Practicing Law in Oregon

Thursday, June 22, 2017
9 a.m.–4:15 p.m.

4 General CLE or Practical Skills credits and 2 Ethics credits
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8:00  Registration

9:00  Oregon Discovery—Rules and Conventions
   ✦ Distinguishing federal and state practice in Oregon
   ✦ Pursuing records of parties and nonparties
   ✦ Usual timing and the practice for scheduling and then getting adjustments
   ✦ Getting public records and discovery with the government
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   ✦ Court assistance in disputes
   Leslie Johnson, *Samuels Yoelin Kantor LLP*, Portland
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9:45  Oregon Pleadings and Parties: Tips to Consider and Traps to Avoid
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10:30  Break

10:45  Depositions in Oregon
   ✦ Oregon’s written and unwritten rules governing depositions
   ✦ Using depositions at trial
   Joseph Franco, *Holland & Knight LLP*, Portland

11:45  Lunch

12:30  The Disciplinary Process: Basics You Need to Know
   ✦ What they do: Client Assistance Office, Disciplinary Counsel Office, and the State Professional Responsibility Board
   ✦ How to respond—a defense perspective
   ✦ Roundtable—common complaints, unique features in Oregon, negotiated outcomes, and recent cases
   Moderator: Dawn Evans, *Disciplinary Counsel’s Office, Oregon State Bar, Tigard*
   Carolyn Alexander, *State Professional Responsibility Board, Portland*
   Daniel Atkinson, *Client Assistance Office, Oregon State Bar, Tigard*
   Wayne Mackeson, *Wayne Mackeson PC, Oregon City*

2:30  Break

2:45  Local Practice in the U.S. District Court for the District of Oregon
   ✦ The importance of civility and professionalism
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3:30  May It Please the Court—An Overview of the Oregon Court System
     The Honorable David Brewer, Oregon Supreme Court, Salem

4:15  Adjourn
FACULTY

Carolyn Alexander, *State Professional Responsibility Board, Portland.* Prior to her retirement, Ms. Alexander was a Senior Assistant Attorney General with the Oregon Department of Justice Appellate Division, where she handled civil and criminal appeals at the state and federal levels. She currently serves on the State Professional Responsibility Board and on the Oregon Board of Licensed Professional Counselors and Therapists. She previously chaired the DOJ’s Ethics Committee for many years, and she served on the OSB Legal Ethics Committee.

Daniel Atkinson, *Client Assistance Office, Oregon State Bar, Tigard.* Mr. Atkinson is an Assistant General Counsel in the Oregon State Bar’s Client Assistance Office. Prior to joining the bar, he spent ten years in private practice at two small general practice firms, first in Silverton and then in Portland.

The Honorable David Brewer, *Oregon Supreme Court, Salem.* Justice Brewer was elected to the Supreme Court in May 2012 and joined the court in January 2013. He previously served as Chief Judge on the Oregon Court of Appeals and as a circuit judge for the Lane County Circuit Court, where he presided over many civil and criminal trials and settled many more cases through the court’s settlement conference program. Justice Brewer serves on the Oregon State Bar Legal Services Task Force.

C. Marie Eckert, *Miller Nash Graham & Dunn LLP, Portland.* Ms. Eckert is an experienced business litigator who has handled a wide range of complex commercial litigation in state and federal courts, including contract and business valuation disputes, business torts, lender liability and creditors’ rights claims, insurance coverage actions, and employment, trusts and estates, and environmental litigation. She is a member of the Federal Bar Association, the American Bar Association, the Multnomah Bar Association, and Oregon Women Lawyers.

Dawn Evans, *Disciplinary Counsel’s Office, Oregon State Bar, Tigard.* Ms. Evans is Disciplinary Counsel and Director of Regulatory Services at the Oregon State Bar, administering the attorney discipline office and the bar admissions department. She served for nine years as the Director of Professional Standards at the State Bar of Michigan and worked for eighteen years in attorney discipline at the State Bar of Texas, including five years as Chief Disciplinary Counsel. She is a former president of the National Organization of Bar Counsel and has held positions as a director of the Texas Young Lawyers Association and president of the Walker County Bar Association.

Joseph Franco, *Holland & Knight LLP, Portland.* Mr. Franco focuses his practice in all stages of litigation. He is experienced in managing complicated discovery, taking and defending key depositions, arguing dispositive motions, and serving as the lead lawyer in trials, arbitrations, and mediations in matters involving breach of contract, legal malpractice, insurance coverage, unlawful trade practices, breach of fiduciary duty, and the protection of trade secrets. He is a member of the Oregon Bench and Bar Commission on Professionalism, the Multnomah Bar Association Court Liaison Committee, and the Oregon Trial Lawyers Association.

Leslie Johnson, *Samuels Yoelin Kantor LLP, Portland.* Ms. Johnson joined Samuels Yoelin Kantor LLP in May 2017, after 21 years in private practice in Portland. Her focus has always been on business litigation and business law, with an emphasis on contract issues, corporate governance, shareholder agreements and disputes, employment law, business and real property transactions, franchise disputes, securities, and lawyer and accountant malpractice. She is a member of the Multnomah Bar Association, the Clark County (Washington) Bar Association, the American Bar Association, the Oregon State Bar House of Delegates, and the American Bar Association House of Delegates. Ms. Johnson has spoken at local and state bar association CLE events on practical litigation skills, and she coauthored chapters of the Oregon State Bar publications *Insurance, Federal Civil Litigation,* and *Civil Pleading and Practice.* Ms. Johnson is licensed to practice in Oregon and Washington.
Wayne Mackeson, Wayne Mackeson PC, Oregon City. Mr. Mackeson is primarily a criminal defense trial lawyer who also researches, writes, and argues cases in the Oregon appellate courts and before the Ninth Circuit Court of Appeals. He also defends lawyers accused of ethics violations and children in juvenile delinquency cases.

Bonnie Richardson, Folawn Alterman & Richardson LLP, Portland. Ms. Richardson is a trial lawyer who represents clients in cases involving legal and professional malpractice, trust and estate litigation, complex commercial litigation, and insurance coverage disputes. She is a member of the Multnomah Bar Foundation board of directors, the Oregon Asian Pacific American Bar Association, the Oregon Judicial Diversity Coalition, the OSB Rules of Professional Conduct 8.4 Drafting Committee, the Oregon Trial Lawyers Association, the Federal Bar Association, and Oregon Women Lawyers. She also serves as an arbitrator for the Oregon State Bar Fee Arbitration Program. Ms. Richardson is a frequent speaker at continuing legal education seminars for attorneys for the Oregon State Bar, Multnomah Bar Association, the National Business Institute, and many other organizations. She is the recipient of the 2016 Multnomah Bar Association Professionalism Award and the 2009 Multnomah Bar Association Pro Bono Award of Merit.

Kevin Sali, Kevin Sali LLC, Portland. Mr. Sali represents individuals and business entities in criminal, civil, and regulatory matters, including high-stakes major felony trials, complex white collar cases, and large-scale environmental actions.
Chapter 1

Oregon Discovery

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I. Overview

A. Introduction

Discovery as performance of the lawyer’s independent duty to investigate imposed by Oregon’s Rules of Professional Conduct, FRCP 11 and ORCP 17.

Discovery is the use of specific procedural tools to obtain information bearing on the case.

B. Rules and Resources

1. State court. Oregon Rules of Civil Procedure (ORCP), Uniform Trial Court Rules (UTCR), and Supplementary Local Rules (SLR) of each county circuit court


4. Treatises. Wright & Miller, FEDERAL PRACTICE & PROCEDURE, and Matthew Bender, MOORE’S FEDERAL PRACTICE (regularly cited to in both state and federal courts)

C. Scope of Discovery

1. Under the Oregon rules, scope extends to any matter, not privileged, that is relevant to the claim or defense of any party. Material sought need not be admissible if reasonably calculated to lead to the discovery of admissible evidence. ORCP 36 B(1).

2. Proportionality. Under a relatively recent change to the Federal rules, the federal court now imposes a proportionality standard. “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.” FRCP 26(b)(1). In determining whether something is proportional the court should consider: 1) the importance of the issues at stake in the action, 2) the amount in controversy, 3) the parties' relative access to relevant information, 4) the parties' resources, 5) the importance of the discovery in resolving the issues, 6) and whether the burden or expense of the proposed discovery outweighs its likely benefit. Id. Similar to the Oregon rule, information within this scope of discovery need not be admissible in evidence to be discoverable. Id. See David Crump, Goodbye, "Reasonably Calculated"; You're Replaced by "Proportionality": Deciphering the New Federal Scope of Discovery, 23 GEO. MASON L. REV. 1093 (2016), for a discussion of the new proportionality standard.

3. In areas that are similar between Oregon state rules and the federal rules, state courts will accept federal decisions as guidance. Boon v. Boon, 100 Or App 354, 357 n.2 (1990) (father had standing to quash subpoena served by mother on father’s psychologist); Vaughan v. Taylor, 79 Or App 359, 363, rev denied, 301 Or 445 (1986) (subpoena as method to
obtain discovery from non-party); Southern Pacific v. Bryson, 254 Or 478, 480 (1969) (early analysis of Oregon’s Rule 34 based on history of FRCP 43). When rules are similar, decisions of other states courts also provide “context.” GPL Treatment Ltd. V. Louisiana-Pacific Corp., 323 Or 116, 124 (1996) (using decisions of other states courts to analyze provision of Uniform Commercial Code).

4. Attorney-client privilege is as defined by the evidence rules and common law. See Oregon Evidence Code (“OEC”) 503 (ORS 40.225). In federal court, the federal common law of privilege takes precedence except with respect to claims and defenses governed by state law. FRE 501. Oregon’s rule may be somewhat distinguished by its lengthy definitions of “client” and “representative of the client” to the extent that “representative” may include, without limitation, any principals, officers, and directors of a corporate client. OEC 503(1)(d)(A).

5. The work product doctrine protects from disclosure materials prepared in anticipation of litigation. The highest degree of protection is given to the “mental impressions” of litigation counsel, but protection extends to work by a party or by a consultant/expert under the direction of the attorney that falls within the “anticipation of litigation” label. See Hickman v. Taylor, 329 US 495, 507 (1947) (seminal discussion of “work product”). The reference to work product in the federal and state rules is identical. See FRCP 26(b)(3); ORCP 36 B(3). For discussions in Oregon common law, see, for example, State v. Riddle, 330 Or 471 (2000) (discussion of work product under Oregon cases as applied to communications between expert and attorney); Brink v. Multnomah County, 224 Or 507 (1960) (same); and United Pacific Ins. Co. v. Trachsel, 83 Or App 401, 404, rev denied 303 Or 332 (1987) (court protected work of fire expert hired after litigation appeared likely). Under state law, the work product extends to both written materials and work product that has not been reduced to writing. Kirkpatrick, OREGON EVIDENCE § 503.06[2] (2013).

D. Planning and Balancing

1. For the most part, do what you would do anywhere you practice.

2. Follow default response times or document agreements to the contrary!

3. The Golden Rule will not necessarily be enforced by the courts, but it still lives in Oregon.

E. Timing

1. FRCP 6 and ORCP 10 control the computation of time. The federal rule is more detailed. Both rules instruct that the day the act is done is not counted in the computation of time. In addition, both rules provide that if the last day of the period falls on a Saturday, Sunday, or legal holiday, the period continues to run until the next business day.

2. Additional time for certain types of service. Under federal law, you add three days to the computation of time if you have served under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to). FRCP 6(d). Under Oregon law, you
add three days to the computation of time if you have served by any method other than personal delivery. ORCP 10B.

II.  Discovery of Parties

A.  Requests for Production or Inspection

1.  FRCP 34 and ORCP 43 are very nearly identical.

2.  Federal requests may be delivered more than 21 days after service of the summons and complaint, at the earliest, and such request is considered to have been served at the first FRCP 26(f) conference. See FRCP 26(d)(2)(A); LR 26-1; The state rule generally allows requests to be served in conjunction with or after service of the summons. ORCP 43 B.

3.  Requests must be in writing; must describe material sought by item or by category and with reasonable particularity; and must specify a reasonable time, place, and manner for production and related acts. “Reasonably particular” is determined by the facts and circumstances of the case. See, e.g., 8B Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 2211 (3d ed.).

4.  Do not file requests for production or responses in either state or federal court unless and until a request is in dispute. LR 34-1; ORCP 9D.

5.  The only reliable way to preserve objections is to make them in a written form, typically by a formal captioned document matching each request to the objections it raises. The state rule does not impose a particular requirement for a writing, but the practice is to follow the federal-rule format – restating each request followed by appropriate objections. See LR 34-2.

6.  The state rule requires a response within 30 days of service of a request, except that a defendant cannot be required to respond earlier than 45 days after service of summons unless the court specifies a shorter term. ORCP 43B(2). The parties may also agree in writing, or the court may order, a different response time.

7.  Fed. R. Civ. P. 34(b)(2) requires a written response, within 30 days after the service of the request, or within 30 days after the parties’ first Rule 26(f) conference, if the request was served early pursuant to Rule 26(d)(2).

8.  The state rule provides that “a party shall serve a response that includes . . . a statement that, except as specifically objected to, any requested item within the party’s possession or custody is provided, or will be provided or made available within the time allowed and at the place and in the manner specified in the request[.]” ORCP 43 B(2); but see Citizens’ Utility Board v. Public Utility Commission, 128 Or App 650, 657-58 (1994) (“[W]e agree . . . that ORCP 43B does not require the conclusion that [the responding party] waived the right to seek protection . . . by failing to seek protection sooner.”). The local federal rule is clearer and stricter: failure to object to the time fixed by the rules, or within the time the parties have agreed, constitutes a waiver of any objection. LR 26-5(a).
9. FRCP 26(e) imposes some duty to supplement responses. The Oregon rule indicates that “[a] party . . . is under a continuing duty during the pendency of the action to produce promptly any item responsive to the request and not objected to which comes into the party’s possession, custody, or control.” ORCP 43B(4).

B. Requests for Admission

1. Governed by FRCP 36 and ORCP 45.

2. Distinctions between federal and state rule:
   a) In federal action, do not file requests or responses, though they may be used as exhibits at trial. LR 36-1. In state court, requests and responses must be filed with court (by exclusion from ORCP 9 D).
   b) ORCP 45 F limits the number of requests to 30 without court order; federal rule imposes no such limit.
   c) ORCP 45 A mandates specific language in the request warning of the import of failure to make a timely response.
   d) In both federal and state practice, each matter on which an admission is requested must be separately set forth. ORCP 45 E provides that the request must leave sufficient space for a response, and it is customary to follow this same format in federal court, although there is no analogous provision.

3. Requests for Admission can be useful, particularly in state court, to establish foundation for likely trial exhibits. Such documents must be attached to the requests for admission unless they have been or are otherwise furnished or made available for inspection and copying. FRCP 36(a)(2); ORCP 45 A.

4. ORCP 45 B follows FRCP 36(a)(3) in requiring that a written response be served within 30 days after service of the request unless the court shortens or extends the time. Failure to respond in a timely fashion results in an automatic admission of the matters contained in the request.

5. Requirements for substantive responses are the same in state and federal court. The answering party may admit, deny, or object to the request or may state that the matter is neither admitted nor denied. The party is further required to qualify an admission or denial if good faith so requires. In lieu of a response, a party may object to a requested admission, but objections based upon ambiguous, unintelligible, or argumentative requests may be tested in court and are not favored.

6. If the court determines that an answer is insufficient, the court may impose money sanction, or will order the party to amend its answer, or will order that the matter is deemed admitted. See Asea Inc. v. Southern Pacific Transportation, 669 F2d 1242, 1245 (9th Cir 1981) (matter is deemed admitted).
Chapter 1—Oregon Discovery

7. Both federal and state rule provide that if a party fails to admit the genuineness of a document or the truth of a matter, and the party making the request later establishes the genuineness or truth of the matter, the court may order the offending party to pay for the reasonable expenses, including attorney fees, of making that proof. See, e.g. Elliot v. Progressive Halcyon Ins. Co., 222 Or App 586, 590 (2008) (attorney fees awarded).

8. The subject matter of admissions under FRCP 36 and ORCP 45 are conclusively established for trial. A denial has been determined by the Oregon courts to have no evidentiary weight or effect. See Bowers v. Winitzki, 83 Or App 169, 173, n. 5 (1986).

C. Interrogatories (federal court only)

1. Interrogatories are not authorized in the state courts of Oregon, but they are widely used in federal court actions. They may be used to identify trial witnesses, including expert witnesses. FRCP 26(a)(2). In certain circumstances, the facts known to or opinions held by an expert who has been retained but is not expected to testify may also be discovered. FRCP 26(b)(4)(B). Unless otherwise stipulated or ordered by the court, each party may only serve another party with 25 interrogatories, which includes discrete subparts. FRCP 33(a)(1).

2. Interrogatories, answers, and objections are not filed with the court unless the court so directs or they become the subject of a motion. LR 33-1.

3. Local Rule discourages lengthy boilerplate preambles and encourages conciseness and clarity. Broad, general interrogatories are not permitted. An opposing party may not be asked to “state all facts on which a contingency is based” or to “apply law to facts.” See LR 33-1(c) and (d).

4. Answers and objections must be served within 30 days after service of the interrogatories. Each question must be set forth in full before each answer or objection. Each objection must be followed by a statement of reasons. The answers must be made under oath and must be signed by the person giving the answers. Objections are to be signed by the attorney. FRCP 33(b); LR 33-2(a).

5. Interrogatories may be used as exhibits or evidence in support of a motion and, subject to the rules of evidence, may be introduced at trial. LR 33-1(b). Answers to interrogatories frequently play a key role in motions for summary judgment.

III. Discovery of Nonparties

A. Subpoenas for documents or things

1. In both federal and state actions, a subpoena is the method for obtaining discovery from a nonparty. The subpoena can be used to compel a nonparty to attend a deposition and/or to produce documents or tangible things. FRCP 45(a)(1)(C); ORCP 55 F(2) and (3).
2. Service by mail is effective if the target consents in advance, but effective service always requires that the appropriate witness fee be delivered with the subpoena. FRCP(b)(1); ORCP 55D(1) and (3)

3. For subpoenas seeking production of documents only (without attendance at a deposition), the state rule requires that the civil subpoena be served on each party at least seven days before the subpoena is served on the target, and the target shall be given no less than 14 days to respond, in order to allow time for preserving objections and obtaining court assistance, if appropriate. ORCP 55 D(1).

4. Both federal and state rule require notice to all parties of discovery subpoenas, usually accomplished by service of a copy of the subpoena. Other parties are entitled to copies of production obtained, just as they would be entitled to attend a deposition.

5. Note that state rule has special provisions for discovery of health information at ORCP 55 H.

B. Interstate Discovery

1. Federal rule allows for service of a subpoena any place within the United States. FRCP 45(b). 28 USC 1783 governs services directed at a United States national or resident who is in a foreign country.

2. Practice in state actions pending in Oregon depends on the requirement of the state in which the discovery will occur. The state court will issue a commission or letters rogatory for discovery from a nonresident upon a proper motion, supported by an affidavit substantiating the need for the discovery. See ORCP 38 B and 55. Do not forget that state rule authorizes service of subpoenas by mail so long as the target of service assents to service by that method. ORCP D(3) and (4). Be sure to confirm that agreement with the service.

C. Public Records Requests

1. For requests directed to public bodies, see ORS 192.410-505. An attorney litigating against a public body may need to serve a copy of a records request on that public body. See ORS 192.420.


3. The procedural pathway governing requests and review of denials depends on the public body to which the request is directed. See ORS 192.450-.490.

4. Federal documents may be requested under the Federal Freedom of Information Act (5 USC §552), with reference to specific agency records and inspection provisions set forth in the CFRs and agency guidelines.
IV. Review of Major Distinctions Between Federal and State Court Practice

A. Initial disclosures

While federal rule anticipates formal initial disclosures, the District of Oregon has a tradition of waiving this requirement. LR 26-2 allows the parties to waive the disclosures, and there is a form on the court’s website for documenting waiver. U.S DISTRICT COURT: DISTRICT OF OREGON, Fed. R. Civ. P. 26(a) Discovery Agreement, available at https://www.ord.uscourts.gov/index.php/component/phocadownload/category/44-generic?download=176:frcp-26-agreement.

Except in certain actions, such as for a dissolution of marriage, there is no equivalent to initial disclosures for state actions. See e.g. ORS 107.089.

B. Interrogatories

As noted earlier, this is an important tool in federal litigation that is not available in state actions.

C. Time limits on the conduct of discovery

In Oregon state court, as a general rule, once discovery commences the only time limit on completing it is the reasonableness of the time left for a response. Local practice is evolving at the county level—even among individual judges and, particularly, for more complex cases—to call for work on a scheduling order. (Be sure to check each circuit court’s website for current local rules regarding scheduling orders, pretrial and trial judge assignments, and trial settings. A list of all circuit court local rules can be found at https://web.courts.oregon.gov/Web/OJDPublications.nsf/SLR?OpenView&count=1000.)

By contrast, the rule in federal court is for formal scheduling orders with default deadlines cutting off general discovery, a subsequent cut-off for a period of expert discovery, and staged pretrial submissions. Discovery requests must be propounded in time for the response to be due before the cut-off. These deadlines can only be changed by court order pursuant to motions.

D. Experts

Pre-trial discovery of experts is allowed in federal actions only; none in state actions absent agreement among the parties. (It happens!) Oregon courts have repeatedly prohibited discovery of experts in the absence of such agreement. See Stevens v. Czerniak, 336 Or 392, 400-05 (2004); Nielson v. Brown, 232 Or 426 (1962); Brink v. Multnomah County, 224 Or 507 (1960) (seminal discussions of work product and expert discovery). But see Gwin v. Lynn, 344 Or 65, 75 (2008) (allowing a party to depose a witness who is serving as an expert witness and a fact witness). This is colloquially referred to in Oregon as “trial by ambush.” Hinchman v. UC Mkt., LLC, 270 Or. App. 561, 569 (2015).

An issue may arise when a party seeks a pretrial (OEC 104) hearing on the admissibility of an opponent’s expert testimony. Oregon appellate courts have not yet ruled on “the propriety

During the time set aside by the scheduling order, FRCP 26(a)(2) anticipates that the discovery of experts will be initiated by an exchange of reports. The format of the report is determined by FRCP 26(a)(2)(B). Exchanges of records and depositions usually follow, but not always.

V. Getting Court Assistance

A. Requirement to confer

The parties to a discovery dispute have an obligation to confer before filing discovery motions in both state and federal courts. LR 7-1(a); UTCR 5.010(2)-(3). Motions will be rejected as a matter of course unless the first paragraph is a certificate of compliance with those rules. Failure to perform the duty may serve as a basis for outright denial of the motion, irrespective of its other merits.

B. Protecting confidential or privileged materials

1. Material confidential but not privileged

Commercially sensitive and confidential information that is within the scope of discovery and that does not fall within a recognized privilege cannot be withheld from production, but it may be entitled to protection limiting its dissemination. To that end, stipulated protective orders are routinely entered in state court. Even contested motions for protective orders are generally granted unless the restriction proposed is likely to impair the opposing party’s use in some unfair fashion.

The local federal court, however, has a heightened bar for such orders. Entry of a protective order that restricts public access to such information will only be allowed on a detailed, particularized showing of need. See Foltz v. State Farm Mut. Auto. Ins. Co., 331 F3d 1122 (9th Cir 2003) (holding that presumption favoring public access requires a particularized showing for confidentiality).

2. Material withheld on basis of privilege or work product

In order to protect privileged material, specific written objections need to be served on a timely basis.

In most cases, preparation of a log of items withheld will be required. The description needs to be sufficiently detailed to allow the challenging party to evaluate the claims of privilege. Be prepared for the court, either federal or state, to order in camera review for close calls. Unsubstantiated claims of privilege may draw sanctions in both federal and state courts here.
It is always the burden of the party claiming privilege to establish the circumstances justifying the claim. This rule stands in contrast to the burden on motions to invade work product, where the moving party must show substantial need.

C. Motions to Compel

The moving party has the burden of establishing that the information being sought falls within the scope of discovery. See, e.g., Kahn v. Pony Express Courier Corp., 173 Or App 127, 133 (2001); Frease v. Glazier, 330 Or 364, 371 (2000) (moving party must show that exception to privilege applies to opposing party’s material). But see Jane Doe 130 v. Archdiocese of Portland in Oregon, 717 FSupp2d 1120 (2010) (stating federal court position that burden on opposing/objecting party to show request beyond scope). Format of motions is essentially the same at both levels: the motion, memorandum, and supporting affidavits which lay out the sequence of discovery, describes efforts at resolution, and identify key documents supporting.

