency or admissibility of particular witnesses, including experts and children;
- (2) the use of prior convictions for impeachment purposes;
- (3) the use of prior or subsequent bad acts;
- (4) the use of reputation or other character evidence;
- (5) the use of evidence subject to “rape shield” protections;

n. notices of affirmative defenses and other required notices to present particular evidence;

o. the dismissal of charges on the basis of a civil compromise, best interests of a youth in delinquency cases, in the furtherance of justice, and the general equitable powers of the court.

3. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should carefully consider all facts in the case, applicable law, case strategy, and other relevant information, including:

- a. the burden of proof, and the potential advantages and disadvantages of having witnesses testify at pretrial hearings and to what extent a pretrial hearing reveals defense strategy to a client's detriment;
- b. whether a pretrial motion may be necessary to protect the client's rights against later claims of waiver, procedural default or failure to preserve an issue for later appeal;
- c. the effect the filing of a motion may have upon the client's speedy trial rights; and
- d. whether other objectives, in addition to the ultimate relief requested by a motion, may be served by the filing and litigation of a particular motion.

STANDARD 5.2 – FILING AND ARGUING PRETRIAL MOTIONS

A lawyer should prepare for a motion hearing just as he or she would prepare for trial, including preparing for the presentation of evidence, exhibits and witnesses.

Implementation:

1. Motions should be timely filed, comport with the formal requirements of the court, and succinctly inform the court of the authority relied upon.
2. When a hearing on a motion requires taking evidence, a lawyer's preparation should include:
 - a. investigation, discovery and research relevant to the claims advanced;
 - b. subpoenaing all helpful evidence and witnesses;
 - c. preparing witnesses to testify; and
 - d. fully understanding the applicable burdens of proof, evidentiary principles and court procedures, including the costs and benefits of having the client or other witnesses testify and be subject to cross examination.
3. A lawyer should consider the strategy of submitting proposed findings of fact and conclusions of law to the court at the conclusion of the hearing.

4. After an adverse ruling, a lawyer should consider seeking interlocutory relief, if available, taking necessary steps to perfect an appeal, and renewing the motion or objection during trial in order to preserve the matter for appeal.

STANDARD 5.3 – PRETRIAL DETERMINATION OF CLIENT’S FITNESS TO PROCEED

A lawyer must be able to recognize when a client may not be competent to stand trial and take appropriate action.

Implementation:

1. A lawyer must learn to recognize when a client’s ability to aid and assist in the proceedings may be compromised due to mental health disorders, developmental immaturity, or developmental and/or intellectual disabilities.
2. A lawyer must assess whether the client’s level of functioning limits his or her ability to communicate effectively with counsel, as well as his or her ability to have a factual and rational understanding of the proceedings.
3. When a lawyer has reason to doubt the client’s competency to stand trial, the lawyer should gather information and consider filing a pretrial motion requesting a competency determination.
4. In deciding whether to request a competency determination, a lawyer must consider, among other things:
 - a. his or her obligations, under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-client relationship, to the extent possible, with a client with diminished capacity; and
 - b. the likely consequences of a finding of incompetence, and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client or referral to other agencies.
5. If the lawyer decides to proceed with a competency hearing, he or she should secure the services of a qualified expert. When the client is a youth, such an expert should be versed in the emotional, physical, cognitive, and language impairments of children and adolescents; the forensic evaluation of youth; the competence standards and accepted criteria used in evaluating juvenile competence; and effective interventions or treatment for youth.
6. If a court finds an adult client incompetent to proceed, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment available. If the client is a youth,

a lawyer should seek to resolve the delinquency case by having the petition converted to a dependency petition or through a motion to dismiss in the best interests of the youth.

7. If a court finds a client is competent to proceed, a lawyer should continue to raise the matter during the course of the proceedings if the lawyer has a good faith concern about the client's continuing competency to proceed, and in order to preserve the matter for appeal.

STANDARD 5.4 – CONTINUING OBLIGATIONS TO FILE OR RENEW PRETRIAL MOTIONS OR NOTICES

During trial or subsequent proceedings, a lawyer should be prepared to raise any issue which is appropriately raised pretrial but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Counsel should also be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

Commentary:

In many cases, the dispositive issue may concern some issue other than whether the client committed the alleged offense. Invariably these issues should be the subject of pretrial motions, supported by thorough factual investigation and legal research. The range of such issues is broad, as illustrated by the foregoing standard. The timing of motions is a strategic consideration and a function of court rule and, in many instances, local court practice. In every case, in order to determine whether to litigate a pretrial motion, a lawyer must be knowledgeable about current developments in the defense of criminal and delinquency cases and be skilled in presenting evidence and argument on complex legal issues.

The potential advantages of litigating pretrial motions are many. This point is perhaps best summarized by the commentary on this subject in the *National Juvenile Defense Standards*, which reads as follows:

Pre-trial motions hearings provide immediate and long-term benefits. Immediately, counsel has the opportunity to convince the judge that the case should be dismissed, or at the very least that certain evidence should be suppressed. Counsel also has the benefit of additional discovery through the state's responses to the motion prior to trial.

In the long-term, when motions generate a hearing, counsel can gain invaluable opportunities to pin down prosecution witnesses on the record and develop transcripts that could be used to impeach the witnesses with their prior inconsistent statements. Counsel has the opportunity to strengthen his or her relationship with the client through a demonstration of counsel's willingness to fight for the client. Because in many jurisdictions the vast majority of cases are resolved through a plea agreement, pre-trial motions practice may have an enormous impact on the kind of plea offer the prosecutor is willing to consider.

STANDARD 6.1 - EXPLORATION OF DISPOSITION WITHOUT TRIAL

A lawyer has the duty to explore with the client the possibility, advisability, and consequences of reaching a negotiated disposition of charges or a disposition without trial. A lawyer has the duty to be familiar with the laws, local practices, and consequences concerning dispositions without trial.

Implementation:

1. A lawyer should explore and consider mediation, civil compromise, diversion, Formal Accountability Agreements, having the case filed as a juvenile delinquency or dependency case, alternative dispositions including conditional postponement, motion to dismiss in the interest of justice, negotiated pleas or disposition agreements, and other non-trial dispositions.
2. A lawyer should explain to the client the strengths and weaknesses of the prosecution's case, the benefits and consequences of considering a non-trial disposition and discuss with the client any options that may be available to the client and the rights the client gives up by pursuing a non-trial disposition.
3. A lawyer should assist the client in weighing whether there are strategic advantages to be gained by taking a plea or whether the sentence or disposition results would likely be the same.
4. With the consent of the client, a lawyer should explore with the prosecutor and, in juvenile cases, the juvenile court counselor, when appropriate, available options to resolve the case without trial. The lawyer should obtain information about the position the prosecutor and juvenile court counselor will take as to non-plea dispositions and recommendations that will be made about sentencing or disposition. Throughout negotiation, a lawyer must zealously advocate for the expressed interests of the client, including advocating for some benefit for the client in exchange for a plea.

