Learning The Ropes

A Practical Skills & Ethics Workshop for new admittees & lawyers entering private practice

November 8, 2022
November 9, 2022
November 10, 2022

This seminar qualifies for 15.75 MCLE credits (9.75 Oregon Practice and Procedure, 3 Introductory Access to Justice, 2 Ethics - Oregon Specific, and 1 Mental Health Substance Use Education Credits)
Day 1 –

Tuesday, November 8, 2022

Day 1 qualifies for 6.75 MCLE Credits (4.75 Practical Skills Credits - Oregon Practice and Procedure; 2 Ethics Credits - Oregon Specific)

8:00 – 8:30 Registration/Check-In – DoubleTree by Hilton Hotel 1000 NE Multnomah Street, Portland – 503.281.6111

8:30 – 9:00 PLF Overview

Learn how to reduce your risk of malpractice and how the PLF can help

Megan I. Livermore, Professional Liability Fund Chief Executive Officer

9:00 – 10:00 Introduction to Claims and Risk Management

What to do when you've made a mistake, how the PLF works, and services offered

Matthew A. Borrillo, Professional Liability Fund Director of Claims

Hong Dao, Professional Liability Fund Director of Practice Management Assistance Program

10:00 – 10:15 Break

10:15 – 11:15 Regulation of Lawyer Conduct in Oregon (1 Ethics Credit - Oregon Specific)

Linn D. Davis, Oregon State Bar Assistant General Counsel and Client Assistance Office Manager

11:15 – 12:15 Professionalism: Be the Person Your Dog Thinks You Are (1 Ethics Credit - Oregon Specific)

The Honorable John V. Acosta, United States Magistrate Judge

The Honorable Eric L. Dahlin, Multnomah County Circuit Court Judge

12:15 – 1:30 Lunch (included in registration fee)

CHOOSE ONE OF EACH OF THESE CONCURRENT SESSIONS:

1:30 – 2:15 Civil Motion Practice

Xin Xu

Xin Xu Law

1:30 – 2:15 Estate Planning and Administration; Guardianships and Conservatorships

OR

1:30 – 2:15 Courtroom Primer

Ben Eder

Thuemmel Uhle & Eder

Lydia Anderson-Dana

Stoll Berne PC

1:30 – 2:15 Criminal Law

OR

1:30 – 2:15 Business Law/Business Transactions

W. Todd Cleek

Cleek Law Office LLC

Anne E. Koch

Wyse Kadish LLP

1:30 – 2:15 Transition

2:20 – 3:05 Family Law

Amanda C. Thorpe

Cauble Selvig & Whittington LLP

2:20 – 3:05 OR

2:20 – 3:05 Courtroom Primer

Ben Eder

Thuemmel Uhle & Eder

Lydia Anderson-Dana

Stoll Berne PC

2:20 – 3:05 Criminal Law

OR

2:20 – 3:05 Business Law/Business Transactions

W. Todd Cleek

Cleek Law Office LLC

Anne E. Koch

Wyse Kadish LLP

3:05 – 3:30 Transition

3:05 – 3:30 Transition


OR

3:10 – 3:55 Criminal Law

Justin N. Rosas

The Law Office of Justin Rosas

3:55 – 4:05 Break


The Honorable Katharine von Ter Stegge, Multnomah County Circuit Court Judge

The Honorable Angela F. Lucero, Multnomah County Circuit Court Judge
Day 2 qualifies for 6 MCLE Credits (3.5 Practical Skills Credits - Oregon Practice and Procedure; 1 MHSU Credit; and 1.5 Introductory Access to Justice Credits)

8:00 – 8:30 Registration/Check-In – DoubleTree by Hilton Hotel 1000 NE Multnomah Street, Portland – 503.281.6111

8:30 – 10:00 Essential Guide to Practice Management (1.5 Practical Skills Credits)
Topics include trust accounting, conflicts, technology, office systems, file management, and pitfalls to avoid
Rachel Edwards, Monica H. Logan, and Isaac Alley, Professional Liability Fund Practice Management Attorneys

10:00 – 10:15 Break

**CHOOSE ONE OF TWO TRACKS:**

**Creating a Firm**
Why choose going solo? How choices about marketing, financials, client relations, fees, staff, and support services can lead to solo success.
10:15 – 11:15 Solo Success: Launching Your Own Practice
Rachel Edwards
PLF Practice Management Attorney

11:15 – 12:15 Solo Success: Staying the Course
Monica Aguilar Campbell
Monica Aguilar Campbell Law Office LLC
Jeffry Hinman
Hinman Law PC
Jessica M. Nomie
Jessica Nomie Law
Monica H. Logan
PLF Practice Management Attorney

12:15 – 1:30 Lunch (included in registration fee)

1:30 – 3:00 Pro Bono, Legal Aid, and Other Tools to Reach Justice for All (1.5 Introductory Access to Justice Credits)
Maya Crawford Peacock, Executive Director, Campaign for Equal Justice
Jill R. Mallory, Statewide Pro Bono Manager, Legal Aid Services of Oregon
Eric E. McClendon, Oregon State Bar Referral and Information Services Manager
William C. Penn, Oregon Law Foundation Executive Director and Legal Services Program Assistant Director

3:00 – 3:15 Break

3:15 – 4:15 Lawyer Well-Being (1 Mental Health and Substance Use Education Credit)
Kirsten Blume, JD, MA Candidate, Oregon Attorney Assistance Program Attorney Counselor Associate
Kyra M. Hazilla, JD, LCSW, Oregon Attorney Assistance Program Director and Attorney Counselor
Bryan R. Welch, JD, CADC I, Oregon Attorney Assistance Program Attorney Counselor

**Joining a Firm**
10:15 – 11:45 Success Tips For Lawyers Joining Firms (Part I)
Justice J. Brooks, I, Associate
Foster Garvey PC
Sydney Duong Holmes, Associate
Larkins Vacura Kayser LLP
Holly J. Martinez, Associate
Perkins Coie LLP
Traci R. Ray, Moderator
Executive Director, Barran Liebman LLP

11:45 – 12:15 Success Tips For Lawyers Joining Firms (Part II)
Bryan R. Welch, JD, CADC I
OAAP Attorney Counselor
Gemma A. Nelson, Associate
Elliott Ostrander & Preston PC

10:15 – 11:15 Solo Success: Launching Your Own Practice
Rachel Edwards
PLF Practice Management Attorney

11:15 – 12:15 Solo Success: Staying the Course
Monica Aguilar Campbell
Monica Aguilar Campbell Law Office LLC
Jeffry Hinman
Hinman Law PC
Jessica M. Nomie
Jessica Nomie Law
Monica H. Logan
PLF Practice Management Attorney
Learning The Ropes - Day 3

Day 3 – Thursday, November 10, 2022

Day 3 qualifies for 3 MCLE Credits (1.5 Practical Skills Credits - Oregon Practice and Procedure; and 1.5 Introductory Access to Justice Credits)

8:00 – 8:30 Registration/Check-In – DoubleTree by Hilton Hotel 1000 NE Multnomah Street, Portland – 503.281.6111

8:30 – 9:30 Courtroom Do’s and Don’ts
  Successful courtroom protocol and procedures
  The Honorable Adrian L. Brown, Multnomah County Circuit Court Judge
  The Honorable Rebecca D. Guptill, Washington County Circuit Court Judge

9:30 – 10:00 Alternative Dispute Resolution – Mandated and Voluntary
  Court-mandated arbitration/mediation and other alternative dispute resolution options
  Lisa C. Brown, Lisa Brown Dispute Resolution

10:00 – 10:15 Break

10:15 – 11:45 Access to Justice: Building a Sustainable and Inclusive Practice (1.5 Introductory Access to Justice Credits)
  Each panelist will share their experience on creating an accessible and inclusive office environment, and a panel discussion on tips to work successfully with a wide range of clients from diverse backgrounds and with different needs
  Steven L. Hill, Hill Law Office
  Kim T. Le, Source Law
  Emery Wang, Vames, Wang and Sosa
  Hong Dao, Moderator, Professional Liability Fund Director of Practice Management Assistance Program
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CHAPTER 1

PROFESSIONAL LIABILITY FUND OVERVIEW

Megan I. Livermore
Professional Liability Fund
Chief Executive Officer
Welcome to
Learning The Ropes
presented by the Professional Liability Fund

November 8-10, 2022

PLF Overview

Megan Livermore
Chief Executive Officer

Professional Liability Fund
WHAT IS THE PLF?

• Mandatory malpractice provider for Oregon State Bar members in private practice whose principal office is in Oregon
• Created in 1977 by the Oregon State Bar Board of Governors, Began operations in 1978
• PLF Board—7 attorneys and 2 public members, appointed by BOG
• Unique in the U.S.

WHAT DO WE DO FOR YOU?

• Practice Management Assistance Program (PMAP)
• Oregon Attorney Assistance Program (OAAP)
• Claims: Defense; Repair; Deposition defense (discretionary)
PRIMARY COVERAGE: HOW MUCH?

- Liability & Expense Limits
  - $300,000 for indemnity
  - $75,000 claims expense (starting 2022)
  - One claim limit per year

- Assessment: $3,300 per year
  - Discounts for 1st year: 40% ($1,980)
  - Discounts for 2nd and 3rd years: 20% ($2,640)

PRIMARY COVERAGE: WHO IS COVERED?

- Covered:
  - OSB Member
  - Private Practice
  - Principal office in Oregon

- Not Covered:
  - Law Clerks (supervised attorney)
  - Employed exclusively as in-house counsel, government lawyer, in a non-law-related field, employed by Legal Aid and other non-profit entities who have alternative insurance
  - Unemployed
PRIMARY COVERAGE: WHAT’S IN IT FOR ME?

• No deductible
• No underwriting
• No individual rate increases for claims
• Coverage cannot be canceled

PRIMARY COVERAGE: ARE THERE EXCLUSIONS?

• Wrongful conduct
• Punitive Damages, sanctions and certain fee awards
• Business transactions with clients
• Losses arising out of the business side of practice of law
  o Lost or stolen client funds or documents/property
  o Mishandling of client funds
• Defense of ethics complaints
PLF EXCESS COVERAGE: WHY?

• Primary Plan provides only a minimum amount of money for each lawyer’s mistakes

• Primary Plan **not** designed to cover a significant loss or many claims against one lawyer or a number of lawyers

PLF EXCESS COVERAGE: WHAT IS IT?

• Independent from Primary Program and totally self-supporting

• Largest Excess carrier in Oregon

• Covers approximately 700 firms/2000 attorneys

• Limits from $700,000 to $9,700,000

• Cyber Liability coverage
  o Excluded at Primary
CONTACTING US: IS THERE A DOWNSIDE?

• Short answer: No

• Communications with the PLF are confidential

• The PLF cannot discipline and does not report lawyers to the Bar

• We are here to help

WHAT IS THE TAKE AWAY?

• You are in good company—eventually, almost everyone who practices law in Oregon will touch the PLF in some way

• Call us! We’ve got your back.
  o OAAP
  o PMAP
  o Claims
CHAPTER 2

Introduction to PLF Claims and Risk Management

Matthew A. Borrillo
Professional Liability Fund Director of Claims

Hong Dao
Professional Liability Fund Director of Practice Management Assistance Program
Introduction to PLF Claims and Risk Management

Matt Borrillo
Director of Claims

Hong Dao
Director of Practice Management Assistance Program (PMAP)

Confidentiality Protected By Statute

Bar
- Regulatory
- Discipline
- Public

PLF
- Claims Department
- Practice Management Assistance Program
- Oregon Attorney Assistance Program

ORS 9.080, 9.568; OSB Bylaw 24; PLF Policies 6.150 - 6.300; ORPC 8.3
Likelihood of Claim

- 7,192 Lawyers Covered by the PLF
- Between 850 – 950 Claims Per Year
- Chances are roughly 1 in 7 (about 15%)
- 10 yrs (75%) - 15 yrs (81%) – 20 yrs (85%)

Rate of claims

New v. experienced attorneys
Solo/small firms v. big firms
Factors that lead to malpractice claims

- Inadequate office systems
- Inadequate experience in the law
- Failure to follow through
- Inadequate preparation
- Document drafting errors
- Failure to file/record documents
- Failure to meet deadline
- Trial errors
- Poor client relations

Number of Claims by Area of Law
PLF Claims Closed in 2021 (646 claims)
Indemnity and Expense Paid
PLF Claims Closed in 2021 ($15.8m)

Anatomy of a Malpractice Claim
Layers of Causes – A Teamwork Approach
Client Does Not Know There May Be An Issue

- Gather Information
- Contact PLF
- Contact Excess Carrier
- Consider “repairs” so we can discuss them
- Consider ethics issues
- Inform the client

Informing the Client Potential/Actual Issue

- Call the PLF First
- Facts Only
- No Opinions
- Recommend Independent Legal Advice
- Discuss Ethical Issues
- Send Confirming Letter
Let the Professionals Help You

- Accept your role as a client/covered Party
- Talk to PLF before you talk to anyone

https://osbplf.org
503-639-6911 | 800-452-1639
- Claims Attorneys
- Practice Management Attorneys
- Practice aids • Books • CLEs
- InPractice Blog • InBrief Newsletter

https://oaap.org
503-226-1057 | 800-321-6227
- Short-term individual counseling
- Referral to other resources
- Support groups • Workshops
THANK YOU
REGULATION OF LAWYER CONDUCT IN OREGON

Linn Davis
Oregon State Bar Assistant General Counsel and Client Assistance Office Manager
THE REGULATION OF LAWYER CONDUCT IN OREGON

Learning the Ropes November 2022
Linn Davis Asst General Counsel/CAO

WHO WE ARE
WHO WE ARE

OREGON RULES OF PROFESSIONAL CONDUCT (RPC) 8.5

HTTPS://WWW.OSBAR.ORG/RULESREGS

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.
**CLIENT ASSISTANCE OFFICE (CAO)**

OSB Rules of Procedure (BR) Rule 2.5 Intake and Review of Inquiries and Complaints by CAO

(a) Client Assistance Office. The Bar shall maintain a Client Assistance Office, separate from that of Disciplinary Counsel. The Client Assistance Office shall, to the extent possible and resources permitting, receive, review, and respond to all inquiries from the public concerning the conduct of attorneys and may refer inquirers to other resources. The Client Assistance Office will consider inquiries submitted in person, by telephone or by e-mail, but may require the complainant to submit the matter in writing before taking any action. The Client Assistance Office will determine the manner and extent of review required for the appropriate disposition of any inquiry.

(b) Disposition by Client Assistance Office.

(1) If the Client Assistance Office determines that, even if true, an inquiry does not allege misconduct, it shall dismiss the inquiry with written notice to the complainant and to the attorney named in the inquiry.

(2) If the Client Assistance Office determines, after reviewing the inquiry and any other information deemed relevant, that there is sufficient evidence to support a reasonable belief that misconduct may have occurred, the inquiry shall be referred to Disciplinary Counsel as a grievance. Otherwise, the inquiry shall be dismissed with written notice to the complainant and the attorney.

(3) The Client Assistance Office may, at the request of the complainant, contact the attorney and attempt to assist the parties in resolving the complainant's concerns, but the provision of such assistance does not preclude a referral to Disciplinary Counsel of any matter brought to the attention of the Client Assistance Office.

(c) Review by General Counsel. Any inquiry dismissed by the Client Assistance Office may be reviewed by General Counsel upon written request of the complainant. General Counsel may request additional information from the complainant or the attorney and, after review, shall either affirm the Client Assistance Office dismissal or refer the inquiry to Disciplinary Counsel as a grievance. General Counsel may affirm the dismissal by adopting the reasoning of the Client Assistance Office without addition discussion. The decision of General Counsel is final.

**DISCIPLINARY COUNSEL'S OFFICE (DCO)**

Rule 2.6 Investigations (excerpt)

(a) Review of Grievance by Disciplinary Counsel.

(1) For grievances referred to Disciplinary Counsel by the Client Assistance Office pursuant to BR 2.5(a)(2), Disciplinary Counsel shall, within 14 days after receipt of the grievance, mail a copy of the grievance to the attorney, if the Client Assistance Office has not already done so, and notify the attorney that he or she must respond to the grievance in writing to Disciplinary Counsel within 21 days of the date Disciplinary Counsel requests such a response. Disciplinary Counsel may grant an extension of time to respond for good cause shown upon the written request of the attorney. An attorney need not respond to the grievance if he or she provided a response to the Client Assistance Office and is notified by Disciplinary Counsel that further information from the attorney is not necessary.

(2) If the attorney fails to respond to Disciplinary Counsel or to provide records requested by Disciplinary Counsel within the time allowed, Disciplinary Counsel may file a petition with the Disciplinary Board to suspend the attorney from the practice of law, pursuant to the procedure set forth in BR 7.1. Notwithstanding the filing of a petition under this rule, Disciplinary Counsel may investigate the grievance.

(3) Disciplinary Counsel may, if appropriate, offer to enter into a diversion agreement with the attorney pursuant to BR 2.10. If Disciplinary Counsel chooses not to offer a diversion agreement to the attorney pursuant to BR 2.10 and does not dismiss the grievance pursuant to BR 2.6(b), Disciplinary Counsel shall refer the grievance to the SPRB at a scheduled meeting.

(b) Dismissal of Grievance by Disciplinary Counsel. If, after considering a grievance, the response of the attorney, and any additional information deemed relevant, Disciplinary Counsel determines that probable cause does not exist to believe misconduct has occurred, Disciplinary Counsel shall dismiss the grievance. Disciplinary Counsel shall notify the complainant and the attorney of the dismissal in writing. A complainant may contest in writing the action taken by Disciplinary Counsel in dismissing his or her grievance, in which case Disciplinary Counsel shall submit a report on the grievance to the SPRB at a scheduled meeting. The SPRB shall thereafter take such action as it deems appropriate.
DISCIPLINARY COUNSEL'S OFFICE (DCO)

RPC 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS (excerpt)
(a) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
(1) knowingly make a false statement of material fact; or
(2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

BR 7.1 Suspension for Failure to Respond to a Subpoena (excerpt)
(a) Petition for Suspension. When an attorney fails without good cause to timely respond to a request from Disciplinary Counsel for information or records, or fails to respond to a subpoena issued pursuant to BR 2.2(b)(2), Disciplinary Counsel may petition the Disciplinary Board for an order immediately suspending the attorney until such time as the attorney responds to the request or complies with the subpoena. A petition under this rule shall allege that the attorney has not responded to requests for information or records or has not complied with a subpoena, and has not asserted a good-faith objection to responding or complying. The petition shall be supported by a declaration setting forth the efforts undertaken by Disciplinary Counsel to obtain the attorney’s response or compliance.
(b) Procedure. Disciplinary Counsel shall file a petition under this rule with the Disciplinary Board Clerk. The Adjudicator shall have the authority to act on the matter for the Disciplinary Board. A copy of the petition and declaration shall be served on the attorney as set forth in BR 1.8(a).
(c) Response. Within 7 business days after service of the petition, the attorney may file a response with the Disciplinary Board Clerk, setting forth facts showing that the attorney has responded to the requests or complied with the subpoena, or the reasons why the attorney has not responded or complied. The attorney shall serve a copy of the response upon Disciplinary Counsel pursuant to BR 1.8(b). Disciplinary Counsel may file a reply to any response with the Disciplinary Board Clerk within 2 business days after being served with a copy of the attorney’s response and shall serve a copy of the reply on the attorney.
(d) Review by the Disciplinary Board. Upon review, the Adjudicator shall issue an order that either denies the petition or immediately suspends the attorney from the practice of law for an indefinite period. The Adjudicator shall file the order with the Disciplinary Board Clerk, who shall promptly send copies to Disciplinary Counsel and the attorney.

NEITHER SILENCE NOR “BOOM SHAKALAKA” ARE VALID RESPONSES

[Bar Counsel charged that] “respondent failed without good cause "to respond to requests for information by Bar Counsel or the [board of bar overseers] made in the course of the processing of a complaint."

The respondent alleged that he "DID COMPLY, and DID PROVIDE AN ANSWER, and my answer was provided in a form of SILENCE. (BOOM SHAKALAKA)." He also stated that, to the extent an answer was required, he "formally den[j]ied, and demand[ed] a Jury Trial."

By failing without good cause to cooperate with bar counsel’s investigation of a complaint of misconduct, the respondent violated S.J.C. Rule 4:01, § 3 (1)."

In re Liviz (Mass. 2020)
DISCIPLINARY COUNSEL'S OFFICE (DCO)

Rule 2.6 Investigation (excerpt)
(c) Review of Grievance by SPRB.

(1) The SPRB shall evaluate a grievance based on the report of Disciplinary Counsel to determine whether probable cause exists to believe misconduct has occurred. The SPRB shall either dismiss the grievance, admonish the attorney, direct Disciplinary Counsel to file a formal complaint by the Bar against the attorney, or take action within the discretion granted to the SPRB by these rules.

- (A) If the SPRB determines that probable cause does not exist to believe misconduct has occurred, the SPRB shall dismiss the grievance and Disciplinary Counsel shall notify the complainant and the attorney of the dismissal in writing.
- (B) If the SPRB determines that the attorney should be admonished, Disciplinary Counsel shall so notify the attorney within 14 days of the SPRB's meeting. If an attorney refuses to accept the admonition within the time specified by Disciplinary Counsel, Disciplinary Counsel shall file a formal complaint against the attorney on behalf of the Bar. Disciplinary Counsel shall notify the complainant in writing of the admonition of the attorney.
- (C) If the SPRB determines that the complaint should be investigated further, Disciplinary Counsel shall conduct the investigation and notify the complainant and the attorney in writing of such action.

DISCIPLINARY COUNSEL'S OFFICE (DCO)

Rule 6.1 Sanctions.
(a) Disciplinary Proceedings. The dispositions or sanctions in disciplinary proceedings or matters brought pursuant to BR 3.4 or 3.5 are

(1) dismissal of any charge or all charges;
(2) public reprimand;
(3) suspension for periods from 30 days to five years;
(4) a suspension for any period designated in BR 6.1(a)(3) which may be stayed in whole or in part on the condition that designated probationary terms are met; or
(5) disbarment.

In conjunction with a disposition or sanction referred to in this rule, a respondent may be required to make restitution of some or all of the money, property, or fees received by the respondent in the representation of a client, or reimbursement to the Client Security Fund.
IN oREGON, LAWYER REGULATION IS PUBLIC

our ethical Duties as lawyers

Loyalty  Competence  integrity
LOYALTY - CONFLICTS

We have a duty to avoid current and former client conflicts of interest. Know who your clients are. Avoid having clients you don't intend.