D. Sanctions

Authority exists in the rule and case law for a wide range of sanctions in cases involving discovery abuse. Awards of expenses for motions to compel are very infrequent, but outright dismissals or judgment are not unheard of in cases where the record reflects prolonged failure to participate in discovery. See, e.g., Asato v. Dunn, 206 Or App 753, 759 (2006) (affirming outright dismissal as discovery sanction). Remember that specific findings from the trial court are necessary to protect order and/or to preserve issues. Peeples v. Lambert, 345 Or 209, 216 (2008).

VI. Discovery in Criminal Cases

A. Governing statutes

The primary statutes governing discovery in criminal cases are ORS 135.805 through ORS 135.873. The discovery statutes now specifically encompass Brady/Giglio materials. See ORS 135.815(g).

Certain information must be redacted before a defense attorney provides discovery materials to a defendant. See ORS 135.815(5)-(6).

B. Victims’ rights provisions

Oregon law provides that:

If contacted by the defense or any agent of the defense, the victim must be clearly informed by the defense or other contacting agent, either in person or in writing, of the identity and capacity of the person contacting the victim, that the victim does not have to talk to the defendant’s attorney, or other agents of the defendant, or provide other discovery unless the victim wishes, and that the victim may have a district attorney, assistant attorney general or other attorney or advocate present during any interview or other contact.
ORS 135.970(2). For purposes of this rule, “victim” is defined broadly as “the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime against the person or a third person.” ORS 135.970(5). There are other aspects of this definition that apply to particular types of cases, so any attorney handling a criminal case in Oregon should review this section carefully.

C. Subpoenas

Subpoenas in criminal cases are primarily governed by ORS 136.555-136.603. A subpoena may not be used for discovery. Where materials are sought, the default procedure is to subpoena the materials directly to the trial or hearing at which the subpoenaing party seeks to use them in evidence. If the attorney needs access to the materials ahead of time in order to be able to use them effectively, an order directing early production and copying may be sought. See ORS 136.580(2).

In State v. Cartwright, 173 Or. App. 59, 20 P.3d 223 (2001), rev’d, 336 Or. 408, 85 P.3d 305 (2004), the Oregon Court of Appeals set forth an analysis to govern motions for early production. This analysis largely tracked the federal standard as set forth in United States v. Nixon, 418 U.S. 683 (1974). The Oregon Supreme Court reversed the intermediate court, but this reversal was on separate procedural grounds. See State v. Cartwright, 336 Or. 408, 85 P.3d 305 (2004). Some Oregon trial courts continue to follow the framework set forth by the Court of Appeals, so attorneys should be familiar with that court’s analysis.
Chapter 2

Oregon Pleadings and Parties: Tips to Consider and Traps to Avoid

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I. INTRODUCTION

These materials are intended to provide you with basic resources regarding Oregon’s state court procedures for pleadings and parties. However, be forewarned: each county may also have local practices—some written and some not—that can trip you up. In addition to consulting the Oregon Rules of Civil Procedure (“ORCP”) and Uniform Trial Court Rules (“UTCR”), the wise lawyer will also check the Supplemental Local Rules (“SLR”) for the county in which they plan to appear. Most rules can be accessed online through the Oregon Judicial Department at http://www.courts.oregon.gov/OJD/rules/pages/index.aspx.

Check with the local bar organizations for local practice aides. For example, Clackamas County Bar Association has a “lawyer Survival Guide” which provides detailed information about filing and practices in that county or the Multnomah Bar Association which has judicial profiles and county practice materials.

II. DIFFERENCES—THE OREGON PLAINTIFF

While many states have adopted civil procedures that mirror those used by federal courts, Oregon has a long history of carefully preserving its own method of doing things. One of the areas where Oregon has withstood federalization is in its pleadings. The careful plaintiff will consider those differences before preparing and filing his or her complaint in Oregon.

A. One Form of Action

ORCP 2 provides that there is only one form of action in Oregon, known as a civil action. Except as specifically identified in the rules, statutes, or Constitution, procedural distinctions between actions at law and suits in equity have been abolished in Oregon.

B. Code Pleading Versus Notice Pleading

Oregon state courts require “code” or fact pleading that must contain a plain and concise statement of “ultimate facts” constituting a claim for relief without unnecessary repetition. ORCP 18A. As a result, claims or defenses must state ultimate facts to support the elements of each particular claim or defense. Davis v. Tyee Industries, Inc., 295 Or 467, 476, 668 P2d 1186 (1983). With Oregon’s system, mechanisms are in place to frame, narrow, or broaden the ultimate facts alleged and to narrow the issues for discovery and trial. See ORCP 21D and E. It is the allegations contained in the pleadings that are used to measure relevance of particular evidence at trial. Thus, in the absence of amendment, evidence outside the scope of the issues pleaded may be excluded through the doctrine of variance. Compare Smith v. Fred Meyer, Inc., 70 Or App 30, 687 P2d 1128 (1984). It has become common practice for judges in Oregon to summarize the pleadings rather than read them to the jury.

By contrast, federal and other courts require “notice” pleading, which merely includes a short and plain statement showing that a pleader is entitled to relief. FRCP 8(a)(a). Since federal pleadings are designed to place a party on “notice” of a particular claim or defense, they can consist of a general summary of the position stated. Any further narrowing is more typically achieved through discovery and other procedural mechanisms.
The careful pleading of ultimate facts is best done through a simple detailed recitation of facts, which will withstand a motion attacking the complaint as redundant or frivolous. Conversely, it also requires more than mere notice of the claims being alleged to withstand a motion to make more definite and certain. Thus, there is a certain element of art to a properly alleged complaint that walks the fine line between both ends of the spectrum.

C. Standards for Pleadings and Documents

1. Pleadings Allowed. ORCP 13 provides that the pleadings are the written statements by the parties of the facts constituting their respective claims and defenses. The only permissible pleadings include the complaint, answer, third-party complaint, and reply. An answer may also include a counterclaim against a plaintiff or a cross-claim against a defendant. Answers are necessary in response to cross-claims and third-party complaints. Replies are necessary to respond to counterclaims and to assert an affirmative defense to defenses asserted in an answer. ORCP 13B. Demurrers and pleas are not used. ORCP 13C.

2. Substantive Requirements. ORCP 16 contains several substantive requirements for pleadings filed in Oregon state court. The complaint must have a caption containing the title of the action, the name of the court, the case number, and a pleading designation in accordance with ORCP 13B. In the complaint, the title must include the names of all the parties. However, subsequent pleadings may abbreviate the title by stating the name of the first party on each side, “with an appropriate indication of other parties.” ORCP 16A. The case number, which is assigned when the complaint is filed, should be placed on all pleadings.

The pleading must consist of plain and concise statements in paragraphs that are consecutively numbered in Arabic numerals (i.e., 1, 2, 3, etc.). The contents of each paragraph, where possible, should be limited to stating a single set of circumstances. A paragraph number may then be referred to by number in all subsequent pleadings and may be adopted by reference in a different part of the same pleading. ORCP 16B and D.

Each separate claim or defense must be separately stated. Alternative theories of recovery are allowed as separate counts under the same claim. Even when a party is in doubt as to which of two factual statements is true, they may be pleaded in the alternative, so long as they can be verified in good faith as being consistent with ORCP 17, discussed below. ORCP 16C. Any pleading that contains a claim for relief shall state the ultimate facts constituting that claim, without unnecessary repetition, and must include a demand for the relief called the prayer. The prayer for relief is the request for the relief to which plaintiff thinks it is entitled. The purpose of the prayer is to advise defendant of the precise nature of the demand, in order that the party may be prepared to meet it. Kerschner v. Smith, 121 Or 469, 473, 236 P 272 (1925), 121 Or 469, 256 P 195 (1927). The prayer is not part of the claim, although it may explain or qualify other parts of the pleading. Finch v. Miller, 271 Or 271, 275, 531 P2d 892 (1975); Green v. Cox, 44 Or App 183, 186, 605 P2d 1198 (1980). If recovery of money or damages is sought, the amount thereof must be stated. ORCP 18. However, the amount of a claim for noneconomic damages does not need to be specifically stated, inconsistent with the rule. McKenzie v. Pacific Health & Life Ins. Co., 118 Or App 377, 382, 847 P2d 879 (1993), rev dismissed, 318 Or 476 (1994).
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Pleadings are to be liberally construed, so as to disregard any error or defect that does not affect the substantive rights of the adverse party. ORCP 12. Stringer v. Car Data Systems, Inc., 314 Or 576, 841 P2d 1183 (1992).

3. Technical Requirements. UTCR 2.010 contains detailed instructions for compliance with the technical requirements for pleadings in Oregon. Below is only a brief summary of some of the requirements. Lawyers and legal assistants should familiarize themselves with all provisions. Failure to comply with the requirements could result in a court clerk rejecting a pleading and returning it the lawyer as unfiled or its being stricken. UTCR 1.090. Such a result would be disastrous if the pleading was filed on the last day of a statute of limitations (“SOL”) or other deadline.

a. Title or Caption. The title, or caption, is treated as a formal matter. Its purpose is to identify the parties with the claim and the court. State ex rel. Brookfield Co. v. Mart, 135 Or 603, 609, 283 P 23, 295 P 459 (1931). The caption should indicate the type of claim, such as “personal injury,” “breach of contract,” “injunctive relief,” etc. UTCR 2.010(11)(b).

The caption of the pleading should also contain a statement of whether it is subject to mandatory arbitration.

b. Size and Appearance. Except where designated by the court, all pleadings must be printed or typed on 8.5×11-inch paper that contains numbered lines on the left side. No font is specified, though Times New Roman, Arial, or Courier are common. Blanks in preprinted forms may be completed in handwriting, as may notations by the trial court administrator or a judge.

Printing should be on one side only, double-spaced, and with two to four inches left blank at the top of the first page. Subsequent pages must have a one-inch margin. The name of the document and page number, expressed in Arabic numerals, must appear at the bottom left side of each page, and the attorney or firm name and information, including facsimile and email, must also appear within the document, frequently in the bottom right margin. Exhibits must be marked as such at the bottom right side with an Arabic numeral identifying the exhibit, as well as its page number. UTCR 2.010(2)–(10).

c. Subscription and Verification. Pleadings must be signed by at least one attorney of record who is an active member of the Oregon State Bar or, if a party is not represented by an attorney, by the party. ORCP 17A. The name of the party or attorney signing any pleading or motion must be typed or printed immediately below the signature, and the signatures must be dated. UTCR 2.010(6). While verifications of pleadings have generally been eliminated, there are some unique exceptions for specific statutory claims. The wise practitioner will consult the Oregon Revised Statutes for the type of claim being asserted.

d. Paragraphs. Claims and defenses must be made in paragraphs that are numbered consecutively in the center of the page with Arabic numerals and lowercase letters for any subparagraphs.

4. Special Pleading Rules. Oregon law provides numerous special pleading rules, some of which may be intuitive and some not. Likewise, some are matters of substance, and some procedural. The following is a brief summary of the highlights.
a. **Conditions Precedent.** In pleading the performance or occurrence of all conditions precedent, it is sufficient to generally allege that all conditions precedent have been performed or occurred. A denial of such occurrence, however, must be made specifically and with particularity, forcing the adverse party to establish the proof of such performance at trial. ORCP 20A.

b. **Designation of Type of Claim.** Although UTCR 2.010(11) requires the pleader to designate the type of claim, failure to correctly designate may not be fatal. *Windle v. Flinn*, 196 Or 654, 664, 251 P2d 136 (1952); *Laird v. Frick*, 142 Or 639, 644, 18 P2d 1029 (1933).

c. **Presumptions.** Facts presumed by law need not be alleged. For example, it is unnecessary to allege that a contract within the statute of frauds is in writing when the making of the contract is alleged. See, e.g., *Ingerslev v. Goodman*, 116 Or 210, 216, 240 P 877 (1925); *Smith v. Jackson*, 97 Or 479, 482, 192 P 412 (1920). Similarly, where a corporation is a plaintiff, it is not necessary to allege the corporate existence or that the corporation has the capacity to sue; both are presumed. *Rossman*, *Plain and Concise Language*, 6 Or L Rev 293, 297 (1927). Presumptions can be a powerful ally in trial and are frequently overlooked. An extensive list of evidentiary presumptions is contained in ORS 40.135, Oregon Evidence Code (“OEC”) 311.

d. **Judicial Notice.** Facts judicially noticed need not be alleged. *Peters v. McKay*, 195 Or 412, 421, 238 P2d 225 (1951), reh’g denied 195 Or 412, 246 P2d 585 (1952); *Cameron v. Goree*, 182 Or 581, 599, 189 P2d 596 (1948) (courts take judicial notice of facts that form part of the common knowledge of people who possess average intelligence). However, the careful lawyer will allege facts over which there may be any doubt. Some examples of facts that may be judicially noticed include corporate existence of cities and counties, the existence of ordinances, comprehensive plans, or enactment, incorporation of a city or county, or a private right derived by statute where the title and date of passage are alleged. ORCP 20D; ORCP 20C.

e. **Matters of Record/Written Instruments.** Oregon allows a party to allege something involving a document in one of three ways. They may: (i) summarize the material parts of the document in the body of the pleading; (ii) copy the material parts of the document into the pleading; or (iii) attach a copy of the document to the pleading as an exhibit and incorporate it by reference in the allegations. *Vaughn v. Spence*, 170 Or 440, 448–49, 133 P2d 242 (1943).

Oregon has “consistently adhered” to the above method of pleading. *Vaughn, supra*, 170 Or at 449. However, an exhibit cannot supply ultimate facts to establish a claim; those allegations must still be made in the complaint. Where a written instrument is relied upon as the foundation of a claim and it is set forth in full in the complaint or incorporated by reference, the written instrument prevails over the pleading for its purported legal effect. *Kelley v. Mallory*, 202 Or 690, 697, 277 P2d 767 (1954).

f. **Compliance with the Statute of Limitations.** It is not usually necessary for the plaintiff to allege facts showing compliance with any applicable SOL. Nevertheless, specific facts showing why the SOL is tolled or avoided must be pleaded if it would otherwise appear that the SOL had run. *Hewitt v. Thomas*, 210 Or 273, 276, 310 P2d 313 (1957); *Huycke v.*
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Latourette, 215 Or 173, 176, 332 P2d 606 (1958). In cases where the statute begins to run upon discovery, discovery must be pleaded. Frohs v. Greene, 253 Or 1, 7, 452 P2d 564 (1969).

g. Judgment or Other Determination of Court or Officer. In pleading a judgment or other determination of a court or officer with special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish at trial the facts conferring jurisdiction. ORCP 20B.


i. Libel, Slander, and Fraud. In an action for libel or slander, it is not necessary to allege extrinsic facts to show application to the plaintiff. It is sufficient to say that the same was spoken or published about the plaintiff. If controverted, the plaintiff must establish at trial that it was published or spoken. ORCP 20E.

Certain causes of action, such as fraud must be alleged with greater particularity. The elements of actionable fraud consist of: (i) a representation; (ii) its falsity; (iii) its materiality; (iv) the speaker’s knowledge of its falsity of ignorance of its truth; (v) his intent that it should be acted on by the person and in the manner reasonably contemplated; (vi) the hearer’s ignorance of its falsity; (vii) his reliance on its truth; (viii) his right to rely thereon; and (ix) his consequent and proximate injury. To state a good cause of action, it is necessary that each and every one of the essential elements of fraud be alleged. Musgrave v. Lucas, 193 Or 401, 410, 238 P2d 780 (1951).

j. Time and Place. Only material aspects of time and place are necessary. When matters of quality and quantity are unimportant to a case, they do not need to be alleged as material facts. Within the bounds of ORCP 17, it is sufficient to allege that a certain event occurred “on or about” a certain date when the exact date is unknown.

k. Statutory Duty of Damages. Where a case rests on a statutory duty imposed on a class of persons, the complaint must contain facts bringing the defendant within the statutory class. State Forester v. Obrist, 237 Or 63, 390 P2d 333 (1964). Violation of a statutory duty may be alleged in general terms without pleading the exact language of the statute. Moe v. Alsop, 189 Or 59, 66, 216 P2d 686 (1950), overruled in part in other grounds, Bay Creek Lumber & Mfg.
Where aggravated damages are claimed under a statute, the statute should be recited in the complaint or the claim should be stated as being made under the terms of the statute. *Springer v. Jenkins*, 47 Or 502, 507, 84 P 479 (1906).

### I. Punitive Damages

Oregon has special requirements for the pleading and recovery of punitive damages contained in ORS 31.725 et seq. Plaintiffs may not include a claim for punitive damages in their initial complaint. ORS 31.725(1) and (2). Instead, at any time after the pleading is filed, a party may move the court to allow amendment of the pleading in order to assert a claim for punitive damages. Both the moving and nonmoving parties may submit affidavits and documentation supporting or opposing a punitive damages claim. ORS 31.725(2).

Upon receipt of a motion to amend to add punitive damages, the court will conduct a hearing to determine if there are specific facts, supported by admissible evidence, to allow the punitive damages claim. The court decides the motion based upon a directed-verdict standard. ORS 31.725(3).

The party seeking punitive damages must prove “by clear and convincing evidence” that the party against whom punitive damages are sought “has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.” ORS 31.730(1). The court must issue its decision on the motion to amend a pleading to assert a claim for punitive damages within ten days after the hearing. If the court does not issue a decision within ten days, the motion is deemed denied. ORS 31.725(5). Discovery of evidence of a defendant’s ability to pay is not allowed unless and until a motion to amend is allowed. ORS 31.725(6).

The distribution of a punitive damages award may affect whether it is worth alleging. The Department of Justice Criminal Injuries Compensation Account receives 60% of the award, while the prevailing party receives only 40%, no more than 20% of which may be paid to the prevailing party’s attorney. ORS 31.735. Specific notification and payment procedures apply, not the least of which is a requirement that the prevailing party provide notice in writing of the judgment to the Department of Justice Crime Victims’ Assistance Section in Salem, Oregon, within five days after the entry of the verdict or judgment. ORS 31.735(3).

### m. Information and Belief

If a party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party may allege so, which will have the same effect as a denial. ORCP 19A.

### n. Recitals and Negative Pregnants

No allegation in a pleading is held insufficient merely because it is pled by way of a recital rather than alleged directly. Likewise, no denial is treated as an admission because it contains a negative pregnant. ORCP 20G. Nevertheless, allegations by way of recital rather than direct allegations are not encouraged. The most common example of a recital is an allegation introduced by a “whereas” or an allegation introduced with “by reasons of.” *See Graham v. Corvallis & Eastern R. Co.*, 71 Or 477, 142 P 774 (1914).

### o. Fictitious Parties and Unknown Persons

When you do not know the name of an opposing party, it may be designated by any name, with the pleadings amended to substitute
the true name once it is known. ORCP 20H. However, a pleading should explain why an unknown “Jane Doe” party cannot be specifically identified. When heirs of a deceased are unknown, they may be designated as “unknown heirs.” ORCP 20I. See also ORCP 20J regarding unknown persons when trying to determine an adverse claim, estate, lien, or interest in property. Be wary when the SOL is close, as notice must be received by the proper party.

D. Prerequisites for Certain Claims

A thorough discussion of statutes of limitations and service requirements is beyond the scope of this presentation. Nevertheless, close attention should be paid to the SOL applicable to the type of claims and relief requested. Although based on the same transaction or occurrence, different claims or theories may be subject to different statutes of limitation. A lawyer’s characterization of the claim does not necessarily determine which SOL will apply. Securities-Intermountain, Inc. v. Sunset Fuel Co., 289 Or 243, 611 P2d 1158 (1980).

More importantly, certain types of claims may contain additional demand or notice requirements. A few examples are included below.

1. Oregon Tort Claims. No action may be maintained arising out of any act or omission of a public body or its agents unless notice of the claim is given as required by ORS 30.275. When a person injured is a minor, incompetent, or otherwise unable to give the notice, the deadline for the notice is tolled up to a maximum of only 90 days. Otherwise, notice must be given within 180 days after the alleged loss or injury, or within one year if the claim is for wrongful death.

2. Insurance Policies—Proof of Claim. Most insurance policies require notice from the insured of any loss or claim in order to activate the insurer’s responsibilities under the policy. See ORS 742.061 (proof of claim required to start claim for attorney fees); American Star Ins. Co. v. Allstate Ins. Co., 12 Or App 553, 558, 508 P2d 244 (1973) (notice over 2.5 years after the accident did not satisfy notice requirement).

3. Conversion. In order to state a claim for conversion in certain circumstances, the party claiming rightful ownership must demand the return of the property and have been refused. See Daniels v. Foster & Kleiser, 95 Or 502, 507, 187 P 627 (1920).

4. Shareholder’s Derivative Action. In most cases, a shareholder may not pursue an action on behalf of the corporation unless the corporate officers and directors have refused to take the action in response to the shareholder’s demand. See Browning v. C & C Plywood Corp., 248 Or 574, 434 P2d 339 (1967).

5. Attorney Fees. Certain claims for personal injury under ORS 20.080, and breach of contract under ORS 20.082, where the prayer is for less than $10,000 may substantively qualify for recovery of attorney fees, but only where a demand is sent to the defendant at least 30 days before commencement of the tort action and 20 days before commencement of the contract action.
E. Choosing the Correct Parties

1. Capacity

a. Governmental Units. The United States, the State of Oregon, municipal corporations, counties, and certain specified public agencies, commissions, boards, departments, and corporations may commence proceedings in Oregon courts.

b. Corporations. Foreign corporations may sue in Oregon, but where a foreign corporation is “transacting business” in Oregon and has not obtained a certificate of authority, it cannot maintain an action. ORS 60.704(1). However, even where a foreign corporation has not obtained the necessary certification, it can still be sued. ORS 60.704(5).

Where a corporation is dissolved, it still may have an action prosecuted in its corporate name; a dissolved domestic corporation may be sued on a cause of action arising prior to dissolution if the action is commenced within five years. ORS 60.644(2)(c). Whether a dissolved foreign corporation is subject to suit depends upon the laws of its domicile.

c. Partnerships and Unincorporated Associations. A limited partnership may sue or be sued as an entity. Any partnership or unincorporated association may sue in any name that it has assumed and be sued by any name that it has assumed or by which it is known. ORCP 26B.

d. Minors and Incapacitated Persons. ORCP 27 places restrictions on when a party who is a minor or incapacitated may appear. Minors who are a party to an action must appear by a conservator or guardian. If they do not have one, the court will, under some conditions, appoint one. ORCP 27A. Incapacitated persons must also appear by or through a conservator or guardian. If they do not have one, the court will, under some conditions, appoint one. ORCP 27B.

2. Permissive Joinder. ORCP 28 provides the conditions under which parties may be joined in an action. All persons may join as plaintiffs in an action if they assert any right to relief jointly, severally or in the alternative in respect to or arising out of the same transaction or occurrence and if a common question of fact or law will arise in the action. A party need not be interested in obtaining or defending against all the relief demanded. ORCP 28A. Separate trials may also be sought where justice so requires. ORCP 28B. Judgment may be entered for one or more of the parties according to their respective rights to relief or to their liabilities. ORCP 28A.

3. Compulsory Joinder. ORCP 29 applies to compulsory joinder. When a party is needed for just adjudication and is subject to service of process, it is to be joined if feasible under the standards identified in ORCP 29A. When a necessary party cannot be made a party, the court must determine whether the action can equitably continue or should be dismissed under the standards identified in ORCP 29B.

A person who is subject to service must be joined as a party if: (a) in that person’s absence, complete relief cannot be accorded among those already parties; or (b) that person claims an interest relating to the subject of the action and is so situated that the disposition in the person’s absence may: (i) as a practical matter, impair or impede the person’s ability to protect that interest; or (ii) leave any of the persons already parties subject to a substantial risk of
incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. ORCP 29A. Where a necessary party has not been joined and can be joined, the court shall order that the person be made a party. Where the person should join the action as a plaintiff but refuses to do so, that person must be made a defendant, the reason being stated in the complaint.

4. Misjoinder or Nonjoinder of Parties. ORCP 30 provides that parties may be dropped or added by order of the court on motion of any party or on the court’s own initiative at any stage of the proceeding and on such terms as are just. The rule further provides that any claim may be severed and proceeded with separately. Misjoinder of parties is not grounds for dismissal of an action.

5. Substitution of Parties. ORCP 34 provides the procedure for substitution of parties, whether resulting from death, disability, or some other issue relating to a party. Substitution will allow the action to proceed with the substitute party. The rules provide that an action may be continued upon death of a plaintiff, if the claim survives, by substituting the personal representative or successor in interest upon motion to the court within one year. ORCP 34D. On motion, the court may also substitute a guardian, conservator, or successor in interest within one year after disability of a party. ORCP 34C. Additional time and procedural limitations apply to other substitutions.