5. A lawyer cannot accept any negotiated settlement or agree to enter into any non-trial disposition without the client's express authorization.
6. A lawyer must keep the client fully informed of continued negotiations and convey to the client any offers made by the prosecution or recommendations by the juvenile court counselor for a negotiated settlement. The lawyer must assure that the client has adequate time to consider the plea and alternative options.
7. A lawyer should continue to take steps necessary to preserve the client's rights and advance the client's defenses even while engaging in settlement negotiations.
8. Before conducting negotiations, a lawyer should be familiar with:
 - a. the types, advantages and disadvantages, and applicable procedures and requirements of available pleas or admissions to juvenile court jurisdiction, including a plea or admission of guilty, no contest, a conditional plea or admission of guilty that reserves the right to appeal certain issues, and a plea or admission in which the client is not required to acknowledge guilt (*Alford* plea);
 - b. whether agreements between the client and the prosecution would be binding on the court or on prison, juvenile, parole and probation, and immigration authorities; and
 - c. the practices and policies of the particular prosecuting authorities, juvenile authorities, and judge that may affect the content and likely results of any negotiated settlement.
9. A lawyer should be aware of, advise the client of, and, where appropriate, seek to mitigate the following, where relevant:
 - a. rights that the client would waive when entering a plea or admission disposing of the case without trial;
 - b. the minimum and maximum term of incarceration that may be ordered, including whether the minimum disposition would be indeterminate, possible sentencing enhancements, probation or post-confinement supervision, alternative incarceration programs, and credit for pretrial detention;
 - c. the likely disposition given sentencing guidelines;
 - d. the minimum and maximum fines and assessments, and court costs that may be ordered, and the restitution that is being requested by the victim(s);
 - e. arguments to eliminate or reduce fines, assessments and court costs; challenges to liability for and the amount of restitution; the possibilities of civil action by the victim(s), and asset forfeiture; and the availability of work programs to pay restitution and perform community service;
 - f. consequences relating to previous offenses;

- g. the availability and possible conditions of, protective supervision, conditional postponement, probation, parole, suspended sentence, work release, conditional leave, and earned release time;
- h. the availability and possible conditions of deferred sentences, conditional discharges, alternative dispositions, and diversion agreements;
- i. for non-citizen juvenile clients, the possibility of temporary and permanent immigration relief through the available legislative or administrative immigration programs and Special Immigrant Juvenile Status,
- j. for non-citizen clients, the possibility of adverse immigration consequences;
- k. for non-citizen clients, the possibility of criminal consequences of illegal re-entry following conviction and deportation;
- l. the possibility of other consequences of conviction, such as:
 - i. requirements for sex offender registration, relief, and set-aside;
 - ii. DNA sampling, and AIDS and STD testing;
 - iii. loss of civil liberties such as voting and jury service privileges;
 - iv. affect on driver's or professional licenses and on firearms possession;
 - v. loss of public benefits;
 - vi. loss of housing, education, financial aid, career, employment, vocational, or military service opportunities; and
 - vii. risk of enhanced sentences for future convictions;
- m. the possible place and manner of confinement, placement, or commitment;
- n. the availability of pre- and post-adjudication diversion programs and treatment programs;
- o. standard sentences for similar offenses committed by offenders with similar backgrounds; and
- p. the confidentiality of juvenile records and the availability of expungement.

10. A lawyer should identify negotiation goals with the following in mind:

- a. concessions that the client might offer to the prosecution, including an agreement:
 - i. not to contest jurisdiction;
 - ii. not to dispute the merits of some or all of the charges;
 - iii. not to assert or litigate certain rights or issues;
 - iv. to fulfill conditions of restitution, rehabilitation, treatment, or community service; and
 - v. to provide assistance to law enforcement or juvenile authorities in investigating and prosecuting other alleged wrongful activity;
- b. benefits to the client, including an agreement:
 - i. that the prosecution will refile allegations in juvenile court and will not contest juvenile court jurisdiction;
 - ii. that the prosecution will not oppose release pending sentence, disposition, or appeal;
 - iii. that the client may reserve the right to contest certain issues;
 - iv. to dismiss or reduce charges immediately or upon completion of certain conditions;

- v. that the client will not be subject to further investigation for uncharged conduct;
- vi. that the client will receive, subject to the court's agreement, a specified set or range of sanctions;
- vii. that the prosecution will take, or refrain from taking, a specified position with respect to sanctions, and/or that the prosecution will not present certain information, whether at the time of sentencing, during preparation of a pre-sentence report, or in determining the client's date of release from confinement; and
- viii. that the client will receive, or that the prosecution will recommend, specific benefits concerning the place and manner of confinement, conditions of parole or probationary release, and the provision of pre- or post-adjudication treatment programs.

11. A lawyer has the duty to inform the client of the full content of any tentative negotiated settlement or non-trial disposition, and to explain to the client the advantages, disadvantages, and potential consequences of the settlement or disposition.

12. A lawyer should not recommend that the client enter a dispositional plea or admission unless appropriate investigation and evaluation of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward.

STANDARD 6.2 – ENTRY OF DISPOSITIONAL PLEA OR ADMISSION

A decision to enter a plea resolving the charges, or to admit the allegations, rests solely with the client. The lawyer must not unduly influence the decision to enter a plea and must ensure that the client's acceptance of the plea is voluntary and knowing, and reflects an intelligent understanding of the plea and the rights the client will forfeit.

Implementation:

1. A lawyer has the duty to explain to the client the advantages, disadvantages, and consequences of resolving the case by entering a dispositional plea or by admitting the allegations.

2. A lawyer has the duty to explain to the client the nature of the hearing at which the client will enter the plea or admission and the role that the client will play in the hearing, including participating in the colloquy to determine voluntary waiver of rights and answering other questions from the court and making a statement concerning the offense. The lawyer should be familiar with the Model Colloquy for juvenile waiver of the right to trial. The lawyer should explain to the client that the court may in some cases reject the plea.

3. At the hearing, a lawyer has the duty to assist the client and to ensure that :

- a. any plea petition is legible and accurate and clearly sets forth terms beneficial to the client;
 - b. the court, on the record, inquires, using any applicable model colloquy, into whether the client's decision is knowing, voluntary, and intelligent;
 - c. the court enters the plea or admission only after finding that the client's decision was knowing, voluntary, and intelligent; and
 - d. the judicial record is legible, clear, accurate and contains the full contents and conditions of the client's plea or admission.
4. If during the plea hearing, the client does not understand questions being asked by the court, the lawyer must request a recess to assist the client.

STANDARD 7.1 – GENERAL TRIAL PREPARATION

A. A trial or juvenile adjudicatory hearing (hereinafter referred to as a trial) is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared on the law and facts, and competently plan a challenge to the state's case and, where appropriate, presentation of a defense case.

B. The decision to proceed to trial with or without a jury rests solely with the client. The lawyer should discuss the relevant strategic considerations of this decision with the client.

C. A lawyer should develop, in consultation with the client, an overall defense strategy for the conduct of the trial.

Implementation:

1. A lawyer should ordinarily have the following materials available for use at trial:
 - a. Copies of all relevant documents filed in the case;
 - b. Relevant documents prepared by investigators;
 - c. Voir dire questions;
 - d. Outline or draft of opening statement;
 - e. Cross-examination plans for all possible prosecution witnesses;
 - f. Direct examination plans for all prospective defense witnesses;
 - g. Copies of defense subpoenas;
 - h. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);

- i. Prior statements of all defense witnesses;
- j. Reports from experts;
- k. A list of all exhibits, and the witnesses through whom they will be introduced;
- l. Originals and copies of all documentary exhibits;
- m. Proposed jury instructions with supporting authority;
- n. Copies of all relevant statutes and cases;
- o. Evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;
- p. Outline or draft of closing argument; and
- q. Trial memoranda outlining any complex legal issues or factual problems the court may need to decide during the trial.

2. A lawyer should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial. The lawyer should analyze potential prosecution evidence for admissibility problems and develop strategies for challenging inadmissible evidence. The lawyer should be prepared to address objections to defense evidence or testimony. The lawyer should be prepared to raise affirmative defenses. The lawyer should consider requesting that witnesses be excluded from the trial.