Reasonable expectations of the client test:

"To establish that the lawyer-client relationship exists based on reasonable expectation, a putative client's subjective, uncommunicated intention or expectation must be accompanied by evidence of objective facts on which a reasonable person would rely as supporting existence of that intent; by evidence placing the lawyer on notice that the putative client had that intent; by evidence that the lawyer shared the client's subjective intention to form the relationship; or by evidence that the lawyer acted in a way that would induce a reasonable person in the client's position to rely on the lawyer's professional advice. The evidence must show that the lawyer understood or should have understood that the relationship existed, or acted as though the lawyer was providing professional assistance or advice on behalf of the putative client, as the lawyer" In re Welaher, 310 Or 757, 770 (1990).

LOYALTY - CONFLICTS

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

(1) the representation of one client will be directly adverse to another client;

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

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

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

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

(2) the representation is not prohibited by law;

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

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

LOYALTY - CONFLICTS

Rule 1.0(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

Rule 1.0(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
LOYALTY – FORMER CLIENT CONFLICTS

RULE 1.9 DUTIES TO FORMER CLIENTS

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

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

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

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

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

(d) For purposes of this rule, matters are “substantially related” if the lawyer’s representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or

(2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client’s position in the subsequent matter.
OTHER ASPECTS OF LOYALTY – COMMUNICATION

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

RULE 1.4 COMMUNICATION

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

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
OTHER ASPECTS OF LOYALTY – CONFIDENTIALITY

RULE 1.6 CONFIDENTIALITY OF INFORMATION
A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

RULE 1.0(f) "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

COMPETENT REPRESENTATION REQUIRES

RULE 1.1 COMPETENCE
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
COMPETENT REPRESENTATION ALSO REQUIRES

RULE 1.3 DILIGENCE
A lawyer shall not neglect a legal matter entrusted to the lawyer.

Pattern of failing to take action when action is needed = neglect of a legal matter.

INTEGRITY

Rule 1.2(b) – Don’t assist a client in fraud or illegal conduct

Rule 3.1 – Don’t pursue claims or contentions that you know are lacking in factual or legal merit.

Rule 4.1 Truthfulness - in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting in an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
INTEGRITY

Rules 3.3 Candor Toward Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;
(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or
(5) engage in other illegal conduct or conduct contrary to these Rules.

INTEGRITY

Rules 3.3 Candor Toward Tribunal continued
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal.
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, but in no event require disclosure of information otherwise protected by Rule 1.6.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL (excerpt)

A lawyer shall not:

(a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:

1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or (3) a reasonable fee for the professional services of an expert witness.

(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;

RULE 8.4 MISCONDUCT (excerpt)

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

1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

4) engage in conduct that is prejudicial to the administration of justice;
RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

(a) In representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Rule 8.4(a) It is professional misconduct for a lawyer to:

(7) in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.
REPORTING DUTIES

Rule 8.1 Bar Admission and Disciplinary Matters

(b) A lawyer admitted to practice in this state shall, within 30 days after receiving notice thereof, report in writing to the disciplinary counsel of the Oregon State Bar the commencement against the lawyer of any disciplinary proceeding in any other jurisdiction.
REPORTING DUTIES

Rule 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATIONS

(I) Every lawyer who receives notification from a financial institution that any instrument presented against his or her lawyer trust account was presented against insufficient funds, whether or not the instrument was honored, shall promptly notify Disciplinary Counsel in writing of the same information required by paragraph (I). The lawyer shall include a full explanation of the cause of the overdraft.

REPORTING DUTIES

OSB Rules of Procedure Rule 1.11 Designation of Contact Information.

(a) All attorneys must designate, on a form approved by the Bar, a current business address and telephone number, or in the absence thereof, a current residence address and telephone number. A post office address designation must be accompanied by a street address.

(b) All attorneys must also designate an e-mail address for receipt of bar notices and correspondence except (i) attorneys whose status is retired and (ii) attorneys for whom reasonable accommodation is required by applicable law.

(c) An attorney seeking an exemption from the e-mail address requirement in paragraph (b)(ii) must submit a written request to the Chief Executive Officer, whose decision on the request will be final.

(d) It is the duty of all attorneys promptly to notify the Bar in writing of any change in his or her contact information. A new designation is not effective until actually received by the Bar.
March 8, 2017

Two Rivers Correctional Institute
92911 Beach Access Road
Umatilla, OR 97882

Re: Consultation Fee of $125

Dear Mr.,

Given that you are a convicted sex offender, pervert and miscreant, it is difficult to see how you could conceivably have any moral or intellectual high ground upon which to accuse anybody of anything. Maybe that is why you are spending a substantial part of the rest of your life in prison.

First, and foremost, you are an idiot. For what it is worth, I spent over a half an hour with your mother discussing your legal problem. I normally bill at $200 an hour. So I cannot see any money. Nevertheless, I felt absolutely terrible for your elderly mother having such an absurd belief and a deplorable moron idiot for a son. For the $125 I charged her, you are simply not worth dealing with. I communicated this response to the Oregon Bar (as after you made a frivolous ethical complaint). On January 9, 2017, I had already refunded your mother $125, simply because you and your case were not worth my time to deal with. Again, I felt absolutely terrible for your mother having to put up with trash like you for offering.

Enjoy your time in prison.

PROFESSIONALISM?

PROFESSIONALISM?
PROFESSIONALISM

Oregon State Bar

Statement of Professionalism

Adopted by the Oregon State Bar House of Delegates and
Approved by the Supreme Court of Oregon effective September 26, 2006

As lawyers, we belong to a profession that serves our clients and the public good. As servants of the
rule of law, we aspire to professional standards of conduct that go beyond merely complying with
the letter of the law. The professionalism of lawyers is essential to our civil society. As such, we
are expected to uphold ethical standards that are consistent with the public trust and confidence
placed in us by the bar, the courts, and our clients. We must be mindful of the ethical principles
promulgated by the Oregon Supreme Court. These principles reflect the rule of law, ensuring the
public good and promoting the following principles in dealing with our clients, opposing counsel, the courts and all others:

- I will maintain the integrity of the profession and the legal system.
- I will reveal all forms of discrimination.
- I will promote and improve the image of the legal profession in the eyes of the public.
- I will support a diverse bench and bar.
- I will provide counsel to the courts.
- I will support the education of the public about the legal system.
- I will seek to advance my clients' goals, while at the same time recognize my professional
duty to give independent legal advice to my client
- I will disclose to my clients of the same and potential benefits or risks of any
- I will communicate fully and promptly with my client, and use written agreements with
- I will not employ tactics that are intended to delay, harass, or drain the financial resources
- I will prepare for trial and be prepared for any proceeding, in which I am representing my client
- I will disclose and report to my clients, as is necessary in the representation of my client
- I will only public positions and litigation that serve merit
- I will exercise all litigation methods and approaches to resolve disputes at every stage
- I will support pro bono activities.

Legal Ethics Helpline

503-431-6475

Oregon lawyers should use this line for personal ethics assistance from OSB counsel. Members of the public should call the Client Assistance Office at 503 620-0222.
OTHER HELPFUL RESOURCES

Oregon Formal Ethics Opinions Online: https://www.osbar.org/ethics/toc.html

(also valuable are the Managing Your Practice columns)

The Ethical Oregon Lawyer (OSB Legal Pubs 2015) available at BarBooks online or in print.

OSB Professional Liability Fund www.osbplf.org

Oregon Law Practice Management blog http://oregonlawpracticemanagement.com/

Oregon Attorney Assistance Program www.aoap.org 503 226-1057 800 321-6227 (OAAP)

OSB Fee Dispute Resolution Program https://www.osbar.org/feedisputeresolution
CHAPTER 4

PROFESSIONALISM: BE THE PERSON YOUR DOG THINKS YOU ARE

The Honorable John V. Acosta  
*United States Magistrate Judge*

The Honorable Eric L. Dahlin  
*Multnomah County Circuit Court Judge*
OSB PLF Learning The Ropes Program

“Professionalism: Be the Person Your Dog Thinks You Are”
Tuesday, November 8, 2022 @ 11:15 a.m. to 12:15 p.m.

The Honorable John V. Acosta, United States Magistrate Judge
The Honorable Eric L. Dahlin, Multnomah County Circuit Court Judge

RESOURCES:

Professionalism statements:

OSB Professionalism Statement
United States District Court, Oregon, Professionalism Statement

Cases:

Ahanchian v. Xenon Pictures, Inc., 624 F. 3d 1253 (9th Cir. 2010)
Art Ask Agency v. The Individuals, et al., Case No. 20-cv-1666 (N.D. Ill.)
(March 6, 2020 Order).
La Jolla Spa MD, Inc. v. Avidas Pharmaceuticals, LLC, Case No.: 17-CV-1124-
Sahyers v. Prugh, Holliday & Karatinos, P.L., 560 F.3d 1241 (11th Cir. 2009)
Smith v. City of Medford, Case No. 1:17-cv-00931-CL (April 13, 2020 Order)
“Why Kill All the Lawyers,” OSB Bulletin (Jan. 1999)
Wisner v. Laney, 984 N.E. 2d 1201 (Ind. 2012)

Articles:

“Civility,” ABA Journal (January 2013)
“Ivory Tower Interventions: Responding to Professionalism Dilemmas with
Judges,” OSB Bulletin (July 2020)
“Professionalism for Litigation and Courtroom Practice,” OSB Bulletin
(August 2007)

Examples:


I. Professionalism Is Not Ethics.

A. Ethics (Rules of Professional Responsibility):

1. A set of written rules that tell you what you must do and must refrain from doing
2. Being ethical can be “the passing grade”; the minimum required.

B. Professionalism.

1. A set of aspirational goals – “What we should – and should not – do.”

2. Think of it as the “What if my mother was watching?” standard.
   a. Or, think of it as the “What would I think of myself” standard.
   b. Better still, would you still be that person your dog thinks you are?

II. What Does “Professionalism” Mean?

A. Keep your word.

B. Agree to disagree – agreeably.

C. Extend professional courtesies.

D. Be courteous to and respectful of everyone.

E. Don’t let the other lawyer control your behavior.

F. Don’t do something just because you can.

G. Don’t take unfair advantage of opposing counsel.

III. Why Professionalism? Quality of Life

A. You’re staring a career that likely will last for 40 years.

B. Do you want to live the next 40 years as a cage fighter?

C. Beware the “adversary creep” into your personal life.

   1. Will you be able to be the person your dog thinks you are if you spend 8, 10, or 12 hours a day, week, after month, after year behaving like a cage fighter?

   2. “Dad, when you yell at me . . . .”

IV. Why Professionalism? Career Satisfaction

A. Professionalism avoids ethical problems.
1. Being late to hearings and meetings, missing deadlines, and last-minute efforts to meet deadlines = an increased risk of error = malpractice claims.

2. Personal lack of attention to detail.
   a. Example: issuing a garnishment on a debtor who is not in default.

3. Failing to communicate, or to communicate effectively, with clients.
   a. Example: every month the OSB Bulletin’s disciplinary notices contained examples of Oregon lawyers who were disciplined in whole or in part because they didn’t communicate with clients.

4. Substance abuse.
   a. Example: DUIs b’c of alcohol abuse.

B. What kind of clients do you want to have?

1. What kind of lawyers do good clients want to have?

2. “junk-yard dogs” usually attract junk-yard clients.

3. Most clients, particularly institutional, corporate, and organizational clients, don’t want to be represented by a lawyer who will damage their public image, will diminish the appeal of their product or service, will act in ways that are inconsistent with the entity’s culture, or will detrimentally affect the court’s perception of them in future cases.

C. Do you want to encourage malpractice claims, bar complaints, and billing disputes?

1. The importance of a legal “bedside manner.”

D. You never know who you will encounter in your career 10, 15, or 20 years later.

1. What a different path . . . . All those I encountered over the years (judgeship, partnership, bar committees, community service, law school teaching) who could have damaged by career path had I not been professional during my encounters with them.

V. The Benefits Professional Conduct – and the Prejudicial Effects of Behaving Unprofessionally: Jurors.
A. Jurors: they notice when lawyers are professional and exhibit good manners – and when they aren’t professional and are poorly behaved. Examples:

1. “I had to go home and remind myself that it was not about the lawyer but was about the [party]. It was distracting from the merits.”

2. Found for party “in spite of” that party’s lawyer.

3. Did not like the lawyer’s condescending; contemptuous, harsh tone.

4. Dislike of lawyers’ “drama” (one referred to it as “BS”) in the courtroom.

B. Jurors: want lawyers to use trial time efficiently and effectively. Observations about poor use of time include:

1. Lawyers need to be more concise; questions should be to the point, clear, short.

2. Lawyer talked too much; kept talking; didn’t get to the point.
   a. “80% of what the lawyers talked about was irrelevant.”
   b. “We’re pretty smart – the lawyers didn’t need to ask the same thing over and over.”

C. Jurors want lawyers to be organized and well prepared. Juror observations include:

1. Inability to use electronic evidence equipment made lawyer look “bumbling and unprofessional.”

2. “I think it’s important to be prepared . . . it seems like lawyers are very patient with each other about this, which means it must be pretty typical to be digging around for documents in the middle of testimony, but I find it to be a waste of time and therefore frustrating.”

3. Pauses between questions were frustrating because they dragged out the trial when the trial already was long; made the lawyer look disorganized.

VI. The Benefits Professional Conduct – and the Prejudicial Effects of Behaving Unprofessionally: Judges.

A. Judges and their staffs notice when professionalism is present and also when it’s absent.

B. Judges can publicize unprofessional behavior if the unprofessional behavior is egregious enough:

1. Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253 (9th Cir. 2010):
Illustrates the danger of sharp tactics and the use of a technical and narrow reading of rules.

Court criticized district court for not exercising its discretion to enforce the dictates of FRCP 1 to defendant’s counsel’s unprofessional conduct.

**Opinion excerpt:** Perhaps contributing to the district court’s errors and certainly compounding the harshness of its rulings, defense counsel disavowed any nod to professional courtesy, instead engaging in hardball tactics designed to avoid resolution of the merits of this case. We feel compelled to address defense counsel’s unrelenting opposition to Ahanchian’s counsel’s reasonable requests. Our adversarial system depends on the principle that all sides to a dispute must be given the opportunity to fully advocate their views of the issues presented in a case. . . Here, defense counsel took knowing advantage of the constrained time to respond created by the local rules, the three-day federal holiday, and Ahanchian’s lead counsel’s prescheduled out-of-state obligation. Defense counsel steadfastly refused to stipulate to an extension of time, and when Ahanchian’s counsel sought relief from the court, defense counsel filed fierce oppositions, even accusing Ahanchian’s counsel of unethical conduct. Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system. . .

Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect. . . Where, as here, there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries.


Illustrates the financial consequences of unprofessional behavior: the court wrote a 23-page opinion to impose sanctions in the amount of $28,502.03 on plaintiff’s lawyer.

**Opinion excerpt:** “Never before in this Court’s nearly ten-year tenure have the sanctions the Court imposes today been more fitting and more deserved by an attorney. Chovanes’s atrocious conduct at the Gardner deposition in particular fell far below the standard of professional conduct becoming an attorney practicing before this—or any other—Court. There may be a fine line between zealous advocacy and unprofessional conduct, but Chovanes trampled that line long before barreling past it. [Plaintiff’s lawyers’] frivolous, willful, vexatious conduct greatly expanded the Gardner
deposition far beyond what the proceedings would have lasted without her unending unjustified interruptions and harassment of [defense counsel].”

The court ordered plaintiff’s counsel to self-report the opinion to the Pennsylvania bar along with all the exhibits (including the sanctions hearing transcript) and ordered her to attach the opinion to any pro hac vice application to the S.D. Ca., and further ordered that “This requirement shall have no expiration date and shall remain in effect in perpetuity.”


Illustrates the danger of following a client’s instructions without fulfilling the role of adviser to your client and officer of the court.

Court found plaintiff to be the prevailing party but denied award of attorney fees because the “reasonable fee is no fee.”

**Opinion excerpt:** The district court’s inherent powers support its decision here. . . [T]he lawyer for Plaintiff made absolutely no effort – no phone call; no email; no letter – to inform them of Plaintiff’s impending claim much less to resolve this dispute before filing suit. Plaintiff’s lawyer slavishly followed his client’s instructions and – without a word to Defendants in advance – just sued his fellow lawyers. FN7 As the district court saw it, this conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court. The district court refused to reward – and thereby to encourage – uncivil conduct by awarding Plaintiff attorney’s fees or costs.

**FN7:** This explanation counts for little: a lawyer’s duties as a member of the bar – an officer of the court – are generally greater than a lawyer’s duties to the client. See *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir. 1993) (“An attorney’s duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself.”).


Illustrates: judges’ frustration with lawyers’ constant bickering and the consequences of being drawn into opposing counsel’s bad behavior and responding in kind.

**Opinion excerpt:** “Professionalsism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and
civility are the mainstays of our profession and the foundations upon which lawyers practice law. The public expects it. Fellow lawyers expect it. Our profession demands it.”

“A jury trial is not a free-for-all. It is a civil forum in which advocates represent their clients before a panel of citizens, in front of a judicial officer who is responsible for enforcing the rules of procedure and rules of evidence and assuring the proper behavior of everyone in the courtroom. . . . It is important that attorneys not lose control of their passion for their client or cause and become too emotionally involved and make the cause personal. In such circumstances they risk harm to their client, their reputation, and our profession.”

5. In re Starr, 330 Or. 385, 394 (2000) (stating that “persistent, even reckless, lack of professionalism” is a trait or mindset relevant to reinstatement to the bar, equivalent in importance to “failure to acknowledge prior wrongdoing”).

VII. The Benefits Professional Conduct – and the Prejudicial Effects of Behaving Unprofessionally: Public Confidence in the Justice System.

A. “What would Atticus Do?”

B. Atticus Finch and Top 100 Heroes in American Film.

C. A word about lawyer jokes:

1. I stopped telling them a few years ago.

2. “Jokes about socially unacceptable things aren’t just “jokes.” They serve a function of normalizing that unacceptable thing, of telling the people who agree with you that, yes, this is an okay thing to talk about.”

VIII. Professionalism in Writing.

A. Almost always, your written work product is the first impression and is the basis for your credibility with the court and other lawyers.

1. “Half of what we say is that we are the ones saying it.”

2. When the judge sees your name on the docket or a brief, will the reaction be relief or dread.

B. Guidelines.

1. Don’t make it personal.
2. Don’t convert your client’s case into a tug-of-war between the lawyers.

3. Content:
   
   a. Avoid invectives and personal attacks against opposing counsel.

   b. Avoid hyperbole, sarcasm, inflammatory adjectives, snide or condescending remarks

C. Examples of unprofessional writing:

   1. “Plaintiff’s counsel has over-litigated this case, starting with [the] largely frivolous . . . complaint.”

   2. “[Plaintiff] attempted to reach for the brass ring yet again.” ( Appearing in the fact summary.)

   3. “At its core, this case is nothing more than an international forum shopping expedition that should not be countenanced by the court.” (Appearing in the introduction.)

   4. “This Declaration is a feeble attempt to question [witness’s] analysis. However, it is a red herring at best.”

   5. “I. Preliminary Statement - Criticism of the Response

   “[Defendant’s] Response is one attempt at misdirection after another and, in fact, sounds like the cries of a guilty child being scolded by a parent for hitting a sibling: it was not my fault, it’s their fault.”


   “Many a child on the playground has uttered the oft-quoted refrain, “I’m taking my ball and going home.” [Defendant], acting the part of the playground bully, has taken this one step further. [Defendant] seeks to take our ball (i.e. the [Plaintiff’s] insurance policy) and make us go home. The recess monitor, in this case the court, should not allow this result.”

IX. Professionalism and Other Lawyers.

   A. More experienced opponents.

   1. The litigation process contemplates a skill and experience disparity between lawyers.
2. But be aware that some lawyers will deliberately try to take advantage of less skilled or experienced lawyers.

3. It will happen.

B. Guidelines for less experienced lawyers.

1. Don’t retaliate.

1. Know the rules: rules of procedure, local rules, the “unwritten” rules, such as the “ask-first/take-first” deposition custom.

2. Generally, you aren’t required to agree to something proposed by opposing counsel, and certainly not required to agree in immediate response to the suggestion being made.

3. Find an experienced lawyer you can consult as a resource.

4. For misstatements and accusations, protect your record by responding to accusations on the record or in writing.

5. If a lawyer engages in obstructionist behavior, always have ready the phone number of the assigned judge and/or presiding judge, and if it’s likely to occur in deposition, consider videotaping the deposition.

C. Sanctions motions

1. Serious matter because it is a charge against an officer of the court that s/he has violated an ethics standard.

2. Some lawyers will threaten to file a sanctions motion as an intimidation tactic.

   a. Make sure your conduct was appropriate, consider consulting with a more experienced lawyer.

   b. If your conduct is proper, tell the other lawyer they should file the motion if they believe it necessary.

   c. Generally, judges don’t like sanctions motions because they are often filed as a tactic or without supporting evidence.

   d. An ill-considered sanctions motion from opposing counsel likely will cause that lawyer to lose credibility with the court.
c. Generally, judges don’t like sanctions motions because they are often filed as a tactic or without supporting evidence.

d. An ill-considered sanctions motion from opposing counsel likely will cause that lawyer to lose credibility with the court.
As lawyers, we belong to a profession that serves our clients and the public good. As officers of the court, we aspire to a professional standard of conduct that goes beyond merely complying with the ethical rules. Professionalism is consistent conduct that includes compliance with all ethical rules promulgated by the Oregon Supreme Court, courageous representation of clients, striving for the public good and complying with the following principles in dealing with our clients, opposing parties, opposing counsel, the courts and all others:

- I will promote the integrity of the profession and the legal system.
- I will work to ensure access to justice for all segments of society.
- I will avoid all forms of discrimination.
- I will protect and improve the image of the legal profession in the eyes of the public.
- I will support a diverse bench and bar.
- I will promote respect for the courts.
- I will support the education of the public about the legal system.
- I will work to achieve my client’s goals, while at the same time maintain my professional ability to give independent legal advice to my client.
- I will always advise my clients of the costs and potential benefits or risks of any considered legal position or course of action.
- I will communicate fully and openly with my client, and use written fee agreements with my clients.
- I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party.
- I will always be prepared for any proceeding in which I am representing my client.
- I will be courteous and respectful to my clients, to adverse litigants and adverse counsel, and to the court.
- I will only pursue positions and litigation that have merit.
- I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.
- I will support pro bono activities.
Encouraging the quality of our professional lives and improving the public’s perception of our profession begins with our conduct toward each other. It also rests on our conduct in the courtroom, before judges, opposing counsel, juries and members of the public. Lawyers are educated and trained to exercise a high degree of skill and competence in representing individuals and organizations in the legal system. They should complement those attributes by exercising the highest standard of conduct when dealing with judges, clients and one another, whether verbally or in writing.

Professionalism differs from ethics in that ethics rules are mandated rules of conduct, while professionalism is a standard to which lawyers should aspire. The following suggestions for observing professionalism stem from years of litigation and courtroom experience — and some hard lessons learned during that time. This list was compiled from comments received from judges, attorneys and clients who were asked for suggestions on what can be done to improve professionalism. Integrating these suggestions into daily practice not only will improve the quality of your professional life, but will also make you a more effective advocate for your client.