6. Real Party in Interest. ORCP 26A requires that every action be prosecuted in the name of the real party in interest. The real party in interest is the person or entity that has the right to enforce the claim. The rule is designed to protect the defendant from being harassed later for the same claim for relief. Verret v. Leagjeld, 263 Or 112, 501 P2d 780 (1972). Certain persons and entities, such as executors, administrators, bailees, or trustees, may sue in another party’s name without that other party being joined. ORCP 26A. Insurers frequently are allowed to sue in the name of their insured through use of a loan receipt that maintains the insured’s interest in the matter. Failure to join a real party in interest will not result in immediate dismissal of the action. Instead, the real party in interest is given a reasonable time to ratify, join, or substitute into the action. ORCP 26A.

F. Choosing Where to File

1. State Versus Federal Court. While this presentation is focused on state court procedures, the wise lawyer will not overlook whether to file his or her action in federal court if all other things are equal. Obviously, some actions involving federal questions may only be maintained in federal court. Conversely, some actions, due to the amount in controversy or the absence of diversity, must be pursued in state court. When either court would have jurisdiction, considerations should be given to a number of factors that could have a dramatic effect on the ultimate result.

a. Federal Court Pros. Federal judges have law clerks and cases are immediately assigned to a judge. The rules and court practices are more specified. Many attorneys believe summary judgment is more likely to be granted by federal judges who have more resources to review briefs and write opinions. Judges are used to seeing attorneys from all over the state. There is no “trial by ambush.”
b. **Federal Court Cons.** Some practitioners complain that federal court interferes with lawyers “trying their cases.” Rules and procedures control most aspects of a case, including disclosures, pretrial conferences, scheduling orders, and evidence. While those procedures can force parties to look at their case more quickly, they also tend to significantly increase litigation costs. And there is no “trial by ambush.”

c. **State Court Pros.** State court is less expensive, and there tends to be more flexibility in how cases are prepared and tried. Depending on the county, some courts virtually leave the parties alone until just before trial. Some cases are subject to nonbinding arbitration. Some courts implement and enforce a fast-track system in which trials go within 12 months from filing; other counties do not. No disclosure or deposition of expert witnesses; no interrogatories, i.e. “trial by ambush.”

d. **State Court Cons.** Judges tend to have less time to spend on a particular matter. Budgetary restrictions can impede availability of judges for trial of civil matters. Some cases are subject to nonbinding arbitration. Some counties will not set over trial dates due to fast track rule. No disclosure of or deposition of experts so you are faced with “trial by ambush.”

2. **Venue.** Once the decision is made to file in state court, a plaintiff must then determine the appropriate venue. If a contract is involved, the choice may already have been specified in the document. Depending on the type of case, venue may exist in several different counties. See ORS 14.030 et seq.. With many exceptions, venue generally exists in the county where the cause of action arose or at least one of the defendants resides. Corporations are typically deemed to be a resident of any county where they conduct regular, sustained business.

If a choice is available, consideration should then be given to strategic factors such as distance for the client and lawyers, local customs and procedures, and the relative nature of typical jurors in each county.

G. **Commencing the Action**

ORCP 3 provides that, “other than for purposes of statutes of limitations,” an action is commenced by filing a complaint with the clerk of the court.

1. **Commencement Within the SOL.** ORS 12.010 and 12.020 generally regulate commencement for the purposes of determining whether an action was commenced before expiration of a particular SOL. For those purposes, commencement does not occur until the complaint is filed and the summons and complaint are served on a particular defendant.

2. **Relation Back.** Oregon subscribes to a unique “relation back” system for determining commencement that allows for additional time to serve a defendant. Pursuant to ORS 12.020(2), if the complaint is filed within the time allowed by the applicable SOL, service of the summons and complaint within 60 days of the filing date allows the service to “relate back” to the date of filing. Thus, the action is deemed to have been commenced on the date of filing. Beware: The relation back only applies within 60 days of the filing date, not the SOL. Many attorneys have filed well before the SOL expired but failed to serve within 60 days thereafter and before the SOL expired. As a result, the action was not deemed commenced.
3. **Time.** Except as governed by ORS 174.120, ORCP 10 provides important information on how time periods are calculated in Oregon. Specifically, the date of the act, event, or default from which the period of time begins to run is not included, but the last day is included unless it falls on a Saturday, Sunday, or legal holiday. In that event, the time period runs until the next day that is not a Saturday, Sunday, or legal holiday. *See also* ORS 187.010 and 187.020 for a list of legal holidays.

When the period of time prescribed or allowed is less than seven days, then intermediate Saturdays, Sundays, and legal holidays are not included in the computation of time. When the time is more than seven days, all days within the period are counted. ORCP 10A.

Except with regard to service of summons, additional time may be allowed when a party is served with documents by mail. If the party served is required to do some act within a prescribed period after service of a notice or other paper on that party, then three days are added to the response period when service is made by mail. ORCP 10C.

**III. DIFFERENCES—THE OREGON DEFENDANT**

Many of the rules and procedures discussed with regard to the Oregon plaintiff also apply to the Oregon defendant. To avoid undue repetition, only the differences are highlighted. An answer or responsive pleading is due with 30 days after service of the summons. If service is by publication, then the answer or responsive pleading is due within 30 days from the date of first publication. ORCP 7C.

**A. General Considerations**

1. **Tender of Defense.** The process of tendering the defense of a matter is a procedure through which a party gives notice of a pending action to another party from whom indemnity may be sought. The party tendering the defense typically demands defense of, or participation in, the action. Tenders of defense are based upon principles of collateral estoppel and the law of indemnity.

Where a claim is covered under an indemnity agreement, or the allegations of the complaint, without amendment, state a claim within the terms of the indemnity agreement, the indemnitor has a duty to defend the indemnitee. *St. Paul Fire & Marine Ins. Co. v. Crosetti Bros., Inc.,* 256 Or 576, 475 P2d 69 (1970). The tender of defense may be based upon express indemnity agreements, such as insurance policies, contracts, and warranties, or through implied indemnity, such as that arising out of a relationship between the parties.

Before tendering the defense of the matter, thought should be given to several strategic considerations, specifically:

a. Is indemnitor able to respond to a judgment?

b. What is the caliber of the defense that the indemnitor would provide?

c. Is the indemnitor obliged to defend all claims or just some of the claims asserted?
d. Would acceptance of the defense with reservation of rights as to ultimate responsibility for a judgment be acceptable?

The tender of defense must be given within a “reasonable time.” Notice immediately before trial is generally not sufficient.

2. Extensions of Time. Local custom and practice is to grant defendants an extension of time upon request. Where defense counsel has insufficient time to prepare an appropriate response to a claim, it is common practice to ask opposing counsel for an extension of time in which to appear or respond. Professional courtesy dictates that a reasonable extension be given whenever possible. However, any agreement concerning the extension of time to respond to a claim should be memorialized in writing. Where the SOL is expired, or rapidly approaching, it is also common practice for a plaintiff to request confirmation that there are no service or SOL defenses that will be raised. In that manner, it is less likely that a plaintiff will be prejudiced by the extension.

Most lawyers will automatically write to plaintiff’s counsel informing them of their representation of a particular defendant, stating that they intend to appear and requesting that they be given at least 10 days’ notice of any intent to apply for default. Doing so requires that defense counsel receive notice before a motion for default is filed.

3. Removal to Federal Court. Immediately upon receipt of the complaint, counsel should determine whether the case is removable to federal court pursuant to 28 USC §1441(a) (diversity of citizenship) or 28 USC §1441(b) (federal question). Petition for removal of a civil action must be filed within 30 days after the defendant receives a copy of the initial pleading or a service of summons. 28 USC §1446(b).

There are a number of procedural “snafus” associated with removal, and considerable care should be taken in analyzing these issues, particularly in multiple-party cases. For example, a removal petition filed 29 days after the moving defendant was served but 42 days after the first defendant was served was held not to be timely filed. See Balestrieri v. Bell Asbestos Mines, Ltd., 544 F Supp 528 (ED Pa 1982).

Moreover, where a jury trial is requested before removal, or if the procedure of the court in which the case was originally filed does not require express demand for jury trial (like Oregon), demand is not required after removal unless specifically directed by the court. Otherwise, the petitioner has 10 days after filing the petition for removal in which to demand a jury trial; a nonpetitioner has 10 days after being served with notice of removal. FRCP 81(c).

B. Motions to Consider

Generally, motions against a complaint must be filed within the time allowed for a party to appear and defend under ORCP 7C. If a motion is filed, it may not file its answer until the issues raised in the motion are resolved. ORCP 21A.

Several motions are available under ORCP 21, including motions to dismiss a particular claim or the entire complaint for various reasons, motions to strike sham, frivolous, or irrelevant
pleadings, motions to strike a complaint containing more than one claim not separately stated, or motions to make the allegations more definite and certain.

In the past, a great deal of money was spent by lawyers filing and responding to Rule 21 motions. A wise defendant will carefully consider whether it is strategically better to file motions to clean up a complaint or to simply allow the allegations to stand as pleaded. In addition to the economic considerations, filing such motions frequently serve to educate the plaintiff and improve the claims. Many experienced litigators feel that the use of pretrial motions only educates the opponent as to the opponent’s weaknesses. Others take the “first door out” approach and are of the view that the use of pretrial motions encourages settlements and the early disposition of cases. The expense associated with pretrial motion practice should be discussed with the client, and the ultimate decision should be that of the client.

C. Defenses That Must Be Raised or Waived

Certain defenses may be raised either by motion or by answer. ORCP 21G(1) provides that defenses of lack of jurisdiction over a person, another action pending, insufficiency of summons or process, or insufficiency of service are waived if not included in an ORCP motion or a responsive pleading. No amendment is allowed to raise those defenses.

ORCP 21G(2) provides that other defenses may be raised by amendment if leave of court is obtained and the party did not know, and could not have reasonably known, that the defense existed. Those defenses include legal capacity to sue, real party in interest, and that the action was not commenced within the time allowed by statute.

Under ORCP 21G(3), defenses for failure to state ultimate facts constituting a claim, failure to join an indispensable party, or an objection of failure to state a legal defense to a claim may be made in a pleading permitted under ORCP 13B, in a motion for judgment on the pleadings, or at trial on the merits. However, the wise practitioner will not wait until that time to pursue such a motion. Finally, a defense that the court lacks jurisdiction over the subject matter may be made at any time.

D. Filing the Answer

1. Admissions. ORCP 19A requires a defendant to admit or deny the allegations upon which the adverse party relies. Where a defendant admits a fact in the answer, that admission relieves the plaintiff from proving that allegation at trial. Owen v. Bradley, 231 Or 94, 100, 371 P2d 966 (1962). However, an admission may be waived where the case is tried as if the admitted fact were still at issue. ORCP 23B. An admission in the pleadings of one defendant is not admissible against a codefendant, especially when the interests of the defendants are adverse to one another. Hyatt v. Johnson, 204 Or 469, 477, 284 P2d 358 (1955).

2. Denials. ORCP 19A also requires a party to state in short and plain terms the party’s defenses to each claim asserted. If a party lacks sufficient knowledge or information sufficient to form a belief as to the truth of the matter alleged, then it must so state, and doing so will have the effect of a denial. Denials must fairly meet the substance of the allegations denied. The pleader must admit as much of an allegation as is true and deny the remainder. Thus, an
entire allegation may not be denied simply because part of it is not true. That portion that is true must be admitted. ORCP 19A.

A general denial is permissible only when the pleader intends in good faith to controvert every allegation of the pleading. Allegations to which a response is required, other than the amount of damages, are deemed admitted if not denied. If no responsive pleading is required, the allegations will be treated as denied or avoided. ORCP 19C. Other issues sometimes arise as to certain types of denials, as follows.

a. **The Negative Pregnant.** A denial that does not completely respond to an allegation and therefore implies that the allegation may be partly true is known as a “negative pregnant.” ORCP 20G provides that no denial shall be treated as an admission on the ground that it contains a negative pregnant.

b. **Evasive Denial.** A denial must “fairly” meet the substance of the allegations denied. ORCP 19A. A refusal to admit or deny allegations may result in the allegations being admitted. ORCP 19C.

c. **Argumentative Denial.** An argumentative denial is an allegation by the responding party that could not be true if the plaintiff’s allegations were true. Under the traditional rule, an argumentative denial was regarded as not denying anything and therefore admitting the allegation in the plaintiff’s complaint. See Loveland v. Warner, 103 Or 638, 204 P 622, reh’g denied 103 Or 638, 206 P 298 (1922) (the insertion of a clause pretending to admit a fact not pleaded in the complaint is not proper, raises no issue, is not capable of being denied, and should not be tolerated).

3. **Defenses.** All defenses must be stated separately. ORCP 16B. Alternative and inconsistent defenses are permissible and often tactically wise, though it may also be more effective to decide on a single defense before the time of trial. One should plead partial as well as complete defenses. Mitigation of damages is an example of a partial defense that, to be relied upon, generally must be pleaded. Kirby v. Snow, 252 Or 592, 595, 451 P2d 866 (1969). Partial defenses should be pleaded as such, or one risks having them treated as a complete defense.

4. **Affirmative Defenses.** In responding to a preceding pleading, a party shall set forth any matter constituting an avoidance or affirmative defense. ORCP 19B. Any fact that does not directly controvert a fact necessary to be established by the claimant is a new matter and must be pleaded as an affirmative defense. Hubbard v. Olsen-Roe Transfer Co., 110 Or 618, 626, 224 P 636 (1924). If doubt exists as to the admissibility of evidence of any defensive matter under a denial, it is appropriate to set it forth as an affirmative defense. However, the party asserting an affirmative defense will generally bear the burden of proof on that issue.

Certain matters must be set forth affirmatively, including accord and satisfaction, arbitration and award, assumption of risk, comparative or contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, laches, payment, release, res judicata, statute of frauds, statute of limitation, unconstitutionality, and waiver. A nonexhaustive list of other affirmative defenses not listed in the rules include mistake, adhesion, impossibility, incompetency, failure to mitigate, and setoff or recoupment.
Ordinarily, the party alleging the defense must prove it. While the burden of proof shifts to the plaintiff when a defendant raises a matter as an affirmative defense that could equally be proven under a denial, a defendant cannot take advantage of that rule where it assumes the burden of proof on an issue. Thus, when affirmatively controverting an issue that may be part of the plaintiff’s burden of proof, the defendant should specifically deny that, by so pleading, it is admitting that it is assuming the burden of proof. That position should be clearly stated in the pleading so that a trial or an appellate court cannot cite reliance on the pleadings as a rationale for imposing the burden of proof on the defendant.

a. Effect of Failure to Plead Affirmative Defense. Failure to plead an affirmative defense in the first responsive pleading may result in a waiver, and the party failing to plead the defense may not be permitted to introduce evidence in support of the defense. ORCP 23B.

b. Joinder of Affirmative Defense. A party is permitted to assert as many affirmative defenses as it may have. ORCP 19B, 21A. If more than one affirmative defense is pleaded, each must be set forth separately. ORCP 16B. Defenses may also be inconsistent. ORCP 16C. When one is in doubt as to which of several statements of fact is true, statements may be alleged in the alternative. However, inconsistent statements of fact within the pleader’s knowledge are improper. See ORCP 17C.

E. Counterclaims, Cross-Claims, and Third-Party Claims

1. Counterclaims. A counterclaim is a claim by the defendant against the plaintiff that is asserted in the answer. ORCP 13B. A defendant may assert as many counterclaims, both legal and equitable, that the defendant may have against the plaintiff. ORCP 22A(1). Oregon generally does not require compulsory counterclaims. Burlington Northern Inc. v. Lester, 48 Or App 579, 583, 617 P2d 906 (1980). However, when a counterclaim is based upon facts common with any affirmative defenses asserted by the defendant, or where only part of the counterclaim is asserted, the doctrine of res judicata or collateral estoppel might preclude subsequent litigation in a separate proceeding. Thus, some counterclaims may be compulsory even though Oregon’s counterclaim rule only mentions permissive counterclaims.

2. Cross-Claims. When an action is against two or more defendants, any defendant may allege in its answer a cross-claim against any other defendant. A cross-claim must: (a) arise out of the transaction or occurrence that is the subject matter of the complaint; or (b) relate to any property that is the subject matter of the original action. ORCP 22B(1). A cross-claim may include a claim for indemnity or contribution. ORCP 22B(2).

Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the joinder rules. ORCP 22D(1). The joinder rules should not be confused with the rules allowing third-party complaints. Compare ORCP 22C. Oregon rules contain a special joinder provision relating to counterclaims that is not found in the federal rules. ORCP 22D(2) provides that a defendant in an action on a contract brought by an assignee may join all or any as persons liable for attorney fees under ORS 20.097 (maker and plaintiff/assignee both liable to defendant for attorney fees if the defendant prevails in contract action and contract provides for recovery of such fees). The Oregon rules provide that a party
joined under ORCP 22D is to be treated as a defendant for purposes of service of summons and time to answer under ORCP 7. ORCP 22D(3).

3. **Third-Party Complaint.** After the commencement of an action, a defending party, as a third-party plaintiff, may file and serve a complaint against a person not then a party to the action as a third-party defendant, alleging that the person is or may be liable to the defending party for all or part of the plaintiff’s claim against it. The third-party defendant, in turn, can then raise defenses, counterclaims, or cross-claims just like any other party. ORCP 22C. Where a counterclaim is asserted against a plaintiff, the plaintiff also may cause a third party to be brought into the action. ORCP 22C(2).

ORCP 22C(1) requires that a defending party, as a third-party plaintiff, must commence a third-party action not later than 90 days after service of the plaintiff’s summons and complaint on the defending party. Otherwise, it must obtain agreement of parties who have appeared and leave of court. Although some circuit court judges have ruled that the court has the power to grant leave to file third-party actions without regard to whether the other parties to the action agree, this appears to be contrary to the express language of ORCP 22C(1). The careful lawyer will decide whether to file a third-party claim as soon as possible after the complaint is served.

**IV. GENERAL CONSIDERATIONS**

A. **Amended and Supplemental Pleadings**

1. **Amendment as a Matter of Course.** ORCP 23A allows a party to amend its pleading once as a matter of course at any time before a responsive pleading is served, or, if no response is permitted, the amendment must be filed within 20 days after the pleading to be amended is served.

2. **Amendment by Leave of Court Before Trial.** Where a party cannot amend as a matter of course, it must obtain leave of court or written consent of the adverse party before it can amend its pleading. “[L]eave shall be freely given when justice so requires.” ORCP 23A. Review of a trial court’s decision to deny leave to amend is for abuse of discretion. *Quillen v. Roseburg Forest Products, Inc.*, 159 Or App 6, 10, 976 P2d 91 (1999). Thus, beware of last-minute motions to amend filed by the opposing party. Note that some defenses ordinarily waived if not raised can be raised by amended pleading under certain limited circumstances. ORCP 21G(2).

An order granting leave to amend should be obtained prior to filing and serving the amended pleading. Once the order is entered, the pleading can be filed. The pleading should be filed and served after the order is entered. A proposed pleading should be filed with a motion to amend. However, the proposed pleading does not become an “official” pleading unless so ordered by the court.

3. **Amendments After Motion.** After a motion to dismiss, a motion to strike an entire pleading, or a motion for judgment on the pleadings has been granted, the court may, upon such terms as may be proper, allow a party to amend its pleading. ORCP 25A. Where a court orders that part of the pleading be stricken or where the pleading, or a part of it, is to be made
more definite and certain, the pleading must be amended pursuant to ORCP 23D. See ORCP 25A.

4. Amendments After Commencement of Trial. Where issues not raised by the pleadings are not objected to at trial, they will be treated in all respects as if they had been raised in the pleadings. On motion of any party at any time, even after judgment, the pleadings may be amended to conform to the evidence and to raise such issues. However, failure to amend does not affect the outcome of the trial on those issues. If evidence is objected to as not being within the scope of the pleadings, the court may allow the pleadings to be amended if the merits of the action will be advanced and the objecting party cannot demonstrate prejudice. ORCP 23B. In some circumstances, a court may grant a continuance to enable the objecting party to meet the new evidence. ORCP 23B.

5. Relation Back of Amendments. Whenever a claim or defense asserted in an amended pleading arises out of the conduct, transactions, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. ORCP 23C.

An amendment changing the party against whom a claim is asserted relates back if the conditions described above are satisfied and, within the statute of limitations, the new party: (1) had notice of the action so it will not be prejudiced in its defense; and (2) knew, or should have known, that, but for a mistake concerning the identity of the proper party, the action would have been brought against the new party. ORCP 23C.

6. Procedure for Amendments. Under ORCP 23D, where a pleading is amended before trial, a new “amended” pleading is filed, labeled as such. Occasionally, an amendment may be made by deletions or interlineation in the original pleading. ORCP 23D. An amended pleading must be complete in itself, without reference to the preceding pleading or amendments by the party. ORCP 23D. Once an original pleading has been amended, the original pleading no longer is operative for the action. Nevertheless, it may still serve as evidence or an admission. Whenever an amended pleading is filed, it must be served on all parties who are not in default. A default judgment may be entered in accordance with the original pleading served upon any party who is in default or against whom a default has already been entered. However, the amended pleading need not be served on such parties in default unless that pleading asks for additional relief against them. ORCP 23A.

7. Response to Amendments. Unless the court orders otherwise, a party must respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amendment, whichever is longer. ORCP 15C.

B. Interpleader

ORCP 31A provides that persons having claims against the plaintiff may be joined as defendants and be required to interplead when their claims are such that the plaintiff is or may be exposed to multiple liability. A defendant exposed to similar liability may obtain such interpleader by way of a cross-claim or counterclaim. It is not grounds for objection that the claims do not have a common origin or that they are adverse to and independent of one another.
It is also not grounds for objection that the plaintiff alleges that it is not liable in whole or in part to any or all of the claimants.

ORCP 31B provides that any property or amount involved as to which the plaintiff admits liability may, upon order of the court, be deposited with the court “or otherwise preserved, or secured by bond in an amount sufficient to assure payment of the liability admitted.” Once that is done, the court may enjoin all the parties before it from pursuing any other action regarding the subject matter of the interpleader action. Following a hearing, the court may order the plaintiff discharged from liability “as to the property deposited or secured” before determining the rights of the claimants.

Interpleader is often considered as a possibility when an insurer is faced with multiple claims against an insured that exceed the amount of a liability policy. In theory, interpleading the policy limits would allow the insurer to avoid incurring defense costs on the claims. However, in practice, doing so without first obtaining a release for an insured could expose the insurer to allegations of bad faith in leaving its insured unprotected.

C. Ethical Considerations—ORCP 17

In form, ORCP 17 is similar to its federal counterpart, FRCP 11. In practice, however, it is infrequently necessary or imposed by Oregon judges. Fortunately, Oregon’s collegiality has avoided a flood of Rule 17 sanction motions except when they are well-deserved.

1. Sanctions for Improper Pleading

a. Certification to the Court. ORCP 17 is somewhat similar to FRCP 11 in requiring certain certifications to the court by signing pleadings, motions, and other papers. Sanctions are available for violations of these rules. An attorney or party signing a pleading certifies that:

i. The statements are based upon reasonable knowledge, information, or belief, formed after making reasonable inquiry under the circumstances;

ii. The pleading is not made for an improper purpose, such as delay or a needless increase in the cost of litigation;

iii. The legal positions taken are “warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law;” and

iv. The allegations or denials are supported by the evidence.

Any allegations or denials that the party or attorney does not wish to certify as supported by the evidence must be “specifically identified.” The party or attorney’s signature constitutes a reasonable belief that an allegation so identified will be supported by the evidence after further investigation and a denial so identified is reasonably based upon a lack of information or belief. ORCP 17C.
ORCP 17(D) also provides that, in the event a pleading or motion is signed in violation of the rule, the court may, upon motion or its own initiative, impose sanctions on the party or the attorney. Sanctions under ORCP 17 are limited to amounts sufficient to reimburse the moving party for attorney fees, including fees for bringing the motion. ORCP 17(D)(4). ORCP 17 sanctions may also include amounts sufficient to deter future false certifications. ORCP 17(D)(4). However, sanctions sufficient to deter future false certification must be based “upon clear and convincing evidence of wanton misconduct.” ORCP 17(D)(4).

2. **Asserting a Claim in Bad Faith.** ORS 20.105 provides for an award of attorney fees for disobeying a court order or other misconduct. It requires a court to award reasonable attorney fees to a party against whom a claim, defense, or ground for appeal or review is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense, or ground, upon a finding by the court that the party willfully disobeyed a court order or that there was no objectively reasonable basis for asserting the claim, defense, or ground for appeal.