3. A lawyer should evaluate whether expert testimony is necessary and beneficial to the client. If so, the lawyer should seek an appropriate expert witness and prepare the witness to testify, including possible areas of cross examination.

4. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings.

5. Throughout the trial process a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all trial proceedings be recorded.

6. Where appropriate, a lawyer should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, a lawyer should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.

7. A lawyer should plan with the client the most convenient system for conferring throughout the trial. Where necessary, a lawyer should seek a court order to have the client available for

conferences. A lawyer should where necessary secure the services of a competent interpreter/translator for the client during the course of all trial proceedings.

8. Throughout preparation and trial, a lawyer should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Commentary:

Trial preparation and execution is both an intellectual and logistical exercise. A lawyer must prepare adequately and in a timely manner so that when the trial begins the lawyer has the necessary exhibits, witnesses, trial materials, and any other items necessary during the trial. A lawyer will be performing a number of tasks over the course of trial that must be coordinated so that an adequate defense is presented. A trial judge has a great deal of discretion in managing the courtroom and an unprepared attorney is likely to jeopardize a client's defense.

When appropriate to preserve an important legal issue or prevent inappropriate comment in opening statement, a lawyer should consider obtaining a pretrial ruling by filing a motion in limine to prevent comment on evidence that may not be ultimately admitted or to inform final analysis of the trial worthiness of a particular case or trial theory.

Expert witnesses present a unique challenge to lawyers. They are chosen for their knowledge base rather than because circumstances made them a percipient witness. The lawyer should evaluate and consider whether a particular expert is helpful to the defense case. Once selected the expert needs to be given all appropriate information to prepare to testify. Finally, the lawyer should prepare the witness for testimony and anticipate possible lines of cross examination. This preparation can include where appropriate a list of questions and it is advisable to have the expert commit to answers prior to calling them as a witness. The expert has his or her own duty as a witness to follow the oath and testify truthfully, and therefore the lawyer must determine what the witness will say prior to presenting the witness. If the witness is not helpful to the defense then the witness should not be called to the stand.

STANDARD 7.2 – VOIR DIRE AND JURY SELECTION

A. A lawyer should be prepared to question prospective jurors and to identify individual jurors whom the defense should challenge for cause or exclude by preemptory strikes.

B. A lawyer should carefully observe the prosecutor's questioning of jurors to inform defense challenges for cause and use of preemptory challenges, and to object if the prosecutor is attempting to exclude jurors for impermissible reasons.

Implementation:

Preparation

1. A lawyer should be familiar with the procedures by which a jury is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
2. A lawyer should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, and should be alert to any potential legal challenges to these procedures.
3. Prior to jury selection, a lawyer should seek to obtain a prospective juror list.
4. A lawyer should develop voir dire questions in advance of trial, and tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:
 - a. to elicit information about the attitudes of individual jurors, which will provide the basis for peremptory strikes and challenges for cause;
 - b. to convey to the panel certain legal principles which are critical to the defense case;
 - c. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
 - d. to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor; and
 - e. to establish a relationship with the jury.
5. A lawyer should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
6. A lawyer should be familiar with the law concerning challenges for cause and peremptory strikes.
7. In a group voir dire, a lawyer should avoid asking questions that may elicit responses that are likely to prejudice other prospective jurors.
8. If the voir dire questions may elicit sensitive answers, a lawyer should request that questioning be conducted outside the presence of the remaining jurors.
9. A lawyer should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias if it is likely to benefit the client.
10. A lawyer should be familiar with the requirements for preserving appellate review of any defense challenges for cause that have been denied.
11. Where appropriate, the lawyer should consider whether to seek expert assistance in the jury selection process.

Commentary:

Highlighting the importance of jury selection, some commentators maintain that trials are won or lost during jury selection. It is also among the most challenging stages of a jury trial, requiring knowledge, training and skill to accomplish successfully. It is the occasion, of course, for a lawyer to seek to remove potential jurors from the trial panel who may be biased against the client or who may not be favorably disposed to the defense case. And it is well recognized that a lawyer has a right to ascertain if a juror is prejudiced against the client, even if that requires broader latitude in time and scope by the judge than originally allowed. *State v Williams, 123 Or App 546 (1993)*. But jury selection is also an opportunity for a lawyer to establish a relationship with jurors, to convey legal principles essential to the defense, and to place the client and the defense case in a favorable light. To do so successfully, however, requires a thorough understanding of the law applicable to jury selection, a thoughtful and sensitive approach to interpersonal relations, and a well crafted theory of the defense. Without these components, a lawyer may very well do more harm than good during jury selection.

STANDARD 7.3 – OPENING STATEMENT

An opening statement is a lawyer’s first opportunity to present the defense case. The lawyer should be prepared to present a coherent statement of the defense theory based on evidence likely to be admitted at trial, and should raise and, if necessary, preserve for appeal any objections to the prosecutor’s opening statement.

Best Practice:

1. Prior to delivering an opening statement, a lawyer should ask that the witnesses be excluded from the courtroom, unless a strategic reason exists for not doing so.
2. A lawyer’s objective in making an opening statement may include the following:
 - a. provide an overview of the defense case emphasizing the defense theme and theory of the case;
 - b. identify the weaknesses of the prosecution’s case;
 - c. emphasize the prosecution’s burden of proof;
 - d. summarize the testimony of witnesses, and the role of each in relationship to the entire case;
 - e. describe the exhibits which will be introduced and the role of each in relationship to the entire case;
 - f. clarify the jurors’ responsibilities;
 - g. state the ultimate inferences which the lawyer wishes the jury to draw; and
 - h. humanize the client.

3. A lawyer should listen attentively during the state's opening statement in order to raise objections and note potential promises made by the state that could be used in summation.
4. A lawyer should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
5. Whenever the prosecutor oversteps the bounds of a proper opening statement, a lawyer should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
 - a. the significance of the prosecutor's error;
 - b. the possibility that an objection might enhance the significance of the information in the jury's mind;
 - c. whether there are any rulings made by the judge against objecting during the other attorney's opening argument.
6. A lawyer should consider giving an opening statement during a court trial if either the law or facts are sufficiently complex to justify it. In all cases, a lawyer should evaluate if in the particular circumstances giving an opening would help or hurt the client's case. If the consideration is neutral then the lawyer should give an opening.

Commentary:

Opening statement is the lawyer's opportunity to set forth the defense theory and preview the case for the jury. Judges will vary on their view of the permissible scope of opening statement. In general the purpose and rule of opening is for each side to preview their case and offer a summary of any evidence that they have a good faith belief will be admitted at trial. For this reason, a lawyer should consider whether evidence available to the state but that may have significant prejudice and may be inadmissible should be challenged prior to opening statements. (See 5.1 on pretrial motions) In the alternative, a lawyer should consider seeking a ruling that the prosecutor be precluded from discussing particular evidence that may or may not be admitted at trial.

Historically, opening statements could be strictly limited to a sterile and bland recitation of what witnesses might say. Objections on argumentative grounds were common and lawyers were restricted from making any conclusions. This has evolved and opening statements in the modern case may include discussions of the law or suggest conclusions that the jury could make. Further, by stipulation or with court permission opening statements can include the use of exhibits that are pre-admitted. Finally, in many cases effective use of computer graphics and slides may enhance the opening statement, including actual pieces of evidence such as recorded phone calls or videos. When these presentations are used by the state, the lawyer for the defendant should ask to preview it and challenge material that may not be received in evidence.

STANDARD 7.4 – CONFRONTING THE PROSECUTION'S CASE

The essence of the defense in most cases is confronting the prosecution's case. The lawyer should develop a theme and theory of the case that directs the manner of conducting this confrontation. Whether it is refuting, discrediting or diminishing the state's case, the theme and theory should determine the lawyer's course of action.