1. Promote the efficient resolution of disputes.

In most cases, an attorney should advise the client of the availability of mediation, arbitration and other appropriate methods for resolving disputes outside of the courtroom. A professional lawyer should always consider, and advise the client of, the most efficient way of resolving the dispute. This includes consideration of the effect litigation and particularly the trial will have on your client and the benefits to your client that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost; staying out of court usually accomplishes that goal. Attorneys should do everything they can to resolve pretrial disputes without involving the court. This is especially true with disputes over discovery issues — many motions to compel discovery can be resolved without using the resources of the justice system.

2. Be a counselor to your client, not a mere puppet.

Clients don’t always know what is and isn’t right. They aren’t familiar with the ethics rules that bind lawyers and the unwritten local conventions lawyers observe when working on cases with one another. Some clients want you to dislike the opposing party as much as they do and, thus, they expect you to make the other side’s life miserable. Some clients also might not appreciate that you and your opponent are professional colleagues and very likely will have cases against one another in the years to come, and they might not take into account that your relationship with a judge is important to your ability to represent them in the current case and other clients in future cases.

Adopting a “scorched-earth” or “take-no-prisoners” approach to litigation will not serve your client’s interests and ultimately will work to your client’s disadvantage in resolving the dispute. A lawyer should defuse emotions that might interfere with the effective handling of litigation and which could complicate or preclude resolution of a dispute in a way that best serves the client’s interests. If a client requests or insists upon a course of action that is contrary to local custom or would be counterproductive to the client’s interests, tell the client so and explain why. Some clients might take longer to understand this notion than will others, but you can’t represent your client’s interests by taking an action you know will ultimately harm those interests.

3. Keep your word.

Lawyers spend a lot of time putting things in writing, but in the daily practice of litigation a lot of routine business gets done verbally. Your ability to practice effectively will depend to a large degree on whether opposing counsel and co-counsel trust you. If your colleagues know they can trust you to do what you say, your professional life will be a lot easier. So, do what you say you will, and if you can’t do or agree to something, then say you can’t do or agree to it. You’ll find that a little candor goes a long way.

4. Don’t fudge.

Credibility is everything. Some lawyers gain a reputation for being fudge-
ers. They overstate the facts in a case, misrepresent the holding in a case, or misstate the position of the opposing party. Some attorneys believe they are simply zealously representing their clients when they stretch or shade the truth. They are actually doing a disservice to their clients. Once this reputation sets in, it is difficult for a lawyer to regain credibility, and it ultimately diminishes the lawyer's ability to be effective as an advocate. Credibility and reputation are earned from hard work, ethical practice and a believable and accurate representation. Credibility and reputation will get you a lot further during litigation and especially in a courtroom than any other aspect of your practice.

5. Disagree agreeably.

Lawyers don’t always agree, especially when they are on opposite sides of a case. But a disagreement between lawyers shouldn’t devolve into a declaration of war. Lawyers should keep in mind that disagreements are inherent in litigation and that each side has a job to do for his or her client. In doing that job it is inevitable that lawyers will disagree on the facts, legal or procedural issues, the credibility of a party or witness, or the value of a case. When the disagreement can’t be resolved, accept that the disagreement is a legitimate difference of opinion between two professionals and don’t take it as a personal affront.

6. Extend professional courtesies.

“Live by the sword, die by the sword.” It’s a maxim that applies to litigation and to litigators. The professional lawyer consents to reasonable requests for extensions of time, resets, rescheduling and other routine matters. If such a request won’t prejudice your client, there’s usually no legitimate reason not to agree to an opponent’s request. If you refuse a reasonable request and your opponent takes the matter to the judge and you can’t demonstrate prejudice to your client or unreasonableness by your opponent, think about how you’ll look to the judge. The time will come when you’ll need an extension, reset or rescheduling of a deadline or event. When that time comes, don’t expect your opponent to be reasonable toward you if you’ve refused similar requests from your opponent.

7. Be prepared.

The process of litigating a case and preparing for trial can be more important than the trial itself. Being prepared is to know the rules of civil procedure and courtroom protocol and to follow those rules. This includes such things as: conducting efficient and focused depositions; knowing cases cited in the briefs to address questions at oral argument; marking your exhibits and preparing an exhibit list before trial; exchanging your exhibits with the opposing counsel before trial; knowing what is and is not appropriate to mention in your opening statement; knowing how to offer an exhibit into evidence; carefully selecting and preparing jury instructions and understanding the hearsay rule. Professionalism begins with conducting all phases of litigation well and being prepared to enter the courtroom to conduct your business there in a competent manner.

8. Be on time!

Some lawyers have a hard time showing up at a deposition, a hearing or even the trial at the time it is scheduled to be conducted. Most lawyers work at showing up on time and if they can’t be there on time, they make an effort to notify their opponent or the court of the reason for their tardiness. But some lawyers have no problem with regularly being 10 or more minutes late for a scheduled appearance and never understand that showing up late for a scheduled proceeding or court appearance exhibits an attitude of disrespect for those who are being made to wait.

9. Be courteous and respectful.

A little courtesy and respect go a long way. You can’t belittle or mistreat courthouse staff or opposing counsel without affecting your standing with the judge or the trier of fact. Whether dealing with opposing counsel, a court reporter, courtroom staff or your own co-workers, showing respect toward everyone is often the most effective way to establish the basis for relationships that will serve you and your client well later on. Treating an opponent with respect and professional courtesy typically creates a cordial (if not friendly) dynamic that gives you credibility and influence with your opponent. Ultimately, these characteristics will translate into
better results for your client, regardless of whether the case settles or goes to trial.

10. Pay attention to your appearance.

Most lawyers are appropriately dressed and groomed when they participate in a case proceeding and come into the courtroom. Some forget where they are. Professional lawyers present themselves in such a way as to not detract from the presentation of their case.

11. Maintain an appropriate demeanor.

It is unprofessional to overreact in the courtroom to something you don’t agree with — especially to a ruling by the judge on an objection. Some lawyers have the unfortunate habit of overreacting to testimony or to a ruling they don’t agree with in the courtroom. This tends to undermine a lawyer’s effectiveness and credibility in the courtroom. The advice of one judge is “not take a judge’s ruling or decision personally.”

12. Object to the evidence in an appropriate manner.

Trial lawyers should be frugal with their objections. If it is not hurting your case, don’t object. Seasoned trial lawyers object infrequently; rookies jump up and down constantly. It is unprofessional and ineffective to be registering constant objections. When an attorney makes an objection to the evidence, the attorney should stand and say “objection,” and in a summary fashion state the basis for the objection, such as “relevance” or “hearsay.” If the court wants the other attorney to respond, the court should so indicate. Lawyers can become sloppy and unprofessional with the objection process. Most judges do not appreciate “speaking objections,” where the attorney ends up giving information to the jury that can’t be obtained from a witness.

13. Write as if your reputation depended on it.

During a typical case your written communications will comprise the majority of your contact with the judge, your opponent and your client. In many cases, your written word is often the first contact you will have with each of them.

Don’t write anything you wouldn’t want to be known for among your peers or you wouldn’t want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks.

Each time you compose a pleading, brief, letter or e-mail, you shape your professional reputation. With that in mind, don’t write anything you wouldn’t want to be known for among your peers or you wouldn’t want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks. Don’t overstate the facts of the case, and be careful to accurately present relevant legal authority. Proofread your written work for grammar, spelling and typographical errors. Remember that each time you write you have the unique opportunity to build your professional reputation among judges, colleagues and clients, so make sure you’re creating a reputation you can live with.

14. Avoid ex parte contacts with the court.

Any attempt to gain an advantage over your opponent through an ex parte contact with the court, or the court staff, will poison your reputation with a judge. This includes everything from direct contact with a judge on the merits of the case to supplying information to the court without adequate notice to opposing counsel. For example, it is not appropriate to place a motion or memorandum into the hands of the judge while mailing a copy of the document to opposing counsel, which may arrive at the lawyer’s office two or more days later.

15. Don’t take unfair advantage of opponents.

While it’s part of the litigation process to capitalize on your opponent’s mistakes or inexperience, it’s not necessary to deliberately embarrass, humiliate, intimidate or bully an inexperienced or less skilled opponent. Experienced lawyers should model appropriate professional behavior to less experienced lawyers. If we model rude and boorish behavior to less experienced lawyers, we will create the kind of lawyers that make practice more stressful and less enjoyable. Engaging in such inappropriate conduct might cause your opponent to work harder than he or she otherwise would, to the ultimate disadvantage of your client — and make you look foolish in the process.

16. Don’t do something just because you can.

Justice Potter Stewart once said, “There is a big difference between what you have a right to do and what is right to do.” No ethics rule prohibits lawyers from yelling at their opponents or engaging in intimidating behavior, and the ethics rules don’t require that lawyers be cordial to one another. On the other hand, think about how you’d like to spend the next 40 years as a practicing lawyer. Do you want to build hostile and acrimonious relationships with lawyers against whom you might be practicing for decades? Probably not. It usually takes very little effort to be cordial to your opponent, and that small investment of goodwill will pay large dividends to you in the years to come.

17. Don’t behave differently than you would in front of a judge.

The great bulk of litigation occurs outside the presence of a judge. The rules of professionalism aren’t different just because the judge isn’t present to watch your every move. If you wouldn’t engage in the behavior in front of a judge, then don’t do so when the judge isn’t around.

18. Don’t let your opponent control your behavior.

Some lawyers behave unreasonably or harshly, or are consistently difficult precisely because they want you to lose your objectivity and shift your focus to “getting back” at them. They know that if they can get you to focus on them, then you’ll spend less time working up your case. Once they get you thinking about how to get back at them and not about how to build your client’s case, they’ve won. So
keep your balance. Your client deserves an objective, diligent advocate — not a hothead bent on vengeance against another lawyer.

19. Don’t take yourself too seriously.

A wise practitioner once said, “Take what you do seriously, but not yourself.” Keep in mind that the case is not about you. Many lawyers over-estimate the impact they have in the cases they try in the courtroom. The truth is that the trier of fact focuses on the message (i.e., the facts) and not the messenger unless, through inappropriate conduct, the messenger gives the trier of fact reason to focus on him or her.

The Hon. Daniel L. Harris is a circuit court judge in Jackson County. John V. Acosta is senior deputy general counsel for TriMet. Both are members of the Oregon Bench and Bar Commission on Professionalism.

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The role of lawyers and judges is to help people in our legal system simultaneously exercise their rights and reach the common good under a rule of law. Our mandate of professionalism emphasizes the roles that judges and lawyers alike have in maintaining the integrity of the judicial process, protecting the public and ensuring the future of our profession.

Why Professionalism?

Justice Sandra Day O’Connor explained: “Lawyers possess the keys to justice under a rule of law, the keys that open the courtroom door. Those keys are not held for lawyers’ own private purposes; they are held in trust for those who would seek justice, rich and poor alike.” Professionalism can be defined as the continuous affirmation in our day-to-day actions that we are striving for the higher ideal of justice for our clients and ultimately for the public good. When we step into the federal courthouse in Portland, lawyers are reminded of their solemn commitment to professionalism: “The First Duty of Society is Justice.” It’s difficult to convince clients, other lawyers and the court that you are fulfilling that duty if you are behaving as though you are ready to engage in a cage fight.

Professionalism and ethics are not synonymous. Ethics rules mandate minimum behavioral requirements, which if not met, usually result in some form of discipline from the state bar association, the regulatory body that oversees all lawyers. Professional-
ism embodies aspirational goals that lawyers, as practitioners of a distinguished profession, should strive to meet when dealing with each other, the court and clients. Conducting oneself professionally helps ensure public trust and confidence in the integrity of the justice system.

Professionalism also demonstrates the lawyer's integrity and respect for the judicial process, which in turn engenders credibility. In our profession, credibility is the currency of the realm. No lawyer gets much accomplished for a client, whether in the courtroom or in the conference room, unless he or she has built a foundation of credibility upon which to conduct the client's business. This enhanced credibility of the lawyer in the eyes of opposing counsel, the court and the jury inevitably helps a lawyer advocate towards an efficient and fair resolution of a dispute. Acting professionally helps to better focus opposing counsel, the court or the jury on the issues for decision rather than on the conduct of the lawyers, avoiding a scenario that often leads to a written and oral record clouded with personal attacks and other boorish noise.

Professionalism and effective advocacy go hand-in-hand. Professionalism begets trust, and cooperation is sure to follow closely behind. This trust and cooperation translates to lower costs of litigation and a higher probability of an early and fair resolution.

Professionalism among lawyers and the court also makes the practice of law a more fulfilling life. A lawyer's good reputation — the legacy that remains beyond one's life — will be the better for having acted with professionalism.

Finally, professionalism is necessary to maintain the integrity of the judicial process and the public's confidence in the judicial system. Professionalism increases public confidence in individual lawyers and judges as well as the judicial system. The public has a greater regard for the judicial process and the results of that process if the lawyers and judges exhibit professionalism while working through a dispute. If judges and lawyers do not act to ensure professionalism, through legislative action the public may seek changes to the judicial branch or alter the exclusive privilege of lawyers to represent clients before the courts or in legal matters.

Causes of Unprofessional Conduct

Unprofessional conduct is the result of a number of factors. First, unprofessional conduct may result from a belief that a lawyer is effective only if he or she acts like a "Rambo litigator," "hired gun," "junkyard dog," "hard fighter" or "bulldog." Some lawyers who labor under this belief are often compensating for a lack of experience, skill or confidence.

Second, client perceptions — that their lawyer must be obnoxious to achieve successful results or outcomes — are sometimes a factor in unprofessional behavior. Some clients are convinced that litigation should be conducted like armed combat against an enemy, and such clients may shop around until they find a lawyer or firm they perceive to have a "Rambo litigator" style. When we encounter prospective clients who subscribe to this philosophy, we should stop to consider whether we want to represent such clients. Often, they are the clients who criticize your judgment, find ways to dispute your fees and never seem to be happy with any result you obtain for them.

Third, the adversarial nature of the litigation process or a tense business transaction can be a factor. But while the legal process is adversarial it need not be acrimonious. We should strive to agree to disagree and not resort to personal attacks, condescending comments and threats of sanctions motions, whether orally, in briefs or in letters or e-mails, in an effort to get our way or to simply harass our opponent.

Fourth, the adversary system is inherently stressful. Practicing law is difficult enough without artificially ramping up the stress level. Be mindful too that at any given time an opponent might be coping with stress, perhaps significant, because of workload, events in his or her personal life or other factors.

Fifth, the business of practicing law can be a factor — the bottom line of the law firm or law office environment. Billable hours, high case volumes, insufficient support staff, administrative chores, client expectations, marketing and other obligations and duties can result in a "piling on" feeling of despair. The sheer weight of these responsibilities can make it difficult for us to be civil to one another, and that's when professionalism suffers.

Sixth, and finally, are size and technology. As the bar's membership grows, there is less opportunity for its members to know each other. You're less likely to be rude and harsh toward a lawyer you've known for some period of time and will deal with again, than you are toward a lawyer you've never met and likely won't encounter again. Technology hampers collegiality because it allows us to insulate ourselves from direct, real-time contact with one another. Meetings and phone calls to discuss a new case, confer over a motion or discuss trial exhibits and jury instructions are more likely to foster professionalism between lawyers than sending e-mails, texting messages or faxing letters back and forth.

Costs of Unprofessional Conduct

For starters, the costs of unprofessional conduct include a diminished quality of professional and personal life. We aren't hockey players. Do we want to spend eight, 10 or 12 hours a day engaging in the verbal and written equivalent of body-checking each other into the boards each time we interact with one another? We don't, and common sense tells us why: we can't behave badly day after day, for weeks, months and years of practicing law without becoming that personality in all aspects of our lives. Ultimately, the pernicious effect on one's family, friends and colleagues over the course of a 30- or 40-year career should be obvious.

Without professionalism lawyers are simply pieces in a game of survival of the fittest. In such a model, brute force dominates and what is right and just is often relegated to secondary importance or completely overlooked. In effect, lawyers devolve into mere agents of their respective clients' interests without regard to the broader picture of public good.

Unprofessional conduct also distorts the judicial process and "Equal Justice Under Law;" increases financial, business and personal costs to parties; inflicts personal stress on clients, lawyers and judges; causes personal and professional relationships to deteriorate; erodes personal physical and mental health; damages or destroys your reputation among colleagues and the public at large; and diminishes your ability to attract desirable clients.

The Relationship Among the Rules and Professionalism

Oregon's Rules of Professional Conduct (RPC or ethics) and
the various state and federal rules of procedure and evidence are mandatory rules. Professionalism, however, is a standard to which lawyers should aspire. Professionalism picks up where the ethics rules leave off. Professionalism means following the spirit of the rule, not just the letter of it, and the willingness to go beyond what is required to extend courtesies and accommodations to colleagues, including opponents, where doing so imposes no detriment on your client.

The Oregon State Bar’s current “Statement of Professionalism,” was adopted by the OSB House of Delegates and approved by the Oregon Supreme Court, effective Nov. 16, 2006. A “Statement of Professionalism” also has been adopted by the United States District Court for the District of Oregon. Other standards may apply in Oregon as well, as many professional organizations have adopted Professionalism goals. See, for example, the Multnomah Bar Association's “Commitment to Professionalism,” adopted June 1, 2004. These documents may be found on the Oregon State Bar’s Professionalism web page, www.osbar.org/onld/professionalism.html.

Whether it’s a court or an organization that has adopted a statement of professionalism, the fact that it has embraced those ideals demonstrates the expectation that a standard of conduct higher than the floor created by the ethics rules applies. Simply put, a statement of professionalism sends a message that it is not enough for lawyers to comply only with the ethics rules or rules of procedure.

Moreover, as a self-regulating profession, lawyers have the primary responsibility of ensuring professionalism. While a wide range of options are available to a lawyer to effectively deal with the unprofessional conduct of another lawyer, instances exist when a lawyer must at some point present the issue to the court for resolution.

**When to Bring Unprofessional Conduct to the Court’s Attention**

Unprofessional conduct should be brought to the attention of the court only as a last resort when a party’s rights are prejudiced or there is a real threat of prejudice. Lawyers — the persons charged with resolving differences — are in the best position to resolve professionalism issues. A lawyer may take a number of steps to obviate the need for court intervention. If those efforts are unsuccessful or futile, then the matter should be presented to the court after the appropriate conferral. Consider these three steps when confronting what you perceive to be a lack of civility.

First, before making a judgment about whether a lawyer has acted unprofessionally, determine the facts. A lawyer’s conduct is often caused by circumstances outside his or her control. For example, if a lawyer is not producing responsive documents in a timely manner, the delay may be caused by the actions of the client rather than the lawyer. Similarly, a delay in responding to requests for scheduling or conferral may be caused by another professional commitment or even a personal issue. Effective communication can often reveal whether there is an issue of professionalism. A telephone call or e-mail to the lawyer, co-counsel or an assistant can often clear up the matter. The bottom line is to get your facts straight before operating on the assumption that a lawyer is acting unprofessionally. With a full picture of the facts, you can effectively respond.

Second, when faced with unprofessional conduct, the first strategy may be to ignore it. The conduct may not be worth acknowledging, and at times a decision to not respond to unprofessional conduct will send the signal to the offending lawyer that unprofessional conduct will be ineffective. Some lawyers, often those who are more experienced, use unprofessional conduct as a tool to throw their opponent off balance. The offending lawyer, however, may abandon the costly approach of unprofessionalism if it proves ineffective. Sometimes ignoring unprofessional behavior requires patience, even a lot of it, and it should never be ignored if there is a real threat of prejudice to the client. Mostly, however, demonstrating that the behavior won’t work and focusing on the merits of the case often is the best way to put an end to such tactics.

Third, after exercising judgment as to whether to respond to the unprofessional conduct, directly informing your opponent of the unprofessional conduct can be effective. Even those who act unprofessionally do not like to think of themselves as having acted in such a way. They might think of themselves as fighting hard or being zealous for their client. Reminding the other lawyer of basic principles of courteous or fairness or referring to the applicable standards of conduct promulgated by the court, however, can cause the other lawyer to moderate or stop the behavior.

If informal efforts are not successful, an issue of unprofessional conduct should be presented to the court if the conduct is interfering with a party’s rights or the “just, speedy and inexpensive
determination” of an action. FRCP 1; ORCP 1 B. Unprofessional conduct between lawyers that is merely rude, bothersome or petty should not be brought to the attention of the court unless it begins to interfere with discovery or the case’s overall progress. A good guideline is that unprofessionalism should be brought to the attention of the court either when an ethics or court rule is clearly implicated or when a history of sufficiently documented unprofessional conduct demonstrates a threat to the rights of a party.

Obviously, considerations of time and cost are at play, but these considerations must be weighed against the potential benefit of a favorable ruling and more generally addressing the unprofessional conduct.

**How to Bring Unprofessional Conduct to the Attention of the Court**

The nature of the conduct determines how the conduct should be brought to the court’s attention. If the unprofessional conduct occurs during trial or hearing, the court usually will address it without the need for a lawyer to call attention to it by objection or request for a side bar. If the conduct occurs outside the presence of the court, a request for a pretrial conference may be appropriate to address the issue. If an issue arises during a deposition, judges often are available by telephone to immediately address the problem. Other instances will require a formal motion.

Before a motion can be filed, however, the lawyer must have a personal or telephone conference with opposing counsel on issues or disputes. Oregon’s conferral rules, Local Rule 7.1 (federal) and UTCR 5.010 (state), require a “good faith” effort to confer. These conferral rules require that the lawyers actually talk or explain in a certificate why conferral did not occur, and these rules are often strictly enforced.

The conferral rules address the situation in which a lawyer may be obstructive or dilatory in the conferral process. If a lawyer refuses to confer, simply include that in the certification. A clear refusal to confer, however, does not happen frequently. The problems most often arise when a lawyer chooses not to provide sufficient information for a meaningful conferral. For example, some lawyers choose not investigate whether there may be responsive documents and simply “stand” on their objections. The failure of a lawyer to determine if requested documents actually exist can lead to the parties briefing and courts ruling on the discoverability of documents that do not exist. This scenario is costly to the parties and the court when it ends up ruling on hypotheticals.

**Lack of Experience Can Play a Role**

Often times, unprofessional conduct is the product of a lack of experience or a desire to compensate for inexperience. In some instances, inexperienced lawyers neither fully understand that they are expected to be professional, nor understand that a professional approach is the most effective, nor do they understand what is or is not professional. In yet other instances, an inexperienced lawyer may attempt to make up for lack of experience by engaging in short-sighted and obnoxious strategies to gain an advantage, however short-lived. Sometimes, inexperienced lawyers are told or “taught” that being subjected to sharp practices is just a right of passage — part of the hazing process. This “tradition” perpetuates unprofessionalism.