These rules and statutes impose a definite moral and professional obligation upon the attorney. An attorney should not rely solely on information provided by the client if the attorney can obtain or verify the facts through other sources with reasonable diligence. Thus, whenever possible, an attorney should investigate the merits of a client’s case before filing. If the attorney decides that an action lacks merit, the attorney should advise the client promptly before filing. If the case has already been filed, the attorney should get the client’s consent to dismiss or seek leave to withdraw. Counsel should always be mindful of potential personal liability for improperly bringing or continuing an action.
Chapter 3
Depositions in Oregon

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I. The Culture and Tone of Oregon Depositions

A. Depositions in Oregon are typically conducted in a highly professional manner.

B. Counsel are usually respectful of one another and the tone is courteous.

C. Extensive argument, sarcasm or bickering between counsel is uncommon.

II. Sources of Information About Local Deposition Practice

A. State Court.

1. Civil Motion Panel Statements of Consensus.

2. Multnomah County Deposition Guidelines.

B. Federal Court.

1. District of Oregon Local Rule 30 (“LR”).


III. Noticing the Deposition

A. Confer before noticing any deposition.

1. It is the customary practice to confer regarding the date, time and place for a deposition prior to issuing the deposition notice.
2. Except for good cause, counsel will not serve a notice of deposition until they have made a good faith effort to confer with all counsel regarding a mutually convenient date, time, and place for the deposition. LR 30-2.

B. Specify the means by which the deposition will be recorded.

1. The party seeking the deposition must provide advance notice that the deposition will be recorded by non-stenographic means. ORCP 39 C(4); FRCP 30(b)(3).

2. It is important to adhere to this rule, as the lawyer defending the deposition may object to the deposition proceeding because she would have prepared the witness differently for a video deposition as opposed to a stenographic deposition.

IV. Who May Attend the Deposition Other Than Parties and Their Counsel

A. State Court

1. Attendance of Experts – Attendance of an expert at a deposition has generally been allowed, but has been reviewed on a case-by-case basis upon motion of a party. Multnomah County Circuit Court Civil Motion Panel Statement of Consensus.
2. Attendance of Others – On occasion, persons other than the parties, their counsel and experts are allowed to attend a deposition. This is an unusual circumstance and should be cleared with opposing counsel ahead of time or through application to the court.

3. If you have any doubt about whether the attendance of a person you want to bring to a deposition will cause a problem, deal with it in advance. ORCP 36 C(5) permits a party to request that discovery be conducted with no one present except persons designated by the court. Good cause must be shown for the exclusion of persons from a deposition. ORCP 36 C(5).

B. Federal Court

1. The federal rules likewise place the burden on the party seeking to exclude persons from the deposition to move for a protective order.

2. As a practical matter, a deposition will likely not go forward if someone wants to attend, who the deponent wishes to exclude. So again, deal with these disputes ahead of time so everyone’s time is not wasted.
V. Conduct of the Deposition

A. Conduct the deposition with the same level of decorum that you would if your trial judge was sitting in the room.

1. Counsel present at a deposition will not engage in any conduct that would not otherwise be allowed in the presence of a judge. LR 30-3.

2. This will maximize the chances of obtaining additional discovery if a motion to compel is filed, and will diminish the likelihood that the questioning lawyer will run afoul of the Court.

B. Objections must be concise and non-argumentative.

1. Speaking Objections - Attorneys should not state anything more than the legal grounds for the objections to preserve the record, and objection should be made without comment. ORCP 39 D(3); Multnomah County Deposition Guidelines.

2. Objections should be stated concisely, and in a non-argumentative and nonsuggestive manner. FRCP 30(c)(2).
3. Objections to “form” are common and usually a safe, non-argumentative way of stating on the record, and therefore preserving for trial, an objection to the form of the question being asked.

4. Classic Examples of what to avoid.

i. Avoid engaging in strings of objections that have no relationship to the question asked.

ii. Avoid adding comments to the end of an otherwise valid objection.

iii. Avoid suggesting the answer to the question through an objection.

5. There should be no argument on response to an objection.

i. There should be no argument in response to an objection or an instruction not to answer. LR 30-4.
ii. Argument in response to an objection is neither necessary or desirable. Multnomah County Deposition Guidelines.

C. Instructions not to answer should be used sparingly, and only when justified by rule.

1. Instructions not to answer should only be used to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under FRCP 30(d)(3). FRCP 30(c)(2).

2. In state court, a party similarly may instruct a deponent not to answer a question only when necessary to present a motion for protective order to the Court, to enforce a limitation already ordered by the Court, or to protect a privilege or constitutional or statutory right. ORCP 39 D(3).

3. In both federal and state court it is wise to promptly move for a protective order if you have instructed a witness not to answer on grounds that a question is harassing, irrelevant or should otherwise not be inquired into.

D. Breaks

1. The customary practice is that breaks may be taken if requested by the witness or counsel as long as there is no question pending. Multnomah County Deposition Guidelines.
2. A break may be taken even if there is a pending question, if the question involves a matter of privacy right, privilege, or an area protected by the constitution, statute, or work product. LR 30-5; Multnomah County Deposition Guidelines.

E. Duration of the deposition.

1. The federal rules provide for a presumptive seven hour limit for a deposition. FRCP 30(d)(1).

2. There is no strict time limit for depositions under the Oregon Rules of Civil Procedure. As a practical matter, the vast majority of state court depositions do not exceed the seven hours prescribed by the Federal Rules.

VI. Resolving Disputes Arising During the Deposition.

A. Feel free to confer with opposing counsel off the record.

B. If disputes cannot be resolved, consider seeking immediate judicial intervention through a telephone conference with the trial judge if one is assigned, or with the Presiding Judge.
1. A telephone conference during the deposition is a highly cost effective way to resolve disputes.

2. The mere prospect of such a conference may immediately curb misconduct by an opposing lawyer.

3. Many Oregon federal and state court judges would prefer to contemporaneously rule upon disputes that arise during the deposition.

   i. If the parties have a dispute that may be resolved with assistance from the Court, or if unreasonable or bad faith deposition techniques are being used, the deposition may be suspended so that a motion may be made immediately and heard by an available judge, or the parties may hold a telephone conference with the Court. LR 30-6.

   ii. If the parties have a problem which may be solved by assistance from the court, they should briefly suspend the deposition and contact the presiding court for hearing on the record by phone or at the courthouse. Multnomah County Deposition Guidelines.
VII. Sanctions for Misconduct

1. Appropriate sanctions may be imposed on any person who impedes, delays, or frustrates the fair examination of the deponent. FRCP 30(d)(2).

2. While there is no state court analog to FRCP 30(d)(2), Oregon courts have inherent authority to impose sanctions for discovery abuses.

VIII. Use of Depositions at Trial

A. Use in Opening Statement.

1. Whether and how deposition testimony can be used in the opening statement will be up to the individual trial judge’s discretion.

2. Judges frequently will allow video clips from depositions of the parties to be played during opening statements.

3. Use of limited, tightly-edited, deposition clips in this fashion can be highly effective.
B. Use of Depositions at Trial for Impeachment.

1. Depositions are often used to impeach a witness in one of three ways: 1) the traditional way, by handing the witness a copy of the deposition; 2) by projecting the deposition on a screen in the courtroom; or 3) by playing tightly-edited video clips.

2. I have not experienced a judge who declined to allow one of these three methods, however, use of projections and video will in part depend upon the technology available in the court room.

3. In recent trials I have found the method of projecting the deposition Q and A the most effective because the jury can follow along, but you can run into some of the technical difficulties that sometimes plague the use of video on the fly in the courtroom.
MULTNOMAH COUNTY DEPOSITION GUIDELINES
Presented by the Multnomah Bar Association Court Liaison Committee.

The attorneys and judges of Multnomah County have asked for clarification of local deposition practice. These guidelines are the result of a collaboration between the bench and bar, and are designed to provide uniformity and thereby reduce disputes during discovery depositions. No attempt is made to cover every potential area of dispute; instead, the intent is to cover the majority of avoidable problems arising during discovery depositions.

SCOPE OF DEPOSITION. ORCP 36B(1) provides that any matter not privileged may be inquired into during deposition if reasonably calculated to lead to admissible evidence. If unreasonable or bad faith deposition techniques are being used, the deposition may be suspended briefly, and a motion to limit pursuant to ORCP 39E may be made and heard by an available judge.

OBJECTIONS. ORCP 39D(3) creates a mechanism so that the attorney whose question is objected to may accept the objection as an invitation to correct an alleged defect in the question; rejection of the invitation may result in exclusion of the question and answer at trial. Attorneys should not state anything more than the legal grounds for the objection to preserve the record, and objection should be made without comment to avoid contamination of the answers of the witness. Argument in response to the objection is neither necessary nor desirable.

INSTRUCTIONS NOT TO ANSWER. The only basis for an instruction not to answer a question reasonably calculated to lead to the discovery of admissible evidence is in response to an attempt by the attorney taking the deposition to inquire into an area of privacy right, privilege, an area protected by the constitution, statute, work product, or questioning amounting to harassment of the witness. Any other objection to inquiry, such as lack of foundation, competence, asked and answered, etc., can be preserved with recitation of a brief objection.

DEPOSITION DISPUTES. If the parties have a problem which may be solved by assistance from the court, they should briefly suspend the deposition and contact the presiding court for hearing on the record by phone or at the courthouse. Presiding court will provide names of judges and will give preference to judges who have previously heard matters in the case or judges on the Multnomah County Motion Panel.

PENDING QUESTIONS. If a break in questioning is requested, it shall be allowed so long as a question is not pending. If a question is pending, it shall be answered before a break is taken, unless the question involves a matter of privacy right, privilege or an area protected by the constitution, statute or work product.

PERSONS PRESENT. Any party may attend a deposition. Non-party witnesses are excluded at the request of any party. Parties and non-witness may be excluded by the court upon hearing, or if they disrupt the proceedings.

Approved, MBA Board of Directors, September 1992
Revised December 1992
Reviewed and reapproved, MBA Board of Directors, March 7, 2012
CIVIL MOTION PANEL STATEMENT OF CONSENSUS
Current as of February 1, 2013

The Civil Motions Panel of the Circuit Court is a voluntary group of judges who agree to take on the work of hearing and deciding pretrial motions in civil actions that are not assigned specially to a judge. Periodically, the motion panel judges discuss their prior rulings and the differences and similarities in their decisions. When it appears panel members have ruled similarly over time on any particular question, it is announced to the bar as a “consensus” of the members.

The current consensus of the Panel’s members are set out below. The statements do not have the force of law or court rule; the statements are not binding on any judge. A consensus statement is not a pre-determination of any question presented on the merits to a judge in an action. In every proceeding before a judge of this court, the judge will exercise independent judicial discretion in deciding the questions presented by the parties.

1. **ARBITRATION**

   **A. Motions** - Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator. UTCR 13.040(3). A party may show cause why a motion should not be decided by the arbitrator.

   **B. Punitive Damages** - Where the actual damages alleged are less than $50,000, the pleading of a punitive damages claim which may be in excess of the arbitration amount does not exempt a case from mandatory arbitration.

2. **DISCOVERY**

   **A. Medical Examinations (ORCP 44)**

   1. Vocational Rehabilitation Exams - Vocational rehabilitation exams have been authorized when the exam is performed as part of an ORCP 44 examination by a physician or a psychologist.

   2. Recording Exams and Presence of Third Persons - Audio recordings have been allowed absent a particularized showing that such recording will interfere with the exam. Videotaping or the presence of a third person has been denied absent a showing of special need (e.g., an especially young plaintiff).

   3. We have ordered the pretrial disclosure of the percentage of an examiner’s income received from forensic work and amount of the examiner’s charges. We have ordered that the information be provided for the most recent three years. We have permitted the information to be provided by an affidavit from the examiner, instead of the underlying documentation. We have not conditioned the examination itself on the disclosure of the information.

Motion Panel Statement of Consensus
As Of February 1, 2013

Revised 03/14/2013
Chapter 3—Depositions in Oregon

Page 2 of 5

B. Depositions

1. Attendance of Experts - Attendance of an expert at a deposition has generally been allowed, but has been reviewed on a case-by-case basis upon motion of a party.

2. Attendance of Others - Persons other than the parties and their lawyers have been allowed to attend a deposition, but a party may apply to the court for the exclusion of witnesses.

3. Out-of-State Parties - A non-resident plaintiff is normally required to appear at plaintiff’s expense in Oregon for deposition. Upon a showing of undue burden or expense, the court has ordered, among other things, that plaintiff’s deposition occur by telephone with a follow-up personal appearance deposition in Oregon before trial. Non-resident defendants normally have not been required to appear in Oregon for deposition at their own expense. The deposition of non-resident corporate defendants, through their agents or officers, normally occurs in the forum of the corporation’s principal place of business. However, the court has ordered that a defendant travel to Oregon at either party’s expense, to avoid undue burden and expense and depending upon such circumstances as whether the alleged conduct of the defendant occurred in Oregon, whether defendant was an Oregon resident at the time the claim arose, and whether defendant voluntarily left Oregon after the claim arose.

4. Videotaping - Videotaping of discovery depositions has been allowed with the requisite notice. The notice must designate the form of the official record. There is no prohibition against the use of BOTH a stenographer and a video, so long as the above requirements are met.

5. Speaking Objections - Attorneys should not state anything more than the legal grounds for the objections to preserve the record, and objection should be made without comment.

C. Experts

Discovery under ORCP 36B(1) generally has not been extended to the identity of nonmedical experts.

D. Insurance Claims Files

An insurance claim file “prepared in anticipation of litigation” has been held to be protected by the work product doctrine regardless of whether a party has retained counsel. Upon a showing of hardship and need pursuant to ORCP 36B(3) by a moving party, the court has ordered inspection of the file in camera and allowed discovery only to the extent necessary to offset the hardship (i.e., not for production of entire file).

Motion Panel Statement of Consensus
As Of February 1, 2013

Revised 03/14/2013
Chapter 3—Depositions in Oregon

E. Medical Chart Notes

1. Current Injury - Medical records, including chart notes and reports, have been generally discoverable in personal injury actions. These are in addition to reports from a treating physician under ORCP 44. The party who requests an ORCP 44 report has been required to pay the reasonable charges of the practitioner for preparing the report.

2. Other/Prior Injuries - ORCP 44C authorizes discovery of prior medical records “of any examinations relating to injuries for which recovery is sought.” Generally, records relating to the “same body part or area” have been discoverable, when the court was satisfied that the records sought actually relate to the presently claimed injuries.

F. Photographs

Photographs generally have been discoverable.

G. Privileges

Psychotherapist - Patient - ORCP 44C authorizes discovery of prior medical records of any examinations relating to injuries for which recovery is sought. Generally, records relating to the same or related body part or area have been discoverable. In claims for emotional distress, past treatment for mental conditions has been discoverable. See OEC 504(4)(b)(A).

H. Tax Returns

In a case involving a wage loss claim, discovery of those portions of tax returns showing an earning history, i.e., W-2 forms, has been held appropriate, but not those parts of the return showing investment data or non-wage information.

I. Witnesses

1. Identity - the court has required production of documents, including those prepared in anticipation of litigation, reflecting the names, addresses and phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, attorneys have been allowed to provide a “list” of occurrence witnesses, including their addresses and phone numbers.

2. Statements - Witness statements, if taken by a claims adjuster or otherwise in anticipation of litigation, have been held to be subject to the work-product doctrine. Generally, witness statements taken within 24 hours of an accident, if there is an inability to obtain a substantially similar statement, have been discoverable. ORCP 36B(3) specifies that any person, whether a party or not, may obtain his or her previous statement concerning the action or its subject matter.

Motion Panel Statement of Consensus
As Of February 1, 2013

Revised 03/14/2013
J. Surveillance Tapes

Surveillance tapes of a plaintiff taken by defendant generally have been protected by the work-product privilege, and not subject to production under a hardship or need argument.

3. VENUE

A. Change of Venue (forum non conveniens) - Generally, the court has not allowed a motion to change venue within the tri-county area (from Multnomah to Clackamas or Washington counties) on the grounds of forum non conveniens.

B. Change of Venue - FELA - The circuit court generally has followed the federal guidelines regarding choice of venue for FELA cases.

4. MOTION PRACTICE

A. Conferring and Good Faith Efforts to Confer (UTCR 5.010) -

1. “Conferring.” We have held that “to confer” means to talk in person or on the phone.

2. Good Faith Efforts to Confer. Because “confer” means to talk in person or on the phone, a “good faith effort to confer” is action designed to result in such a conversation. In various cases, motion judges have held that a letter to opposing counsel, even one that includes an invitation to call for a discussion, does not constitute a good faith effort to confer unless the moving attorney also makes a follow-up phone call to discuss the matter. We have held that a phone call leaving a message must be specific as to the subject matter before it constitutes a good faith effort to confer. Likewise, a message that says simply: “This is Jane. Please call me about Smith v. Jones,” is not enough. Last minute phone messages or FAX transmissions immediately before the filing of a motion have been held not to satisfy the requirements of a good faith effort to confer.

3. Complying with the Certification Requirement. UTCR 5.010(3) specifies that the certificate of compliance is sufficient if it states either that the parties conferred, or contains facts showing good cause for not conferring. The judges on the Motion Panel have held that the certificate is not sufficient if it simply says “I made a good faith effort to confer.” It must either state that the lawyers actually talked or state the facts showing good cause why they did not.

B. Copy of Complaint - The failure to attach a marked copy of the complaint to a Rule 21 motion pursuant to UTCR 5.020(2) has resulted in denial of the motions. UTCR 1.090.

Motion Panel Statement of Consensus
As Of February 13, 2013

Revised 03/14/2013
5. **DAMAGES**

**Non-economic Cap** - The court has not struck the pleading of non-economic damages over $500,000 on authority of ORS 31.710 *(former ORS 18.560)* (Note: the Oregon Supreme Court ruled that ORS 18.560(1) violates Article I section 17, Oregon Constitution, to the following extent: “. . . The legislature may not interfere with the full effect of a jury’s assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature.” *Lankin v. Senco Products, Inc.*, 329 Or 62, 82 (1999)).

6. **REQUESTING PUNITIVE DAMAGES**

**A.** All motions to amend to assert a claim for punitive damages are governed by ORS 31.725, ORCP 23A, UTCR Chapter 5 and Multnomah County SLR Chapter 5. Enlargements of time are governed by ORS 31.725(4), ORCP 15D and UTCR 1.100.

**B.** A party may not include a claim for punitive damages in its pleading without court approval. A party may include in its pleading a notice of intent to move to amend to claim punitive damages. While discovery of a party’s ability to pay an award of punitive damages is not allowed until a motion to amend is granted per ORS 31.725(5), the court has allowed parties to conduct discovery on other factual issues relating to the claims for punitive damages once the opposing party has been put on written notice of an intent to move to amend to claim punitive damages.

**C.** All evidence submitted must be admissible per ORS 31.725(3); evidence to which an objection is not made is deemed received. Testimony generally is presented through deposition or affidavit; live testimony has not been permitted at the hearing absent extraordinary circumstances and prior court order.

**D.** If the motion is denied, the claimant has been permitted to file a subsequent motion based on a different factual record (i.e. additional or different facts) without the second motion being deemed one for reconsideration prohibited by Multnomah County SLR 5.045.

**E.** For cases in mandatory arbitration, the arbitrator has the authority to decide any motion to amend to claim punitive damages. The arbitrator’s decision may be reconsidered by a judge as part of de novo review under UTCR 13.040(3) and 13.100(1).
Chapter 4
The Disciplinary Process: Basics You Need to Know

DAWN EVANS
Disciplinary Counsel’s Office
Oregon State Bar
Tigard, Oregon

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The description of Oregon’s attorney discipline process given below is based upon the current Bar Rules of Procedure. To the extent it is impacted by rule changes that will become effective January 1, 2018, italicized language highlights the changes.

Introduction

Oregon’s attorney discipline system assures due process for both complainants and accused lawyers, provides accessibility to information, and seeks outcomes appropriate in each case, taking into consideration both past precedent and the individual circumstances of the matter at hand. It is administered by a professional staff that works in conjunction with volunteers who perform legal analysis and decision-making functions that are essential to the success of the system. Lawyers who are the subject of complaints may be represented by counsel at any point in the process they may choose to retain representation.

While many aspects of Oregon’s system are common to other states’ processes, in some respects Oregon is either unique or in the minority in its approach. For example, because the Oregon State Bar (OSB) is subject to public records laws, its discipline system is open to the public from the inception of a disciplinary inquiry about a lawyer. A member of the public who asks whether a lawyer has been the subject of any grievances can be provided information about not only matters for which the lawyer has been disciplined but as well matters that have been dismissed. This is in stark contrast to the vast majority of states, which maintain confidentiality to some level of their process—typically, with the filing a formal proceeding. Additionally, while many states have a private reprimand as an available sanction, Oregon does not. Moreover, Oregon is one of only a handful of states that has permanent disbarment as an available sanction. In most states, lawyers who are disbarred are eligible to apply for reinstatement after some period of time.

Oregon’s Rules of Procedure governing its disciplinary process were originally enacted in 1984. These rules, colloquially termed “the BRs,” established the creation of a professional staff dedicated to investigation and prosecution of attorney complaints in the form of the Disciplinary Counsel’s Office (DCO) working in tandem with a constellation of volunteer groups with different functions. The DCO staff includes eight lawyers, a paralegal, an investigator, an office manager, and three legal secretaries (one of whom also monitors diversions and probations). With a limited ability to make autonomous decisions about matters in investigation, the DCO answers to the

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1 BR 1.7(b); BR 2.10(f)
2 Records pertaining to matters dismissed by the Client Attorney Assistance office are maintained for a period of three years from the date of dismissal. Records pertaining to matters dismissed by the Disciplinary Counsel are maintained for a period of ten years from the date of dismissal.
3 BR 6.1(d)
State Professional Responsibility Board (SPRB) in seeking authority to pursue a formal proceeding and obtaining authority to resolve any matter not dismissed during the initial investigatory stage.\(^4\) Approximately ten years ago, the Client Assistance Office (CAO) was established within the General Counsel’s office to handle intake of complaints. The CAO is staffed with three lawyers and two support staff.

**CAO Review**

When correspondence is received by the OSB that complains about an Oregon lawyer, it is routed to the CAO, to be reviewed by a lawyer. There is no standing requirement, meaning that any person may complain about the conduct of a lawyer. While it is most typically a former client, it can also be an opposing counsel, an opposing party, another lawyer, or a judge. CAO lawyers may make telephonic inquiries and seek additional information in writing from either the complainant or the attorney before determining whether to dismiss the matter or refer it to the DCO. If, either on the face of the complaint or after investigation, there is “sufficient evidence to support a reasonable belief that misconduct may have occurred,” the matter will be referred to the DCO.\(^5\) Both the complainant and the lawyer who is the subject of the complaint (the respondent) are notified of the outcome. The complainant can appeal a dismissal decision to the OSB’s General Counsel.\(^6\) The General Counsel either affirms the dismissal or refers the matter to DCO. The respondent cannot appeal the decision to refer the matter to the DCO.

**DCO Investigation**

The DCO receives between 200 and 300 referrals from the CAO annually, which constitutes the bulk of its investigatory caseload. Trust account overdraft notifications from financial institutions, indicating that an instrument drawn on a lawyer’s trust account has been dishonored, are sent directly to DCO and typically range between 60 and 100 annually. The DCO may receive referrals from the Client Security Fund Committee when it pays on a claim against a lawyer and it is determined that the conduct at issue has not previously been investigated as potential professional misconduct. The DCO also receives notifications when an Oregon lawyer who is licensed elsewhere has been disciplined by another jurisdiction, in which case a reciprocal discipline proceeding will be commenced. The DCO also on occasion learns from a prosecutor, criminal defense lawyer, judge, a self-report by the lawyer,\(^7\) or other publicity that an Oregon lawyer has been convicted of a crime that subjects the lawyer to discipline. Finally, the DCO has the ability to open investigations in the absence of a written complaint,\(^8\) which may happen because a lawyer has pled guilty to a crime, has been judicially

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\(^4\) BR 2.6(c)(1)
\(^5\) BR 2.5(b)(2)
\(^6\) BR 2.5(c)
\(^7\) A lawyer is not mandated to self-report criminal convictions; however, because in certain circumstances DCO is mandated to seek an immediate suspension of a convicted lawyer’s license, it is not uncommon for lawyers or their criminal defense counsel to report convictions.
\(^8\) BR 2.7
declared not competent, or is the subject of publicity about circumstances or events that, if true, may implicate the Rules of Professional Conduct. The DCO opens 15 to 30 files on its own initiative each year.