Implementation:

1. A lawyer should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.
2. A lawyer should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
3. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, a lawyer should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
4. In preparing for cross-examination, a lawyer should:
 - a. consider the need to integrate cross-examination, the theory of the defense and closing argument;
 - b. consider whether cross-examination of each individual witness is likely to generate helpful information;
 - c. anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
 - d. consider a cross-examination plan for each of the anticipated witnesses;
 - e. consider an impeachment plan for any witnesses who may be impeachable;
 - f. be alert to inconsistencies in a witness testimony;
 - g. be alert to possible variations in witness testimony;
 - h. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
 - i. if available, review investigation reports of interviews and other information developed about the witnesses;
 - j. review relevant statutes and police procedural manuals and regulations for possible use in cross-examining police witnesses;
 - k. be alert to issues relating to witness credibility, including bias and motive for testifying.
5. A lawyer should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.
6. Before beginning cross-examination, a lawyer should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If the lawyer does not receive prior statements of prosecution witnesses until they have completed

direct examination, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

7. At the close of the prosecution's case and out of the presence of the jury, a lawyer should move for a judgment of acquittal on each count charged. The lawyer should request, when necessary, that the court immediately rule on the motion, in order that the lawyer may make an informed decision about whether to present a defense case.

Commentary:

The lawyer should be mindful of how cross-examination may affect the case and whether particular questions might "open the door" to otherwise inadmissible evidence. For example, where the defense attorney questioned the adequacy and thoroughness of the investigating officer's interview of defendant—an interview that was cut short by the defendant's invocation of the right to counsel—the prosecutor was allowed to respond by informing the jury that the detective was unable to conduct a more thorough inquiry because of that invocation. [*State v. Guritz*, 134 Or. App. 262 \(1995\)](#).

Cross-examination should be conducted purposefully to cast doubt on the state's evidence or discredit a state's witness, and in all cases should be consistent with the defense theory of the case. Simply reiterating a witness's direct examination is at best tedious and at worst strengthens the prosecution's case in the mind of the trier of fact.

In preparing any topic or questions for cross examination, a lawyer should prepare the legal basis for asking the question and anticipate objections to admissibility. If the court prohibits questioning on a particular topic, a lawyer should make an appropriate record to preserve the error through an offer of proof.

STANDARD 7.5 – PRESENTING THE DEFENSE CASE

A lawyer should be prepared to present evidence at trial where it will be advance a defense theory of the case that best serves the interest of the client.

Implementation:

1. A lawyer should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, a lawyer should consider whether the client's interests are best served by not putting on a defense case, and instead rely on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
2. A lawyer should discuss with the client all of the considerations relevant to the client's decision whether or not to testify.
3. A lawyer should be aware of the elements of any affirmative defense and know whether the client bears a burden of persuasion or a burden of production.

4. In preparing for presentation of a defense case, a lawyer should:
 - a. develop a plan for direct examination of each potential defense witness, and assure each witness' s attendance by subpoena if necessary;
 - b. determine the implications that the order of witnesses may have on the defense case;
 - c. consider the possible use of character witnesses;
 - d. consider the need for expert witnesses; and
 - e. consider whether to present a defense based on mental disease or defect or diminished capacity or partial responsibility, and provide notice of intent to present such evidence and consult with the client about the implications of an insanity defense.
5. In developing and presenting the defense case, a lawyer should consider the implications it may have for a rebuttal by the prosecutor.
7. A lawyer should prepare all witnesses for direct and possible cross-examination. Where appropriate, a lawyer should also advise witnesses of suitable courtroom dress and demeanor.
8. A lawyer should conduct redirect examination as appropriate.
9. At the close of the defense case, the lawyer should renew the motion for judgment of acquittal on each charged count.
10. A lawyer should be prepared to object to an improper state's rebuttal case, and offer surrebuttal witnesses if allowed.

Commentary:

The Oregon Rules of Professional Conduct properly affirm the constitutional requirement that the client decides whether to testify or not. The lawyer must consult with the client concerning the risks and benefits of testifying. Whether to present other defense evidence, however, is a strategic and tactical decision to be made by the lawyer in consultation with the client. A lawyer should carefully consider the most effective defense presentation that advances the client's cause, or whether the client is best served by not presenting evidence.

STANDARD 7.6 – CLOSING ARGUMENT

A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a verdict for the client based upon the evidence presented at trial and the law applicable to the case.

Implementation:

1. A lawyer should be familiar with the substantive limits on both prosecution and defense summation.
2. A lawyer should be familiar with local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
3. A lawyer should prepare the outlines of the closing argument prior to the trial and refine the argument at the end of trial by reviewing the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
 - a. highlighting weaknesses in the prosecution's case;
 - b. describing favorable inferences to be drawn from the evidence;
 - c. what the possible effects of the defense arguments are on the prosecutor's rebuttal argument; and
 - d. incorporating into the argument:
 - i. helpful testimony from direct and cross-examinations;
 - ii. verbatim instructions drawn from the jury charge; and
 - iii. responses to anticipated prosecution arguments.
4. Whenever the prosecutor exceeds the scope of permissible argument, the lawyer should object, request a mistrial, or seek a cautionary instructions unless tactical considerations suggest otherwise.
5. In a delinquency case, a lawyer should, where appropriate, ask the court, even if sufficient evidence is found to support jurisdiction, not to exercise jurisdiction and move to dismiss the petition (or defer finding jurisdiction until after the dispositional hearing) on the ground that jurisdiction is not in the best interests of the youth or society.

Commentary:

Because summation is argument, parties will be given broad latitude in drawing inferences and suggesting conclusions. The closing should be tailored to the audience, where legal doctrines may better be emphasized in arguments to a judge, while jurors may be more receptive to arguments focused on the facts. Even in bench trials, it is good practice to prepare jury instructions and use them in preparing the closing argument.

The most likely areas for improper argument by the prosecution are discussion of facts not in evidence and unconstitutional comments on the defendant's right not to testify and attempts to

impermissibly shift a burden of proof to the defense. A lawyer should be alert to such improper arguments and raise appropriate objections when they occur.

STANDARD 7.7 – JURY INSTRUCTIONS

A lawyer should ensure that instructions to the jury correctly state the law, and seek special instructions that provide support for the defense theory of the case.

Implementation:

1. A lawyer should be familiar with the local rules and individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
2. Where appropriate, a lawyer should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, a lawyer should provide case law in support of the proposed instructions.
3. A lawyer should object to and argue against improper instructions proposed by the court or prosecution.
4. If the court refuses to adopt instructions requested by the lawyer, or gives instructions over the lawyer's objection, the lawyer should take all steps necessary to preserve the record for appeal.
5. During delivery of the charge, the lawyer should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.
6. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, a lawyer should request that the judge state the proposed charge to the lawyer before it is delivered to the jury and take all steps necessary to preserve a record of objection to improper instructions.

Commentary:

Preservation of jury instruction error can be critical to a defense based on the misapplication of the law. Therefore, a lawyer should carefully review all proposed jury instructions, including uniform jury instructions and others proposed by the court or prosecution, to ensure that they accurately state the applicable law. However, if a jury instruction error is not objected to properly, a client may be deemed to have waived any objection.

STANDARD 8.1 – OBLIGATIONS OF COUNSEL CONCERNING SENTENCING OR DISPOSITION

A lawyer must work with the client to develop a theory of sentencing or disposition and an individualized sentencing or disposition plan that is consistent with the client’s desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the client for such an outcome.