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Responsible mentorship of younger lawyers is a key to instilling professionalism. Oregon law schools are answering the call to teach future lawyers that professionalism is expected and effective in law practice. The New Lawyers Division of the Oregon State Bar and various bar associations have mentorship programs. In addition to these formal programs, judges and lawyers at every opportunity should reach out to fellow lawyers — in words and deed — to spread the message of professionalism.

**Conclusion**

Professionalism is consistent with that shared value to do good that led us to law school. The citizens of Oregon and members of the bench and bar who each hold the privilege to serve the public expect and deserve professionalism in our judicial system. We must constantly renew our sense of commitment to our court system and the public good. The judges and lawyers of Oregon are in partnership to support one another to live the ideal of professionalism.

Whatever a lawyer may gain by unprofessional conduct is frequently short-lived. Unprofessional conduct is subject to the law of karma or that proverbial boomerang that returns to hit its thrower between the eyes. In our Oregon legal community, conduct unbecoming of our profession is noticed by other lawyers and eventually within the circle of judges. A lawyer can labor for years to build a good reputation, but a single act of unprofessionalism can cause that reputation to evaporate.

We should avoid engaging in unprofessional behavior even if the other side is doing so. We also should refrain in argument and written submissions from personal attacks or criticisms of opposing counsel. Model professional behavior when dealing with all others encountered in your daily practice, especially younger lawyers. These acts will reward the lawyer, the client and the public we serve.

The Hon. John V. Acosta is a magistrate judge of the U.S. District Court for the District of Oregon. Richard Vangelisti practices plaintiff’s personal injury law in Portland. The authors serve as members of the Oregon Bench and Bar Joint Commission on Professionalism.

**Endnote**

1 Speech, “Professionalism,” Associate Justice Sandra Day O’Connor, 78 Oregon Law Review 385, 390 (Summer 1999).

2 See, for example, Section 4(A)(3) of the Multnomah County Civil Motion Panel Statement of Consensus: “[The certificate] must either state that the lawyers actually talked or state facts showing good cause why they did not.”
Professionalism: A Judge’s Perspective

By the Hon. John V. Acosta

Judges and lawyers are partners in ensuring professionalism. Each has a role to play in preventing and addressing unprofessional conduct that erodes the civility of practice and the quality of our professional lives. If judges and lawyers do not effectively respond to unprofessional conduct, or if they condone it by inaction, they effectively reward the actor to the detriment of the judicial process and the public’s perception of our profession as a whole. Oregon lawyers and judges share a long and demonstrated commitment to ensuring that professionalism is always a foremost consideration. With all of this in mind, here is one judge’s perspective on fulfilling the judicial role in addressing unprofessional conduct.

Court Authority to Address Issues of Professionalism

Yes. The court always may use its contempt power to address egregious behavior that occurs in its presence, but less severe behavior also can be — and is — the subject of court regulation. Best known are the obligations imposed on lawyers and parties under the civil rules’ discovery provisions. Both the Federal Rules of Civil Procedure and the Oregon Rules of Civil Procedure permit the court to impose sanctions for violations of the rules and for disregarding court orders. But the rules also permit the court to impose sanctions for conduct that undermines the purpose of the discovery rules even if the conduct is not willful. For example, FRCP 37 is entitled “Failure to Make Disclosures or to Cooperate in Discovery; Sanctions,” and subsection (a)(5)(A) of the rule makes clear that sanctions may be awarded without a finding that a party violated a court order or engaged in willful misconduct.

Imposition of sanctions under the rule turns on a reasonableness standard, a lower measure from the intentional misconduct standard that lawyers typically assume controls their discovery-related behavior. This standard has been applied in the District of Oregon. See, e.g., Trustees of Oregon-Washington Carpenters-Employers Trust Funds v. Van Zant Construction, Inc., 2008 WL 2381641, *3 (D. Or. June 3, 2008). Thus, although not willful misconduct, prolonged procrastination in responding to discovery requests that forces the propounding party to file a motion to compel simply to get a response is sanctionable under Rule 37. See Bilyeu v. City of Portland, 2008 WL 4912048, *3-7 (D. Or. Nov. 10, 2008).

In addition, FRCP 83(a)(1) expressly authorizes district courts to “make and amend rules governing its practice,” a source of authority that the District of Oregon has invoked to establish two rules that govern professional standards of conduct in the district. The first is LR 83-7, “Standards of Professional Conduct,” providing that attorneys practicing in the District of Oregon must, among other things, be familiar and comply with the standards of professional conduct required of members of the Oregon State Bar and this court’s Statement of Professionalism.

The second local rule is LR 83-8, “Cooperation Among Counsel,” which prescribes certain behaviors between opposing lawyers and establishes the consequences for engaging in unprofessional behavior. Note that the rule authorizes the judge to impose sanctions against an attorney who unreasonably refuses to “accommodate the legitimate requests of opposing counsel.” Here, a reasonableness standard is applied to conduct occurring outside the judge’s presence.

Finally, professionalism also is embodied in mandatory conferral requirements adopted by both the U.S. District Court and the Oregon Circuit Courts. See LR 7-1(a)(1)(A), requiring the parties to certify that before filing a motion, they “made a good faith effort through personal or telephone conferences to resolve the dispute and have been unable to do so”; and Oregon Circuit Court Uniform Trial Court Rule 5.010, requiring lawyers to certify that they have conferred on motions as a precondition to their filing.

These rules convey the message that judges expect lawyers to talk and attempt to resolve disputes that could lead to motions, and they apply to virtually every motion. Failure to comply with these rules will incur risk of having the motion denied outright. Ultimately, conferral requirements force lawyers to meaningfully discuss a motion and resolve the issues that lead to the filing of motions. When that occurs, parties are spared unnecessary time and expense, the case moves forward more quickly, and the lawyers might establish a foundation for resolving other disagreements without court involvement.

When Should the Court Review an Issue of Professionalism?

Judges can review an issue of professionalism when a potentially unprofessional act occurs in the judge’s presence or when the issue is brought to the court’s attention.

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The extent of the court’s review will depend on the unique circumstances of each case. Keep in mind, however, that the court can on its own initiative inquire into conduct occurring outside the courtroom that appears to be unprofessional. For example, a constant flow of discovery or pretrial motions, especially when the motions are permeated with claims of unprofessional conduct, could result in the court ordering the attorneys to attend a hearing to explain their conduct. Judges do monitor their cases, and they will not look well upon conduct that clearly does not advance the merits of the case but instead could lead to unnecessary motions, delays in completing discovery, or unnecessarily prolonging the case. In federal court, a judge can shift to the parties the expense created by uncooperativeness by appointing a special master to preside over the parties’ discovery activities, see FRCP 53(a)(1) (C), and requiring the parties to bear cost of the special master. See FRCP 53(a)(3).

How Should the Court Respond to an Issue of Professionalism?

This depends on the circumstances of the unprofessional conduct. First, the easy situation is when the conduct occurs in the judge’s presence; the judge can often address it with an appropriate admonition. Remember that both state and federal courts in Oregon have established written expectations for professional behavior by lawyers, and the judge can give a pointed reminder of those expectations to the lawyer or lawyers. This could occur in the jury’s presence, and while judges might try to avoid admonishing an attorney in the jury’s presence, the attorney can always avoid such embarrassment by refraining from the behavior in the first place. Ultimately, the court must preserve the dignity of the court in the eyes of the jury and public in general, and doing that could require taking appropriate actions in front of the judge or on the record.

Second, the court can address unprofessional content in lawyers’ written submissions, either in the court’s written decision or at hearing. Judges can remind counsel — on or off the record — that such language in a brief is neither helpful to the court nor professional.

Third, if a motion presents substantive violations of ethics, statutes or rules of procedure or evidence that also happen to be instances of unprofessional conduct, then the court can rely on those standards in imposing a commensurate sanction. See, for example, 28 U.S.C. § 1927 (sanctions for unreasonable or vexatious litigation conduct); FRCP 11(c) (sanctions); ORCP 17 D (same); FRCP 37 (expenses, sanctions, and expenses on failure to admit); ORCP 46 (same); UTCR 1.090(2) (sanctions for failure to comply with UTCR or SLR); UTCR 19 (contempt).

Fourth, if the judge anticipates issues of professionalism may arise in a case, there are always pretrial management procedures and rules for asserting greater control over the lawyers and their clients. See, for example, FRCP 16 (pretrial and scheduling conference); UTCR 6.010 (conferences in civil proceedings); Multnomah County SLR 6.014 (pre-trial case management conferences in civil actions).

Why is it a Challenge for Judges to Address Issues of Professionalism?

Most incidents of unprofessional conduct occur outside the presence of the judge. As an example, a discovery motion often involves accusations and counter-accusations, such that by the time it reaches the judge it’s usually impossible to determine who, if anyone, is at fault.

Also, a potential incident of unprofessional conduct often has a limited factual record from which a judge may make determinations and, if there is a factual record, it may be dense with detail. It’s difficult, sometimes impossible, and always time-consuming, for judges to try to determine who “started it.” Thus, keep in mind that if you file a discovery motion that involves such conduct as a component of the dispute, you may well be disappointed in the outcome. Simply put, time constraints often force judges to move past such allegations and focus on promptly resolving the discovery dispute so that the parties can get on with discovery and the case will continue to move forward.

Further, the claimed conduct may be a culmination of discrete actions rather than a distinct and overt incident, making particularly difficult the determination of whether there was any unprofessional conduct at all. Judges don’t live with a case the way lawyers do; they don’t regularly interact with the lawyers on all matters pertaining to the case, and thus, they don’t share the accusing lawyer’s sense of frustration or even anger over the relationship with opposing counsel. What might look like unprofessional conduct to the accusing lawyer with many months of personal experience might look different to the judge reading the motion.

Finally, keep in mind that the source of the unprofessional conduct may become unclear if the accusing lawyer responds in similarly unprofessional fashion. Before you file a motion that involves allegations of unprofessional conduct by the other lawyer, and especially if you are seeking sanctions, first make sure that the other lawyer will not be able to say the same of you in his or her response. If she can, then don’t be surprised when the judge denies your motion or admonishes both sides for unprofessional conduct.

The Hon. John V. Acosta is a magistrate judge of the U.S. District Court for the District of Oregon.
I tried one of the most significant cases of my career in 1991. It involved a wrongful death action arising out of a crash on the Siskiyou Pass. The stakes were high. The competition between attorneys was intense. It wasn’t the ultimate verdict that made it significant for me, it was the experience I had with the other jurists. The judge and the three other attorneys involved in this case all graduated from law school in the 1940s and 1950s. What I observed from this experience gave me a better understanding of what our profession was like a generation ago and how it has changed.

In this case I observed a judge and lawyers who showed great respect for each other. They were courteous at all time to all involved in the process. They were all well prepared and expected everyone else to be prepared. The lawyers freely extended professional courtesies and relied on verbal agreements with each other through out the process. They always kept their word. They played by the rules. There was no fudging or corner cutting. They maintained a steady and professional demeanor and appearance — even in the most intense situations — and exercised great restraint and control when it came to what they said, how they said it and what they objected to.

The lawyers regularly conferred when issues would arise and only came to the judge when they couldn’t fashion a solution themselves.

Now I understand, more than 25 years ago, I was witnessing practices and traditions that characterized our profession a generation ago, when the practice of law was viewed more as an “esteemed profession” and a “calling.”¹ We have witnessed our profession become more of a business and a career. I have observed this change accelerate since I entered the profession in the early 1980s, especially from my perspective on the bench where I have had the opportunity to regularly observe the performance of lawyers.

Trying to go back to reclaim our profession’s place in society, or recapture some of the traditions of generations past, is not realistic. We have to look forward and work at preserving those practices and values that have always worked for lawyers: credibility, competence, restraint and loyalty.

Credibility

A lawyer’s credibility is everything in this profession. Credibility is earned from hard work, ethical practice and a believable and accurate advocacy. Some lawyers, in the heat of competition, are tempted to fudge with the facts or the law. Some lawyers will insert provisions into proposed judgments that go beyond the court’s directive. Some lawyers cannot avoid the temptation to pass on information to a judge’s staff that constitutes an ex parte contact. All of these practices undermine a lawyer’s reputation. Once a reputation sets in for fudging, it is thereafter difficult to regain credibility with attorneys and judges. As stated by Justice John Paul Stevens: “An advocate who does not command the confidence of the judge bears a much heavier burden of persuasion than one who never misstates either the facts or the law.”²

A lawyer’s professional reputation is the currency of our profession. Work diligently at building it up and guard it at all costs. Then spend it frugally and wisely. And should you make a mistake that might diminish your reputation, do whatever you have to do to make amends, including the simple act of offering an apology.

Let your legal communications stand on their own legal footing without resorting to expressions of opinion or overstatement. Too often, attorneys use useless words, like “outrageous” or “ludicrous,” to argue their point. This hurts rather than helps their arguments and takes away from the respect the court has for the analysis. Keep it objective and to the point.

Competence

The competent lawyer is first and foremost prepared. The process of pre-
paring for trial is usually much more than the trial itself. Devoting the necessary time to preparation will not only improve your chances of success but, more importantly, will establish a credibility and reputation that will serve you well in the long run. An important part of preparation should include the practice of stipulating with opposing counsel on as many aspects of the trial as possible. Anticipate evidentiary issues and attempt to work out agreements in advance. In many cases you can stipulate in advance to most of the exhibits, to the order of witnesses, to the appropriate resolution of evidentiary issues and to the jury instructions.

Develop a reputation for knowing the rules of procedure and evidence, and the basic skills used in court. Too many lawyers “wing it” too often. This will undermine your effectiveness as an advocate. Know and practice the fundamental procedures followed in trial: from jury selection to opening statements, to offering exhibits into the record to effective cross examination to making the closing argument.

In the end, you want the judge to say in his or her mind: I know this person. This lawyer is always well prepared, anticipates and tries to resolve in advance issues at trial, has talked with opposing counsel about stipulations, tries an efficient and effect case, and doesn’t test the patience of the judge or jury.

Restraint

You can enhance your reputation and effectiveness as an advocate with the appropriate exercise of patience and restraint. Here are a few examples:

• **Don’t respond immediately to that sharply worded email or letter from opposing counsel.** Produce a draft response if you must but wait for a day or two before you actually respond. Your response will be more professional, objective and effective if you have the patience to delay your response. This is a difficult task in today’s world of instant communication, but it will produce significant dividends.

• **Don’t do something just because you can.** We all remember what Justice Potter Stewart once said: “Sometimes there is a big difference between what you have a right to do and what is right to do.” Before you decide to deny a good faith request for an extension or take advantage of opposing counsel for a missed deadline, consider how your actions will impact your reputation or future relationship with the other attorney. “Live by the sword, die by the sword,” is a maxim that applies to our profession. You will most certainly be in a position someday where you are counting on a fellow lawyer to show restraint by extending to you a professional courtesy.

• **Don’t let your opponent control your behavior.** We’ve all been there, in the heat of the contest, where we want to respond in kind to the way opposing counsel is characterizing you or our client. Don’t let your opponent take you away from your game plan. Your client deserves an objective, diligent advocate — not a hothead bent on getting even with the other lawyer.

• **Learn to disagree, agreeably.** Disagreements are inherent in our profession but they don’t have to devolve into a war of strong words, accusations and overstatements. Keep your discussion over disagreements cordial and objective — you will be a more effective advocate. Shakespeare reminded us of the more desirable practice in The Taming of the Shrew. Adversaries in law, he wrote, “strive mightily, but eat and drink as friends.”

Loyalty

We have an ethical duty of loyalty to represent clients with competence and diligence, while maintaining confidenc-es and avoiding conflicts of interest. This duty should be taken very seriously. The duty to loyalty does not, however, require you to be a puppet to your client’s wishes. In the interest of preserving your credibility and reputation, you must insist at all time on being a counselor who balances a client’s interests with your professional goals. Too many lawyers will “perform” for their clients by saying or writing things that aren’t effective or credible. This may please a client in the short run but it almost always harms the client’s interests, and the attorney’s reputation, in the long run. Frankly, your reputation and credibility will rise or fall based on your ability to manage a client’s expectations and demands.

Our duty to loyalty also includes an obligation to advise clients of the most efficient way to resolve the dispute. This should include apprising clients of the availability of mediation and other methods for resolving issues outside the courtroom. Clients should be informed of the effect litigation will have on them and the benefits — financial and otherwise — that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost.

Our approach to the practice of law has rapidly transitioned from a time exemplified by Atticus Finch into the 21st Century. Our profession is now very different in many ways, but fundamental values endure. They endure because employing these values will improve your effectiveness as an advocate while increasing the personal satisfaction you derive from your work.

1 The place of lawyers in American society has been recognized as holding a unique position of moral leadership since the founding of this Country. Alexis de Tocqueville in his famous study of American law and customs referred to lawyers as the Country’s natural aristocracy.


Dan Harris is a retired Jackson County Circuit Court Judge and now fills in as a senior judge as needed around the state. He also serves as a mediator and arbitrator with Harris Mediation & Arbitration, PO Box 51444, Eugene, OR 97405. You can reach him at harrismediator@gmail.com or 541-324-1329.

4-24
United States Court of Appeals, Ninth Circuit.

Amir Cyrus AHANCHIAN, an individual, Plaintiff-Appellant,

v.

XENON PICTURES, INC., a Delaware corporation; CKrush, Inc., a Delaware corporation; Sam Maccarone, an individual; Preston Lacy, an individual, Defendants-Appellees.

Amir Cyrus Ahanchian, an individual, Plaintiff-Appellant,

v.

Xenon Pictures, Inc., a California corporation; CKrush Inc., a Delaware corporation; Sam Maccarone, an individual; Preston Lacy, an individual, Defendants-Appellees.

Nos. 08-56667, 08-56906.


Filed Nov. 3, 2010.

Background: Writer brought copyright infringement action against movie's distributor, production company, director, and screenwriter, alleging defendants used in the movie several skits he authored without his permission. The United States District Court for the Central District of California, John F. Walter, J., denied writer's motion for extension of time to file opposition to defendants' summary judgment motion and motion to accept late-filed opposition, and subsequently granted defendants' motions for summary judgment and attorneys' fees. Writer appealed.

Holdings: The Court of Appeals, Wardlaw, Circuit Judge, held that:

1. writer demonstrated good cause for filing late opposition to defendants' summary judgment motion, and thus grant of extension of time to file opposition was warranted, and
2. writer's delay in filing opposition to defendants' summary judgment motion was result of excusable neglect, and thus grant of motion to allow late-filed opposition was warranted.

Reversed and remanded.

West Headnotes


170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk813 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

Federal Courts 170B 829

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk829 k. Amendment, vacation, or relief from judgment. Most Cited Cases

Under abuse of discretion standard of review, Court of Appeals reverses where the district court applied the incorrect legal rule or where the district court's application of the law to the facts was: (1) illogical; (2) implausible; or (3) without support in inferences that may be drawn from the record.


170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk812 k. Abuse of discretion. Most Cited Cases

Under abuse of discretion standard of review, Court of Appeals reverses where the district court applied the incorrect legal rule or where the district court's application of the law to the facts was: (1) illogical; (2) implausible; or (3) without support in inferences that may be drawn from the record.


170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(I) Motions in General

170Ak923 k. Time for filing. Most Cited Cases

Rule governing enlargement of time, like all the Federal Rules of Civil Procedure, is to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits. Fed.Rules Civ.Proc.Rule 6(b)(1), 28 U.S.C.A.

99 Copyrights and Intellectual Property 99

99I Copyrights

99I(J) Infringement

99k72 Actions for Infringement

99k89 Judgment

99k89(2) k. Summary judgment. Most Cited Cases

District court, in considering writer's motion to allow late-filed opposition to defendant's dispositive motion for summary judgment in copyright infringement action, was required to apply four-factor equitable test to determine whether writer's failure to meet filing deadline constituted “excusable neglect.” Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review

170BVIII(D) I Issues and Questions in Lower Court

170Bk611 k. Necessity of presentation in general. Most Cited Cases

General rule that a party will be deemed to have waived any issue or argument not raised before the district court does not apply where the district court nevertheless addressed the merits of the issue not explicitly raised by the party.

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(I) Motions in General

Writers' motion for one-week extension of time to file opposition to defendants' dispositive motion for summary judgment demonstrated good cause for filing late opposition, and thus grant of extension of time to file opposition was warranted in copyright infringement action, absent any showing of bad faith or prejudice to the adverse party. Fed.Rules Civ.Proc.Rule 6(b)(1), 28 U.S.C.A.
To determine whether a party's failure to meet a deadline constitutes “excusable neglect,” courts must apply a four-factor equitable test, examining:
(1) the danger of prejudice to the opposing party;
(2) the length of the delay and its potential impact on the proceedings;
(3) the reason for the delay; and

Amir Cyrus Ahanchian's counsel moved for a one-week extension of time to file his opposition to defendants' summary judgment motion, citing as good cause: (1) the extremely short eight day response deadline (with three of those days falling over a federal holiday weekend) created by the combination of an unusual local rule and defendants' litigation tactics; (2) his preplanned absence, beginning the day defendants filed the motions, length of delay was mere three days and would not have adversely affected either the summary judgment hearing date or trial date, and there was no indication that writer's failure to file opposition on time was result of bad faith. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

Amir Cyrus Ahanchian's counsel moved for a one-week extension of time to file his opposition to defendants' summary judgment motion, citing as good cause: (1) the extremely short eight day response deadline (with three of those days falling over a federal holiday weekend) created by the combination of an unusual local rule and defendants' litigation tactics; (2) his preplanned absence, beginning the day defendants filed the motions, in fulfillment of an out-of-state commitment; and (3) the large number of supporting exhibits attached to defendants' motion. Defense counsel, without regard to the previous professional courtesies extended to him by Ahanchian's counsel, vigorously opposed the extension. Despite the presence of what most reasonable jurists would regard as good cause and the absence of prejudice to anyone, the district court denied the motion. Even so, Ahanchian's counsel managed to file the opposition, albeit three days late, due to a calendaring mistake and com-
puter problems, along with a motion asking that the district court accept the late-filed opposition. Five days later, the district court construed that motion as one for reconsideration under Rule 60(b), and, applying an incorrect legal standard, denied it. That same day, having plaintiff's opposition in hand, but refusing to consider it, the district court granted defendants' motion for summary judgment, failing to provide any legal reasoning or citation to law or facts. FN1 To add injury to insult, the district court awarded defense counsel $247,171.32 in attorneys' fees. We conclude that the district court abused its discretion in denying both the request for an extension of time and the motion to accept the late-filed opposition, and erred in granting defendants' motion for summary judgment and in awarding attorneys' fees to defense counsel.