In addition to its lawyer staff, the DCO employs support staff that includes an investigator and a paralegal capable of assisting in investigations and providing support during discovery and in advance of trial with such matters as document management and witness coordination. DCO’s investigation is commenced with a letter to the respondent attorney which will include copies of any materials received from the complainant that the lawyer hasn’t already received during the CAO review process. The respondent will be asked to provide a response to anything raised by the complainant. In addition, the DCO lawyer will have precise questions that narrow the issues posed in the original communication. Not infrequently, receiving complete responses to these initially-posed questions will place the DCO lawyer in the position of being able to dismiss the complaint. The letter may also seek documents, such as a copy of the lawyer’s file regarding the representation, copies of any fee agreement, and records pertaining to the receipt and handling of funds received from the client for fees and expenses. A lawyer’s failure to respond to a DCO request for information can itself be a basis for discipline and may result in a proceeding under BR 7.1 that seeks a suspension of the lawyer’s license pending receipt of that response.

In determining whether to dismiss a complaint or seek authority to file a formal proceeding, the DCO determines whether there is probable cause to believe misconduct has occurred. A DCO decision to dismiss is communicated to the complainant and the respondent. The complainant can appeal the dismissal decision to the SPRB. The DCO must obtain authority from the SPRB for any other alternative, which could include issuance of a letter of admonition, referring the matter to the State Lawyers Assistance Committee (SLAC), filing a formal proceeding, authorizing a diversion agreement, or tabling the matter in order for the DCO to obtain additional information. Beginning January 1, 2018, DCO will have the exclusive ability to offer and negotiate a diversion agreement in cases deemed appropriate.

Role of the SPRB

The SPRB is a statewide body of 8 lawyers, representing the seven bar regions in staggered four-year terms, and 2 public members, all of whom are appointed by the OSB president. In a sense, the initial task of the SPRB is deciding whether a formal proceeding should be filed. For all complaints not dismissed by DCO during initial investigation, the SPRB functions as the client body on behalf of the OSB for purposes of negotiating and authorizing settlement, and deciding whether to appeal or cross-appeal outcomes of disciplinary actions. The SPRB also determines

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9 RPC 8.1(a)(2)
10 BR 2.6(b)
11 BR 2.6(b)
12 A diversion agreement permits a lawyer to participate in a contractual remedial program for a defined period of time not to exceed 24 months. If the diversion is successfully completed, the complaint that prompted the diversion will be dismissed. A diversion does not constitute prior discipline.
13 BR 2.3(b)(3)(A)
14 BR 2.3(b)(1)
complainant appeals of DCO dismissals and requests for reconsideration submitted by respondents seeking to reverse or modify the SPRB’s earlier decision to authorize a formal proceeding.

The SPRB meets approximately every six weeks and its meetings are not open to the public as the principal purpose of the meetings is consultation with its lawyer, the DCO. Neither complainants nor respondents or their respective counsel are afforded in-person access to the SPRB on matters before it. In advance of each meeting, SPRB members receive an agenda that includes materials pertaining to each matter under review. In addition, each member will be assigned one or more specific matters being discussed, together with the complete file pertaining to that matter. That member will report on the matter at the meeting and make a recommendation to either concur with or depart from the staff recommendation. For most matters in investigation that the staff is bringing to the SPRB for consideration, staff will be seeking authority to file a formal complaint and perhaps settlement authority. At times, there are circumstances in which dismissal might be the recommended and/or appropriate outcome. As cases proceed and settlement negotiations undertaken, cases will be brought back to the SPRB for its authority regarding settlement.

While the initial investigation determines whether there is probable cause to believe that misconduct has occurred, the burden of proof in formal proceedings is clear and convincing evidence. On occasion, the SPRB may conclude that, although probable cause might exist that professional misconduct was committed, this burden of proof cannot be met and dismiss the matter at the investigatory stage. Other times a dismissal may come about because a respondent attorney successfully argues that the vote to authorize a formal proceeding should be rescinded based upon newly discovered evidence or the application of case law not previously considered.

Additional circumstances can justify a dismissal. If, for example, the respondent is no longer an active member or is not practicing and is already in a posture that would require going through formal reinstatement proceedings, the SPRB may opt to dismiss a new matter.

The DCO may seek authority to dismiss a particular matter because there are already other complaints pending against the respondent that will likely result in disbarment or if the additional matter is unlikely to impact the level of sanction obtained in other pending matters.

The SPRB also has the discretion to dismiss a complaint if, considering the facts and circumstances as a whole, the dismissal would further the interests of justice and would not be harmful to the interests of clients or the public. The factors to be considered in determining whether this option is appropriate include the attorney’s mental state, whether the misconduct is an isolated event or part of a pattern of misconduct, whether potential or actual injury was caused by the attorney’s misconduct, whether the attorney fully cooperated in the investigation, whether the attorney promptly corrected the violation, whether the attorney took substantive steps to prevent misconduct in the future, the seriousness of the violation, whether the violation was a single incident or part of a continuing pattern of misconduct, and whether the violation was intentional or negligent.

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15 BR 5.2
16 BR 2.6(e)(2) sets forth the circumstances under which the SPRB may rescind a decision to file a formal complaint.
17 BR 2.6(f)(2)
18 BR 2.6(f)(2)
and whether the attorney has been previously admonished or disciplined for misconduct.19

Whether a matter is dismissed or a formal proceeding authorized is communicated by the DCO to the complainant and the respondent. The SPRB has the discretion to reconsider a dismissal based upon newly discovered evidence upon a majority vote. Rescission of a vote to authorize a formal proceeding may be made when good cause exists, defined as either new evidence that clearly would have affected the decision to file the formal complaint or the application of legal authority not previously known to the SPRB that demonstrates the decision to file was erroneous.20

Another alternative available to the SPRB is referral of the attorney to the State Lawyers Assistance Committee (SLAC), a statewide committee established in both the State Bar Act and the BRs, with powers and responsibilities that have little parallel in other jurisdictions. Lawyers impaired in their ability to competently represent their clients due to substance use or mental health issues may be candidates for a SLAC referral. Lawyers referred to SLAC are mandated to cooperate with what SLAC recommends,21 which might include a combination of treatment, counseling, random drug or alcohol screens, participation in a twelve-step type program, or regular meetings with an attorney monitor. At times, SLAC may refer a lawyer back to the DCO if the lawyer has failed to comply with SLAC’s requirements. At that point, the lawyer may be subject to discipline for the noncooperation with SLAC. As a separate matter, if the lawyer has become incapable of handling his or her practice, DCO may seek an involuntary transfer of that lawyer to inactive status – one of the special proceedings discussed further below.

**Formal Complaints**

Once authorized by the SPRB, formal complaints are filed by the DCO with the Disciplinary Board Clerk and may incorporate several individual grievances in a single proceeding, reciting as to each a succinct description of the acts or omissions of the lawyer and an identification of the disciplinary rules alleged to be violated.22 A respondent has 14 days in which to file a response after being served.23 The response cannot be a general denial; it must address the allegations made in the formal complaint.24 Amendments of both the complaint and the response are permitted, subject to any time constraints that may be imposed as a pretrial matter by the Disciplinary Board trial panel chair or regional panel chair, if a trial panel chair has not yet been appointed.25

Seventy-five to eighty percent of cases that are not dismissed are resolved without a trial. For cases that involve minor misconduct for which the facts are fully developed at an early stage,
the DCO may seek settlement authority from the SPRB at the same time it authorizes a formal proceeding. Other cases require further discovery once the proceeding has been filed in order for both sides to have a better understanding of a likely outcome, which will positively impact the ability to obtain a negotiated resolution. Discovery may include depositions, document production, and usage of requests for admission. Mediation may be undertaken by agreement of the parties.

In assessing an appropriate sanction for settlement purposes, the SPRB looks to the ABA Standards for Imposing Lawyer Sanctions and to existing Oregon precedents for comparable misconduct. The ABA Standards establish a framework for analyzing the misconduct in relation to the available sanctions, taking into account which ethical duty is violated, the lawyer’s mental state, the actual or potential injury suffered by reason of the misconduct, and the existence of aggravating and mitigating circumstances.

Role of the Disciplinary Board

Cases tried are heard by a three-member panel of the Disciplinary Board (“trial panel”), consisting of two lawyers and one public member from the region where the respondent practices. Members of the Disciplinary Board are appointed by the Supreme Court on the basis of geographical region. They serve three-year terms and may be reappointed. Both the state chair and the regional chairpersons serve until a replacement appointment has been made. Lawyer members must have been admitted to practice in Oregon at least three years prior to their appointment. Each region includes a number of non-attorney members, the total number of which differs in different regions, because the number of Disciplinary Board members varies depending on the size of the lawyer population in their region. Perhaps the most significant change effective January 1, 2018, is the establishment of the position of Adjudicator, an Oregon Supreme Court-selected lawyer, to be employed by the OSB, who will chair every trial panel in which he or she is not disqualified for cause or otherwise unavailable and preside over various special proceedings. In doing so, the Adjudicator takes on the functions presented assigned to the trial panel chair, some functions of the present statewide chair of the Discipline Board (a position that is eliminated), and some functions as to some types of special proceedings that are currently performed by the Oregon Supreme Court. The other two members of the trial panel (for instances in which the BRs call for a trial panel) will be a lawyer and nonlawyer appointed by the regional chair of the Disciplinary Board.

Once assigned to a formal proceeding that is scheduled for hearing, trial panels are typically provided beforehand with a trial memorandum that sets forth the contested issues and applicable case authority. Evidence is taken without strict adherence to the rules of evidence and, in most instances, includes not only evidence as to the factual allegations in the formal complaint but any evidence offered regarding the appropriate sanction.28 Hearings are court-
reported so that a transcript can be produced in the event of an appeal. The panel is required to issue a written opinion within twenty-eight days of conclusion of the hearing, the settlement of the transcript, or the filing of posthearing briefs, if any. Should additional time be required, the trial panel chair may request an extension within the 28-day period with the Disciplinary Board clerk, which will be considered and ruled upon by the state chair of the Disciplinary Board. *After January 1, 2018, the Adjudicator will author all opinions in which the Adjudicator forms a part of the majority, and there are procedures to address a trial panel’s failure to timely issue an opinion. Unlike the SPRB, the Disciplinary Board cannot issue an admonition or offer the lawyer diversion. Although imposition of a stayed suspension is an available sanction, the Supreme Court has disfavored its imposition, stating that it will not force the parties into a probation that has not been mutually agreed upon. Like the SPRB, the Disciplinary Board looks to the *ABA Standards for Imposing Sanctions* and to existing Oregon case law in determining the appropriate sanction in cases where misconduct is found.

**Appeals**

Either the OSB or the respondent may appeal a Disciplinary Board decision. *Beginning January 1, 2018, the deadline for giving notice of seeking the Oregon Supreme Court’s review of a trial panel opinion is 30 days after the Disciplinary Board Clerk has acknowledged receipt of the trial panel opinion. The SPRB determines whether an appeal or cross-appeal will be filed on behalf of the OSB. The DCO files appellate briefs and argues the cases before the Supreme Court, which reviews disciplinary matters *de novo*, with the ability to adopt, modify, or reject the Disciplinary Board’s decision, in whole or in part. In a typical year, the Oregon Supreme Court will render four to six disciplinary opinions.*

**Special Proceedings**

There are several other types of proceedings in which the DCO is the moving party. For example, in circumstances where the lawyer’s continued practice will or is likely to result in substantial harm to any person or the public at large, the DCO may seek a two-thirds vote of the SPRB for authority to petition the Supreme Court to secure an interim suspension of the lawyer’s license until further order of the court. This remedy might be sought when, for example, there are a multitude of complaints filed that, taken together, allege a pattern of theft of client funds within a short period of time. In conjunction with seeking an interim suspension, it may also be necessary or advisable to seek the appointment of a custodian to take over the lawyer’s practice in order to protect the interests of other clients. *After January 1, 2018, the DCO may pursue an interlocutory suspension at any time after the SPRB has determined probable cause exists when it has evidence sufficient to establish probable cause of one or more rules of professional conduct.*

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29 BR 6.1(a)(iv)
30 See *In Re Obert*, 336 Or 640, 89 P3d 1173 (2004).
31 BR 3.1
or the Bar Act, and reasonably believes that clients or others will suffer immediate and irreparable harm by the continued practice of the attorney.

Another circumstance that calls for a rapid response is when a lawyer has been adjudged incapacitated, which could come about as a result of an involuntary mental commitment or the entry of an order in a protective proceeding seeking the appointment of a fiduciary, leaving client matters unattended. In either of those instances, the OSB can file an ex parte application with the Oregon Supreme Court, seeking that the lawyer be placed on involuntary inactive status.\[32\] Where no adjudication as to competence has been entered but it is believed that the lawyer is disabled from continuing to practice law by reason of a personality disorder; mental infirmity or illness; diminished capacity; or addiction to drugs, narcotics or intoxicants, the OSB can petition the Court to make a determination as to whether any of these circumstances exists, which could trigger the court’s entry of an order that the attorney undergo an examination by a qualified expert designated by the court. As in the case of an adjudication of incapacity,\[33\] the court may ultimately enter an order placing the lawyer on an involuntary inactive status. Any disciplinary proceeding that may be pending at the time a lawyer is placed on involuntary inactive status is held in abeyance until further order of the court.\[34\]

Specific procedures apply when a lawyer is convicted in any jurisdiction of a misdemeanor that may involve moral turpitude or a felony. In this setting, a “conviction” occurs upon the entry of a plea of guilty or no contest or upon the entry of a finding or verdict of guilty.\[35\] The DCO refers the matter of the lawyer’s conviction to the Supreme Court, providing copies of the documents that evidence the conviction and indicating the SPRB’s recommendation regarding whether a suspension should be imposed. The lawyer is notified and has 14 days to submit any written material the lawyer wishes the court to consider in determining whether to suspend the lawyer.\[36\] The court may then refer the matter to the Disciplinary Board for hearing, with its determination subject to review by the court. After January 1, 2018, the DCO will determine whether to seek an immediate suspension based upon the conviction without having to first obtain a recommendation from the SPRB; rather, the DCO can petition for an interlocutory suspension based upon the conviction if it has been determined that immediate and irreparable harm to the attorney’s clients or the public is likely to result if a suspension is not ordered.

An Oregon lawyer licensed in another jurisdiction who receives notice that a disciplinary proceeding has been commenced against the lawyer in any other jurisdiction is required to report that occurrence in writing to the DCO within 30 days of receiving notice of the event.\[37\] Often, the DCO learns of the issuance of a disciplinary judgment against an Oregon lawyer directly from the other state because that state is aware of the dual licensure. For purposes of reciprocal discipline, a plea of no contest, a stipulation for discipline, or a resignation while formal charges are pending

\[32\] BR 3.2
\[33\] BR 3.2(b)
\[34\] BR 3.2(b)(3)
\[35\] BR 3.4(a)
\[36\] BR 3.4(b)
\[37\] RPC 8.1(b)
are considered a judgment or order of discipline.\(^{38}\)

The DCO notifies the Oregon Supreme Court of the discipline in another jurisdiction, providing a copy of the judgment or order, which is in and of itself sufficient evidence that the attorney committed the misconduct described in the judgment or order, and conveys the SPRB’s recommendation as to what sanction should be imposed.\(^{39}\) Beginning January 1, 2018, the DCO will determine what sanction should be sought against the lawyer based upon the other jurisdiction’s discipline. The attorney can raise a due process argument about the other jurisdiction’s procedure or make an argument as to why he or she should not be disciplined; the lawyer cannot relitigate the facts underlying the other state’s disciplinary judgment.\(^{40}\) The Court, in determining whether to impose the same, a lesser or greater discipline, or no discipline, can refer the matter to the Disciplinary Board for the taking of testimony.\(^{41}\)

After January 1, 2018, the Adjudicator will make the initial determination of whether the matter can be decided based upon the pleadings or an evidentiary hearing should take place. A rebuttable presumption would impose a sanction equivalent, to the extent reasonably practicable, to the sanction imposed in the other jurisdiction; however, the DCO may give notice of an intention to seek more with a justification for such a request; and, on appeal, the Oregon Supreme Court retains discretion to impose what it deems appropriate, notwithstanding the rebuttal presumption.

Reinstatements

When a lawyer’s license is suspended for any reason, he or she must go through a reinstatement process the extensiveness of which varies depending upon the length of and reason for the suspension. For any disciplinary suspension exceeding six months in length, formal reinstatement is required.\(^{42}\) The lawyer, in that circumstance, carries the burden of establishing that he or she has good moral character and general fitness to practice law and that the resumption of the practice of law will not be detrimental to the administration of justice or the public interest.\(^{43}\) The reinstatement application itself seeks information pertaining to any history of litigation, criminal conduct, and the lawyer’s general fitness. DCO will do both background checks and follow up on any issues raised by the application. Notice of the filing of the application is posted on the OSB website for a period of 30 days.\(^{44}\) At the conclusion of that investigation, a recommendation in favor or against reinstatement is made to the OSB Board of Governors, which votes

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\(^{38}\) BR 3.5(a)

\(^{39}\) BR 3.5(a)

\(^{40}\) BR 3.5(c)

\(^{41}\) BR 3.5(e)

\(^{42}\) BR 8.1. Informal reinstatement pursuant to BR 8.2 pertains to shorter periods of disciplinary suspension and various types of suspension that are not disciplinary – such as a failure to pay Bar dues or to comply with MCLE requirements.

\(^{43}\) BR 8.1(b)

\(^{44}\) BR 8.1(e)
whether to recommend in favor or against reinstatement to the Oregon Supreme Court. When reinstatement is denied, the applicant may within 28 days petition the Court to review the matter. The Court may refer the petition to the Disciplinary Board for hearing.

Upon receiving notice that a petition seeking review has been filed, DCO files a statement of objections, setting forth the issues that caused the disfavorable recommendation on the reinstatement.

At a hearing, the applicant carries the ultimate burden of proof to establish good moral character and general fitness to practice law; but the OSB initially has the burden of producing evidence in support of its position that the applicant should not be readmitted to the practice of law.

45 BR 8.1(e)
46 BR 8.8
47 BR 8.9
48 BR 8.13
In Re: Complaint as to the Conduct of
PETER CARINI, Accused.
OSB 10125
SC S060708
SUPREME COURT OF THE STATE OF OREGON
Filed: August 15, 2013
Argued and submitted April 30, 2013

En Banc
On review from a decision of a trial panel of the Disciplinary Board.
Lee S. Werdell, Bend, argued the cause and filed the briefs for the accused.
Stacy J. Hankin, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM
The accused is suspended from the practice of law for 30 days, commencing 60 days from the date of filing of this decision.

PER CURIAM
In this attorney discipline proceeding, the Bar charged the accused with violating Rule of Professional Conduct (RPC) 8.4(a)(4), which prohibits engaging in conduct that is prejudicial to the administration of justice.1 The trial panel determined that the accused had violated that rule, and it recommended his suspension from the practice of law for 30 days. On review, the accused challenges the trial panel’s determinations regarding the rule violation and sanction. On de novo review, we find that the accused violated RPC 8.4(a)(4), and we further conclude that a 30-day suspension is the appropriate sanction.

I. FACTUAL BACKGROUND
This proceeding arose out of the accused’s failures to appear in court for scheduled hearings in the course of representing four different clients. The accused is a criminal defense attorney, and all four of his clients in the proceedings at issue here were defendants facing pending criminal charges before the Josephine County Circuit Court. We find the following facts by clear and convincing evidence.
A. The Gales and Lockwood Matters
The accused represented Gales in a criminal proceeding; the case was set for a docket call on April 21, 2010. The accused also represented Lockwood in a criminal proceeding that was set for docket call the same day. The accused had received notice of the docket calls in each case in February 2010, and the appearances were entered on his calendar.

1 RPC 8.4(a)(4) provides:
“(a) It is professional misconduct for a lawyer to:
"* * * * *
“(4) engage in conduct that is prejudicial to the administration of justice[.]”
At docket call, which occurs on the Wednesday before the week that a case is scheduled for trial, the parties report whether they are ready for trial the following week. Information obtained at docket call allows the court to efficiently and accurately determine which of the trials that are scheduled for the following week will actually be tried and which will be reset, either on motion or because there are insufficient judges available. Pursuant to a Josephine County Circuit Court local rule, attorneys are required to appear for a docket call either in person or, if prior arrangements are made, by telephone. The mandatory appearance rule allows the court to simultaneously obtain all the information that it needs from the parties and communicate the trial schedule to the parties in an orderly and efficient manner.

The accused did not appear for docket call on April 21 in either the Gales or Lockwood cases. His clients did not appear either. As a consequence, the court issued arrest warrants for both Gales and Lockwood. The court telephoned the accused later in the day on April 21 to inquire why he had not appeared. The accused replied that he had had a trial in another county, that he had forgotten to call the court, and that he had forgotten to give the court a call back number.

Presiding Judge Wolke instructed the accused to send a letter to the court explaining why he had not been present at the docket call. The accused did so, stating that it was his office policy for a staff member to arrange for a telephone appearance for docket calls and that he thought that such an arrangement had been made for the April 21 docket calls. However, an employee of the accused, Byrnes, testified before the trial panel that the court’s “general policy” was for the accused to appear in person unless specific arrangements had been made for a telephone appearance. According to Byrnes, if a telephone appearance had been arranged, a notation to that effect would have been placed on the accused’s office calendar. No such notation had been made for the April 21 docket call appearances.

B. The Burton Matter

The accused represented Burton in a criminal proceeding that was set for a docket call on June 9, 2010, with trial to follow on June 17. Pursuant to the court’s local rules, the accused made prior arrangements to appear by telephone at the docket call. At the appointed time, the court called the accused at the number that he had provided. However, the accused did not answer; instead, the voicemail message gave another number to call. The court called that second number, and no one answered. The accused had begun having trouble with his office phone system in March 2010. The accused knew of the problems with the phone system, but he failed to take steps to ensure that the court could reach him for the docket call on June 9.

Burton did not appear at the docket call, nor did either the accused or Burton appear for trial on June 17. At that point, the court issued a warrant for Burton’s arrest. On August 5, the court held a further hearing at the accused’s request to resolve the outstanding arrest warrant. Both the accused and Burton appeared at the August 5 hearing, and the court recalled the arrest warrant.

C. The Westfall Matter

The accused represented Westfall in a criminal proceeding. A status hearing was set for May 17, 2010, at 1:30 p.m. At a status hearing, the parties report whether any discovery issues exist in a case and whether the case will be resolved with a plea or should be set for trial. The status hearing is an important scheduling tool for the court, because 70 to 80 percent of the cases
are resolved with a plea at status hearings. The results of those hearings allow the court to focus its limited time and resources on those cases that will be tried.

The accused received notice of the status hearing and set the matter on his calendar. The accused called the court at 1:27 p.m. on May 17 and advised that he would be late because he had a court appearance in a different county. The court deferred considering the Westfall matter until 2:45 p.m. Because neither the accused nor Westfall had arrived by then, the court issued a warrant for Westfall’s arrest. The accused arrived at the Josephine County courthouse at about 3:15 p.m., after the court had recessed.

On May 28, the court held another status hearing in the Westfall case at the accused’s request. Both the accused and Westfall appeared at that hearing, and the court recalled the warrant for Westfall’s arrest.

D. The Trial Panel Decision

On October 28, 2010, the Bar filed a formal complaint charging the accused with having violated RPC 8.4(a)(4) by missing the three docket calls and the status hearing. A trial panel was appointed, and the matter was heard on October 4, 2011, and May 17, 2012. The trial panel issued an opinion that included the following findings:

“The accused’s actions in all four cases violated his duty to the legal process and his profession and the duty to protect his clients by failing to abide by court rules. His conduct was prejudicial to the administration of justice in the following particulars:

“He wasted court and staff time in having to deal with his inability to be prompt either in person or by phone for these various court matters. The court is short handed and does not have the time to deal with the accused and his failure to appear for court hearings. In addition, warrants had to be issued for all four cases.

“* * *

“The trial panel finds that the Josephine County Circuit Court has just and actual injuries in the form of additional work, additional staff and additional court time dealing with the accused’s failure to appear. Westfall potentially could have been injured as the court issued a warrant for his arrest for failure to appear. Nothing came of it as Westfall accepted a plea deal the day after the warrant was issued.”