Implementation:

1. In every criminal or delinquency case, a lawyer should:

- (a) be knowledgeable about the applicable law governing the length and conditions of any applicable sentence or disposition, and the pertinent sentencing or dispositional procedures, and inform the client at the commencement of the case of the potential sentence(s) or disposition for the alleged offense(s);
- (b) be aware of the client’s relevant history and circumstances, including prior military service, physical and mental health needs, and educational needs and be sensitive to the client’s sexual orientation or gender identity to the extent this history or circumstance impacts sentencing or the disposition plan.
- (b) understand and advise the client concerning the availability of deferred sentences, conditional discharges, early termination of probation, informal dispositions, alternative dispositions including conditional postponement and diversion agreements (including for servicemember status);
- (c) understand and explain to the client the consequences and conditions that are likely to be imposed as probation requirements, or requirements of other dispositions, and the potential collateral consequences of any sentence or disposition in a case, including the effect of a conviction or adjudication on a sentence for any subsequent crime;
- (d) be knowledgeable about treatment or other programs, out-of-home placement possibilities for juveniles, including group homes, foster care, residential treatment programs and mental health treatment facilities, that may be required as part of disposition or that are available as an alternative to incarceration or out of home placement for youth, that could reduce the length of a client’s time in custody or in out-of-home placement;
- (e) be knowledgeable about the requirements of placements that receive Title IV-E of the Social Security Act funding through contracts with the Juvenile Departments or the Department of Human Services and be able to request “no reasonable efforts” findings from the juvenile court when it would benefit the client;

- (f) develop a plan in conjunction with the client, supported where appropriate by a written memorandum addressing pertinent legal and factual considerations, that seeks the least restrictive and burdensome sentence or disposition, which can reasonably be obtained based upon the facts and circumstances of the case and that is acceptable to the client ;
- (g) where appropriate obtain assessments or evaluations that support the client's plan;
- (h) investigate and prepare to present to a prosecutor, when engaged in plea negotiations, or to the court at sentencing or disposition, available mitigating evidence and other favorable information that might benefit the client at sentencing or disposition;
- (i) ensure that the court does not consider inaccurate information or immaterial information harmful to the client in determining the sentence or disposition to be imposed;
- (j) be aware of and prepare to address express or implicit bias that impacts sentencing or disposition, and
- (k) review the accuracy of any temporary or final sentencing or disposition orders or judgments of the court, and move the court to correct any errors that disadvantage the client.

2. In understanding the sentence or disposition applicable to a client's case, a lawyer should:

- a. be familiar with the law, and any applicable administrative rules, governing the length of sentence or disposition, including the Oregon Sentencing Guidelines, and laws that establish specific sentences for certain offenses or for repeat offenders, and be familiar with juvenile code and case law language that supports a less restrictive disposition that best meets the expressed needs of the youth;
- b. be knowledgeable about potential court-imposed financial obligations, including fines, fees and restitution, and where appropriate challenge the imposition of such obligations when not supported by the facts or law;
- c. be familiar with the operation of indeterminate dispositions, and the law governing credit for pretrial detention, earned time credit, time limits on post-trial and post disposition juvenile detention and out-of-home placement, eligibility for correctional programs and furloughs, and eligibility for and length of post-prison supervision or parole from juvenile dispositions;
- d. as warranted by the circumstances of a case, consult with experts concerning the collateral consequence of a conviction and sentence on a client's immigration status or other collateral consequences of concern to the client, e.g. civil disabilities, sex-offender registration, disqualification for types of employment, consequences for clients involved in the child welfare system, DNA and HIV

testing, military opportunities, availability of public assistance, school loans and housing, and enhanced sentences for future convictions;

- e. be familiar with statutes and relevant cases from state and federal appellate courts governing legal issues pertinent to sentencing or disposition, such as the circumstances in which consecutive or concurrent sentences may be imposed, or when offenses should merge for the purpose of conviction and sentencing;
- f. establish whether the client's conduct occurred before any changes to sentencing or dispositional provisions that increase the penalty or punishment to determine whether application of those provisions is contrary to statute or *ex post facto* prohibitions;
- g. in cases where prior convictions are alleged as the basis for the imposition of enhanced repeat offender sentencing, determine whether the prior convictions qualify as predicate offenses or are otherwise subject to challenge as constitutionally or statutorily infirm;
- h. determine whether any mandatory sentence would violate the state constitutional requirement that the penalty be proportioned to the offense; and
- i. advance other available legal arguments that support the least restrictive and burdensome sentence.

3. In understanding the applicable sentencing and dispositional hearing procedures, a lawyer should:

- a. determine the effect that plea negotiations may have on the sentencing discretion of the court;
- b. determine whether factors that might serve to enhance a particular sentence must be pleaded in a charging instrument and/or proven to a jury beyond a reasonable doubt;
- c. consult with the client concerning the strategic or tactical advantages of resolving factual sentencing matters before a jury, a judge or by stipulation;
- d. understand the availability of other evidentiary hearings to challenge inaccurate or misleading information that might harm the client, and to present evidence favorable to the client, and ascertain the applicable rules of evidence and burdens of proof at such a hearing;
- e. determine whether an official presentence report will be prepared for the court and, if so, take steps to ensure that mitigating evidence and other favorable information is included in the report, that inaccurate or misleading information

harmful to the client is deleted from it, and determine whether the client should participate in an interview with the report writer, advising the client concerning the interview and accompanying the client during any such interview;

- f. determine whether the prosecution intends to submit a sentencing or dispositional memorandum, how to obtain such a document prior to sentencing or disposition, and what steps should be followed to correct inaccurate or misleading statements of fact or law; and
- g. undertake other available avenues to present legal and factual information to a court or jury that might benefit the client, and challenge information harmful to the client.

4. In advocating for the least restrictive or burdensome sentence or disposition for a client, a lawyer should:

- a. inform the client of the applicable sentencing or dispositional requirements, options and alternatives, including liability for restitution and other court-ordered financial obligations, and the methods of collection;
- b. maintain regular contact with the client before the sentencing or dispositional hearing and keep the client informed of the steps being taken in preparation for sentencing or disposition, work with the client to develop a theory for the sentencing or disposition phase of the case;
- c. obtain from the client and others information such as the client's background and personal history, prior criminal record, employment history and skills, current or prior military service, education and current school issues, medical history and condition, mental health issues and mental health treatment history, current and historical substance abuse history, and treatment, what if any relationship there is between the client's crime(s) and the client's medical, mental health or substance abuse issues, and the client's financial status, and sources through which the information can be corroborated;
- d. determine with the client whether to obtain a psychiatric, psychological, educational, or neurological or other evaluation for sentencing or dispositional purposes;
- e. if the client is being evaluated or assessed, whether by the state or at the lawyer's request, provide the evaluator in advance with background information about the client and request that the evaluator address the client's emotional, educational, and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;

- f. prepare the client for any evaluations or interviews conducted for sentencing or disposition purposes;
- g. be familiar with and, where appropriate, challenge the validity and/or reliability any risk assessment tools;
- h. investigate any disputed information related to sentencing or disposition, including restitution claims;
- i. inform the client of the client's right to address the court at sentencing or disposition and, if the client chooses to do so, prepare the client to personally address the court, including advice of the possible consequences that admission of guilt may have on an appeal, retrial, or trial on other matters;
- j. ensure the client has adequate time prior to sentencing to examine any presentence or dispositional report, or other documents and evidence, that will be submitted to the court at sentencing or disposition;
- k. prepare a written disposition plan that the lawyer and the client agree will achieve the client's goals in a delinquency case and, in a criminal case, prepare a written sentencing memorandum where appropriate to address complex factual or legal issues concerning the sentence;
- l. be prepared to present documents, affidavits, letters and other information, including witnesses, that support a sentence or disposition favorable to the client;
- m. as supported by the facts and circumstances of the case and client, challenge any conditions of probation or post-prison supervision that are not reasonably related to the crime of conviction, the protection of the public or the reformation of the client;
- n. in a delinquency case, be prepared to present evidence on the reasonableness of Oregon Youth Authority, Juvenile Department or Department of Human Services efforts that could have been made concerning the disposition and, when supported by the evidence, request a "no reasonable efforts" finding by the court;
- o. in a delinquency case, after the court has found jurisdiction, move the court, when supported by the facts, to not exercise jurisdiction and dismiss the petition, amend the petition, or find jurisdiction on fewer than all charges, on the ground that jurisdiction is not in the best interests of the youth or society;
- p. when the court has the authority to do so, request specific orders or recommendations from the court concerning the place of confinement, parole

eligibility, mental health treatment or other treatment services, and permission for the client to surrender directly to the place of confinement;