FN1. Ahanchian does not argue that we should reverse the district court for its failure to provide any reasoning in its order granting summary judgment. However, we have held this alone is reversible error, because it precludes us from conducting a meaningful review of the district court's order. See Gov't Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1225 (9th Cir.1998) (en banc) (noting that remand is appropriate where the district court fails to "make a sufficient record of its reasoning to enable appellate review"). Nonetheless, we have reviewed the district court record in its entirety and reverse in part and affirm in part the award of summary judgment in the memorandum disposition filed concurrently with this opinion. We also vacate the award of attorneys' fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

These appeals arise from the creation of the movie National Lampoon's TV: The Movie, theatrically released in November 2006. Unlike traditional films, this movie eschews plot or character development, instead lampooning several high profile television programs in a series of independent comedic skits. This lawsuit involves the disputed authorship of a number of these skits. Ahanchian claims that ten skits he authored (and subsequently copyrighted) either appear verbatim in the movie or serve as the basis for skits included in the final version of the movie.

*1256 Ahanchian filed a complaint on September 17, 2007 against Sam Maccarone (director and writer of the film), Preston Lacy (writer and actor), Xenon Pictures, Inc. (distributor), and CKrush, Inc. (producer) asserting causes of action for copyright infringement, breach of an implied contract, and unfair competition in violation of the Lanham Act. Apparently, Maccarone and Lacy were difficult to locate. Defense counsel for Xenon Pictures, who had been appointed by the district court to represent Maccarone and Lacy, sought additional time to answer Ahanchian's complaint on their behalf. Exhibiting the professional courtesy expected of officers of the court, Ahanchian's counsel stipulated to an extension of time—which stipulation the district court then rejected.

On January 7, 2008, the district court issued its scheduling order establishing, among other deadlines: November 18, 2008, as the date for the commencement of trial; September 2, 2008, as the discovery cut-off date; and September 15, 2008, as the last day for hearing motions. Maccarone and Lacy did not file their answer to the complaint until June 30, 2008. Because of Maccarone and Lacy's late entrance into the litigation, the parties entered into a joint stipulation on July 9, 2008, seeking additional time to answer Ahanchian's complaint on their behalf. Exhibiting the professional courtesy expected of officers of the court, Ahanchian's counsel stipulated to an extension of time—which stipulation the district court then rejected.

Because the district court's scheduling order set September 15, 2008, as the last day for hearing motions, the local rules in force at the time made August 25, 2008, the last date to file any motion for
summary judgment. See C.D. Cal. Local R. 6-1 (2008) (requiring that any motion be filed within twenty-one days before the hearing date). Though there is no indication in the record that they did so, the defendants assert that they informed Ahanchian's counsel on August 6, 2008, that they would be filing a motion for summary judgment. On August 25, 2008, the last possible day for filing, the defendants moved for summary judgment seeking dismissal of all of Ahanchian's claims and for terminating sanctions resulting from a discovery dispute. These motions were accompanied by roughly 1,000 pages of supporting exhibits and declarations. Because the defendants chose to wait until the last day to file their motions, the local rules operated to set a deadline of September 2, 2008—the day after Labor Day—for Ahanchian to review these materials and to prepare and file his oppositions. Ahanchian, therefore, was left with a mere eight days, three over the Labor Day weekend, to draft his oppositions to the motions. See C.D. Cal. Local R. 7-9 (2008) (requiring any opposition to be filed no later than fourteen days before the hearing date); Fed.R.Civ.P. 6(a)(1)(C) (extending deadlines by an additional day where a deadline would otherwise fall on a holiday). Also, Ahanchian's lead counsel was scheduled to travel out of state on August 25 to fulfill a previously-scheduled commitment.

FN2. On appeal, Ahanchian's counsel revealed that his trip was required because he was serving as a duly-elected California state delegate to a major political party's national convention. See Cal. Elec.Code § 6201.

Given the already unreasonably strained deadlines, within which fell an out-of-state commitment and Labor Day weekend, on August 28, 2008, Ahanchian asked defense counsel to stipulate to a one-week continuance of the hearing date for defendants' motions, along with corresponding one-week extensions of the deadlines for Ahanchian to file oppositions and for defendants*1257 to reply. Defense counsel refused to so stipulate. The very next day, on August 29, 2008, Ahanchian filed an ex parte application pursuant to Local Rule 7-19 seeking a one-week extension. Ahanchian recited as good cause for the requested extension of time that: (1) defendants had waited until the last day to file their motions, choosing to file four days before the Labor Day weekend, and with knowledge of pending depositions; (2) the accompanying motions and exhibits amounted to 1,000 pages of materials; (3) Ahanchian's lead counsel had left the state on August 25 on a prescheduled trip and would not be returning until September 2; and (4) Ahanchian, who was needed to respond to the motion, was also out of town over Labor Day weekend. Ahanchian noted that “[n]o party will suffer any prejudice” should the court grant the continuance.

Defendants opposed the motion, arguing that Ahanchian had failed to demonstrate “good cause.” Specifically, they argued that Ahanchian's counsel “knew (or should have known) that the motions would be filed no later than August 25—and yet, for reasons unexplained, this is precisely the date plaintiff's counsel decided to travel ‘out of state.’ Why? No reason is offered.” In a footnote, the defendants posed some hypothetical possibilities: “A family emergency? A conflicting work-related priority? Or a vacation to Mexico? The point is, it is not explained. Absence [sic] explanation, good cause cannot be discerned.” As for prejudice, defendants made the weak and false arguments that the requested continuance would give Ahanchian “several weeks to prepare an Opposition,” and yet defendants would have only one week to file their reply. They also asserted that they would have “less time to prepare for trial.” In point of fact, Ahanchian had requested extensions of time to file both his opposition and for the defendants' replies. Had Ahanchian's request been granted, defendants would have had the full time allowed by the local rules to reply. Moreover, the trial was not scheduled to commence for another three months.

Ahanchian ultimately filed his opposition to the summary judgment motion three days late, on
September 5, 2008, \textsuperscript{FN3} at which time he also filed an ex parte application seeking permission to make the late filing.\textsuperscript{FN4} On September 8, 2008, defendants responded by reiterating their opposition to any extension of time, and urging the district court to “ignore” the late opposition. They further suggested that Ahanchian's counsel's representation that he believed the deadline was September 4 was disingenuous, and that Ahanchian had failed to adequately explain the technical computer problems that had resulted in the one-day delay.

\textsuperscript{FN3} Ahanchian's opposition to the Motion for Terminating Sanctions was filed two days earlier, on September 3.

\textsuperscript{FN4} In this application, Ahanchian's counsel explained that his office had made a calendaring error, and thus he erroneously believed that the oppositions were not due until September 4, 2008. The truth of this statement is supported by counsel's earlier application seeking an extension of the deadlines, which represented that “Plaintiff's opposition papers are currently due on September 4, 2008.” Neither defense counsel nor the court chose to alert counsel that he had misstated the deadline, adding two days. Counsel also explained he attempted to meet that erroneously-calculated deadline but “due to technical computer circumstances beyond control,” he could not file until September 5.

On September 10, 2008, in a three-paragraph order, the district court granted defendants' summary judgment motion in full. It simultaneously denied Ahanchian's ex parte motion, concluding, without citing any record support, that Ahanchian, “apparently not pleased with the court's ruling,” had simply failed to file timely oppositions. The court construed Ahanchian's September 5, 2008, ex parte application as a Federal Rule of Civil Procedure 60(b) motion for reconsideration of its denial of Ahanchian's August 29, 2008, request for a one-week extension. The court then denied the motion, citing three authorities: (1) a Fifth Circuit decision concluding that the “inadvertent mistake” of counsel was not a sufficient ground to excuse missing a filing deadline; (2) a Sixth Circuit decision rejecting “calendaring errors” as justification for reconsideration; and (3), finally, an inapposite Ninth Circuit decision that suggests a party should sue its lawyer for malpractice rather than bring a Rule 60(b)(1) motion when it comes to regret an action based on erroneous legal advice.

Meanwhile, in its summary judgment order, the court correctly observed that Ninth Circuit precedent bars district courts from granting summary judgment simply because a party fails to file an opposition or violates a local rule, and also correctly cited its obligation to analyze the record to determine whether any disputed material fact was present. It then effectively flouted both legal principles, stating that it had reviewed only the defense evidence, even though it knew the opposition papers were already filed, having ruled upon the accompanying motion for a late filing. Unsurprisingly, based on only defendants' version of the facts, the court concluded that defendants were not liable on any claim and granted judgment in their favor.

\textsuperscript{FN5} For example, even without considering the late-filed opposition papers, the record then before the district court included the certificates of copyright registration, which are prima facie evidence of ownership and which should have precluded an award of summary judgment on Ahanchian's copyright claims.

Ahanchian timely appeals the district court's procedural rulings, the grant of summary judgment, and the award of attorneys' fees.

\textbf{II. STANDARD OF REVIEW}

[1][2] The district court's denial of an extension of time pursuant to Federal Rule of Civil Procedure 6(b) is reviewed for abuse of discretion, see \textit{Kyle v. Campbell Soup Co.}, 28 F.3d 928, 930 (9th Cir.1994), as is a court's denial of a Rule 60(b) mo-
tion, see United States v. Asarco Inc., 430 F.3d 972, 978 (9th Cir.2005). Accordingly, we reverse where the district court applied the incorrect legal rule or where the district court's application of the law to the facts was: (1) illogical; (2) implausible; or (3) without support in inferences that may be drawn from the record. United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir.2009) (en banc).

III. DISCUSSION

Ahanchian argues that the district court abused its discretion first in denying his request for a one-week extension of time to file his opposition to defendants' summary judgment motion and then in denying his application to file that opposition late. We agree.

A.  
[3][4] Federal Rule of Civil Procedure 6(b)(1) provides:

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Fed.R.Civ.P. 6(b)(1). This rule, like all the Federal Rules of Civil Procedure, “is to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits.” Rodgers v. Watt, 722 F.2d 456, 459 (9th Cir.1983) (quoting Staren v. American Nat’l Bank & Trust Co. of Chicago, 529 F.2d 1257, 1263 (7th Cir.1976)); see also Fed.R.Civ.P. 1 (“[The Federal Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”). Consequently, requests for extensions of time made before the applicable deadline has passed should “normally ... be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party.” 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1165 (3d ed. 2004).

[5] The circumstances of Ahanchian’s predicament clearly demonstrate the “good cause” required by Rule 6(b)(1). “Good cause” is a non-rigorous standard that has been construed broadly across procedural and statutory contexts. See, e.g., Venegas-Hernandez v. Sonolux Records, 370 F.3d 183, 187 (1st Cir.2004); Thomas v. Brennan, 961 F.2d 612, 619 (7th Cir.1992); Lolatchy v. Arthur Murray, Inc., 816 F.2d 951, 954 (4th Cir.1987). To begin with, Ahanchian faced an exceptionally constrained deadline resulting from the peculiar dictates of the local rules for the Central District of California. FN6 Compounding the problem, this deadline followed immediately upon Labor Day weekend during which even the federal courts are closed. By taking advantage of the unusual local rules, defendants cut Ahanchian’s time to respond to two dispositive motions to five business days and three days over the holiday weekend. See Fed.R.Civ.P. 6(a)(1)(C). As was certainly neither unreasonable nor unexpected, both Ahanchian and his attorney were out of town over Labor Day weekend, and, moreover, as he informed the district court, Ahanchian’s lead counsel was out-of-state in fulfillment of a previously-scheduled commitment from the day defendants chose to file their motions through the day the responses were due. FN7

FN6. Like the rules in several districts in this circuit, the Central District Local Rules establish deadlines for filing motions and oppositions by counting backwards from an established hearing date. In 2008, Central District of California Local Rule 6-1 provided that any motion had to be filed “not later than twenty-one (21) days before the date set for hearing.” C.D. Cal. Local R. 6-1 (2008). Similarly, Central District Local Rule 7-9 governed the filing

of oppositions and provided that any opposition had to be filed “not later than fourteen (14) days before the date designated for the hearing of the motion.” C.D. Cal. Local R. 7-9 (2008). As a result, where the movant chose to file a motion twenty-one days before the hearing—the last day allowed by local rules—the nonmovant has a mere seven days to file an opposition. This abbreviated timeline is unusual; every other district in this circuit guarantees nonmovants at least fourteen days to file an opposition to a motion. See D. Ariz. Local R. 56.1(d); D. Alaska Local R. 7.1(e); E.D. Cal. Local R. 78-230(b); N.D. Cal. Local R. 7-2(a), 7-3(a); S.D. Cal. Local R. 7.1(e)(1), (2); D. Guam Local R. 7.1(d); D. Hawaii Local R. 7.2(a), 7.4; D. Idaho Local R. 7.1(c); D. Mont. Local R. 7.1(d)(1)(B); D. Nevada Local R. 7.2(b); D.N. Mariana Islands Local R. 7.1(c)(2); D. Oregon Local R. 7.1(f); E.D. Wash. Local R. 7.1(c); W.D. Wash. Local R. 7(d)(3).

FN7. Even without the revelation that Ahanchian's lead counsel's absence was due to his position as an elected delegate to a major political party's national convention, his lack of availability due to a previously planned trip is a reasonable basis for seeking an extension of time. As Supreme Court Justice David Brewer once recognized, attorneys have an obligation as professionals to assume positions of important social responsibility. See David J. Brewer, The Ideal Lawyer, Atlantic Monthly, November 1906, at 587, 598 (“[T]he true lawyer never forgets the obligations which he as a lawyer owes to the republic, ... he always remembers that he is a citizen.”). Moreover, attorneys, like everyone else, have critical personal and familial obligations that are particularly acute during holidays. It is important to the health of the legal profession that attorneys strike a balance between these competing demands on their time. See Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 Vand. L.Rev. 871, 889-90 (1999).

*1260 Critically, the record is devoid of any indication either that Ahanchian's counsel acted in bad faith or that an extension of time would prejudice defendants. To the contrary, the record reflects that Ahanchian's counsel acted conscientiously throughout the litigation, promptly seeking extensions of time when necessary and stipulating to defendants' earlier request for an extension of time to file their answer and to the twelve-week extension due to two defendants' late appearances. Moreover, defendants' argument that they would be prejudiced by only having a week to reply while Ahanchian would have had several weeks to draft an opposition is unpersuasive and neglects the fact that in the overwhelming majority of districts, more time is given for drafting oppositions than for drafting replies. See, e.g., N.D. Cal. Local R. 7-3(a), (c); S.D. Cal. Local R. 7.1(e)(1), (2). Had the district court had any doubts about the veracity or good faith of Ahanchian's counsel, or been worried about prospective prejudice, it could have held an evidentiary hearing or sought more information; instead, without support in the record, it summarily denied Ahanchian's request.

The record shows that Ahanchian's requested relief was reasonable, justified, and would not result in prejudice to any party. The district court nevertheless denied Ahanchian's motion, thus effectively dooming Ahanchian's case on the impermissible ground that he had violated a local rule. Because Ahanchian clearly demonstrated the “good cause” required by Rule 6, and because there was no reason to believe that Ahanchian was acting in bad faith or was misrepresenting his reasons for asking for the extension, the district court abused its discretion in denying Ahanchian's timely mo-
We next turn to the district court’s denial of Ahanchian’s September 5, 2008, ex parte application to allow his late-filed opposition, which the court construed as a Rule 60(b) motion for reconsideration of its denial of Ahanchian’s Rule 6 motion for an extension. Rule 60(b) provides that a court “may relieve a party or its legal representative from a final judgment, order, or proceeding” on the basis of “mistake, inadvertence, surprise, or excusable neglect.” Fed.R.Civ.P. 60(b). The court denied Ahanchian's application after concluding that Ahanchian had not demonstrated “excusable neglect.” In so doing, however, the district court failed to cite the correct legal standard, applying an incorrect legal standard for deciding Rule 60(b) motions. FN8

FN8. Defendants assert that Ahanchian waived this argument because he did not state in his application that he was relying on the “excusable neglect” standard or cite Rule 60(b). Defendants are correct that a party will be deemed to have waived any issue or argument not raised before the district court. Ritchie v. United States, 451 F.3d 1019, 1026 n. 12 (9th Cir.2006). However, this general rule “does not apply where the district court nevertheless addressed the merits of the issue” not explicitly raised by the party. Blackmon-Malloy v. U.S. Capitol Police Bd., 575 F.3d 699, 707 (D.C.Cir.2009); see also Citizens United v. F.E.C., --- U.S. ----, 130 S.Ct. 876, 888, --- L.Ed.2d ---- (2010). Here, despite Ahanchian's understandable failure to explicitly reference the excusable neglect standard in what he thought was a motion for late filing, and not a Rule 60(b) motion, the district court chose to construe his application as one brought pursuant to Rule 60 and purported to apply the excusable neglect standard. Ahanchian did not waive his argument that the district court abused its discretion in its application of Rule 60.

*1261 [8] To determine whether a party’s failure to meet a deadline constitutes “excusable neglect,” courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993); Briones v. Riviera Hotel & Casino, 116 F.3d 379, 381 (9th Cir.1997) (adopting this test for consideration of Rule 60(b) motions). Through other decisions, including Bateman v. U.S. Postal Serv., 231 F.3d 1220 (9th Cir.2000), and Pincay v. Andrews, 389 F.3d 853 (9th Cir.2004) (en banc), we have further clarified how courts should apply this test.

In Bateman, we concluded that when considering a Rule 60(b) motion a district court abuses its discretion by failing to engage in the four-factor Pioneer/Briones equitable balancing test. Bateman, 231 F.3d at 1223-24. Bateman's counsel had left the country before filing an opposition to the Postal Service's summary judgment motion, allowed the deadline to pass while abroad, failed to file any motions for extensions of time, and failed to contact the district court for sixteen days after he returned because of “jet lag and the time it took to sort through the mail.” Id. at 1223. Because the district court had already awarded summary judgment to the Postal Service, Bateman moved to set aside the judgment pursuant to Rule 60(b). Id. The district court, without mentioning the Pioneer/Briones test, denied the motion after considering only facts relating to the reason for Bateman's delay—the third Pioneer/Briones factor. Id. at 1224. We concluded that the district court had failed to engage in the equitable analysis mandated by Pioneer and Briones, and, by ignoring three of the four Pioneer/Briones factors, had abused its discretion in denying Bateman's Rule 60(b) motion. Id.; see also
Lemoge v. United States, 587 F.3d 1188, 1192 (9th Cir.2009) (“We conclude that the district court did not identify the Pioneer-/Briones standard or correctly conduct the Pioneer-/Briones analysis and that this was an abuse of discretion.”).

In Pincay, we held that courts engaged in balancing the Pioneer-/Briones factors may not apply per se rules. Pincay, 389 F.3d at 855 (“We now hold that per se rules are not consistent with Pioneer.”). Defendants, who had filed their notice of appeal twenty-four days late, asserted that their tardy filing resulted from a calendaring mistake caused by attorneys and paralegals misapplying a clear legal rule. See id. Applying the same four-factor balancing test as required under Federal Rule of Civil Procedure 60(b), the district court found that defendants' neglect was excusable under Federal Rule of Appellate Procedure 4(a)(5). See id. Sitting en banc, we rejected the plaintiffs' contention that the district court had abused its discretion in ruling for defendants. We concluded that, while the calendaring mistake was not a “compelling excuse,” because of the “nature of the contextual analysis and the balancing of the factors adopted in Pioneer,” courts applying the Pioneer-/Briones test cannot create or apply any “rigid legal rule against late filings attributable to any particular type of negligence.” Id. at 860.

The district court's failure to apply Ninth Circuit precedent, particularly the rules set forth in Bateman and Pincay, to Ahanchian's Rule 60(b) motion was error. Just like the district court in Bateman, the district court here neither cited nor applied the Pioneer-/Briones test, but instead based its decision solely on whether the reason for the delay—the third Pioneer-/Briones factor—could establish excusable neglect. By ignoring the other three factors, the district court abused its *1262 discretion. See Bateman, 231 F.3d at 1224. The district court then compounded its legal error by concluding that “a calendaring mistake is the type of ‘inadvertent mistake’ that is not entitled to relief pursuant to Rule 60(b)(1),” impermissibly adopting a per se rule in applying the Pioneer-/Briones balancing test. See Pincay, 389 F.3d at 859-60.

[9] The district court's errors are particularly troublesome because our application of the correct equitable analysis convinces us that Ahanchian's delay was the result of excusable neglect. See Bateman, 231 F.3d at 1224 & n. 3. We start by recognizing that “Rule 60(b) is ‘remedial in nature and ... must be liberally applied.’ ” TCI Group Life Ins. v. Knoebber, 244 F.3d 691, 696 (9th Cir.2001) (quoting Falk v. Allen, 739 F.2d 461, 463 (9th Cir.1984)). With this standard in mind, we conclude that all four Pioneer-/Briones factors favor Ahanchian. First, the defendants would not have been prejudiced by a week's delay in the filing of the opposition and a concomitant week extension to file a reply. At most, they would have won a quick but unmerited victory, the loss of which we do not consider prejudicial. Cf. Bateman, 231 F.3d at 1225 (finding insufficient prejudice where defendants “would have lost a quick victory and, should it ultimately have lost the summary judgment motion ... would have to reschedule the trial date”). Second, the length of the delay was a mere three days; filing the opposition then would not have adversely affected either the summary judgment hearing date, which was ten days away, or the trial, which was two and a half months away. Compare id. (finding a delay of over a month “not long enough to justify denying relief”). Third, while a calendaring mistake caused by the failure to apply a clear local rule may be a weak justification for an attorney's delay, we have previously found the identical mistake to be excusable neglect. See, e.g., Pincay, 389 F.3d at 860. In fact, in Bateman, the attorney's reasons for his nearly month-long delay, the need to recover from jet lag and to review mail, were far less persuasive. Yet, we concluded that excusable neglect was established. Bateman, 231 F.3d at 1225. Fourth, there is no indication that Ahanchian's failure to file the opposition on time was the result of bad faith. Ahanchian's counsel displayed his (mistaken) belief that the oppositions were due on September 4, 2008, in his initial request for an ex-
tension of time. Thus, his reliance on the calendaring mistake was not a bad-faith, post-hoc rationalization concocted to secure additional time. Ahanchian's counsel had no history of missing deadlines or disobeying the district court's orders; in fact, he demonstrated a sensitivity to the court's orders and deadlines by promptly seeking extensions of time where necessary. We have found good faith in situations where attorneys acted far less diligently and conscientiously. See id. (“[Counsel] showed a lack of regard for his client's interests and the court's docket. But there is no evidence that he acted with anything less than good faith.”).

By failing to apply the Pioneer/Briones equitable balancing test and instead adopting an impermissible per se rule, the district court abused its discretion. See Lemoge, 587 F.3d at 1193 (citing Hinkson, 585 F.3d at 1261). Applying the correct legal standard, we conclude that Ahanchian's counsel sufficiently established that his failure to timely file the opposition to summary judgment was the result of excusable neglect, and that the motion to allow the late opposition should have been granted.

C.