With regard to the proper sanction, the trial panel found, as an aggravating factor, that the accused had a prior disciplinary offense. That offense was based on a February 2010 decision by
a Disciplinary Board trial panel that the accused had violated RPC 3.4(C)\(^2\) and RPC 8.4(a)(4)\(^4\) when, for an extended period in late 2007, in violation of a court rule, he did not resolve known trial scheduling conflicts, resulting in his failure to appear for trial in Josephine County Circuit Court. \((\text{Carini I})\). When the accused did not appear for trial, the court was forced to dismiss a jury called to hear the case. The trial panel in that proceeding also found that the accused had violated a different rule, RPC 1.4(a)\(^3\), in connection with his representation of another client. The trial panel imposed a 30-day suspension, but stayed the suspension pending 90 days’ probation. During that probationary period, the accused was required to adopt measures to avoid the type of scheduling conflicts that had caused the violations at issue. The probationary period in \(\text{Carini I}\) began on April 24, 2010, and ended on July 23, 2010. The conduct at issue in this proceeding occurred either just before or during the 90-day probationary period in \(\text{Carini I}\).\(^4\)

The trial panel in this proceeding also found that the accused had substantial experience in the practice of law, and had not “demonstrate[d] any appreciable appreciation as to the effects of his actions, or lack of action, has had on the court or much less on his clients.” In mitigation, the panel found that the accused had not acted dishonestly and had cooperated during the disciplinary process. After considering those aggravating and mitigating factors, the trial panel recommended that the accused be suspended from the practice of law for 30 days.

II. THE PARTIES’ CONTENTIONS

On review, the accused first contends that the Bar failed to prove that his conduct resulted in “substantial harm,” which, he asserts, is necessary to establish that his conduct prejudiced the administration of justice in violation of RPC 8.4(a)(4). According to the accused, the issuance of an arrest warrant is “simply a matter of a clerk pushing a button which causes the warrant to be printed,” and therefore, his failures to appear did not substantially increase the amount of time or effort that court staff had to expend. Moreover, the accused asserts, because his clients failed to appear at their respective court proceedings, and he had no control over their choices in that regard, the court would have issued the arrest warrants anyway, and thus, his own failure to appear had no additional impact on court operations. The accused reasons that the time that the court spent calling him to determine whether he would appear was insignificant and that “all activities of the judge and his clerk were accomplished in the normal course of their work during regular work hours.” In all, the accused opines, the court likely expended no more than 15 minutes as a result of his failures to appear. The accused relies on this court’s decision in \(\text{In re Lawrence, 350 Or 480, 256 P3d 1070 (2011)}\), for the proposition that time and effort that a court spends communicating with an attorney concerning the attorney’s conduct cannot “serve as the basis for a finding of substantial harm in violation of [RPC 8.4(a)(4)].”

\(^2\) RPC 3.4(c) provides:

“A lawyer shall not:

“* * * * *

“(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists[.]”

\(^3\) RPC 1.4(a) provides:

“(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information[.]”

\(^4\) Neither the accused nor the Bar appealed the trial panel’s decision in \(\text{Carini I}\) to this court.
Second, the accused asserts that the Bar impermissibly based the charge in this case on his aggregated conduct in representing four different clients. The accused argues that permitting the Bar to combine, in a single charge based on RPC 8.4(a)(4), instances of conduct involving multiple client representations would expose “almost every lawyer who has practiced over a lengthy period of time” to prosecution under that rule. Accordingly, the accused urges this court to conclude that a charge under RPC 8.4(a)(4) must be limited to conduct occurring within the course of a single representation of a single client.

Finally, the accused asserts that, to violate RPC 8.4(a)(4), an attorney must intentionally engage in conduct that is prejudicial to the administration of justice. The accused asserts that no evidence in the record shows that he intended to miss his court appearances. The accused asserts that we noted, but did not decide, that issue in In Re Claussen, 322 Or 466, 909 P2d 862 (1996).5

The Bar replies that the accused repeatedly violated court rules in ways that were prejudicial to the administration of justice because, “when a lawyer does not appear for a docket call or a scheduling conference, then the court must take additional steps to contact the lawyer in order to obtain the information it needs to manage the docket. Issuing warrants also requires staff and judicial time.” The Bar further asserts that the accused’s failures to appear created the potential for harm to his clients, who were exposed to the risks of arrest and unrepresented court appearances.

With regard to the accused’s second argument, the Bar contends that the text of RPC 8.4(a)(4) does not prohibit the aggregation of conduct involving multiple client representations in a single charge for violating that rule. Finally, the Bar asserts that RPC 8.4(a)(4) does not include a mental state requirement, relying on this court’s statement in Claussen, 322 Or at 482, that the rule “focuses on the effect a lawyer’s conduct has on the administration of justice, rather than on the lawyer’s state of mind when the conduct is undertaken.”

III. ANALYSIS

With the parties’ arguments so framed, we return to the text of RPC 8.4(a)(4). As noted, that rule provides:

“(a) It is professional misconduct for a lawyer to:

** * * * *

“(4) engage in conduct that is prejudicial to the administration of justice[.]”

To establish a violation of RPC 8.4(a)(4), the Bar must prove that (1) the accused lawyer’s action or inaction was improper; (2) the accused lawyer’s conduct occurred during the course of a judicial proceeding; and (3) the accused lawyer’s conduct did or could have had a prejudicial effect upon the administration of justice. See In re Kluge, 335 Or 326, 345, 66 P3d 492 (2003) (so stating for identically worded former DR 1-102(A)(4)). There are two pertinent aspects to the “administration” of justice: “1) The procedural functioning of the proceeding; and 2) the substantive interest of a party in the proceeding.” In re Haws, 310 Or 741, 747, 801 P2d 818

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5 The accused also raises several challenges to RPC 8.4(a)(4) under the state and federal constitutions. Among other arguments, the accused asserts that RPC 8.4(a)(4) is “void for vagueness.” The accused acknowledges that we rejected a similar argument in In Re Rook, 276 Or 695, 556 P2d 1351 (1976), but he asks that we overrule the decision in that case. We decline to do so. Accordingly, we reject the accused’s argument that RPC 8.4(a)(4) is “void for vagueness,” and we reject his remaining constitutional challenges without discussion.
To prove prejudice to the administration of justice, the Bar must show that an attorney’s conduct:

“[H]armed [or had the potential to harm] the procedural functioning of the judicial system, either by disrupting or improperly influencing the court’s decision-making process or by creating unnecessary work or imposing a substantial burden on the court or the opposing party.”

_Lawrence_, 350 Or at 487. Finally, prejudice to the administration of justice “may arise from several acts that cause some harm or a single act that causes substantial harm to the administration of justice.” _Kluge_, 335 Or at 345.

With that understanding, we turn to the accused’s argument that the Bar failed to prove that his conduct prejudiced the administration of justice. Here, the accused failed on four occasions to appear for scheduled court hearings. Under _Kluge_, the question is not whether each of those acts caused “substantial harm,” but rather whether, taken as a whole, those acts caused “some harm.” We conclude that the accused’s conduct caused some harm to the administration of justice in the Josephine County Circuit Court. The accused’s multiple absences required court staff to attempt to locate him, required the court to issue arrest warrants for his clients after those clients failed to appear for their scheduled hearings, and required the court to schedule and conduct additional hearings. We reject the accused’s characterization of those efforts as minimal or merely a matter of routine. The repeated nature of the accused’s conduct distinguishes this case from _Lawrence_, where the issue was whether a single act by an attorney had caused “substantial harm” to the procedural functioning of the judicial system. See 350 Or at 488-89 (accused did not cause substantial harm by causing judge to call accused to chambers to discuss judge’s “concern” about accused’s release of hearing transcript).

Our conclusion is not undermined by the fact that the accused’s clients also failed to appear for the scheduled hearings. The presiding judge testified before the trial panel that, when an attorney appears at docket call but his or her client fails to appear, the court generally provides the attorney with an opportunity to produce the client before a warrant is issued or, alternatively, to give an explanation for the client’s absence. In some circumstances, the explanation provided by the attorney can obviate the need for issuance of an arrest warrant. The accused’s failure to appear deprived the court of that possible benefit and, as explained above, required the court to expend additional time and resources. Similarly, despite their own failures to appear, the accused’s clients would have benefitted from the accused’s presence at the hearings to provide the court with some information, however minimal, regarding the status of their cases.

We turn to the accused’s second argument that the Bar improperly aggregated, in a single charge, conduct that occurred in the course of multiple client representations. That argument also is unpersuasive. As discussed, RPC 8.4(a)(4) prohibits an attorney from engaging “in conduct” that is prejudicial to the administration of justice. Nothing in the text of the rule limits the scope of its prohibition to conduct occurring in the course of a single representation, and we discern no logical support for such a limitation. In _In re Wyllie_, 326 Or 447, 952 P2d 550 (1998), this court considered, in determining that the accused had violated former DR 1-102(a)(4), five instances where the accused had appeared for court proceedings while intoxicated. Those instances occurred over a three-year period. As we explained:

“The accused appeared in court on several occasions while impaired by the use of alcohol. In each case described above, the judge was distracted from the substance
of the proceeding by the accused’s condition. On at least two occasions the accused’s condition resulted directly in the need to delay the proceedings. Additionally, the accused’s impaired state during his representation of defendants in criminal cases created a risk that those defendants would not receive adequate assistance of counsel and that any conviction or plea would be vulnerable to attack on appeal or in post-conviction proceedings, potentially placing additional burdens on the courts.

“In summary, the accused engaged in repeated instances of conduct, each of which caused some harm to the procedural functioning of the courts. Accordingly, we conclude that he violated DR 1-102(A)(4).”

Id. at 453-54. Because the accused’s proposed limitation lacks support in the text of the rule and is inconsistent with our previous application of it, we reject his second argument without further discussion.

Finally, we turn to the accused’s argument that the Bar was required to prove that he intended to miss court appearances in order to establish a violation of RPC 8.4(a)(4) and that it failed to do so. As noted, the Bar counters that, because RPC 8.4(a)(4) does not contain an express mental state requirement, it was not necessary to prove that the accused acted with a culpable mental state. As an initial matter, we decline the accused’s invitation to read into the rule an intent element that does not appear in its text. See Claussen, 322 Or at 482 (implicitly rejecting a similar argument that predecessor rule, former DR 1-102(A)(4), required proof of intent and stating that “[t]he focus of the rule is on the effect of a lawyer’s conduct on the administration of justice, rather than on the lawyer’s state of mind when the conduct is undertaken”); see also In re Marandas, 351 Or 521, 536, 270 P3d 231 (2012) (same); In re Stauffer, 327 Or 44, 59, 956 P2d 967 (1998) (stating that former DR 1-102(A)(4) “focuses on the effect of the lawyer’s conduct, not on the lawyer’s intent.”).

However, that conclusion does not require us to embrace the Bar’s assertion that RPC 8.4(a)(4) amounts to a strict liability rule. That is, to say, consistent with the approach we have taken in Claussen and other cases, that the focus of the rule is on the effect of conduct, not the accused’s state of mind when the conduct is undertaken, does not necessarily compel the conclusion that the rule authorizes discipline for faultless conduct. In other words, this court was not required in Claussen or any subsequent case to decide whether an accused must have a culpable mental state with respect to engaging in the charged conduct itself, apart from the effect of such conduct on the administration of justice.

It is not necessary to resolve that issue in this case, because (1) the accused does not assert that any particular culpable mental state other than intent is necessary to establish a violation of the rule; and (2) from the facts in the record before us, we find that the accused at least acted negligently -- and did so repeatedly -- in failing to appear for the docket calls and
status conference. In the Gales and Lockwood matters, the accused admitted that he had
gotten to contact the court, and he also admitted that he had forgotten to provide the court
with a number at which to contact him. In addition, the accused knew that his office’s phone
system was not functioning properly, thereby depriving the court of an effective means of
contacting him by phone and contributing to his failure to appear in the Burton case. Finally, the
accused negligently failed to make arrangements to avoid the scheduling conflict between two
court appearances that led to his failure to timely appear in the Westfall case. Because clear and
convincing evidence in the record establishes that the accused repeatedly -- and at least
negligently -- failed to appear, we need not decide whether the absence of an express mental
state requirement in the text of RPC 8.4(a)(4) has the effect of imposing “strict liability” for
conduct that violates that rule. The Bar proved by clear and convincing evidence that the accused
engaged in conduct that is prejudicial to the administration of justice. See RPC 8.4(a)(4).

IV. SANCTION

Having determined that the accused violated RPC 8.4(a)(4), we turn to the appropriate
sanction. We first consider the duty violated, the accused’s state of mind, and the actual or
potential injury caused by the accused’s conduct. Kluge, 332 Or at 259; ABA Standard 3.0. We
next determine whether any aggravating or mitigating circumstances exist. Id. Finally, we
consider the appropriate sanction in light of this court’s case law. Id. In determining the
appropriate sanction, our purpose is to protect the public and the courts from lawyers who have
not discharged properly their duties to clients, the public, the legal system, or the profession. See
ABA Standard 1.1.

An exhaustive review of this court’s case law is not necessary to the disposition of this
case and would not benefit the bench, bar, or public. Here, the accused violated his duty to abide
by the legal rules of procedure that affect the administration of justice. ABA Standard 6.0. The
accused’s conduct also caused actual harm to the procedural functioning of the Josephine County
Circuit Court and potential harm to the accused’s clients. In light of those determinations, under
the applicable ABA Standards the presumptive sanction for the accused is a reprimand. See ABA
Standard 6.23.

The trial panel found as aggravating factors that the accused had a prior history of
discipline, had substantial experience in the practice of law, and had not demonstrated remorse
for his conduct, see ABA Standard 9.22(c), (g), (i). We agree. It bears particular emphasis that
the accused has a prior disciplinary history involving the same rule; specifically, he has
previously violated RPC 8.4(a)(4) by failing to appear for a scheduled trial. ABA Standard
9.22(a). The misconduct at issue in this proceeding occurred after the misconduct at issue in

6 We note that, in construing similarly worded rules of professional conduct, courts in other jurisdictions have held
that a violation may occur when an attorney negligently engages in conduct that is prejudicial to the administration
of justice. See, e.g., In re Clark, 207 Ariz 414, 418, 87 P3d 827, 831 (2004) (concluding that accused lawyer’s
negligent conduct constituted conduct prejudicial to the administration of justice); Fink v. Neal, 328 Ark 646, 655,
945 SW2d 916, 921 (1997) (concluding that accused lawyer was subject to discipline for negligently engaging in
conduct prejudicial to the administration of justice); People v. Mills, 861 P2d 708, 711 (Colo 1993) (finding conduct
prejudicial to the administration of justice when accused lawyer, whether intentionally or negligently, improperly
asserted a lien on his client’s estate proceeds); Florida Bar v. McClure, 575 So 2d 176, 178 (Fla 1991) (finding
conduct prejudicial to the administration of justice when accused lawyer, whether intentionally or negligently,
mismanaged funds to the detriment of estate beneficiaries).
Carini I, and some of it occurred while the accused was on probation for the prior violations. In Carini I, the trial panel made the following statement in its written opinion:

“[T]he trial panel admonishes the accused to regard the probation as a final opportunity, and specifically advises any future [trial] panel evaluating the conduct of the accused that it should regard the rules violations found in this case to be serious.”

The accused’s prior disciplinary record weighs in favor of imposing a greater-than-presumptive sanction. In re Cohen, 330 Or 489, 506, 8 P3d 952 (2000); see also In re Jones, 326 Or 195, 200, 951 P2d 149 (1997) (imposition of sanction for similar prior conduct before accused lawyer engaged in conduct at issue is significant aggravating factor).

With regard to mitigating factors, we find that the accused did not have a dishonest motive in failing to appear and in failing to ensure that the court could reach him by telephone, and that the accused cooperated with the disciplinary proceedings. ABA Standard 9.32(b), (e).

In light of the totality of circumstances, and with particular emphasis on the fact that the accused has previously been disciplined for violating the same rule at issue in these proceedings, we conclude that a 30-day suspension is appropriate. Cf. In re Chase, 339 Or 452, 461, 121 P3d 1160 (2005) (30-day suspension appropriate for repeated conduct violating a single disciplinary rule where both aggravating and mitigating factors are found).

The accused is suspended from the practice of law for 30 days, commencing 60 days from the date of filing of this decision.
IN THE SUPREME COURT
OF THE STATE OF OREGON

In re: )

Complaint as to the Conduct of ) No. 12-111

David Herman, ) Trial Panel Opinion

Accused. )

The Oregon State Bar filed a formal complaint in this matter on September 4, 2012. The Accused filed an answer to the formal complaint on January 22, 2013. The parties submitted trial memoranda in advance of the scheduled hearing, which took place on August 19 and August 20, 2013. Written closing argument was also timely submitted. The Bar was represented by Assistant Disciplinary Counsel, Ms. Amber Bevacqua-Lynott. The Accused was represented by Mr. Lawrence Erwin and was personally present at the hearing.

Nature of Charges and Defenses

The Bar has alleged in one cause of complaint that the Accused:

Dissolved without notice a corporation known as Blue Q and transferred the assets to himself by making statements that were false constituting conduct that involved dishonesty and misrepresentation in violation of RPC 8.4(a)(3).

The Accused defends against this charge as follows:

A meeting was held on February 24, 2009 in which a majority of the shareholders voted to dissolve Blue Q and to try to save the business through a separate entity known as Carbcert.com, LLC.

The Trial Panel received testimony from the Accused, Mr. William Mane, Mr. Gregory Mettler, Mr. Richard Alexander and Mr. Alexander Schutfort. The Bar offered exhibits 1 to 95, l0A and 12A. The Accused offered exhibits 101, 102, 103 and 107. All exhibits were received.

Summary of Undisputed Facts

The Accused has been a member of the Oregon State Bar and the Washington State Bar Association. (Ex 3). He transferred to inactive status in Oregon in 2003; it is not known when he became inactive in Washington. He stopped paying bar dues in 2006 in Oregon; it is unknown when he stopped, if he did, paying dues in Washington. (Ex. 3, Tr. 13-14). His practice included environmental mediation, land use, land use planning and complex business
transactions. He had been an officer, director or investor in better than a dozen businesses at the time of the hearing in this matter. (Ex.3).

Richard Wayne Alexander has worked in construction for some 40 years. (Tr. 209). He has been self-employed. (Tr. 210). At the time of the hearing in this matter, he had known the Accused some 20 years. (Tr. 210). Although their legal relationship is in dispute, it is clear they had worked together on several projects in the past. One of those projects had been the demolition of a plywood mill. (Tr. 210).

Alexander “Erwin” Schutfort is a geologist who was working in Eugene at the time of the events at issue here. (Tr. 252). He was employed by Professional Service Industries. (Tr. 255).

These three individuals agreed to form a business called Blue Q Labs, Inc. The purpose of the business was to design and sell containers that would test the level of formaldehyde in composite wood products. (Tr. 252). Mr. Alexander was to design and manufacture the testing chamber. (Tr. 253). Mr. Schutfort designed the software and controller; he also assisted with sales and marketing. (Tr. 253, 256). The Accused was to handle sales, financial management and act as corporate counsel. (Tr. 213, 254-255). In that role, the Accused proposed using a dormant corporation for the new company. (Tr. 253). Mr. Alexander and Mr. Schutfort believed they were to be equal partners in the venture. (Tr. 254, 213; Ex 95).

In early 2007, the Accused filed Articles of Incorporation for a company called Vintrak Information Systems, Inc. He was listed as the only director in article 4. The articles indicate 1000 shares were authorized; this record does not indicate to whom they were issued. (Ex. 8) A Certificate of Amendment was filed March 3, 2008 in which Vintrak Information Systems, Inc. became Blue Q Labs, Inc. effective March 1, 2008. (Ex. 10). Article 4 lists the Accused, David Herman, Richard Alexander and Erwin Schutfort. The documents were filed in Nevada. (Ex. 10). Thus, the Accused, Mr. Alexander and Mr. Schutfort were the directors of the new company. Both Mr. Alexander and Mr. Schutfort believed they were also equal shareholders in the new business. (Ex. 95).

No stock certificates were ever issued in Blue Q Labs, Inc. (Tr. 214, 258).Because no shares of stock were distributed at the time Vintrak became Blue Q Labs, the original shareholder1 of Vintrak retained all of the shares of Blue Q Labs. (Tr. 152-153). There was no election of officers. (Tr. 214, 258).There was no notice of a shareholder meeting or a meeting of the officers of the corporation. (Tr. 215, 258).

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1 The records do not specifically state who owned all of the shares of Vintrak. Although shares were authorized, there are no documents to indicate they were issued. (Tr. 169). The tax return filed for Blue Q Labs, Inc for tax year 2008 listed the Accused as the only shareholder and indicate he owned 100% of the stock. (Ex 34). The tax return for tax year 2009 contains the same information. (Ex. 37). The profits were not shared with either Alexander or Schutfort. No salary or wages were paid for either 2008 or 2009. Ex 34, 37). The most logical inference from the evidence is all shares were owned by the Accused.
The product Blue Q was to build was designed to test formaldehyde levels in plywood, MDF and particle board in order to meet California Air Resources Board standards. (Tr 27). There is testimony about a large chamber and a small chamber. Blue Q was to design and manufacture the small chamber to be used for testing and certification purposes.

It appears there was a market for this testing chamber. However, for a number of reasons, the chambers were not manufactured quickly enough. There is some evidence that the Accused contacted Mr. Jerry Westphal in late 2008 to provide additional enclosures. These extra chambers were provided by Superior Steel and Erwin Manufacturing. (Tr. 260-261). It is clear Mr. Herman did not notify Mr. Alexander he was obtaining chambers from another location. (Ex. 95).

It is clear from this record that a number of units were sold and money came in to pay for them. It is also clear that a number were delivered. What is unclear is exactly how many units were constructed. Nor is it clear how many were delivered or how well they worked.

Alexander and the Accused communicated mostly by phone and in personal visits; the Accused dropped in to Alexander’s workshop routinely. The Accused and Schutfort communicated mostly by email.

The Accused stated the three principals were together in Mr. Alexander’s shop on February 24, 2009. He stated Alexander walked away and refused to talk. He testified he and Schutfort agreed to dissolve Blue Q Labs, Inc. that day. Neither Mr. Alexander nor Mr. Schutfort recalls the events in the way described by the Accused. For the reasons noted below, the Trial Panel does not accept the story told by the Accused; our overall finding is he is not a credible witness and reject his version of events.

The Accused filed a Certificate of Dissolution with the office of the Secretary of State for the State of Nevada on March 14, 2009. He listed himself as President, Secretary, and Treasurer and as the only Director; he used his Reno, Nevada post office box as his address. He attached a document entitled “Corporate Resolution Authorizing Dissolution Of The Corporation. That document asserts a meeting of the Board of Directors was held February 24, 2009. He also asserted there was a quorum present. The document asserts he had the right to dissolve the corporation since no shares of stock had been issued. (Ex. 11).

The Accused has admitted Blue Q Labs was dissolved without a meeting of the shareholders or directors; he further admitted there was no notice of a meeting of the directors or shareholders. No other director or shareholder attended a meeting in which the dissolution of Blue Q Labs, Inc. was approved. (Ex. 27, 31). It is the conclusion of the Trial Panel that no lawful meeting of the directors was held February 24, 2009. ² It is also the conclusion of the Trial Panel that the Accused had sufficient experience as a business lawyer to know no lawful meeting

² The Accused admitted shares of stock were not issued to either Alexander or Schutfort. (Tr. 47-48). No K-1 was provided to either at the time the tax return was filed. (Tr. 70). Thus, neither may ever have been a shareholder in Blue Q Labs, Inc. They clearly were Directors.

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took place and the paperwork filed with the Secretary of State constituted a misrepresentation, if not worse.

While Nevada law may allow directors to make decisions without a formal meeting, consent minutes are required. There are none in the record and the trial panel concludes none were prepared. Thus, the citation to NRS 78.235(4) and (5) is unavailing.

There are other problems with the resolution. It does not appear that any By-Laws were drafted and approved. There are no documents to demonstrate that the Board of Directors elected the Accused as President. There are no documents to demonstrate the Board of Directors elected the Accused to be either Secretary or Treasurer. Nor are there any documents to make the Accused the sole shareholder. Since the amendment listed the three principals as directors, a valid meeting of that group would be needed to reduce the number of directors.

The resolution noted no stock was issued. It is not clear whether he is referring to Vintrak or Blue Q Labs, Inc. We have found shares were issued in Vintrak, which would make the Accused the sole shareholder. A contrary finding would result in a finding the Accused misrepresented the number of shares he owned when he filed tax returns in 2008 and 2009. (Ex. 34, 37). Again, the logical inference from all of the evidence is that the Accused issued stock in Vintrak; thus, he was the sole shareholder in Blue Q. Since shares were issued, the resolution filed with the Secretary of State to dissolve Blue Q Labs, Inc contains knowing misrepresentations of fact.

If the Trial Panel is correct that the Accused was the sole shareholder of Blue Q Labs, Inc, then he could have dissolved the corporation in his role as sole shareholder. (Tr. 154). However, there is no evidence he acted in that fashion. We are then left with the paperwork that was filed in the Secretary of State’s office.