- q. be familiar with the obligations of the court and district attorney regarding statutory or constitutional victims' rights and, where appropriate, ensure that the record reflects compliance with those obligations;
- r. take any other steps that are necessary to advocate fully for the sentence or disposition requested by the client and to protect the interests of the client; and,
- s. advise the client about the obligations and duration of sentence or disposition conditions imposed by the court, and the consequence of failure to comply with orders of the court. In a delinquency case, where appropriate counsel should confer with the client's parents regarding the disposition process to obtain their support for the client's proposed disposition.

Commentary:

In the vast majority of criminal and delinquency cases, there will be a sentencing or disposition hearing and it will be the most significant event in the case. An indispensable first step, in being a good advocate at this stage of a case, is educational so that the lawyer has a good working knowledge and access to resources on what is often an ever-changing array of available sentencing and dispositional options. A lawyer should plan for this stage of the case, at or near the beginning of representation. That planning will ordinarily require an in-depth interview of the client, and if appropriate, the client's parent or custodian, legal research concerning the applicable terms and conditions of sentencing or dispositional options, discussions with the client about his or her preferred option and a realistic portrayal of the various possibilities, and an investigation into factual matters, such as evidence of aggravating or mitigating factors, that may affect the outcome.

Sentencing and dispositional considerations have long been matters that should take place in the context of an overall plan for achieving the client's stated objectives for the case that works in concert with the handling of plea negotiations and the preparation and presentation of the case at trial. Several developments or trends, some pulling in opposite directions, make a coordinated case approach especially imperative.

First, in criminal cases, the potential role of juries in sentencing hearings weighs in favor of a thoughtful approach to the conduct of a trial if the same jury is reasonably likely to later consider some sentencing matters. Meanwhile, the continued viability of "mandatory minimum" laws in Oregon, which place considerably control over case outcomes in the hands of prosecutors, weighs in favor of an early and vigorous investigation of both the underlying allegations and any available mitigation evidence, in order for the lawyer to put the client in the best possible position for plea negotiations with the prosecutor.

In juvenile delinquency cases the court has broad discretion and will receive reports from the Juvenile Court Counselor and the DHS caseworker or OYA parole officer if DHS or OYA are involved. These reports can be cookie cutter and often view the delinquent from a social worker perspective that can lead to overreaching into the lives of the client and the client's family. Counsel for the youth should advocate for a client-driven disposition plan that is individualized and tailored to the offense and not overly expansive. A written client driven disposition plan is the only effective way of countering the written plans of government agents. A written disposition plan should always be requested as part of any evaluation. In complex cases, the assistance of a qualified social worker can be obtained to help develop the client-driven disposition plan.

The proliferation and significance of collateral consequences of both criminal and delinquency adjudications also require an informed, vigorous and coordinated approach to sentencing and disposition. It is now better understood that the non-penal consequences of a conviction or adjudication, such a deportation or the loss of employment, housing, public assistance or opportunities for service in the military, may be of greater significance to a client than the time he or she spends in custody or out of the home. Some of these consequences may be triggered by the offense of conviction or adjudication, while others may be triggered by the duration or conditions of sentencing or disposition. The lawyer is now obligated to understand these consequences and conduct the defense in order to avoid or mitigate their impact.

Since the last revision of these standards, there is increased interest by courts and community corrections officials in "smart sentencing," with an emphasis on evidence based practices that are known to be effective in reducing recidivism. Even without major legislative reforms that embrace this new focus, there are opportunities for clients to benefit from research about what sentencing or dispositional elements work best to protect the public. Lawyers handling criminal and delinquency cases, therefore, should be knowledgeable about the research and its possible application in their cases. To the extent that implementation of evidence based practices also relies upon the use of risk assessment tools, counsel should be aware of the tools used in reports considered by the court at sentencing or disposition, and be prepared to challenge the validity and reliability of them, both facially and as applied to a client, where appropriate.

Because sentencing and disposition are subject to frequent legislative attention and vigorous litigation in the trial and appellate courts, lawyers representing clients in both criminal and delinquency cases must stay current with the latest developments in the law and be prepared to undertake litigation on issues such as the retroactive application of changes in punishment, the validity of prior convictions that trigger sentence enhancements, the merger of convictions, and the proportionality of punishment.

Finally, lawyers representing youth should take special care to confer with clients in developmentally appropriate language about disposition planning. Although a lawyer must make clear to the client and the client's parents that the youth controls decisions concerning disposition

options, to the extent appropriate, and with the permission of the youth, a lawyer should explain the disposition process to parents and enlist their support of the youth's choices. The plan submitted to the court by the lawyer, which ordinarily should be in writing, should address the youth's strengths and particular medical, mental health, educational or other needs, and the use of available resources in the home, the community or elsewhere through which the client is most likely to succeed.

STANDARD 9.1 – CONSEQUENCES OF PLEA ON APPEAL

In addition to direct and collateral consequences, a lawyer should be familiar with and advise the client of the consequences of a plea of guilty, an admission to juvenile court jurisdiction, or a plea of no contest on the client's ability to successfully challenge the conviction, juvenile adjudication, sentence or disposition in a appellate proceedings.

Implementation:

1. A lawyer should be familiar with the effects of a guilty plea, admission to juvenile court jurisdiction, or a no contest plea on the various forms of appeal.
2. During discussions with the client regarding a possible admission, plea of guilty or no contest, a lawyer must inform the client of the consequences of such a plea on any potential appeals.
3. A lawyer should be familiar with the procedural requirements of the various types of pleas, including the conditional guilty plea, that affect the possibility of appeal.

Commentary:

A plea of guilty or no contest severely limits the scope of a client's direct appeal. A defendant who has pleaded guilty or no contest must identify a "colorable claim of error" simply in order to file a notice of appeal. ORS 138.050. Even if the client satisfies that procedural hurdle, in cases in which the client pled guilty or pled no contest, the Court of Appeals is limited by statute to reviewing only the sentence imposed by the court. ORS 138.050; see *State v. Anderson*, 113 Or App 416, 419, 833 P2d 321 (1992) ("[A] disposition is legally defective and, therefore, exceeds the maximum allowable by law if it is not imposed consistently with the statutory requirements."). Although ORS 138.050 does not limit appeals in juvenile cases, and thus there is no requirement that "a colorable claim of error" be identified, as a practical matter the client's admission to facts constituting jurisdiction greatly limits the scope of appeal.

STANDARD 9.2 – PRESERVATION OF ISSUES FOR APPELLATE REVIEW

A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the client and apprise the client of which issues have been preserved for review.

Implementation:

1. A lawyer must know the requirements for preserving issues for review on direct appeal and in federal habeas corpus proceedings.
2. A lawyer should review with the client those issues that have been preserved for appellate review, and the prospects for a successful appeal.