Perhaps contributing to the district court's errors and certainly compounding the harshness of its rulings, defense counsel*1263 disavowed any nod to professional courtesy, instead engaging in hardball tactics designed to avoid resolution of the merits of this case. We feel compelled to address defense counsel's unrelenting opposition to Ahanchian's counsel's reasonable requests. Our adversarial system depends on the principle that all sides to a dispute must be given the opportunity to fully advocate their views of the issues presented in a case. See Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir.2003); Iva Ikuko Toguri D’Aquino v. United States, 192 F.2d 338, 367 (9th Cir.1951). Here, defense counsel took knowing advantage of the constrained time to respond created by the local rules, the three-day federal holiday, and Ahanchian's lead counsel's prescheduled out-of-state obligation. Defense counsel steadfastly refused to stipulate to an extension of time, and when Ahanchian's counsel sought relief from the court, defense counsel filed fierce oppositions, even accusing Ahanchian's counsel of unethical conduct. Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system. See Cal. Attorney Guidelines of Civility & Professionalism § 1 (“The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.”); see also Marcangelo v. Boardwalk Regency, 47 F.3d 88, 90 (3d Cir.1995) (“We do not approve of the ‘hardball’ tactics unfortunately used by some law firms today. The extension of normal courtesies and exercise of civility expedite litigation and are of substantial benefit to the administration of justice.”).

Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect. See Bateman, 231 F.3d at 1223 n. 2 (“[A]t the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values.”); Peterson v. BMI Refractories, 124 F.3d 1386, 1396 (11th Cir.1997) (“There is no better guide to professional courtesy than the golden rule: you should treat opposing counsel the way you yourself would like to be treated.”). Where, as here, there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries. See Cal. Attorney Guidelines of Civility & Prof. § 6.

CONCLUSION

The district court abused its discretion in denying Ahanchian's request for a one-week extension to file his opposition and erred in denying Ahanchian's motion to allow a three-day late-filed opposition it construed as a Rule 60(b) motion. FN9 Ac-
accordingly, we **REVERSE** the district court's grant of summary judgment, vacate the district court's award of attorneys' fees, and **REMAND** this case for further proceedings.

**FN9.** The district court also stated in a footnote that the denial was, in the alternative, based on a lack of good cause. This conclusion was also an abuse of discretion, as the above discussion demonstrates.

C.A.9 (Cal.), 2010.
Ahanchian v. Xenon Pictures, Inc.

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United States District Court, S.D. California.

LA JOLLA SPA MD, INC., Plaintiff,
v. AVIDAS PHARMACEUTICALS, LLC, Defendant.

Case No.: 17-CV-1124-MMA(WVG)

Signed 08/30/2019

Attorneys and Law Firms


Amy E. Burke, Jennifer J. McGrath, Theodora Oringher PC, Los Angeles, CA, Julie Chovanes, Pro Hac Vice, Chovanes Law LLC, Philadelphia, PA, for Defendant.

ORDER GRANTING PLAINTIFF’S MOTION FOR SANCTIONS

Hon. William V. Gallo, United States Magistrate Judge

*1 Incivility is a scourge upon the once-venerable legal profession and has unfortunately become increasingly more rampant in the profession in recent years. See generally Lasalle v. Vogel, 36 Cal. App. 5th 127 (Cal. Ct. App. 2019) (lamenting the state of the modern legal profession and discussing its degradation through the years). In today’s combative, battle-minded society, the lay perception of a “good” attorney is someone who engages in the obstreperous, scorched-earth tactics seen on television and makes litigation for the opposing side as painful as possible at every turn. However, outside the fictional absurdities of television drama, attorneys in the real world—presumably educated in the law and presumably committed to upholding the honor of the profession—should know and behave much more honorably.

When unchecked, incivility further erodes the fabric of the legal profession. Judges rightfully expect and demand more of officers of the court, and rules exist to ensure that lack of civility does not hinder litigation and does not go unpunished. Thus, Courts are equipped to address incivility under appropriate circumstances. This case sadly presents the Court with such an opportunity—to address the atrociously uncivil and unprofessional conduct of an attorney whose behavior wantonly and unnecessarily multiplied proceedings and aggressively harassed opposing counsel far beyond any sensible measure of what could be considered reasonably zealous advocacy for a client. Such behavior before this Court will not be chalked up to being simply “just part of the game.” As explained below, this Court GRANTS Plaintiff’s motion for sanctions in the amount of $28,502.03.

I. BACKGROUND

Once the parties finally settled upon their current counsel earlier this year after a total of five sets of attorneys between them, the stage was set for the sanctions motion now pending before the Court. On January 9, 2019, the Court held a second Case Management Conference in which defense counsel Julie Chovanes participated the day after the Court approved her request to appear pro hac vice. (Doc. Nos. 52-53; 55 (Transcript of CMC).) Although the Court had allowed prior counsel to conduct discovery, they apparently had failed to take much discovery, and new Plaintiff’s counsel, James Ryan, requested additional time to do so. Accordingly, this Court granted Plaintiff’s motion to amend the original Scheduling Order and allowed the parties to take fact discovery until April 8, 2019 and take expert discovery until June 17, 2019. (Doc. No. 54 ¶ 7.)

A short few weeks later, the parties called this Court to mediate a discovery dispute. (Doc. Nos. 57-60.) However, the disputes did not end there, and the Court held additional discovery conferences on February 26, 2019 (Doc. Nos. 67-68); March 22, 2019 (Doc. Nos. 74-75); 1 April 1, 2019 (Doc. Nos. 78-80); April 10, 2019 (Doc. Nos. 81-82); May 3, 2019 (Doc. No. 88); and May 10, 2019 (Doc. No. 89). In all, this Court held seven discovery conferences in a short four-month period.

*2 As a result of these numerous disputes, the Court spent hours on teleconferences with Chovanes and Ryan, hearing arguments, and generally observing the demeanor and tenor of both attorneys. Because the Court was able to observe the attorneys’ behavior on these conferences, the Court can now confirm that both of their demeanors and behavior during the deposition at the heart of the pending sanctions motion was consistent with how they conducted themselves during the discovery conferences. The Court
observed Plaintiff’s attorney Ryan as consistently even-keeled and respectful—though at times frustrated—as he argued in favor of his client. He did not raise his voice, engage in any attacks against the other side or opposing counsel, and dispassionately argued his positions. Defense counsel Chovanes, however, displayed a wholly different demeanor. The Court witnessed Chovanes repeatedly raise her voice at Ryan and even the Court, continuously interrupt Ryan and this Court, and characterize Plaintiff’s case as a “garbage case” on multiple occasions. Outside the presence of this Court, Chovanes repeatedly failed to meet and confer about discovery disputes, often stating she would respond at a later date but then failing to respond despite multiple efforts to follow up by Ryan. At times, Chovanes also simply ignored Ryan’s meet and confer communications. Chovanes’s general demeanor during teleconferences with the Court was consistently flippant, overly-aggressive, turbulent, and quick to confrontation.

One aspect of the fact discovery process that led to a dispute was the deposition of Margaret Gardner, the founder and designated Rule 30(b)(6) witness for Defendant. Leading up to Gardner’s deposition and the May 10, 2019 Mandatory Settlement Conference, Defendant sought to limit her deposition due to her health concerns. After receiving a physician’s note, the Court ordered that the deposition take place in Philadelphia for seven hours and that it proceed in two-hour increments with 30-minute breaks. (Doc. No. 82.) Also at that discovery conference on April 10, 2019, Chovanes indicated she wished to seek a protective order to limit the scope and length of Gardner’s deposition given Chovanes’s belief that the deposition should not take “more than a few hours.” The Court provided Chovanes the opportunity to file a motion for a protective order and set an April 15, 2019 deadline to do so. (Doc. No. 82 ¶2.) However, although Chovanes referenced filing a motion for a protective order several times, the motion was never filed and so a protective order never issued.

The deposition of Margaret Gardner took place on May 3, 2019 in Philadelphia, and Chovanes quickly set the tone for the day.2 As Ryan opened the deposition by providing standard instructions ordinarily given in depositions—such as for Gardner and Ryan to speak in turn to avoid speaking over each other—Chovanes stated: “Objection to the lecture.” (Id. at 12.) And so began a protracted day of Ryan attempting to take Gardner’s deposition while Chovanes continuously interrupted, lodged frivolous objections, improperly instructed Gardner to not answer questions, and extensively argued with Ryan. Chovanes’s continuous, relentless interrupting Ryan’s questioning also included an outburst by Chovanes, where she and Gardner left the room after Chovanes falsely and bizarrely accused Ryan of threatening Gardner.4

*3 Approximately two hours into the deposition, the parties successfully contacted this Court for a discovery conference regarding Chovanes’s objections and instructions to Gardner. (Doc. No. 93-6 at 120:7-128:7.) Up to that point, Chovanes had repeatedly objected to Ryan’s questions on relevance grounds, objected that his questions exceeded the scope of the Rule 30(b)(6) deposition notice, and objected that some of the questions were outside the scope of discovery. Based on these objections, Chovanes had repeatedly instructed Gardner to not answer Ryan’s questions. The Court instructed the parties to continue the deposition, preserve objections, and told the parties that objections based on scope and relevance were not proper bases to instruct Gardner to not answer questions. The deposition thus continued, and the parties did not contact the Court again that day.

After the discovery conference with the Court, Chovanes stopped instructing Gardner to not answer questions but continued to interrupt and make objections of various kinds. She also continued to relentlessly argue with Ryan, constantly trying to hurry up his questioning, making frivolous objections, making objections that made no sense in the context of a deposition, and instructing Ryan how he should ask questions and conduct the deposition.

The deposition was recorded by a videographer and a stenographer. As part of its sanctions motion, Plaintiff submitted video clips and the entire transcript of the deposition. Plaintiff divided the interruptions into six categories and provided 128 video clips encompassing 133 examples of behavior that Plaintiff contends cumulatively warrant sanctions.5 (Doc. No. 93-2.) Defendant filed an opposition to the sanctions motion, but despite the opportunity, provided no video clips in rebuttal.

After the deposition, Ryan sought and was granted leave to file a motion for sanctions after his attempts to meet and confer with Chovanes about sanctions failed. Ryan now seeks $28,502.03 in sanctions pursuant to Federal Rule of Civil

In response, Defendant contends sanctions are not warranted because Ryan was able to ask questions and concluded the deposition by confirming he had no further questions. Defendant argues Chovanes’s conduct did not result in prejudice to Plaintiff. Continuing Chovanes’s personal attacks on Ryan at the deposition, Defendant’s opposition papers contend that Ryan was unprepared near the end of the deposition because of the pauses between his questions, he was “wasting time,” and contends it was proper for Chovanes to note these things for the record to protect Gardner from “further abuse.” (Doc. No. 94 at 4-5.) With respect to the amount of sanctions Plaintiff seeks, Defendant does not address any specific components of the sanctions amount, instead asserting that there’s a lack of documentary evidence to support the entire amount. Defendant also notes a discrepancy with respect to the date on which Ryan travelled to Philadelphia, though there is no dispute that he did in fact travel there for the deposition.

The Court held a hearing on the sanctions motion on August 16, 2019 and heard argument from Chovanes and Ryan. Chovanes continued to deny any impropriety, did not present any new evidence, and did not challenge any specific monetary component of the amount of sanctions Plaintiff seeks. She did not defend her conduct. She did not show any remorse. And she again characterized Plaintiff’s case a “garbage case.” This Order follows.

II. LEGAL STANDARD

A. Sanctions Under Federal Rule of Civil Procedure 30(d)(2)

*4 Under Rule 30(d)(2), a court may “impose an appropriate sanction—including the reasonable expenses and attorney’s fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.” Rule 30’s advisory committee notes make clear that the sanction may be imposed on parties and attorneys alike. District courts within the Ninth Circuit have held that Rule 30(d)(2) sanctions do not require a finding of bad faith. See, e.g., BNSF Ry. Co. v. San Joaquin Valley R.R. Co., No. 08CV1086-AWI-SMS, 2009 U.S. Dist. LEXIS 111569, at *9 (E.D. Cal. Nov. 17, 2009); Robinson v. Chefs’ Warehouse, No. 15CV5421-RS(KAW), 2017 U.S. Dist. LEXIS 40824, at *7 (N.D. Cal. Mar. 21, 2017), on reconsideration, 2017 U.S. Dist. LEXIS 93339 (N.D. Cal. June 16, 2017).


Under 28 U.S.C. § 1927, any attorney “who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927. Section 1927 thus provides the Court the authority “to hold attorneys personally liable for excessive costs for unreasonably multiplying proceedings.” Gadda v. Ashcroft, 377 F.3d 934, 943 n.4 (9th Cir. 2004).

Section 1927 indicates that actions that multiply the proceedings must be both unreasonable and vexatious, and the Ninth Circuit has also stated that recklessness alone will not suffice; what is required is recklessness plus something more—for example, knowledge, intent to harass, or frivolousness. See Thomas v. Girardi, 611 F.3d 1027, 1061 (9th Cir. 2010) (reckless plus intentionally misleading); Lahiri v. Universal Music & Video Distrib. Corp., 606 F.3d 1216, 1221-22 (9th Cir. 2010) (cumulative acts over five years evidenced a pattern of recklessness and bad faith warranting sanctions); B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1107 (9th Cir. 2002) (recklessness plus knowledge); Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001) (recklessness plus frivolousness, harassment, or improper purpose). “Tactics undertaken with the intent to increase expenses, or delay, may also support a finding of bad faith.” New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1306 (9th Cir. 1989) (internal citations omitted). Indeed, “[e]ven if an attorney’s arguments are meritorious, his conduct may be sanctionable if in bad faith.” Id. (citation omitted).

C. “Inherent Powers” Sanctions

The Supreme Court in Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), delivered the definitive summary of the bases on which a federal court may levy sanctions under its inherent power. The Court confirmed that federal courts have the inherent power to levy sanctions, including attorneys' fees, for “willful disobedience of a court order ... or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons...” 447 U.S. at 766 (internal quotation marks and citations omitted). The Court also noted that a court “certainly may assess [sanctions] against counsel who willfully abuse judicial processes.” Id. The Court later reaffirmed the Roadway principles in Chambers v. NASCO, Inc., 501 U.S. 32 (1991), emphasizing the continuing need for
resort to the court’s inherent power because it is “both broader and narrower than other means of imposing sanctions.” 501 U.S. at 46. On the one hand, the inherent power “extends to a full range of litigation abuses.” Id. On the other, the litigant must have “engaged in bad faith or willful disobedience of a court’s order.” Id. at 46-47. In Chambers, the Supreme Court left no question that a court may levy fee-based sanctions when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, delaying or disrupting litigation, or has taken actions in the litigation for an improper purpose. Id. at 45-46 & n.10.

*5 As is relevant here, “[b]efore awarding sanctions under its inherent powers ... the court must make an explicit finding that counsel’s conduct constituted or was tantamount to bad faith.” Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) (internal quotations and citation omitted). The Ninth Circuit has extensively explained what constitutes bad faith in the context of “inherent powers” sanctioning authority:

Under both Roadway and Chambers, ... the district court has the inherent authority to impose sanctions for bad faith, which includes a broad range of willful improper conduct. For example, in In re Itel Sec. Litig. v. Itel, 791 F.2d 672 (9th Cir. 1986), counsel filed objections to exact fee concessions in an action pending before another court. The objections were not frivolous, nor were they submitted with any knowledge that they were meritless. But counsel’s goal was to gain an advantage in the other case, which we concluded was “sufficient to support a finding of bad faith.” Id. at 675. “For purposes of imposing sanctions under the inherent power of the court, a finding of bad faith ‘does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or mala fides, the assertion of a colorable claim will not bar the assessment of attorney’s fees.’” Id. (quoting Lipsig v. Nat’l Student Mktg. Corp., 663 F.2d 178, 182 (D.C. Cir. 1980) (per curiam)).

Itel teaches that sanctions are justified when a party acts for an improper purpose -- even if the act consists of making a truthful statement or a non-frivolous argument or objection. In Itel, the improper purpose was the attempt to gain tactical advantage in another case. 791 F.2d at 675 (discussing improper motivation). This approach is in harmony with Roadway, where the Supreme Court made clear that courts possess inherent power to impose sanctions for “willful abuse of judicial processes.” 447 U.S. at 766.

In reviewing sanctions under the court’s inherent power, our cases have consistently focused on bad faith. For example, in United States v. Stoneberger, 805 F.2d 1391 (9th Cir. 1986), the district court imposed sanctions on a chronically late attorney. Reversing the imposition of sanctions, we held that mere tardiness does not demonstrate the improper purpose or intent required for inherent power sanctions. Id. at 1393. Rather, “[a] specific finding of bad faith ... must ‘precede any sanction under the court’s inherent powers.’” Id. (quoting Roadway, 447 U.S. at 767).

We again reversed sanctions due to a lack of intent in Zambrano v. City of Tustin, 885 F.2d 1473 (9th Cir. 1989). In that case, the plaintiff’s counsel negligently failed to comply with local court rules that required admission to the district court bar. We vacated the sanctions, holding that the district court may not sanction mere “inadvertent” conduct. Id. at 1485; see also id. at 1483 (“Nothing in the record indicates that their failure to request admission to the district bar was anything more than an oversight or ordinary negligence on their part.”); id. at 1484 (“Willful or reckless disregard of court rules justifies punitive action.”). Similarly, in Yagman v. Republic Ins., 987 F.2d 622, 628 (9th Cir. 1993), we vacated the imposition of sanctions where there was no evidence that the attorney had “acted in bad faith or intended to mislead the court.”

*6 Fink v. Gomez, 239 F.3d 989, 992-94 (9th Cir. 2001).

III. DISCUSSION

The Court first sets forth Chovanes’s specific unprofessional, obstructive, harassing, frivolous, and willful conduct. The Court thereafter concludes Chovanes acted in bad faith and that sanctions are warranted based on the totality of her conduct.

A. Chovanes’s Conduct

1. Instances of Chovanes Instructing Gardner to Not Answer Based on Impermissible Grounds

Under Rule 30, an attorney may instruct a client not to answer “only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)” to terminate or limit the deposition on grounds of bad faith, oppression, and the like. Fed. R. Civ. P. 30(c)(2), (d)(3). If none of the enumerated objection grounds exists, the
objection may be noted on the record, “but the examination still proceeds; the testimony is taken subject to any objection.”
Id. at 30(c)(2).

1. As Plaintiff argues, on at least approximately 39 occasions, Chovanes did not adhere to Rule 30’s limits on instructing a deponent to not answer or adhere to its procedures for addressing possible bad faith questioning. Instead, Chovanes cited impermissible grounds and did not allow Gardner to answer various basic questions despite preserving the objections on the record. The vast majority of these instances occurred before the parties’ discovery conference with this Court and included instances where no reasonable attorney would object or instruct a witness to not answer a question. For example, Chovanes instructed Gardner to not answer the following benign foundational questions that any competent attorney would ask in the early stages of a deposition:

• Are you an officer of Avidas Pharmaceuticals? (Doc. No. 93-6 at 14:14-17.)

• Are you a member of Vidas Pharmaceuticals? (Id. at 14:19-22.)

• Are you a managing member of Avidas? (Id. at 15:7-8.)

• When was Avidas Pharmaceuticals formed? (Id. at 18:9-11.)

• Are there any current employees of Avidas Pharmaceuticals? (Id. at 29:2-5.)

• Where has Avidas been located since 2008? (Id. at 29:7-9.)

• Is Dan McCall a member of Avidas Pharmaceuticals, LLC? (Id. at 29:16-30:3.)

• Is Michael Warner ... a member of Avidas Pharmaceuticals, LLC? (Id. at 30:5-8.)

2. In addition to these simple background questions, Chovanes instructed Gardner to not answer several questions based on her erroneous assertion that they were beyond the scope of the Rule 30(b)(6) deposition notice and thus not subject to proper questioning. At the beginning of the deposition, Chovanes demanded that Ryan produce the deposition notice and proclaimed that deposition questioning would be limited to the topics in the notice. (Doc. No. 93-6 at 13:5-8 (“I would suggest ... you get the 30(b)(6) notice out, because you're not going to be able to go anywhere beyond that.”); 14:2-4 (“But right now let’s stick to the 30(b)(6) notice. Okay? Otherwise, you're not going to be getting answers.”)) Chovanes even ludicrously contended Ryan could not ask basic foundational background questions because the deposition notice did not include such a category:

*7 What -- there's nothing on ... your 30(b)(6) notice, that says “foundational information.”

So you're beyond the scope of the 30(b)(6) notice too. So that makes no sense, foundational information. You're just making that up, sir.

Let’s proceed to what’s on the 30(b)(6) notice, which is why we're here.

(Id. at 23:24-24:7.) The deposition transcript contains several other instances where Gardner was instructed to not answer based on “scope” objections, all of which were based on Chovanes’s contention that any question not specifically tethered to one of the categories in the deposition notice was beyond the scope of the notice and thus beyond the scope of the deposition. (See, e.g., id. at 28:5-10 (question about how to spell a product Gardner had mentioned in testimony); 31:3-8 (question about other products Defendant may have sold); 46:22-48:15 (Chovanes attempting to prevent questions related to inventory topic that was listed in the deposition notice); 51:14-22.)

Chovanes’s objections here were baseless, of course, because Rule 30(b)(6) deposition notices do not limit the examiner to the topics listed in the notice. Although a party noticing a deposition pursuant to Rule 30(b)(6) “must describe with reasonable particularity the matters on which the examination is requested, ... the ‘reasonable particularity’ requirement of Rule 30(b)(6) cannot be used to limit what is asked of the designated witness at a deposition.” ChrisMar Sys Inc. v. Cisco Sys Inc., 312 F.R.D. 560, 563 (N.D. Cal. 2016) (emphasis added); see also Moriarty v. Am. Gen. Life. Ins. Co., No. 17CV1709-BTM(WVG), 2019 US. Dist. LEXIS 62041, at *8 (S.D. Cal. Apr. 10, 2019) (Gallo, J.). “The 30(b)(6) notice establishes the minimum about which the witness must be prepared to testify, not the maximum.” ChrisMar Sys Inc., 312 F.R.D. at 563 (emphasis added); see also see also Moriarty, 2019 US. Dist. LEXIS 62041, at *8. Thus, deposition notice categories are simply the basic informational categories that a corporate representative should familiarize herself with to competently answer questions on behalf of the entity—they do not serve as handcuffs to limit the examiner from asking, for example,
basic foundational questions about the deponent or the entity itself.

Accordingly, Chovanec’s unrelenting attempts to limit Ryan to the categories specified in the deposition notice were untethered to any legal authority or principle and were utterly baseless. Chovanec then compounded the error by instructing Gardner to not answer questions because, as explained below, “scope of deposition notice” is not a proper basis upon which a deponent can be instructed to not answer.