If no share of stock were issued in Vintrak, then the amendment of its articles to rename the company to Blue Q Labs would be ineffective. (Tr. 170). The Trial Panel finds shares of stock were issued to the Accused when he owned Vintrak. Consequently, the Trial Panel also finds the amendment documented in exhibit 10 is effective. As a result, in order to dissolve the corporation, a valid vote of the Directors was needed. That did not occur.

After the Accused dissolved Blue Q Labs, Inc., he instructed money from sales to be sent to Equine Management, a company ostensibly owned by the Accused’s wife. (Tr. 113-114, 273, Ex. 84, 43, 44). He also closed down the U.S. National Bank account for Blue Q Labs, Inc. (Ex 95). He cited bank fraud as the reason; however, there is no evidence there ever was bank fraud. We find this excuse to be a sham, designed to move money from the Blue Q Labs account

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3 If no stock were ever issued, the corporation would not have been validly formed in the first place, under either name. (Tr. 177). The Trial Panel finds Vintrak was validly formed.
4 There is some testimony this company reverted to the Accused through divorce proceedings. However, as noted above, we do not credit the testimony of the accused. Further, the testimony from the Accused is not detailed enough, even if believed, to establish the ownership of Equine Management in February and March, 2009.

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to another. The Accused admitted he did not notify Mr. Alexander he was shutting down the business or closing the account. Mr. Schutfort denies being told the Blue Q Labs, Inc. account was being closed. (Ex. 95). We credit his testimony.

Money also went to another company called Carbcert. (Tr. 65). The Accused was the sole owner, director, officer and shareholder of Carbcert.com, LLC. (Tr. 65). The articles of organization list Donald Manzer as the managing member of the LLC. (Ex. 12). However, the managing agreement is signed by the Accused as the managing member. (Ex. 12A). The LLC was dissolved by the end of the year. (Ex 13). There are no documents making the Accused the managing member. (67-68).

There is testimony regarding Blue Q Labs, LLC; the argument of the Accused describes this as Blue Q 2. This is a company formed by Mr. Alexander during the summer of 2009, after he learned Blue Q Labs, Inc. had been dissolved and the bank account was closed. Neither the Accused nor Mr. Schutfort were members of this LLC. The record does not tell us the status of that company. This company has no relevance to the actions of the Accused.

The Accused admits not all “corporate niceties” were followed. He infers they need not be. That is the problem. Those “corporate niceties” are the result of decades of legislative work and case law handed down by the courts. They govern how corporations are to be set up and dissolved. They are there to protect shareholders, directors and officers. To describe them as “corporate niceties” demeans the entire process and reflects an attitude that they are to be observed only when it is convenient. The rule of law does not work that way. It indicates to the Trial Panel the Accused uses those “corporate niceties only when it is useful and ignores them when it is not. Law and ethics do not work that way.

The Trial Panel did not believe the explanation of the Accused and did not find him credible. The Trial Panel believes the testimony of the Accused is not credible on demeanor grounds. The Accused rarely looked at either his own counsel or the trial panel when he answered questions. He acted in a manner that did not evoke trust in what he said. He looked furtive. He did not answer questions completely or fully, was tangential and provided unnecessary detail. A good example is provided at pages 20 to 23 of the transcript. His answers were unnecessarily long, as if the longer he talked, the more likely the questioner would forget the question. A good example is the question on page 309 of the transcript and the answer that follows over the next several pages of transcript. He quibbled over unnecessary details. (Tr. Tr. 54-55). Another example is his explanation for why money from Blue Q Labs, Inc. was sent to Equine Management. (Tr. 331-340).

The Trial Panel understands the right of the Accused to give a full and complete explanation of the charges against him. However, in judging his credibility in this case, the length and unnecessary detail presented here crosses the line from explanation to obfuscation and reflects adversely on his credibility.

5 The role of Carbcert is unclear. There is some evidence the Accused used this business to finish Blue Q Labs, Inc commitments. It is clear this business was also used to start another business to provide certification services. (Ex 95).
The testimony of the Accused is neither reliable nor persuasive. There are many examples where he contradicts himself, as his needs arise. One example is whether he and Mr. Alexander were business partners, particularly in Santiam Ventures, a project to dismantle an old plywood mill. He specifically testified that they were not. (Tr. 303). On the other hand, in a letter to Martha Hicks from September 24, 2003, he stated as follows:

“I have been business partners in a variety of businesses since 1995, including but not limited to the installation of a large network wireless area network at Port Huememe, California, reclamation and environmental cleanup of a sawmill, and construction and restoration of aircraft.” (Ex. 47).

His answer is evasive as noted on pages 14 through 16 of the transcript; he is also tangential. (Tr. 14-17).

Another good example is the discussion of exhibit 10. This is a Certificate of Amendment that was used to form Blue Q Labs, Inc. They renamed an earlier corporation known as Vintrak Information Systems, Inc. The sole director of Vintrak was the Accused. (Ex. 8). Exhibit 10 amended the Articles of Incorporation to make the Accused, Alexander and Schutfort directors of Blue Q Labs, Inc. (Ex 10). The question from Bar Counsel asked if the three were partners. The first answer was they were members. (Tr. 43). He then said “principals”. (Tr. 44). When asked if each had an ownership interest in the company, went on for the next 3 pages, without answering the question. The answer is clearly non-responsive. (Tr. 44-46). He finally admitted there was to be a three way split between the Accused, Schutfort and Alexander. (Tr. 47). The paperwork does not reflect this arrangement.

We find Mr. Alexander to be a credible witness. We also find Mr. Schutfort to be a generally credible witness. We are not convinced his answer regarding the reason he is no longer working for PSI is correct. However, the Trial Panel did not find that bit of testimony was sufficient to diminish his over all testimony or challenge his credibility.

Sanction

The Supreme Court has outlined its approach to the determination of a sanction as follows:

“We first consider the duty violated, the accused’s state of mind, and the actual or potential injury caused by the accused’s conduct. In re Kluge, 332 Or 251, 259, 27 P3d 102 (2001); ABA Standard 3.0. We next decide whether any aggravating or mitigating circumstances exist. Kluge, 332 Or at 259. Finally, we consider the appropriate sanction in light of this court’s case law. Id. In determining the appropriate sanction, our purpose is to protect the public and the administration of justice from lawyers who have not discharged properly their duties to clients, the public, the legal system, or the profession. See ABA Standard 1.1.”

The Bar has proven by clear and convincing evidence the Accused violated RPC 8.4(a)(3), which states it is professional misconduct for a lawyer to “(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.” We have found the Accused filed documents that did not reflect the true state of the corporation at a time he did not have the authority to dissolve it. We have found the Accused also closed the bank account for Blue Q Labs, Inc. without authority. We have also found the Accused diverted funds that were to go to Blue Q Labs, Inc to Equine Management, a company he controlled. Finally, we have found some of this money and some assets of Blue Q Labs, Inc. to a new company called Carbcert. His actions were dishonest and deceitful; the statements in the documents were false. His actions breached the duty he owed to the directors of Blue Q Labs, Inc.

We find the Accused acted with intent. While we recognize solving problems among business partners when a business may be failing is difficult, there are legal and ethical ways to resolve them. There is a legal framework within to work and, as a lawyer, the Accused would be the person best suited of the three to know how to resolve these issues legally. Instead, with a conscious disregard for the rights of Mr. Alexander and Mr. Schutfort, the Accused shut down the business and worked to make sure any remaining funds were transferred to accounts he controlled. Further, he set up the business is such a way that benefitted him from a tax perspective, but was inconsistent with the generally held belief they were all equal partners. Although some money went to Mr. Alexander and Mr. Schutfort to reimburse them for costs they advanced, there is no evidence they were ever paid wages. Nor is there any evidence they received a partnership distribution or advance.6

Although it is unknown whether the business would have eventually turned successful, that opportunity was removed by the unilateral actions of the Accused. Whether the injury was actual or potential, injured his partners were. Each had put substantial time into the venture and it was taken away. The Accused was trusted by Mr. Alexander and Mr. Schutfort and that trust was violated.

Having found the Accused engaged in conduct that involves dishonesty, deceit and misrepresentation and having found the Accused acted with intent, the presumptive sanction is disbarment. ABA Standard 5.11 states disbarment is generally appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice.

The critical issue is whether the conduct here was so egregious as to “seriously adversely” affect the Accused’s fitness to practice law. Because the Accused has not been charged with nor proven to have committed a criminal act, the answer to this question determines whether the presumptive sanction is disbarment or a reprimand. ABA Standard 5.11, 5.12 and 5.13. The ability to trust your lawyer is at the heart of an attorney-client relationship. While the Accused did not represent either Mr. Alexander or Mr. Schutfort, because he was a lawyer, they

6 There was an attempt to infer some checks were forged. However, we find there is no evidence those check were forged by either Mr. Alexander or Mr. Schutfort.
turned over certain aspects of the business to him and him alone. He violated their trust. There is nothing in his response to this complaint that indicates he would act any differently if the occasion presented itself again. Each partner was to be a partner and the paperwork was not prepared in that fashion. He filed paperwork to dissolve the corporation that contains false statements. He closed down the bank account without notice. He diverted money from Blue Q Labs, Inc. to an account he controlled. We find the actions of the Accused seriously and adversely reflect upon his fitness to practice law.

We turn to aggravating circumstances. We agree the Bar has proven a dishonest or selfish motive. ABA Standard 9.22(b). The Accused was looking out for himself at the expense of his compatriots. We also found a refusal to acknowledge the wrongful nature of his conduct. ABA Standard 9.22(g). The Accused has substantial experience in the practice of law, having been admitted to the Bar in 1990. ABA Standard 9.22(i).

We do not agree the Bar has proven a pattern of misconduct. ABA Standard 9.22(c). Any actions he took in other business situations, particularly as they relate to his litigation with Mr. Alexander, was not pled in the complaint filed in this matter. Nor is there proof of misconduct. We specifically make no findings in relation to that litigation.

We do not find multiple offenses. ABA Standard 9.22(d). The Bar alleged the Accused violated only one rule in this matter. While there are several actions that were taken into account to demonstrate the rule was violated, we have a single course of conduct.

We do not find the Bar has proven indifference to making restitution. ABA Standard 9.220). The Bar has not proven money was owed to either Mr. Alexander or Mr. Schutfort. The Bar’s own expert did not identify an amount of money that should have been paid to either person. While the Bar makes that argument, we do not find the testimony of their expert supports the argument. (Tr. 206). Mr. Schutfort has made no claim against the Accused for money.

We find one mitigating factor. The Accused has not been disciplined in the past.

We next review the case law that is pertinent to this matter. We find several that are on point.


In this case, the dishonest conduct began when the incorporation paperwork did not issue shares to each partner. It included filing a tax return with the Accused as the only shareholder. It included filing false documents to dissolve the corporation. It also included closing down the bank account without notice to his partners and diverting funds of the business to his personal businesses.
This is a course of conduct that was designed to divest the partners of the value they added to the corporation. The Accused must be disbarred.

**Findings of Fact**

1. At the time of the events applicable to this matter, the Accused was an inactive member of the Oregon State Bar who stopped paying bar dues in 2006.

2. In 2007, the Accused formed a corporation called Vintrak Information Systems; he listed himself as the sole officer and director. 1000 shares were authorized.

3. On March 3, 2008, Vintrak became Blue Q Labs, Inc. The articles of incorporation were modified to indicate the company had three directors, the Accused, Richard Alexander and Alexander Schutfort.

4. Richard Alexander and Alexander Schutfort reasonably believed they were partners with an equal share in the business.

5. The Accused was the sole shareholder of Blue Q Labs, Inc.; when he prepared the paperwork to form Blue Q Labs, Inc. he did not prepare the paperwork to provide the issuance of share of stock to Mr. Alexander or Mr. Schutfort.

6. On March 14, 2009, the Accused filed a Certificate of Dissolution; he attached a resolution stating the Board of Directors had voted to dissolve the company at a properly constituted meeting of the Board. The Accused listed himself as the only director.

7. The Certificate of Dissolution and the accompanying Corporate Resolution contained false and misleading statement; the Accused knew the statements were false.

8. The Accused converted the financial assets of Blue Q Labs, Inc. for his own use.

9. The Accused is not a credible witness; his demeanor was not credible and his inconsistent statements impeached his testimony.

**Conclusions of Law**

1. The Accused violated RPC 8.4(a)(3).

2. The Accused acted with intent, as that term is used in the ABA *Standards for Imposing Lawyer Sanctions*. 
3. The actions of the Accused seriously adversely reflect upon the Accused’s fitness to practice law in this state.

4. The Accused is disbarred.

Dated this 14th day of November 2013.

[Signatures]

Trial Panel Chairperson

Trial Panel Member

Trial Panel Member
IN THE SUPREME COURT
OF THE STATE OF OREGON

In re: )
)
Complaint as to the Conduct of ) Case Nos. 14-61 and 14-91
)
W. BLAKE SIMMS, )
)
Accused. )

Counsel for the Bar: Linn D. Davis
Counsel for the Accused: None
Disciplinary Board: Courtney C. Dippel, Chairperson
Frank J. Weiss
Virginia Anne Symonds, Public Member
Disposition: Violations of RPC 1.15-1(d) and RPC 1.16(d). Trial
Panel Opinion. 120-day suspension.
Effective Date of Opinion: July 8, 2015

TRIAL PANEL OPINION

This matter came regularly before a trial panel of the Disciplinary Board consisting of
Courtney C. Dippel, Chair, Frank J. Weiss, Esq., and Virginia Anne Symonds, Public
Member (“Trial Panel”) on April 10, 2015. Linn D. Davis represented the Oregon State Bar
(“Bar”). William Blake Simms, Esq. (“Accused”) has made no appearance in this matter.

The Trial Panel has considered the factual allegations in the Complaint, the Bar’s
Sanctions Memorandum and supporting exhibits, the Declaration of Linn D. Davis, and the
Accused’s prior disciplinary history. Based on the findings and conclusions below, we find
that the Accused violated Oregon Rules of Professional Conduct (“RPC”) 1.15-1(d) and
1.16(d). We further determine that the Accused should be suspended from the practice of law
for a period of 120 days.

INTRODUCTION

The Complaint: A Formal Complaint (“Complaint”) was filed on September 17,
2014, against the Accused claiming violations of the RPCs. In its first Cause of Complaint,
the Bar claimed that the Accused violated RPC 1.15-1(d) (safekeeping and returning client
property) and 1.16(d) (protecting a client’s interests upon termination of representation) in
his representation of Ms. Cherylil Marsh (“Marsh”) in claims of employment discrimination. In its second Cause of Complaint, the Bar claimed that the Accused violated RPC 1.15-1(d) (safekeeping and returning client property) and 1.16(d) (protecting a client’s interests upon termination of representation) in his representation of Ms. Amy Craighead (“Craighead”) in claims of employment discrimination.

**The Bar’s Motion and Order for Default:** The Accused was personally served with a copy of the Complaint and Notice to Answer on November 19, 2014. After notice, the Accused failed to file an Answer. On December 24, 2014, the Bar moved for an Order of Default. On January 28, 2015, the Order of Default was signed by Mr. Ronald W. Atwood, the Region 5 Chairperson, and entered with the Disciplinary Clerk on January 30, 2015.

The Order of Default found the Accused in default for failure to file an answer or other appearance and deemed true the Complaint’s allegations.

**Sanctions Briefing:** Based upon the Order of Default, on March 20, 2015, the Trial Panel requested that the parties submit any arguments regarding appropriate sanctions to be made in writing by April 10, 2015, pursuant to BR 5.8(a) and 2.4(h).

The Bar submitted its Sanctions Memorandum on April 10, 2015, along with supporting exhibits, and the Declaration of Linn D. Davis. The Accused submitted nothing.

**FINDINGS OF FACT**

The Trial Panel makes the following findings of fact.

**The Marsh Matter—Case No. 14-91**

The Accused undertook the legal representation of Marsh on or about September 5, 2012, to pursue claims of employment discrimination for a contingent fee. Marsh advanced a $1,000 retainer to the Accused for costs.

On or about March 13, 2013, the Accused settled Marsh’s claims and received settlement funds. This concluded the matter for which Marsh had hired him. Thereafter, Marsh repeatedly asked the Accused to send her the funds in his possession that she was entitled to receive. Despite Marsh’s repeated requests, the Accused failed to promptly forward the funds to her.

When the Accused refused to respond to her requests, Marsh turned to the Bar for assistance. The Client Assistance Office and Disciplinary Counsel’s Office both contacted the Accused repeatedly about Marsh’s funds. Despite those repeated requests, the Accused did not forward Marsh the funds to which she was entitled until August 21, 2013—six months after the Accused settled Marsh’s claims.

**The Craighead Matter—Case No. 14-61**

In September 2012, the Accused agreed to represent Craighead in claims of employment discrimination for a contingent fee. Craighead provided the Accused with $500
for costs at that time and then provided him with an additional $500 for costs on or about October 1, 2012.¹

When the Accused agreed to represent Craighead, he maintained an office in Multnomah County, Oregon. On October 11, 2012, the Accused filed a civil action on Craighead’s behalf in Multnomah County, Craighead v. U.S. Bank, N.A., Multnomah County Circuit Court Case No. 1210-12765. Thereafter, the Accused closed his Multnomah County office and did not inform the Multnomah County Circuit Court that he had closed his office, nor did he provide the court with a change of address.

On or about December 7, 2012, the Accused informed Craighead that if she wished to pursue the civil action against U.S. Bank, she needed to advance additional costs. At that point, Craighead informed the Accused that she had decided not to pursue the action and terminated his representation. Craighead asked the Accused to account for the funds she had advanced and return the unused funds to which she was entitled.

The Accused failed to promptly account for the funds he had received from Craighead and he failed to forward to Craighead the funds to which she was entitled. Further, the Accused failed to notify the court that he no longer represented Craighead in the civil action.

In January 2013, Craighead again repeatedly demanded that the Accused forward the funds that she was entitled to receive. The Accused informed Craighead that he had estimated that he had spent about $600 to file and serve papers, which left a balance of $400 due to her. However, the Accused never further accounted to Craighead for the funds and did not forward any funds to her, even after Craighead contacted the Bar and the Client Assistance Office, and Disciplinary Counsel inquired of the Accused about the funds and an accounting.

To date, the Accused has never fully accounted for Craighead’s funds or returned the funds to which she is entitled.

**DISCUSSIONS AND CONCLUSIONS OF LAW**

The Bar has the burden of establishing the Accused’s misconduct in this proceeding by clear and convincing evidence. BR 5.2. Clear and convincing evidence means that the truth of the facts asserted is highly probable. In re Taylor, 319 Or 595, 600, 878 P2d 1103 (1994).

The Bar’s factual allegations against the Accused in the Complaint were deemed to be true by virtue of the Order of Default pursuant to BR 5.8(a). In re Magar, 337 Or 548, 1036 P3d 121 (2005).

¹ Paragraph 12 of the Complaint alleges that the additional funds for costs were advanced on October 1, 2013. However, that has to be a typographical error given the timeline of the other events alleged. That typographical error has no impact on the Trial Panel’s decision.
Chapter 4—The Disciplinary Process: Basics You Need to Know

551–53, 100 P3d 727 (2004); In re Kluge, 332 Or 251, 27 P3d 102 (2001). However, the Trial Panel still needed to decide whether the facts deemed true by virtue of the default constitute violations of the disciplinary rules, and if so, what sanctions may be appropriate. See In re Koch, 345 Or 444, 198 P3d 910 (2008); see also In re Kluge, supra (describing the two-step process).

We will discuss the causes of complaint in groups based on the RPCs that were the subject of the violation as follows.

The Accused Violated RPC 1.15-1(d) and 1.16(d) in Both the Marsh and Craighead Matters

RPC 1.15-1(d) provides that once a lawyer receives funds or other property to which a client is entitled, the lawyer shall promptly notify the client and “[s]hall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.”

RPC 1.16(d) provides that “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.”

The Trial Panel concluded that the Accused violated RPC 1.15-1(d) in both the Marsh and Craighead matters. In the Marsh matter, the Accused received settlement funds to which his client was entitled, yet failed to forward those funds to Marsh until three months later and only after Marsh engaged in substantial efforts that she should not have been required to make. The failure to promptly deliver funds to a client violates RPC 1.15-1(d). In re Synder, 348 Or 307, 318, 232 P3d 952 (2010) (lawyer violated RPC 1.15-1(d) when he failed to promptly deliver to the client, after the client had requested, property to which the client was entitled); In re Koch, 345 Or at 450 (Bar’s allegation in complaint that lawyer held client funds for protracted period after the representation concluded was sufficient to establish violation of RPC 1.15-1(d)).

The Accused also violated RPC 1.15-1(d) in the Craighead matter when he failed to promptly account for the funds that Craighead had advanced for costs and has never, in fact, accounted for such costs.

The Trial Panel concluded that the Accused violated RPC 1.16(d) in both matters also. In the Marsh matter, the Accused’s representation of Marsh ended when he settled and concluded her employment discrimination matter. In violation of RPC 1.16(d), the Accused failed to take reasonable steps after his representation concluded to protect Marsh in that he
did not surrender the settlement funds his client was entitled to receive. *In re Balocca*, 342 Or 279, 292, 151 P3d 154 (2007) (finding violation under former DR 2-110(A)(3) where lawyer failed to deliver refund to client promptly upon closing the client’s file).

In the Craighead matter, the Accused violated the rule when he did not notify the court that he had closed his office in Multnomah County, failed to provide the court with a change of address, and did not refund Craighead’s funds for costs that had not been incurred. *In re Fadeley*, 342 Or 403, 411, 153 P3d 682 (2007) (lawyer’s failure to promptly refund unearned fees when the lawyer-client relationship ended violated former DR 2-110(A)(3)).

**SANCTION**


A. **ABA Standards Applied to This Case**

The *Standards* require an analysis of four factors by the Trial Panel: (1) the ethical duty violated; (2) the attorney’s mental state; (3) the actual or potential injury; and (4) the existence of aggravating and mitigating circumstances. *Standards*, § 3.0; *In re Jackson*, 347 Or 426, 440, 223 P3d 387 (2009); *In re Knappenberger*, 344 Or 559, 574, 186 P3d 272 (2008). The Trial Panel analyzes the first three factors and reaches a presumptive sanction. That sanction can then be adjusted by the Trial Panel under the *Standards* based upon the presence of aggravating or mitigating circumstances. *In re Jackson*, 347 Or at 441. Finally, the Trial Panel evaluated whether the sanction is consistent with Oregon case law. *Id.*

1. **Duties Violated.** The most important ethical duties are those obligations that a lawyer owes a client. *Standards*, p. 5. The Accused violated his duty to deal with client property. *Standards*, § 4.1. The Accused also breached duties owed as a professional by failing after his employment was terminated to take reasonable steps to protect his clients. *Standards*, § 7.0

2. **Mental State.** The *Standards* recognize three mental states: intentional, knowing, and negligent. A lawyer acts intentionally by acting with the conscious objective or purpose of accomplishing a particular result. A lawyer acts knowingly by being consciously aware of the nature or circumstances but without having a conscious objective to accomplishing a particular result. A lawyer acts negligently by failing to heed a substantial risk that circumstances exist or a result will follow, in circumstances in which the failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, pp. 9, 10.

The Trial Panel finds that the Accused’s conduct was at first, negligent, then knowing, and finally intentional. Initially, the Accused knew that he had
concluded the Marsh matter and that settlement funds were required to be forwarded to Marsh. The Accused acknowledged that he owed Craighead a refund of unearned funds that she had advanced and, therefore, that the funds were required to be forwarded to her. In each matter, the Accused was reminded of his obligations by numerous contacts from the clients and the Bar. The Accused was aware that he was not fulfilling his duties even if he did not intentionally fail to carry them out at the outset.

As time went on, the Accused’s failure to act became knowing or intentional. As the court found in Koch, a lawyer acts knowingly when a client’s repeated requests put the lawyer on notice that the lawyer is failing to carry out the lawyer’s duties. In re Koch, 345 Or at 449. A lawyer’s continued failure to act will eventually support the inference that the lawyer’s failure is intentional. In re Sousa, 323 Or 137, 144, 915 P2d 408 (1996) (“A failure to act can be characterized as intentional, rather than attributed to mere neglect or procrastination, if the lawyer fails to act over a significant period of time, despite the urging of the client and the lawyer’s knowledge of the professional duty to act”) (citing In re Loew, 292 Or 806, 810–11, 642 P2d 1171 (1982), in which a one-year period was found sufficient to infer an intentional failure to act).

3. **Actual or Potential Injury.** Under the Standards, the injuries caused by a lawyer’s professional misconduct may be either actual or potential. In re Williams, 314 Or 530, 547, 840 P2d 1280 (1992) (“[A]n injury need not be actual, but only potential, in order to support the imposition of a sanction.”); Standards, p. 6.