Commentary:

A trial lawyer faces the often-challenging task of zealously advocating for the best result for her client at trial while simultaneously preserving legal issues for later challenge on appeal in the event of conviction or adjudication. Some issues require only an objection from the lawyer sufficient to alert the court to the issue and the client's position in order to preserve the issue for appellate review. *State v. Wyatt*, 331 Or 335, 15 P3d 22 (2000).

However, other types of issues require additional steps to be taken. For example, if the trial court excludes evidence over the objection of the lawyer, the lawyer often must make an offer of proof to the court detailing what the evidence would have been, so that appellate courts can determine the merits of the legal issue and the harm of the exclusion. OEC 103(1)(b) ("Error may not be predicated upon a ruling which * * * excludes evidence unless a substantial right of a party is affected" and "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."); *State v. Bowen*, 340 Or 487, 500, 135 P3d 272 (2006) ("[A]n offer of proof ordinarily is required to preserve error when a trial court excludes testimony."); see also *State v. Wirfs*, 250 Or App 269, 274, 281 P3d 616 (2012) (defendant not required to make an offer of proof "because the trial court and the prosecutor were aware of the substance of the testimony that defendant would elicit.").

Another example of a more complex preservation requirement involves arguments for or against proposed jury instructions. ORCP 59H, which applies to criminal trials through ORS 136.330(2), requires a party to state its objections to the giving of an instruction (or the failure to give an instruction) "with particularity" and to except after jury instructions have been delivered.

A lawyer's most important goal at trial is to obtain a favorable ruling for her client. Should that effort fail, the lawyer must insure that she has met the specific requirements for preserving the issue for appellate review, should the client decide to appeal the conviction, adjudication, sentence or disposition.

As a subset of the duty to keep the client informed, a lawyer should discuss with the client the various forms of appeal, including the right to a de novo rehearing by a judge of a juvenile adjudication by a referee and the specific issues presented in the client's case that could be pursued on appeal. The lawyer should advise the juvenile client that the time to file an appeal of an adjudication starts running from the time of the adjudication, not the disposition, and if necessary a separate appeal of the disposition can be filed. *State ex rel Juv Dept. v. J.H.-O.*, 223 OrApp 412 (2008).

STANDARD 9.3 -UNDERTAKING AN APPEAL

A lawyer must be knowledgeable about the various types of appeals and their application to the client's case, and should impart that information to the client. A lawyer should inquire whether a client wishes to pursue an appeal. When requested by the client, a lawyer should assure that a notice of appeal is filed, and that the client receives information about obtaining appellate counsel.

Implementation:

1. Throughout the trial proceedings, but especially upon conviction, adjudication, sentencing and disposition, a lawyer should discuss with the client the various forms of appellate review and how they might benefit the client.
2. If the client chooses to pursue a re-hearing of a juvenile referee's order or an appeal, a lawyer should take appropriate steps to preserve the client's rights, including requesting a re-hearing, filing notice of appeal or referring the case to an appellate attorney or public defender organization to have the notice of appeal filed.
3. When the client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the trial court. A trial lawyer must provide the appellate lawyer with all records from the trial case, the court's final judgment, and any other relevant or requested information.
4. If a lawyer is representing a client is financially eligible for appointed counsel, the lawyer shall determine whether the client wishes to pursue an appeal and, if so, transmit to the Office of Public Defense Services the information necessary to perfect an appeal, pursuant to ORS 137.020(6).
5. If the client decides to appeal, a lawyer should inform the client of the possibility of obtaining a stay pending appeal and file a motion in the trial court if the client wishes to pursue a stay.

Commentary:

If the client has been convicted despite the best efforts of a lawyer, a lawyer must discuss the various methods of appealing the conviction or adjudication and resulting sentence or disposition

that are available to the client, including rehearing, direct appeal, post-conviction relief, and a petition for federal habeas corpus. Each of those forms of appeal has unique applications and requirements, and the client should be informed of the potential benefits and disadvantages of all types of appeal. In particular, a lawyer should review filing deadlines and requirements to insure the client does not lose the opportunity to pursue an appeal.

A lawyer is constitutionally mandated to confer with the client about the right to appeal. *Roe v. Flores-Ortega*, 528 US 470, 480, 120 S Ct 1029, 145 L Ed 2d 985 (2000) (“We instead hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”). A lawyer should explain both the meaning and consequences of the court’s decision and provide the client with the lawyer’s professional judgment regarding whether there are meritorious grounds for appeal and the probable consequences of an appeal, both good and bad.

There may be circumstances in which a lawyer should file a notice of appeal on behalf of the client to preserve the client’s right to appeal in the face of a looming deadline, despite the fact that the lawyer will not eventually represent the client on appeal. The preferred course of action is to refer the case to the attorney or organization that will represent the client on appeal in time to allow that lawyer or entity to timely file notice of appeal. However, the primary concern is that the client’s right to appeal is preserved.

Communication between lawyers who represent the client at the various stages of a criminal or delinquency case (trial, direct appeal, post-conviction relief, etc.) is critical to the client’s success. That is particularly true of communication between a client’s trial lawyer and the lawyer helping the client file a petition for post-conviction or post-adjudication relief.

STANDARD 9.4 – POST SENTENCING AND DISPOSITION PROCEDURES

A lawyer should be familiar with procedures that are available to the client after disposition. A lawyer should explain those procedures to the client, discern the client’s interests and choices, and be prepared to zealously advocate for the client.

Implementation:

1. Upon entry of judgment, a lawyer should immediately review the judgment to ensure that it reflects the oral pronouncement of the sentence or disposition and is otherwise free of legal or

factual error. In a delinquency case, a lawyer should insure that the judgment includes the disposition probation plan, including any actions to be taken by parents, guardians, or custodians.

2. The lawyer must be knowledgeable concerning the application and procedural requirements of a motion for new trial or motion to correct the judgment.

3. The lawyer representing a youth in delinquency proceedings should be versed in relevant case law, statutes, court rules, and administrative procedures regarding the enforcement of disposition orders, as well as the methods of filing motions for post-disposition and post-adjudicatory relief, for excusal or relief from sex offender registration requirements, and/or to review, reopen, modify or set aside adjudicative and dispositional orders. For youth whose circumstances have changed; youth whose health, safety, and welfare is at risk; or youth not receiving services as directed by the court, a lawyer should file motions for early discharge or dismissal of probation or commitment, early release from detention, or modification of the court order. Where commitment is indeterminate and youth correctional authorities have discretion over whether and when to release a youth from secure custody, when the period of incarceration becomes excessive, the lawyer should advocate to terminate or limit the term of commitment, if desired by the youth.

Commentary:

In general, when the written judgment conflicts with the court's oral pronouncement of sentence at trial, the written judgment controls. See *State v. Swain/Goldsmith*, 267 Or 527, 530, 517 P2d 684 (1974); *State v. French*, 208 Or App 652, 655, 145 P3d 305, 307 (2006); *State v. Mossman*, 75 Or App 385, 388, 706 P2d 203 (1985). It is therefore imperative that the written judgment accurately reflects the favorable aspects of the sentence imposed by the court at the sentencing hearing.

Under ORCP 64 and ORS 136.535, a trial court may grant a motion for new trial if certain conditions are met, including irregularities in the proceedings, juror misconduct, or newly discovered evidence that could not have been discovered and produced at trial. Similarly, the trial court has the authority to correct an erroneous term in the judgment under ORS 138.083, even if the case is on appeal. The juvenile court may modify or set aside a jurisdictional order. ORS 419C.610. The lawyer should be knowledgeable about the availability and procedural requirements of these motions.