3. Chovanec also instructed Gardner to not answer various questions based on relevance grounds. (See, e.g., Doc. No. 93-6 at 31:3-8; 45:10-20; 50:6-51:1; 53:13-22; 53:24-54:4; 60:4-61:8; 68:18-69:12; 73:8-12; 75:22-76:2; 78:11-15; 118:10-120:1.) A sub-set of Chovanec’s relevance-based objections were based on Chovanec’s incorrect assertion that this Court had limited the scope of all discovery to matters after May 2014. Chovanec’s reference to the May 2014 “cutoff” was related to an Order this Court issued on February 8, 2019 following a discovery conference regarding disputed written discovery responses. (See Doc. No. 60.) Although the language of that Order seemed to limit all discovery to the time period after May 2014, the Court later issued a second written Order, clarifying that the first Order was limited to the written discovery at issue in that dispute—not discovery in general. (See Doc. No. 73.) At the deposition, Ryan was prepared, had a copy of the clarifying Order in hand, and he read the relevant portions to Chovanec. (Doc. No. 93-6 at 21:8-23.) Chovanec then shifted tactics, stating she recalled this Court orally limiting discovery to events after May 2014 during a telephonic discovery conference—but she could not identify when that occurred. (Id. at 21:25-22:11.)

*8 This Court has never limited the scope of all discovery as Chovanec asserted. However, this did not deter her from repeatedly instructing Gardner to not answer questions based on this erroneous reasoning—even after Ryan had read her the clarifying Order. (See, e.g., id. at 45:16-20 (“Objection. Why is it relevant? This is dated ’08 and we’re talking about ’14 and beyond. Objection. Don’t answer that question. Move ahead.”); 45:22-46:1 (“You can answer with regard to anything after May of 2014.”); 46:15-18 (“You disagree with it, but she’s not going to answer anything before May of 2014. [It’s beyond the scope and it’s not within the judge’s order.”]); 52:13-17; 60:4-61:8 (Chovanec “foreclosing” questioning); 68:10-69:12 (question about other persons who may have maintained records related to the subject product); 70:15-18 (“I want to get to areas the Court said we should get to, not to areas that are irrelevant and before May of 2014.”))

Even if the above objections were factually accurate, Chovanec’s instructions to not answer the questions based on relevance grounds nonetheless would have run afoul of basic principles of objecting during depositions. The plain and simple language of Rule 30 makes clear that

[a]n objection at the time of the examination—whether to evidence, to a party’s conduct, to the officer’s qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection.... A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

Fed. R. Civ. P. 30(c)(2); see also Brineko v. Rio Properties, Inc., 278 F.R.D. 576, 581 (D. Nev. 2011) (“The remedy for oppressive, annoying and improper deposition questioning is not simply to instruct a witness not to answer.”); Detoy v. City & Cnty. of San Francisco, 196 F.R.D. 262, 365 (N.D. Cal. 2000) (“As a rule, instructions not to answer questions at a deposition are improper.”); Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 11(IV)-A § 11:1565 (“Rule 30(c)(2) renders ‘relevancy’ objections meaningless in most depositions. The deponent must even answer questions calling for blatantly irrelevant information ‘subject to the objection.’ ”). Although Chovanec at times instructed Gardner to not answer based on privilege, the vast majority of Chovanec’s instructions to Gardner did not fall within the Rule’s enumerated bases and violated this exceedingly simple rule.

4. Although the above categories constituted the bulk of the inappropriate objections and instructions to not answer, there are other violative examples sprinkled in the transcript:

- MS. CHOVANES: Well, don’t answer that question. “Required to follow” is not a legal question—I mean, it’s
asking for your opinion, and that’s not what we're here for. (Doc. No. 93-6 at 117:25-118:2.)

• Q. Can you generally describe what those agreements were.

MS. CHOVANES: Objection. No don't answer that question. That's a ridiculous question. What do you mean by “generally describe.” That’s dangerous. I'm not going to let her answer that. Rephrase. There are titles right here so why don't you just ask her that. Why are you wasting our time? (Id. at 33:10-19.)

• Q. And generally speaking -- and I know you're not a lawyer. Generally speaking, what is your understanding as to what the know-how agreement provides?

MS. CHOVANES: Objection. I'm not going to let you answer that question. If you want to point her to specific areas and ask her questions about facts, but that comes too close to opinion testimony so we're not going to answer. (Id. at 37:17-28:1.)

• Q. Exhibit 1 reflects a number of units of inventory of Vitaphenol products. Did Avidas confirm that it received each of those units of inventory that is stated on Exhibit 52 of Exhibit 1?

*9 MS. CHOVANES: Objection to the question. It’s not understandable. It also misstates the document itself. So I'm not going to let you answer the question because it’s not an accurate reflection of what’s in the document. You can't make up stuff about the documents and ask the witness to testify. Go from the document itself. (Id. at 44:13-45:1.)

• Q. Where were those records located?

A. In the Doylestown office.

Q. Did the Vitaphenol records that were maintained in the Doylestown office, were they transferred to your home office at some point?

MS. CHOVANES: Objection; inference. I'm not going to let her answer that question because it’s leading and it implies facts that aren't in evidence. (Id. at 79:4-12.)

• Q. Do you know whether all of the records that Avidas maintained relating to Vitaphenol products were retained?

MS. CHOVANES: Objection. Don't answer that question.

MR. RYAN: On what grounds?

MS. CHOVANES: It makes no sense; and I'm not going to get into these areas without a specific question making sense. (Id. at 84:19-85:2.)

In addition to at times being nonsensical, none of these refusals to allow Gardner to answer complied with Rule 30(c)(2).

In sum, the transcript contains at least 39 instances where Chovanes violated Rule 30(c)(2) by instructing Gardner to not answer questions based on improper grounds.

2. Instances Where Chovanes Disruptively Instructed Ryan On How to Pose Questions to Gardner

In addition to the above, there can be no question that Chovanes deliberately frustrated, delayed, and impeded Gardner’s deposition in other ways. Under Rule 30(c)(2), an objection “must be made concisely in a nonargumentative ... manner.” However, Chovanes repeatedly violated this rule by making objections that were an attempt to instruct Ryan how to pose questions and disrupted the flow of the deposition. In many instances, Chovanes’s objections were verbose, argumentative, accusatory, and anything but concise—all in violation of Rule 30(c)(2). Chovanes routinely engaged in speaking objections and then extensively argued with Ryan when he attempted to clarify or meet and confer about the objections. The following are representative examples from the 39 instances of this conduct identified by Plaintiff:

• Q. Are you an employee of Avidas Pharmaceuticals?

A. I am the founder.

MS. CHOVANES: Objection; irrelevant. Why don't you identify why the witness is here first. Okay? She’s here pursuant to the 30(b)(6) notice that you issued. I think it’s usually presentable to the witness at this point. Whether or not she’s an employee or not is irrelevant; right? (Doc. No. 93-6 at 11:20-12:5.)

• Q. And you mentioned that Avidas Pharmaceuticals was -- began operations in around 2008. At the time that Avidas Pharmaceuticals began operations, was Vitaphenol the first product that it sold?
MS. CHOVA NES: Objection. That question is in two parts, and I object to your saying that the witness mentioned anything. No need for a preamble. Let’s just ask a nice clean question. Please restate the question. (Id. at 31:13-32:2.)

• Q. So Exhibit 51 is one of the agreements that Avidas Pharmaceuticals entered into with La Jolla Spa MD; is that correct?

MS. CHOVA NES: Objection. Don’t ask questions so they lead, please. You may answer. (Id. at 37:7-12.) [6]  

• Q. Did Avidas have Harmony manufacture new Vitaphenol anti-aging toner?

A. Yes.

*10  MS. CHOVA NES: You know what? While there’s no question, I’m going to ask you to speed this up and say: Are there any products on that list that they did not manufacture? Can we do it quicker?

MR. RYAN: No.

MS. CHOVA NES: Why not, Counsel?

MR. RYAN: But I think it’s important that we go through each one.

MS. CHOVA NES: Yeah, I know you think it’s important to waste our time, but we’re trying to get out of here and with concern – out of courtesy for everyone’s time. (Id. at 58:9-24.)

• Q. Where were those records located?

A. In the Doylestown office.

Q. Did the Vitaphenol records that were maintained in the Doylestown office, were they transferred to your home office at some point?

MS. CHOVA NES: .... Just ask her simple questions. It’s not that complicated.

MR. RYAN: It’s a simple question.

MS. CHOVA NES: No, it’s not. [7] (Id. at 79:4-16.)

• Q. Do you believe that your file folder that contains emails relating to Vitaphenol contains all of the emails that were sent or received relating to Vitaphenol from 2008 to the present?

MS. CHOVA NES: Objection to the question; it’s irrelevant, the use of the word “believe.” Do you want to rephrase the question, please? I mean, you’re obviously hunting to pin her down for destroying documents, and I think it’s unfair. So ask a good question. (Id. at 88:24-89:9.)

• Q. In connection with this agreement, Avidas sold its inventory of Vitaphenol products to SciDerma; is that correct?

MS. CHOVA NES: .... Can you do that? Can you ask just open-ended questions -- was inventory transferred? -- and then maybe we can get into it that way.

MR. RYAN: Well, I don’t think I’m required to only ask open-ended questions.

MS. CHOVA NES: Well, I understand. You can ask them how you -- but my objection is with regard to the word “sold,” which as you recall we already went through on an extensive go-around already with regard to paper discovery. I mean, I would just ask the witness -- you’re pulling teeth. Why don’t you just ask her what happened as a result of the agreement and see what happens. Maybe you’ll get the statement you want. (Id. at 103:7-104:6)

• Q. Does SciDerma still owe Avidas some money in connection with the Harmony product inventory that was transferred to it?

MS. CHOVA NES: To the extent SciDerma is a company, that’s an interesting question. I don’t know if they’re still in business. So why don’t you ask within the scope of if the client knows they’re -- if the witness even knows they’re a company.

MR. RYAN: Well, I just want to know whether Avidas believes that SciDerma still owes money in connection with the Harmony product.

MS. CHOVA NES: Avidas’ belief is not relevant to this case, and she’s not going to testify with regard to a legal matter. (Id. at 109:21-110:11.)
• Q. With respect to the inventory values that we see on Exhibit Roman numeral IV, do you know who came up with those values for the inventory?

MS. CHOVAINES: Objection to the question. I don't know what “come up with” means,” and I'd ask you to clarify and be precise with regard to your question. (Id. at 113:7-13.)

• Q. The packaging that we see on the left side of Exhibit 58 that’s similar to the packaging we see in Exhibit 57. Do you see that?

MS. CHOVAINES: Objection to your statement about similarity. Ask a question. Don't editorialize. (Id. at 160:3-9.)

*11 • Q. And that would be true for the entire period of time that SciDerma sold the Vitaphenol products: Information would come in various forms.

MS. CHOVAINES: ..... Objection. Can you ask a question that makes sense, because that one doesn't. It's got too many parts. (Id. at 196:15-23.)

• Q. This report on Bates-stamped Page 1042 in the upper left-hand corner says “November and December sales.” So is it your belief that these are November and December sales from the year 2010?

MS. CHOVAINES: You're not entitled to her belief. Ask a question that seeks relevant information.

MR. RYAN: I disagree.

MS. CHOVAINES: You're not entitled to her belief. That’s an opinion. You're entitled to facts. Ask a simple question. I don't know why you mess them up by putting “belief” in. That calls for opinion testimony on its face.

MR. RYAN: I'm entitled to her opinion based on her foundation so far.

MS. CHOVAINES: No, you're not entitled to her opinion. We'll go to the judge on that. You're not entitled to a person’s opinion. They're a fact witness. So ask the question if you want. Again, I'll make the same objection. (Id. at 202:21-203:18.)

• Q. On May 8th of 2014, you emailed Joe Kuchta, “Joe, this is the draft of the email I will send to Dianne York.” Why did you send that email to Joe Kuchta?

MS. CHOVAINES: Objection; there’s been no foundation laid for the fact it’s an email. Do you want to do that first?

BY MR. RYAN: Q. Did you send an email to Joe Kuchta on May 8th of 2014 a 7:35 a.m.?

A. Yes.

MS. CHOVAINES: No, that’s not the way to do it. Come on, Counsel. (Id. at 246:12-25.)

3. Instances of Chovanoe Initiating or Attempting to Initiate Unnecessary Colloquy

Under Rule 30(d)(2), sanctions may be imposed for impeding, delaying or frustrating the fair examination of the deponent. Chovanoe did all of these things by initiating or attempting to initiate unnecessary and frivolous colloquy and unnecessarily “noting” things during the deposition. Plaintiff identifies fifteen instances during which Chovanoe initiated or attempted to initiate unnecessary colloquy. These unnecessary interruptions and discussions prolonged the deposition and served to continually harass Ryan. Some examples include:

• Q. Are you an employee of Avidas Pharmaceuticals?

MS. CHOVAINES: Are you going to respond to what I said? [ 9 ]

MR. RYAN: No, you made your objection.

THE WITNESS: I'm the founder of the company.

MS. CHOVAINES: Okay. I would like to know why we're here then, if you're not going to produce a 30(b) (6) notice. Are you going to acknowledge we're here pursuant to that?

MR. RYAN: We are here pursuant to a 30(b)(6) notice.

MS. CHOVAINES: And what are the categories of that notice? Do you want to present them? Because as I pointed out to the Court, it's very difficult, given the history of this case and your repeated items -- your repeated arguments that you keep identifying, it’s very difficult for us to have this deposition when you should have done this a long time ago.

You have been carefully proscribed by the Court to certain areas of relevance. I would suggest we start with
those and, therefore, you get that 30(b)(6) notice out, because you're not going to be able to go anywhere beyond that.

*12 Do you understand?

MR. RYAN: I've listened to your objection. I feel like I'm allowed to ask questions.

MS. CHOVA NES: Okay. Well, you're not going to be. Anything beyond the scope of what the Court has ordered is the scope. And we reiterated at our last conference. We're not going to get into -- and don't interrupt me please. Let me finish.

Anything the Court specifically noted at the last conference that the Court's order was in place and the witness is not to answer anything beyond those orders. So we're going to have a continuing objection to anything beyond those and she's not going to answer.

You can either identify those categorically or waste everyone's time by going through those individually. But right now let's stick to the 30(b)(6) notice. Okay? Otherwise, you're not going to be getting answers.

MR. RYAN: Okay. Well, here's what I'm going to do. I'm going to ask questions, and you can make objections. And if you want to instruct the witness not to answer, you have that right.

MS. CHOVA NES: Okay. Note that you've refused my offer to speed this up. Go ahead. (Doc. No. 93-6 at 12:7-14:12.)

• MR. RYAN: Well, I'm trying to develop foundational information, and this witness has already testified that she's the founder of the defendant in this case. So I'm trying to get some information ... [10 ]

MS. CHOVA NES: What -- there's nothing on here, on your 30(b)(6) notice, that says "foundational information." [11 ]

So you're beyond the scope of the 30(b)(6) notice too. [12 ] So that makes no sense, foundational information. You're just making that up, sir.

Let's proceed to what's on the 30(b)(6) notice, which is why we're here. (Id. at 23:3-24:7.)

• Q. The information that's contained in Exhibit 61, the monthly reports, what's the source information for those reports?

MS. CHOVA NES: I'm going to object. That's an impossible question to answer, because this is a made-up document.

Go through slowly and ask her the source of individual information to the extent she knows. But to say the source of all this information, if she can answer that summarily, go for it. But I think the question is confusing and unfair. (Id. at 192:23-193:9.)

• MR. RYAN: I'm not wasting your time.

MS. CHOVA NES: They're right in the 30(b)(6) notice. In fact, since there's no question outstanding -- is there? Or my objection to it, asking to rephrase. No, no question outstanding?

I'm going to ask the witness to reread the 30(b)(6). And counsel do the courtesy of rereading the 30(b)(6) with the witness so as not to try to trick her.

MR. RYAN: I don't need to read it. I wrote it.

MS. CHOVA NES: You need to read it, because you're trying to trick the witness, which I object to.

So why don't you read it carefully and show her what agreements you're talking about.

MR. RYAN: I'm not trying to trick the witness.

MS. CHOVA NES: Then why are you asking her questions without any foundation -- tenure to this 30(b)(6) notice? It just makes no sense.

MR. RYAN: I'm sorry it doesn't make sense to you.

MS. CHOVA NES: Right --

MR. RYAN: I'm allowed to ask questions.

*13 MS. CHOVA NES: Right, you are, questions that make sense and are relevant and aren't wasting our time. And this is a garbage case, and we've known that since the beginning, and you're just wasting our time more.

Now ask questions that she can answer with regard to the 30(b)(6). Whether or not she remembers the agreements
independently of a 30(b)(6) is meaningless and a waste of our time. (Id. at 33:20-35:7.)

• MR. RYAN: Well, it’s not beyond the scope because the 30(b)(6) notice doesn't have any specific dates in it.

MS. CHOVANES: Where does it have your statement about inventory?

MR. RYAN: I'm asking questions about the sales and distribution agreement.

MS. CHOVANES: Right. Where is -- no, you're asking about something that was received. That has nothing to do with this except it’s listed in the agreement. You're not asking about the agreement, sir.

MR. RYAN: I am. It’s --

MS. CHOVANES: No, you're asking about inventory, which is totally different and not on your list.

MR. RYAN: It’s No. 8 on my list.

MS. CHOVANES: Inventory of products, not whether they were received from -- whatever. So your question, again, is not on this, according to your own example.

MR. RYAN: Well, just so we're clear, a 30(b)(6) notice does not require me to list every question that I'm going to ask of a witness.

Do you agree with that?

MS. CHOVANES: I'm not going to talk about 30(b)(6) depositions generally. I'm talking about this one, and the scope is proscribed -- there’s that word again -- by the 30(b)(6) as well the judge’s order. We've been going over this again and again. Please answer your questions – ask your questions within that scope. Why are you surprised? You keep re-attacking it. It’s a statement, and we made it.

MR. RYAN: Because you keep preventing me from asking questions.

MS. CHOVANES: Right. That’s exactly right. Yes, you're right.

MR. RYAN: Right. So you're preventing me from asking questions about inventory at Avidas; is that true?

MS. CHOVANES: Beyond the scope of the judge’s order. Okay. Stop it. Go ask questions. We're not going to -- you've already wasted five minutes making meaningless arguments.

Ask questions that are acceptable. Go. Otherwise, we're going to leave because you're wasting our time.

MR. RYAN: I've already read you the judge’s order clarifying his prior order. He said that his prior order is only limited to the interrogatories.

Now, you had an opportunity to make a protective order motion, which you said you were going to do at one of the conferences, and you didn't do that. So if you had any objections to the scope of discovery, you could have raised them with the Court at the time, but you didn't.

MS. CHOVANES: The Court -- that’s because right after I said that, the Court said, Of course that’s limited by our orders. That’s what’s in the transcript.

I'm not going to argue anymore. Do you want to take her deposition with the allowable questions after 2014, which are, by the way, on your 30(b)(6). There are plenty of them. Go. (Id. at 46:19-49:11.)

• Q. I'm handing you a document that was previously marked as Exhibit 33 --

MS. CHOVANES: Previously marked where?

MR. RYAN: At a deposition of Topix?

MS. CHOVANES: What deposition?

MR. RYAN: Of Topix Pharmaceuticals.

•14 MS. CHOVANES: Where is the exhibit marker from Topix? Where is the original? Because otherwise, it’s your reference, and I don't believe you.

MR. RYAN: I'm representing that it was previously marked as Exhibit 33.

MS. CHOVANES: Okay. We're subject to the objection that this is an unmarked exhibit, we're not going to -- we're going to take this whole area under advisement.

What do you want to ask about this? Why don't you let me know that. And if you want to go off the record and
tell me why you want to ask about an unmarked exhibit that we've never seen before, that would be good.

MR. RYAN: I'm not sure why you can say you've never seen this before because this document was produced by Avidas and it's Bates number A_1138 --

MS. CHOVANES: There's no exhibit sticker on this, sir. There's no exhibit sticker. We've never seen this before, and you just represented it as an exhibit. You can't do that.

Where is the one with the exhibit sticker? Would you answer that?

MR. RYAN: Here's what I'll do. I'm going to mark this as Exhibit 54, as a new exhibit. (Id. at 61:10-62:18.)

• MS. CHOVANES: Well, what's the relevance of your question? Transaction happened in 2010. Give me an offer of proof and maybe we can forestall the Court.

MR. RYAN: I'm not required to give you an offer.

MS. CHOVANES: I know that, but maybe we can forestall the Court because you're asking about stuff that's in 2010 and makes no sense.

I'm sure you have some elements in mind and you're just holding it back to extend this and torture me and the Court. So what's your -- what's your --

MR. RYAN: If you've reviewed the third amended complaint --

MS. CHOVANES: Okay. Well, tell me.

MR. RYAN: If you've read the third amended complaint, you would know why this document was --

MS. CHOVANES: Okay. Well, tell me. Don't hide it. Tell me.

MR. RYAN: I don't need to educate you about the case.

MS. CHOVANES: Oh, my goodness. Okay. Well, if you're not going to talk about why it's relevant and you're not going to explain what you have in mind -- (Id. at 118:24-120:1.)

• MR. RYAN: Next I want to mark as Exhibit 59 some images that were attached ... to a filing that Avidas made in this case.

MS. CHOVANES: Specifically what filing?

MR. RYAN: Docket 47-3.

MS. CHOVANES: And what context? Again, I'm going to object to just producing documents out of context.

MR. RYAN: Well, these are your filings so I'll leave it up to you.

MS. CHOVANES: No, you have to give a context. We produced many files in this case, and if your answer is "that's your filing," it's simply unfair.

MR. RYAN: The filing is Document 47-3 that was filed by Avidas in this lawsuit.

MS. CHOVANES: Great. And what paper was it filed with? And what was the context? You can't ask the witness about something that's been filed with the particular context out of context. It's just unfair, Mr. Ryan. But you go ahead. (Id. at 162:22-163:20)

• Q. I want to focus your attention on Exhibit 60. Please look at the first page of Exhibit 60, which is Bates number A-1044. What is this document that we see that's Bates-stamped 1044?

MS. CHOVANES: Objection. What is this document? What does that mean? Do you want to ask her just what it is in -- with regard to her business?

*15 And, by the way, this probably also objected to under the protective order, so your client has to get off the phone.

MR. RYAN: It's not subject to the protective order.

MS. CHOVANES: It is, and I'm declaring it as such. It has to do with the company's business.

If you're going to ignore the protective order, we're not going to have testimony on this basis, and the judge just said that. Okay?

If you want to give me a proffer while your client gets off the phone and we go off the record, I'm willing to listen. But right now, since this is getting into their business, I have a real issue with you asking about it with her on the phone.
MR. RYAN: You didn't mark this document as confidential.

MS. CHOVALES: Great. And now you're asking about it. [*15] (Id. at 175:4-176:6)

• Q. If you take a look at Exhibit 5, there’s a series of emails. And the sequence of how the emails are set up is that the oldest email is on the top, and then the latest email in the chain is -- follows behind there.