   In this case, there is significant actual injury as the clients were deprived of their funds—in Marsh’s case, for a substantial period of time. In Craighead’s case, the client has never received the refund to which she is entitled from the Accused.

B. **Presumptive Sanction**

   Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury to a client. Standards, § 4.12. Suspension is also generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury to a client, the public, or the legal system. Standards, § 7.2.

   The Trial Panel next examines whether aggravating or mitigating circumstances justify an adjustment of the presumptive sanction.
Chapter 4—The Disciplinary Process: Basics You Need to Know

C. Aggravating Circumstances

1. Prior Disciplinary History—Standards, § 9.22(a)
   In December 2013, the Accused was suspended for 60 days based on a finding of misconduct committed in Arizona, where he is also licensed. In that matter, like these, the Accused failed to properly account for client funds and failed to carry out his professional duties upon the termination of his employment. Because that sanction was imposed after the misconduct in the present matters, the Trial Panel gives it less weight.

2. Pattern of Misconduct—Standards, § 9.22(c)
   The Arizona discipline and the present matters demonstrate a pattern by the Accused of disregarding duties to clients to properly account for and deliver client funds and to protect clients upon the termination of the Accused’s employment.

3. Substantial Experience in the Practice of Law—Standards, § 9.22(i)
   The Accused was admitted to the practice of law in Arizona in 2002. The Accused was admitted reciprocally in Oregon in 2011. Given that level of experience, the Accused’s failure to comply with fundamental duties regarding client property is inexcusable.

The Trial Panel finds no mitigating circumstances.

D. Oregon Case Law

In In re Koch, the court suspended a lawyer for 120 days for similar failures in two client matters, accompanied by a failure to communicate with the clients during the period of the lawyer’s representation and a failure to respond to disciplinary inquiries. While the Accused is not charged with failing to communicate or respond to disciplinary inquiries, his violations of his duties regarding client funds and the termination of representation are egregious—he has never refunded the funds owed to Craighead. While significant mitigating factors existed in Koch, such factors are absent here.

Considering the Accused’s conduct and the aggravating factors, the Trial Panel concludes that some period of suspension is appropriate.

Sanctions are intended to protect the public and uphold the dignity, respect, and integrity of the profession and are not designed to penalize the accused lawyer. In re Stauffer, 327 Or 44, 66, 956 P2d 967 (1998); In re Kimmell, 332 Or 480, 488, 31 P3d 414 (2001). Appropriate discipline also deters unethical conduct. In re Kirkman, 313 Or 181, 188, 830 P2d 206 (1992).

After evaluating the ABA Standards, the factors in this case, and Oregon case law, the Trial Panel concludes a suspension of 120 days was the appropriate sanction.
DISPOSITION

The Accused shall be suspended from the practice of law for a period of 120 days.

DATED this 6th day of May 2015.

/s/ Courtney C. Dippel
Courtney C. Dippel
OSB No. 022916
Trial Panel Chairperson

/s/ Frank J. Weiss
Frank J. Weiss
OSB No. 991369
Trial Panel Member

/s/ Virginia Anne Symonds
Virginia Anne Symonds
Trial Panel Public Member
Chapter 5
Local Practice in the District of Oregon—2017

C. MARIE ECKERT
VANESSA L. TRIPLETT
Miller Nash Graham & Dunn LLP
Portland, Oregon

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Helpful Resources

1. District Court's Website: www.ord.uscourts.gov.
   - E-Filing.
   - Local Rules.
   - Forms (including the stipulated protective orders, mentioned below).
   - Practice Tips.
   - Court Fees.
   - Instructions for e-filing.
   - General reference manual for various areas of state and federal law.

Case Filing and Initial Conferences

1. Divisions
   b. Identify the division where "divisional venue" lies in the caption of the complaint.
   c. "Divisional venue" means the division of the court in which:
      i. A substantial part of the events or omissions giving rise to the claim occurred; or
      ii. A substantial part of the property that is the subject of the action is situated. LR 3-2.

2. Electronic Filing
   a. "Case initiating documents" must be filed electronically with the court, unless the attorney is not a "registered user." LR 5-1.
   b. Counsel must file a civil cover sheet, form JS-44. LR 3-4, Practice Tip 1.
   c. Checking the JURY DEMAND box on the JS-44 Civil Cover Sheet does not constitute a valid jury demand under LR 38 or Fed R Civ P 38(b). LR 3-4, Practice Tip 2.
   d. The words DEMAND FOR JURY TRIAL must be included on the last line of the document title of any jury demand filed under Fed R Civ P 38(b). LR 38-1.
   e. Filing deadline is 11:59 p.m. LR 5-3.
3. Service of Pleadings
   a. Service of pleadings is complete upon the transmission of the "Notice of Electronic Filing." LR 5-4.
   b. Rule Change: Removal of additional 3-days response time for electronic service: There have been some recent amendments to the FRCP, FRAP, and local district court rules in Oregon as noted below.
      1) Fed R Civ P 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow three added days to act after being served.
      2) Fed R App P 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow three added days to act after being served.
      3) As of March 1, 2017 USDC of Oregon has amended Local Rule 6 as follows: "Local Rule 6 has been eliminated due to amendments to Fed. R. Civ. P. 6(d). Under amended Fed. R. Civ. P. 6(d), three days will no longer be added to the response when service is by electronic means.

4. Scheduling Orders
   a. Opposing parties must hold an initial conference of counsel under Fed R Civ P 26(f) for discovery planning within 30 days after all defendants file a responsive pleading or motion under Fed R Civ P 12. LR 26.1.
   b. After the conference of counsel, the lawyers must contact the assigned judge’s courtroom deputy to set a Fed R Civ P 16(b) scheduling and planning conference. LR 16.2.
   c. At the Rule 16(b) conference, lawyers must be prepared to discuss their discovery plan to the court. LR 16-2.
   d. Following the scheduling and planning conference, the court will typically issue an order setting deadlines for completing discovery, filing dispositive motions, exchanging expert witness disclosure reports, and other pretrial filings.
   e. Once the schedule is set, the parties cannot stipulate to extend any deadline in the court’s discovery and scheduling orders. LR 29.1. If a party wants to modify these deadlines, the lawyer must show:
      i. Good cause why the deadlines should be modified;
      ii. Effective prior use of time;
      iii. A suggested new date for the deadline in question; and
      iv. An assessment of the effect of the proposed extension on other existing deadlines, settings, or schedules. LR 16.3(a).
5. December 1, 2015 Rule Amendments Intended to Speed Up Cases:
   a. Under amended Fed R Civ P 4(m): the court must dismiss an action if the
      complaint is not served within 90 days, shortening the period from the old rule,
      which allowed 120 days to serve a complaint.
   b. Revised Fed R Civ P 16(b)(2) shortens the period to issue a case management
      order to 90 days (the old rule provided for 120 days).
      i. Rule 16(b)(3) was amended to add preservation of documents and lists
          topics that judges may address in their case management orders.
      ii. Rule 16(b)(3)(B)(v) was amended to encourage pre-motion conferences
          for discovery disputes and allows a case management order to require
          that: “. . . before moving for an order relating to discovery, the movant
          must request a conference with the court.” This amendment is intended
          to decrease the amount of time spent on discovery motions.

Discovery

1. Initial Disclosures
   a. Initial disclosures can generally be waived by the parties. LR 26-2.
   b. Protocols for Employment Cases: In initial discovery for employment cases
      alleging adverse actions:
      i. Plaintiff and defendant must disclose certain information and produce
         certain documents related to the employment relationship and
         termination. LR 26-7:
   c. E-Discovery in Patent Cases: A model order streamlines the discovery of
      electronically stored information in patent cases (link provided in the online
      version of LR 26-6).
      i. The model order can be modified if the parties agree or one party
         shows good cause.
      ii. The model order generally excludes metadata and limits e-mail
          production to specific issues, custodians, and search terms.
      iii. Inadvertent production of privileged documents under the model order
           does not waive the privilege.

2. 2015 Rule Change: New Proportionality Rule
   a. Amended Fed R Civ P 26(b)(1) adds language that party is entitled to
      discovery that is relevant to claims and defenses and "proportional to the
      needs of the case . . . ."
      i. Factors considered in determining whether discovery request is
         "proportional" to needs of the case:
         a. The importance of the issues at stake in the case;
         b. The amount in controversy;
c. The parties’ relative access to relevant information;
d. The parties’ resources;
e. The importance of the discovery in resolving the issues; and
f. Whether the expense of the proposed discovery outweighs the likely benefit.

b. Amended Fed R Civ P 34(b)(2): changes the rule to require party responding to discovery request to:
i. state objection “with specificity”;
ii. state specifically when material will be made available; and
iii. state clearly if materials are being withheld on the basis of an objection.

3. Sanctions for Failure to Preserve Electronically Stored Information.
   a. Amendments to Fed R Civ P 37(e):
      i. The rule has been re-written to place limits on spoliation sanctions (but does not address trigger of duty to preserve or the scope of that duty).
      ii. Amended to permit curative measures upon finding of prejudice.
      iii. Amended to permit adverse inference instruction, dismissal, or default only upon a finding that the party who failed to preserve did so "with the intent to deprive another party of the information's use in the litigation."

4. Protective Orders
   a. The District of Oregon provides two form stipulated protective orders:
      i. The first-tier protective order includes only a "confidential" designation.
      ii. The second-tier protective order includes a "confidential" and "attorneys' eyes only" designation. LR 26-4 (Practice Tip)
   b. The court recommends that you use one of these protective orders unless you have a very good reason to modify them.

5. Motions
   a. All motions, other than motions for temporary restraining orders, must contain the certification that the parties conferred and attempted to resolve the dispute, as required by LR 7.1.
      i. Practice Tip 1 LR 7-1: The conferral requirements of LR 7-1 are broader than those established in Fed R Civ P 37(a)(1), which deals only with motions to compel discovery.
   b. The moving party in a discovery motion may not file a reply, unless specifically directed to do so by the court. LR 26-3(c).
   c. Parties may contact the assigned judge to set a telephone conference to resolve any discovery problems. LR 26.3(f).
6. **Motions to Compel**
   a) Motions to compel are subject to the requirements of LR 26-3 related to motion title, word-count or page limits, replies, calendaring, pre-filing conferences, and certifications of conferral. LR 37-1.
   b) If the judge included a requirement in the case management order pursuant to Fed R Civ P 16(b)(3)(B) that the parties must have a court conference before filing a motion to compel, the moving party must request this conference with the Court by contacting the judge's courtroom deputy. **Practice Tip LR 26-3.**
   c) Time limits to comply with motions to compel: unless otherwise directed by the court, the party against whom an order to compel has been entered must comply with the order within 14 days after the order is entered. LR 37-2.

7. **Stipulations**
   a. Parties cannot agree to extend any deadlines established by the case scheduling order; any filing deadline established by the court, the local rules, or the federal rules; any court-scheduled conference; the pretrial order date; or the trial date. LR 29.1. Only a court order can alter these deadlines.

**Motions for Summary Judgment**

1. Parties must support factual positions with citations to the record. LR 56-1(a).
   a. The parties no longer need to file a separate concise statement of material fact.

2. Parties may assert evidentiary objections in a response or reply memorandum; it is not necessary to file a separate motion to strike. LR 56-1(b).
   a. If the nonmoving party makes an evidentiary objection in the response memorandum, the moving party may address the objection in its reply. The nonmoving party cannot file any additional briefing on its evidentiary objection. LR 56-1(b).
   b. If the moving party raises an evidentiary objection in its reply, the nonmoving party has seven days to address the objection in a surreply. The moving party cannot file any additional briefing on its evidentiary objection. LR 56-1(b).

3. Motions for summary judgment are subject to the conferral requirement and certification provisions of LR 7.1, as are evidentiary objections raised in a response or reply memorandum. LR 7.1 and 56-1(b).

**Trial**

1. Parties must submit a proposed pretrial order, unless the parties consent otherwise, subject to the court’s approval. LR 16-5. It should contain:
   a. The nature of the action;
   b. Whether the trial will be by jury or not;
   c. All agreed facts and disputed facts;
d. A statement of each claim/defense;

 e. Amendments to the pleadings.

2. Magistrate judges may conduct trial if the parties consent and may be able to set earlier and firmer trial dates. LR 73-1 and LR 73-2. Parties are encouraged to consent to magistrates.

**Professionalism**

1. Statement of Professionalism must be adhered to by all attorneys admitted to practice in the District of Oregon. LR 83-7.

   a. The Statement of Professionalism sets forth 14 "general guidelines" for practice.

2. Counsel must notify the court if, for example, counsel is suspended/disbarred by any court or is convicted of a felony. LR 83-6.

3. Counsel must cooperate and be courteous with each other in all phases of litigation. The court can impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel. The court can also consider the lack of cooperation in attorney fee awards. LR 83-8.

Gregory P. Joseph*

1. Narrower Scope of Discovery. Discovery is confined to matters (i) “relevant to any party’s claim or defense” and (ii) “proportional to the needs of the case.” (Rule 26(b)(1))

   - Reasonably-Calculated Language Deleted. The sentence formerly providing that “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence” has been deleted, with the note that it was never intended to define the scope of discovery. (It was originally added in 1946 to solve a specific problem — parties were objecting in depositions to relevant questions on the ground that the answers would not be admissible at trial — but took on a life of its own over the years.)

2. Early Rule 34 Requests. Requests for production or inspection may be served within 21 days of the service of the summons and complaint (i) by any party on the served defendant and (ii) by the served defendant on the plaintiff or any other served party (which could include third-party defendants or additional counterclaim defendants whom the defendant has promptly served). (Rule 26(d)(2)(A))

   - These requests are considered served at the time of the Rule 26(f) conference. (Rule 26(d)(2)(B))

3. Responses to Rule 34 Requests. No more boilerplate objections or vague pledges.

   - Specific Objections. The response to each item of a Rule 34 request must “state with specificity the grounds for objecting to the request, including the reasons” (Rule 34(b)(2)(B))

   - Specific Deadline for Production. Production must be completed “no later than the time for inspection specified in the request or another reasonable time specified in the response” (Rule 34(b)(2)(B)) Determining “another reasonable time” could be challenging, especially if the Rule 34 request is made early, under Rule 26(d)(2)(A). Amendment of responses is likely to become common.

   - Specificity as to Whether Production Is Being Withheld. “An objection must state whether any responsive materials are being withheld on the basis of the objection.” (Rule 34(b)(2)(C)) Until the responding party is familiar with the universe of responding materials, this may be unknowable. Initial responses may have to recite either the responding party’s belief as to whether materials are likely to be withheld or that it is uncertain whether materials will be withheld—and then supplemented in a timely fashion once the fact is determined.

* Past President, American College of Trial Lawyers; past Chair, ABA Section of Litigation; past member, Advisory Committee on the Federal Rules of Evidence; President, Supreme Court Historical Society; author, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (5th ed. 2013); CIVIL RICO: A DEFINITIVE GUIDE (4th ed. 2015); MODERN VISUAL EVIDENCE (Supp. 2015); member, Editorial Board, MOORE’S FEDERAL PRACTICE (3d ed. 1995-).
4. **Spoliation of Electronically-Stored Information.**

- No sanctions may issue against a party for spoliation of ESI unless all 4 of the following criteria are satisfied: (i) the ESI should have been preserved; (ii) it is lost; (iii) the party failed to take reasonable steps to preserve it; and (iv) it cannot be restored or replaced. (Rule 37(e))

- If all four of these criteria are satisfied:
  
  - Plus one more—prejudice—then the court “may order measures no greater than necessary to cure the prejudice.” (Rule 37(e)(1)) These measures cannot include the penalties identified in subdivision (e)(2) (presuming the lost information was unfavorable to the spoliator; an adverse inference instruction; a default judgment, or dismissal).

  - Plus a different one—that the spoliator “acted with the intent to deprive another party of the information’s use in the litigation”—then, regardless of prejudice, the court may presume the lost information was unfavorable to the spoliator or issue an adverse inference instruction, a default judgment, or dismissal. (Rule 37(e)(2)) Note: (i) prejudice need not be shown, and (ii) intent may be a jury issue under Fed. R. Evid. 104.

- Rule 37(e) applies only to spoliation of ESI, not tangible evidence. In five Circuits (1st, 2d, 6th, 9th and sometimes D.C.), negligence will continue to suffice for the imposition of severe sanctions for spoliation of tangible evidence.

- Rule 37(e) applies only to “a party,” not third-party spoliators (e.g., subpoena recipients).

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Chapter 6
Oregon’s Judicial Branch†

THE HONORABLE DAVID BREWER
Oregon Supreme Court
Salem, Oregon

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OREGON SUPREME COURT

Website: http://courts.oregon.gov/Supreme/

Address: Supreme Court Bldg., 1163 State St., Salem 97301-2563

Records and Case Information: 503-986-5555; Oregon Relay 711

Fax: 503-986-5560

Staff Directory from Oregon.gov: http://dasapp.oregon.gov/statephonebook/display.asp?agency=19800&division=00010

The Supreme Court of Oregon has seven justices, elected by nonpartisan, statewide ballot, to serve six-year terms. Justices elected to the Supreme Court must be United States citizens, members of the Oregon State Bar and residents of Oregon for at least three years. The court has its offices and courtroom in the Supreme Court Building one block east of the State Capitol in Salem. The members of the court elect one of their number to serve as chief justice for a six-year term.

Powers and Authority

The Supreme Court was created, and its role largely defined, by Article VII of the Oregon Constitution, as amended. It is primarily a court of review in that it reviews the decisions of the Court of Appeals in selected cases. The Supreme Court usually selects cases with significant legal issues calling for interpretation of laws or legal principles affecting many citizens and institutions of society. When the Supreme Court decides not to review a Court of Appeals case, the Court of Appeals’ decision becomes final. In addition to its discretionary review function, the Supreme Court hears direct appeals in death penalty, lawyer and judicial discipline, and Oregon Tax Court cases. It may accept original jurisdiction in mandamus, quo warranto and habeas corpus proceedings. It also reviews ballot measure titles, prison siting disputes, reapportionment of legislative districts, and legal questions on Oregon law referred by federal courts.

Administrative Authority

The chief justice is the administrative head of the Judicial Department and, as such, exercises administrative authority over and supervises the appellate, circuit and tax courts. The chief justice makes rules and issues orders to carry out necessary duties and requires appropriate reports from judges and other officers and employees of the courts. As head of the Judicial Department, the chief justice appoints the chief judge of the Court of Appeals and the presiding judges of all state trial courts from the judges elected to those courts. The chief justice adopts certain rules and regulations respecting procedures for state courts. The chief justice also supervises a statewide plan for budgeting, accounting and fiscal management of the judicial department.

The chief justice and the Supreme Court have the authority to appoint lawyers, elected judges and retired judges to serve in temporary judicial assignments.

Admission and Discipline of Lawyers and Judges

The Supreme Court has responsibility for admitting lawyers to practice law in Oregon and the power to reprimand, suspend or disbar lawyers whose actions have been investigated and prosecuted by the Oregon State Bar. In admitting lawyers, the Supreme Court acts on the recommendation of the Board of Bar Examiners, which conducts examinations for lawyer
applicants each February and July and which screens applicants for character and fitness to practice law. The Supreme Court appoints at least 14 members to the Board of Bar Examiners. The board includes two “public” members who are not lawyers. The Supreme Court also has the power to censure, suspend or remove judges after investigation and recommendation by the Commission on Judicial Fitness and Disability.

OREGON COURT OF APPEALS

Website: http://courts.oregon.gov/COA/
Address: Supreme Court Bldg., 1163 State St., Salem 97301-2563
Records and Case Information: 503-986-5555; Oregon Relay 771
Fax: 503-986-5865

Created in 1969 as a five-judge court, the Court of Appeals was expanded to six judges in 1973 and to ten in 1977. The 2012 House Bill 4026B amended ORS 2.540 to increase the number of Court of Appeals judges from 10 to 13. The bill provides that the new positions become operative on October 1, 2013, and that they should be filled by gubernatorial appointment. The judges, otherwise elected on a statewide, nonpartisan basis for six-year terms, must be United States citizens, members of the Oregon State Bar and qualified electors of their county of residence. The chief justice of the Supreme Court appoints a chief judge from among the judges of the Court of Appeals.

Court of Appeals judges have their offices in the Justice Building in Salem and usually hear cases in the courtroom of the Supreme Court Building. The court ordinarily sits in panels of three judges. The Supreme Court has authority to appoint a Supreme Court justice, a circuit court judge or an Oregon Tax Court judge to serve as a judge pro tempore of the Court of Appeals. The 1997 Legislature created an appellate mediation program called the Appellate Settlement Conference Program; see ORS 2.560(3).

Jurisdiction

The Court of Appeals has jurisdiction to review appeals of most civil and criminal cases and most state administrative agency actions. The exceptions are appeals in death penalty, lawyer and judicial disciplinary, and Oregon Tax Court cases, which go directly to the Oregon Supreme Court.

Reviews and Decisions

A party aggrieved by a decision of the Court of Appeals may petition the Supreme Court for review within 35 days after the Court of Appeals issues its decision. The Supreme Court determines whether to review the case. The Supreme Court allows a petition for review whenever at least one fewer than a majority of the Supreme Court judges participating vote to allow it.

OREGON TAX COURT

Website: http://courts.oregon.gov/Tax/
Address: Robertson Bldg., 1241 State St., 4th Floor, Salem 97301-2563
Phone: 503-986-5645; TTY: 503-986-5651
Chapter 6—Oregon’s Judicial Branch

**Fax:** 503-986-5507

**Staff Directory from Oregon.gov:** [http://dasapp.oregon.gov/statephonebook/display.asp?agency=19800&division=00030](http://dasapp.oregon.gov/statephonebook/display.asp?agency=19800&division=00030)

The Oregon Tax Court has exclusive, statewide jurisdiction in all questions of law or fact arising under state tax laws, including income taxes, corporate excise taxes, property taxes, timber taxes, cigarette taxes, local budget law and property tax limitations.

**Magistrate Division**

**Address:** Robertson Bldg., 1241 State St., 3rd Floor, Salem 97301-2563

**Phone:** 503-986-5650

The Oregon Tax Court consists of two divisions: the Magistrate Division and the Regular Division. The judge of the Oregon Tax Court appoints a presiding magistrate and one or more other magistrates to serve in the Magistrate Division.

Trials in the Magistrate Division are informal proceedings. Statutory rules of evidence do not apply, and the trials are not reported. The proceedings may be conducted by telephone or in person. A taxpayer may be represented by a lawyer, public accountant, real estate broker or appraiser.

The filing fee is $240. All decisions of the magistrates may be appealed to the Regular Division of the Oregon Tax Court.

**Regular Division**

Appeals from the Magistrate Division are made directly to the Regular Division of the Oregon Tax Court. The judge of the Oregon Tax Court presides over trials in the Regular Division. The Regular Division is comparable to a circuit court and exercises equivalent powers. All trials are before the judge only (no jury) and are reported. The parties may either represent themselves or be represented by an attorney. Appeals from the judge’s decision are made directly to the Oregon Supreme Court. The filing fee is $240.

The judge serves a six-year term and is elected on the statewide, nonpartisan judicial ballot.

**OREGON CIRCUIT COURTS**


**Circuit Court Judges Phone Directory from Oregon.gov:** [http://dasapp.oregon.gov/statephonebook/display.asp?agency=19800&division=00150](http://dasapp.oregon.gov/statephonebook/display.asp?agency=19800&division=00150)

The circuit courts are the state trial courts of general jurisdiction. The circuit courts have juvenile jurisdiction in all counties except Gilliam, Morrow, Sherman and Wheeler, where the county court exercises juvenile jurisdiction except for termination of parental rights proceedings, over which the circuit courts have exclusive jurisdiction. The circuit courts also exercise jurisdiction in probate, adoptions, guardianship and conservatorship cases in all counties except Gilliam, Grant, Harney, Malheur, Sherman and Wheeler.

Circuit court judges are elected on a nonpartisan ballot for a term of six years. They must be citizens of the United States, members of the Oregon State Bar, residents of Oregon for at least three years and residents of their judicial district for at least one year (except Multnomah County judges, who may reside within ten miles of the county). Since January 1, 2007, there are 173 circuit
judges serving the 36 Oregon counties. The circuit judges are grouped in 27 geographical areas called judicial districts. Multnomah County district has 38 circuit judges; Lane, 15; Marion, 14; Washington, 14; Clackamas, 11; Jackson, 9; Deschutes, 7; Coos-Curry, 6; four districts have five judges, three districts have four judges, six districts have three judges, three districts have two judges and three districts have one judge.

To expedite judicial business, the chief justice of the Supreme Court may assign any circuit judge to sit in any judicial district in the state.