A lawyer should be familiar with the authority of a trial court to stay execution of the sentence, or part of a sentence, pending appeal, and seek such relief where appropriate.

STANDARD 9.5- MAINTAIN REGULAR CONTACT WITH YOUTH FOLLOWING DISPOSITION

A. A lawyer for a youth in delinquency proceedings should stay in contact with the youth following disposition and continue representation while the youth remains under court or agency jurisdiction.

B. A lawyer should inform a youth of procedures available for requesting a discretionary review of, or reduction in, the sentence or disposition imposed by the trial court, including any time limitations that apply to such a request.

Implementation:

1. The lawyer should reassure a youth that the lawyer will continue to advocate on the youth's behalf regarding post-disposition hearings, including probation reviews and probation or parole violation hearings, challenges to conditions of confinement, and other legal issues, especially when the youth is incarcerated. The lawyer should also provide advocacy to get the client's record expunged or to obtain relief from sex offender registration.

2. A lawyers for youth convicted as adults but who were under 18 years of age at the time of the offense should be familiar with and inform the client of the "second look" provisions of ORS 420A.203 and ORS 420A.206.

Commentary:

Post-disposition access to counsel is critical for youth under the continuing jurisdiction of the court or a state agency. Issues such as significant waiting lists for residential facilities, the failure to provide services ordered by the court, conditions of confinement, and enforcement of disposition requirements require the legal acumen and advocacy of counsel.

In addition, a lawyer should check in periodically with the youth and routinely ensure that the facility or agency is adhering to the court's directives and that the youth's needs are met and the client's health, welfare, and safety are protected.

Special attention is required to insure that secure facilities are providing educational, medical, and psychological services.

If the youth is committed to a state agency, a lawyer should maintain regular contact with the caseworker, juvenile court counselor, youth correctional facility staff or juvenile parole officer, advocate for the youth as necessary, and ask to be provided copies of all agency reports documenting the youth's progress. A lawyer should participate in case review meetings and administrative hearings. When appropriate, the lawyer should request court review to protect the client's right to treatment.

The lawyer may be the youth's only point of contact within the community when the youth is placed in a residential or correctional facility. The lawyer should advocate for adequate contact between the youth and his or her family and home visits when appropriate, if desired by the

youth.

DRAFT

OREGON STATE BAR

Board of Governors Agenda

Meeting Date: April 25, 2014
Memo Date: April 11, 2014
From: Danielle Edwards, Director of Member Services
Re: Committee Appointments

Action Recommended

Consider appointments to the Legal Ethics, Uniform Civil Jury Instructions, and Unlawful Practice of Law Committees as requested by the committee officers and staff liaisons.

Background

Legal Ethics Committee

Due to the resignation of one committee member the chair and staff liaison recommend the appointment of **Alexander Wylie** (014570). As the committee begins reviewing opinions on lawyer advertising Mr. Wylie's offers valuable experience as a private practitioner focusing on personal injury. He indicated LEC was his first choice preference for appointment on the volunteer survey.

Recommendation: Alexander Wylie, member, term expires 12/31/2014

Uniform Civil Jury Instructions Committee

Since the beginning of the year three committee members have resigned. To fill these vacant positions the committee officers and staff liaison recommend the appointment of **Jeremiah Vail Ross** (105980), **Jodie Ayura** (051918), and **Jennifer L. Coughlin** (065781). All three of these members completed the volunteer survey and confirmed their ability to commit the necessary time to fully participate on the committee.

Recommendation: Jennifer L. Coughlin, member, term expires 12/31/2014

Jodie B. Ayura, member, term expires 12/31/2015

Jeremiah V. Ross, member, term expires 12/31/2015

Unlawful Practice of Law Committee

Due to a resignation the committee needs one new member appointed. The committee officers and staff liaison recommend the appointment of **Erin K. Fitzgerald** (083243). Ms. Fitzgerald selected UPL as her first committee preference and is enthusiastic about serving.

Recommendation: Erin K. Fitzgerald, member, term expires 12/31/2014

Operating Principles
for the
Oregon State Bar and Board of Bar Examiners

1. BBX and OSB Roles and Responsibilities in Admissions

The Oregon Supreme Court has sole authority to determine who should be admitted to the practice of law in the State of Oregon. The Board of Bar Examiners (“BBX”) is appointed by the Court to examine applicants and recommend to the Court for admission to practice those applicants who meet the requirements prescribed by the law and the rules of the Court. To that end, the BBX is responsible for: developing and adopting a bar examination; determining the manner of examination, including what accommodations to provide applicants; grading bar examinations; setting standards for bar exam passage, and; evaluating applicants’ character and fitness to practice law.

The Oregon State Bar (“OSB”) is responsible for providing facilities, equipment and administrative support to the BBX and otherwise implementing admissions policies established by the BBX and the Court.

2. Employment: Admissions Director and Admissions Staff

The Admissions Department staff, including the Admissions Director, are employees of the OSB.

A. Hiring of the Admissions Director

In the event of a vacancy in the Admissions Director position, the OSB will prepare a job description in consultation with the BBX. The OSB will conduct the initial screening of applicants. The initial pool of candidates will be submitted to the BBX for consideration. The BBX and the OSB will conduct joint interviews of selected candidates and the BBX will recommend its choice for the position to the OSB Executive Director. The OSB Executive Director will make the final hiring decision, giving due consideration to the recommendation and input of the BBX. If the BBX objects to the Executive Director’s selection, recruitment will be reopened.

B. Supervision, Discipline, Firing or Reassignment of the Admissions Director

OSB Regulatory Counsel is responsible for the day-to-day supervision and annual performance evaluation of the Admissions Director. The BBX will provide input on its working relationship with the Admissions Director and any concerns that it may have. The OSB Executive Director will make personnel decisions regarding the Admissions Director, including but not limited to discipline, reassignment or employment termination, giving due consideration to the recommendations and input of the BBX.

3. Liability

A. OSB

As provided in OSB Bylaw 2.106 and subject to the limitations provided in the Oregon Tort Claims Act, the OSB will defend and indemnify the OSB officers, Board of Governors, individual BOG members and OSB employees, including Admissions Department staff, against and for any and all claims arising out of an alleged act or omission occurring in the performance of their duties.

B. State of Oregon Judicial Branch

Subject to the limitations provided in the Oregon Tort Claims Act, the State of Oregon Judicial Branch will defend and indemnify the BBX and its individual members against and for any and all claims arising out of an alleged act or omission occurring in the performance of their duties.

4. Budget

With the approval of the Oregon Supreme Court, the BBX may fix and collect fees to be paid by applicants for admission, which shall be paid into the treasury of the OSB. The BBX annual budget shall be prepared and BBX fiscal operation shall be managed in accordance with OSB policy, including cost containment measures that the OSB may implement for the OSB as a whole. The BBX annual budget shall be approved for submission to the Court by mutual agreement of the BBX and the BOG, after consideration of the policy goals and strategic plans (including, but not limited to, technology enhancements) of the BBX and the BOG.

5. Confidentiality

The OSB and BBX recognize that, pursuant to Oregon Supreme Court rule, the records, work product and proceedings of the BBX in carrying out its functions are confidential. The OSB will exercise reasonable care to prevent unauthorized disclosure of BBX records and information and will adhere to the rules of the Oregon Supreme Court regarding confidentiality.

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6. These Operating Principles supersede and replace the 1989 Agreement between the Oregon State Bar and the Board of Bar Examiners.

Approved by:

Hon Thomas A. Balmer
Chief Justice, Oregon Supreme Court

Date

Tom Kranovich
President, Oregon State Bar

Date

Renee Starr
Chair, Board of Bar Examiners

Date