MS. CHOVALES: Did you produce this in discovery?

MR. RYAN: Yes.

MS. CHOVALES: You produced this in discovery?

MR. RYAN: No, Mr. Kuchta did.

MS. CHOVALES: No, you produced it, your client.

MR. RYAN: No, no, no. Mr. Kuchta.

MS. CHOVALES: Yeah, why didn't your client produce this in discovery?

MR. RYAN: My client is not on the document. Why would my client have it?

MS. CHOVALES: I thought you just said it’s a series of emails, and what’s that? Her name right in the front here. Why didn't you produce this?

MR. RYAN: This is an embedded email. It’s forwarded by Ms. Gardner to Mr. Kuchta?

MS. CHOVALES: Right. And why didn't you produced [sic] this email?

MR. RYAN: We'll deal with it at a different point in time.

MS. CHOVALES: No, no, no. It’s unfair for you to be hiding documents and then all of a sudden produce them here.

MR. RYAN: I'm not hiding anything.

MS. CHOVALES: Are you saying you produced this? And if so, let me know exactly when.

MR. RYAN: I'm talking about Exhibit 5 as an entirety, this document was produced by Mr. Kuchta. Okay?

MS. CHOVALES: What document? There’s no Bates numbers or anything on it. I just don't -- I'm -- all this is objection. We're going to go real slow, because I don't believe you, and your client should have produced this document. (Id. at 241:10-243:3) [*16]

4. Instances of Chovanes Unnecessarily “Noting” For the Record

Plaintiff also identifies seventeen instances when Chovanes unnecessarily noted various things for the record. However, the Court isn't particularly concerned with many of these instances. Although many were gratuitous and certainly pointless, some happened when Ryan was calling his client or when the unnecessary “noting” did not disrupt the flow of the deposition. However, the following instances when Chovanes unnecessarily made objections or comments did disrupt and delay the deposition:

• [Discussing photographic exhibits attached to a motion Defendant had filed and Chovanes had submitted as part of a declaration.] MS. CHOVALES: What filing, sir?

MR. RYAN: Filing document 47-3.

MS. CHOVALES: And why was this -- do you have the rest of where this was? An appendix or something?

MR. RYAN: No.

*16 MS. CHOVALES: Note my -- excuse me. Let me object to this because we didn't produce anything like this, exclusive of other information, so I think it’s unfair and out of context. Plus I'll note that there is no identification, there’s no Bates number or anything on this, so I don't really accept counsel’s representation.

With that said, you may answer if it’s a relevant, nonprivileged question. (Id. at 157:1-15.)

• [Discussing the same photographic exhibits as above.] Do you believe that Exhibit 57 depicts the Vitaphenol packaging that was created by Harmony Labs?

A. I believe so but I'm not certain.

MS. CHOVALES: I'm sure something was said about this. Again, I'll note my continuing objection, as this was in a brief, and pulling it out of a context of a brief is unfair to the witness.
MR. RYAN: Do you agree that any statements made in the briefs filed by Avidas can be used as admissions against Avidas, Ms. Chovanes.

MS. CHOVANES: Don't answer that. That's a privileged question. Don't answer that.

MR. RYAN: I'm asking you, Ms. Chovanes.

MS. CHOVANES: I have no idea what you're talking about. We're here to ask the witness questions. Keep going. Note my objection. (Id. at 158:13-159:6.)

• Q. Next I'm handing you a document that's previously marked as Exhibit 24.

MS. CHOVANES: By whom? By when?

MR. RYAN: By me.

MS. CHOVANES: When?

MR. RYAN: At the deposition of Joe Kuchta.

MS. CHOVANES: Again, the record will reflect there's no exhibit number, there's no Bates number, and I have a continuing objection to asking questions about this material.

If counsel could show me in the transcript where this document has been marked, I would gladly withdraw my objection. (Id. at 251:8-21.)

None of the above colloquy served any reasonably practical purpose and served only to disrupt Ryan's questioning and delay the deposition further. Chovanes's petty quibbling about photographs that had been filed in this case by her own client were frivolous and served no useful purpose. Nor did her objections about Ryan's use of those photographs during the deposition based on them being used out of context simply because the photographs had originally been used as exhibits to one of Chovanes's client's court filings. What these continuous, unnecessary interruptions did do, however, was to systematically eat away at Ryan's allotted seven hours of deposition, disrupt Ryan's line of thinking and flow of questioning, and continue to obstruct the deposition.

5. Instances Where Chovanes Made Objections That Suggested To Gardner How She Should Answer the Question

Under Rule 30(c)(2), an objection “must be made concisely in a ... nonsuggestive manner.” However, Chovanes repeatedly violated this rule by making suggestive objections that subtly coached Gardner how to answer Ryan’s questions. The following are some representative examples.

• Q. What are the brand names of the products that Avidas has developed and produced since 2008?

A. We have –

MS. CHOVANES: To the best of your recollection.

MR. RYAN: Ms. Chovanes, please don't provide speaking objections for the witness.

MS. CHOVANES: That's an objection. I'm allowed to object. Are you objecting to the fact that I'm objecting?

MR. RYAN: Yes, because --

MS. CHOVANES: I'm allowed to object. It's not a speaking objection to say that your assumption may be incorrect.

MR. RYAN: That wasn't what you said. You said to the witness --

*17 MS. CHOVANES: Your assumption -- of course that's what I said. Your assumption was -- we're not going to read back. Just please go on.

MR. RYAN: Please don't make speaking objections.

MS. CHOVANES: Please ask questions that aren't objectionable; I won't be making speaking objections, which I'm not doing anyway. (Doc. No. 93-6 at 26:11-27:9.)

• Q. Has Avidas Pharmaceuticals ever had any involvement with a product called Vitaphenol?

MS. CHOVANES: You can answer that.

THE WITNESS: Yes.

MS. CHOVANES: To the extent you understand what “involvement” means. (Id. at 30:10-15.)

• Q. Can you describe how the repackaged products that SciDerma created differed in look from the products that Avidas sold when it sold the Vitaphenol products?
MS. CHOVAINES: That’s a really long question. And what do you mean by “look” Because “look and feel” is actually a legal question, what’s look and feel. So I -- excuse me, let me finish.

So I'm going to ask you to rephrase in light of the definition of “look” as possibly a legal definition. I mean, do you have one? Why is this relevant anyway? Having her factually describe stuff.

I mean, go ahead if you can answer it, but I would rather that you not use those legal terms, Mr. Ryan.

MR. RYAN: I'm not intending them in any legal sense.

MS. CHOVAINES: Okay. Well, if you can answer, go ahead. (Id. at 151:6-152:1.)

• Q. Do you know who signed any of the checks that Avidas sent to La Jolla Spa at any point in time?

MS. CHOVAINES: Objection; irrelevant. It’s your client. How should she know that?

THE WITNESS: No, I do not. (Id. at 185:4-10.)

• Q. So if SciDerma made a mistake in the reports that it sent to Avidas, Avidas wouldn't know that there was a mistake; correct?

MS. CHOVAINES: Objection; asked and answered, plus it calls for speculation.

You can answer if you are able.

THE WITNESS: We didn't have any reason to mistrust the information --

MS. CHOVAINES: Just answer the question. (Id. at 209:12-21.)

Like Chovanes’s other objections quoted throughout this Order, these objections lacked conciseness. While it appears Gardner at times did not heed Chovanes’s comments, the objections nonetheless suggestively coached Gardner on how to answer Ryan’s questions.

6. Instances of Chovanes’s Discourteous or Aggressive Behavior Towards Ryan

Plaintiff also identifies two instances of Chovanes’s discourteous behavior towards Ryan, one of which was an inexplicable outburst during which Chovanes stood and loomed over the examination table, aggressively accused Ryan of threatening Gardner, and then left the deposition room for a break. This bizarre incident occurred after Ryan declined Chovanes’s request to take a break. Ryan instead stated he wished to proceed to finish the two-hour block of time since the Court had previously ordered the deposition proceed in two-hour increments with thirty-minute breaks. When Chovanes persisted, Ryan simply asked Gardner if she needed a break and likely would have taken a break had Gardner said she needed one. The bizarre outburst proceeded as follows:

MR. RYAN: We're not off the record.

MS. CHOVAINES: Okay. Well, let’s stay on. I want to talk about taking a break. It’s 11:30, and the Court said they'll call in at 12:30 our time; right?

MR. RYAN: Yes.

*18 MS. CHOVAINES: Okay. So what do you want to do about a break?

MR. RYAN: Well, I think we need to go for our allotted two hours, and then we'll take a break.

MS. CHOVAINES: There’s no allotted two hours. [ 17 ]

MR. RYAN: That’s what the Court said, is we should take --

MS. CHOVAINES: No, the Court didn't say anything about timing. [ 18 ] The witness – the witness is doing the best she can. And we moved this precisely for your convenience. Don't start doing that game. You've wasted plenty of time.

MR. RYAN: Do you need to take a break?

MS. CHOVAINES: No, don't talk to my witness, ever. Don't you ever talk to my witness. Do you understand how threatening that is?

MR. RYAN: Why are you standing up? [ 19 ]

MS. CHOVAINES: And how unprofessional that is?

MR. RYAN: Why are you standing up?

MS. CHOVAINES: Because you're a male exercising male privilege and talking to my witness in a situation where she’s already nervous. And you're talking to her directly?
That’s, first of all, a violation of the ethical rules, as you know.

MR. RYAN: Why are you standing up?

MS. CHOVAHES: We’re going to take a break. Come on, Margie, let’s take a break.

MR. RYAN: You’re leaning over the table.

MS. CHOVAHES: Yes, because of your threatening nature --

THE VIDEOGRAPHER: I’m sorry. You have the microphone on.

MS. CHOVAHES: Because you threatened my witness just now. Don’t you ever talk to her directly.

MR. RYAN: I did not threaten the witness.

MS. CHOVAHES: Okay.

THE VIDEOGRAPHER: The [microphone] clip is still on it.

THE WITNESS: I’m sorry. I hope I didn’t break it.

THE VIDEOGRAPHER: You can just leave it there. Off the video?

MR. RYAN: Not yet.

THE WITNESS: Excuse me.

(Whereupon, Ms. Chovanes and Ms. Gardner leave the deposition room.)

MR. RYAN: Now we’re off the record.

THE VIDEOGRAPHER: Time is 11:37 a.m. We’re going off the video record.

(Doc. No. 93-6 at 80:19-83:7.) This troubling tirade began with Ryan’s seemingly benign question to Gardner, asking whether she needed to take a break. As with the rest of Chovanes’s conduct during this deposition, the cold, typed words of the transcript truly do not do justice to the tone and tenor of Chovanes’s sustained harassment of Ryan. This Court has reviewed the video clip of the above exchange. The video demonstrates that Ryan’s voice was calm, relaxed, and non-threatening in any way. He also said nothing to Gardner that could remotely be considered threatening to trigger Chovanes’s grossly disproportionate response.

What the Court can surmise from this interaction following Chovanes’s rebuffed request to take a break is that it may have been fabricated in order to take the break. This appears to be the only reasonable explanation because nothing Ryan said could have warranted the inexplicably disproportionate response from Chovanes. However, once Chovanes reacted in this manner, she was able to leave the room and take the break she had requested under the guise of some feigned outrage in response to Ryan’s completely benign and reasonable question to Gardner about her need for a break. Based on the transcript, this appears to be the only reasonable explanation for Chovanes’s outburst. It certainly cannot be justified as a reasonable, rational response to anything Ryan said or did. In any event, such irrationally aggressive conduct toward opposing counsel is precisely the type of disturbing, unprofessional behavior that has no place in the legal profession. This conduct further served to disrupt the deposition and perpetuate the incredibly tense, rancorous atmosphere Chovanes had singlehandedly created from the opening minutes of the deposition.

7. Additional Examples of Chovanes’s Harassing, Obstructive Behavior

*19 In addition to the above categories and examples Plaintiff cited, the Court’s review of the full deposition transcript revealed many more instances of Chovanes’s obstructive behavior.

1. For example, Chovanes constantly instructed Ryan to “hurry up,” accused him of wasting her and Gardner’s time, and generally attempted to rush Ryan’s questioning. (See, e.g., Doc. No. 93-6 at 14:24-15:1; 30:3; 33:18-19 (“Why are you wasting our time?”); 35:3; 48:16-18 (“Ask questions that are acceptable. Go. Otherwise, we’re going to leave because you’re wasting our time.”)); 50:16; 58:21-24 (“Yeah, I know you think it’s important to waste our time, but we’re trying to get out of here and with concern – out of courtesy for everyone’s time.”)); 60:25; 74:18-20 (“You can answer, but that’s the last question, because this is just wasting everyone’s time.”)); 81:13; 85:25-86:1; 170:24; 214:8-9.) These comments by Chovanes are quite puzzling because Ryan was entitled to question Gardner for 7 hours regardless of how quickly or slowly he questioned her. Thus, these repeated comments by Chovanes served no other purpose than to harass and antagonize opposing counsel and to perpetuate the hostile atmosphere of the deposition.

3. Then there were eleven instances on which Chovanes simply objected by saying “objection” without specifying any basis for the objection. (Doc. No. 93-6 at 117:8; 191:20; 197:12; 197:17; 211:18; 236:19; 244:6; 261:13; 261:24; 262:4; 276:16.) Without a specific basis for an objection, “objection” alone is a pointless interjection and can serve no other purpose but to interrupt. These objections were consistent with Chovanes overall obstructive modus operandi in this deposition.

4. And then there were eighteen objections with a basis identified where the basis was nonsensical in the context of a deposition or intentionally obtuse about the meanings of words and could only be intended to obstruct and harass Ryan. Also included are argumentative “objections.” These instances included:

• Q. How long has Avidas done that?
  MS. CHOVANES: Objection to the term “long.” (Doc. No. 93-6 at 18:22-24.)
  
• Q. You signed as the president on behalf of Avidas Pharmaceuticals; is that correct?
  MS. CHOVANES: Objection; the document speaks for itself. (Id. at 39:6-9.)

• Q. Do you have any documents that reflect how much inventory Avidas received in 2008 from La Jolla Spa?
  MS. CHOVANES: Objection. Don't answer that question. You're getting into materials that even by your own admission are foreclosed.
  MR. RYAN: I didn't make any admissions. (Id. at 52:13-21.)

• MS. CHOVANES: Objection; mischaracterization of her -- now, don't start mischaracterizing her testimony just because you're upset. (Id. at 69:16-19.)

• Q. Did the Vitaphenol records that were maintained in the Doylestown office, were they transferred to your home office at some point?
  MS. CHOVANES: Objection; inference. I'm not going to let her answer that question because it’s leading and it implies facts that aren't in evidence. (Id. at 79:6-12.)

• Q. Do you know whether all of the records that Avidas maintained relating to Vitaphenol products were retained?
  MS. CHOVANES: Objection. Don't answer that question.
  MR. RYAN: On what grounds?
  MS. CHOVANES: It makes no sense; and I'm not going to get into these areas without a specific question making sense. (Id. at 84:19-85:2.)

• Q. This document is also signed on behalf of SciDerma Medical by someone named Douglas S. Neal. Do you know who that is?
  MS. CHOVANES: Objection to the characterization. (Id. at 101:3-7.)

• Q. Has it done anything affirmatively to try to collect that money?
  MS. CHOVANES: Objection to the question. Don't answer. I don't like the prejudicial nature of the word “anything” and what was the other part -- anyway, rephrase the question, if you would. (Id. at 109:12-19.)

• Q. In the last column on Exhibit Roman numeral IV it lists inventory values for various products. Do you know who placed the value on those inventory items?
  MS. CHOVANES: Objection; assumes a fact not in evidence. (Id. at 112:23-113:4.)

• Q. So Mr. Henn was an outside consultant to Avidas; is that correct?
  MS. CHOVANES: Objection; asked and answered. Plus the vagueness of the term “outside consultant” is objectionable. (Id. at 134:6-10.)

• Q. Well, there’s a difference between taking a bottle that’s existing and pouring it into a new bottle, and taking
the existing bottle and then putting a new label on it. I'm trying to understand which of those two things, or something else, that SciDerma did. Do you have an understanding --

MS. CHOVANES: Objection. Can you ask a question that makes sense? That made no sense. I'm not going to let her answer it because it's inconsiderate of her to give her questions that make no sense. Come on. (Id. at 150:7-18.)

• Q. Can you describe how the repackaged products that SciDerma created differed in look from the products that Avidas sold when it sold the Vitaphenol products?

MS. CHOVANES: That's a really long question. And what do you mean by “look”? Because “look and feel” is actually a legal question, what's look and feel. So I -- excuse me, let me finish.

So I'm going to ask you to rephrase in light of the definition of “look” as possibly a legal definition. I mean, do you have one? Why is this relevant anyway? Having her factually describe stuff.

I mean, go ahead if you can answer it, but I would rather that you not use those legal terms, Mr. Ryan.

MR. RYAN: I'm not intending them in any legal sense. (Id. at 151:6-24.)

• [Chovanes objecting to a document that her client filed on the docket.] MS. CHOVANES: Note my -- excuse me. Let me object to this because we didn't produce anything like this, exclusive of other information, so I think it's unfair and out of context. Plus I'll note that there is no identification, there's no Bates number or anything on this, so I don't really accept counsel's representation. With that said, you may answer if it's a relevant, nonprivileged question. (Id. at 157:7-15.)

*21 • [Same as above.] MS. CHOVANES: No, you have to give a context. We produced many files in this case, and if your answer is “that's your filing,” it's simply unfair.

MR. RYAN: The filing is Document 47-3 that was filed by Avidas in this lawsuit.

MS. CHOVANES: Great. And what paper was it filed with? And what was the context? You can't ask the witness about something that's been filed with the particular context out of context. It's just unfair, Mr. Ryan. But you go ahead. (Id. at 162:1-20.)

• Q. And that would be true for the entire period of time that SciDerma sold the Vitaphenol products: Information would come in various forms.

MS. CHOVANES: Objection.

MR. RYAN: -- related to sales?

MS. CHOVANES: Sorry. Objection. Can you ask a question that makes sense, because that one doesn't. It's got too many parts.

• Q. So this is the monthly report for November 30th of 2011; is that true?

MS. CHOVANES: Objection; document speaks for itself.

• Q. Who did you have discussions with at SciDerma about terminating the agreement between Avidas and SciDerma?

MS. CHOVANES: Assumes a fact not evidence. Objection. (Id. at 215:12-16.)

• Q. How was -- how were the Vitaphenol products being sold in early 2014, before May of 2014?

MS. CHOVANES: Objection. Please clarify the question. “How” means so many things I'm not going to let her answer it because it's too ambiguous. (Id. at 220:24-221:5.)

The deposition transcript contains additional examples, and the Court could go on. Suffice it to say that all of the above representative examples of various pointless or nonsensical objections highlight Chovanes’s unrelenting interruptions of Ryan’s questioning, interposing objections that either made no sense or served no practical purpose in the context of a deposition (as opposed to a trial). For example, there is no planet in any solar system on which the word “how” is ambiguous in the context of Ryan’s final question above. The same is true for the word “long” in the first example cited above.

5. Finally, the transcript contains examples of discourteous conduct towards Ryan that interrupted and delayed the completion of the deposition. Chovanes disparaged Ryan and his case throughout the deposition, calling the case
“garbage” (Doc. No. 93-6 at 35:1-2, 68:24) or maligning him personally and the nature of his questioning (see, e.g., id. at 118:3-4 (“Again, you’re belaboring the witness, you have so many ‘belief’ questions.”); 228:10-13 (“If you keep asking questions that are objectionable, we’re really not getting anywhere. So let’s go, come on Counsel. Ask questions that are good ones.”); 267:16-17 (“Ask a real question with a noun, a topic and date.”)).

B. Chovanes’s Conduct Multiplied Proceedings Under Rule 30(d)(2)

The Court has painstakingly enumerated numerous examples that collectively demonstrate Chovanes systematic impeding, delaying, and frustrating the fair examination of Gardner. From the opening moments of the deposition, Chovanes adopted a hostile tone and posture against Ryan and then unrelentingly proceeded to make Ryan’s examination as difficult as possible. Chovanes employed all of the categories of tactics identified above to continuously interrupt the deposition and mercilessly harass Ryan. Every baseless objection, diatribe, argumentative comment, and petty argument cumulatively compounded to greatly extend the time spent in deposition. And every baseless interruption identified above served to harass Ryan, shift his focus away from the purpose of the deposition and towards battling Chovanes, and greatly frustrated the fair examination of Gardner. Rather than being able to focus on Gardner and this case, Ryan was continuously drawn into squabbles with Chovanes as the seven hours allotted for the deposition quickly burned away. Accordingly, this Court easily finds sanctions upon Chovanes are appropriate under Federal Rule of Civil Procedure 30(d)(2). 20


*22 Under 28 U.S.C. § 1927, any attorney “who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927. Section 1927 thus provides the Court the authority “to hold attorneys personally liable for excessive costs for unreasonably multiplying proceedings.” Gadda v. Ashcroft, 377 F.3d 934, 943 n.4 (9th Cir. 2004). Here, the Court finds Chovanes unreasonably and vexatiously prolonged Garner’s deposition far longer than necessary and far longer than it would have taken without Chovanes’s incessant, baseless, petty interruptions and drawing Ryan into unnecessary, frivolous disputes and discussions. Indeed, the transcript is replete with Chovanes’s misconduct, and it appears Chovanes spoke more at the deposition than Garner spoke. Without Chovanes’s conduct, the deposition would have concluded far sooner and would have been a far more productive and pleasant experience for everyone involved, including Garner. Interruptions and objections could be justified if they could reasonably add value to representing a client in a deposition. However, Chovanes’s frivolous conduct added no such value and instead created a highly corrosive atmosphere that never should have been created. Because Chovanes’s conduct was often baseless, it was unreasonable and vexatious. 21 Accordingly, this Court finds ample basis to impose section 1927 sanctions upon Chovanes. 22

D. Sanctions Are Also Appropriate Under the Court’s Inherent Power

Finally, sanctions are appropriate under the Court’s inherent power because Chovanes’s conduct went far beyond the multiplication of proceedings that Rule 30(d)(2) and section 1927 address. The Court’s inherent power “extends to a full range of litigation abuses.” Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991); see also Fink v. Gomez, 239 F.3d 989, 992 (9th Cir. 2001) (“Under both Roadway and Chambers, ... the district court has the inherent authority to impose sanctions for bad faith, which includes a broad range of willful improper conduct.”) In addition to wastefully prolonging and multiplying proceedings at the Gardner deposition, Chovanes engaged in a wide range of harassing and abusive behavior that this Court finds intolerable. As explained immediately below, this behavior was carried out in bad faith and with the intent to obstruct the fair examination of Gardner.

E. Chovanes Acted In Bad Faith

For the purposes of both section 1927 and inherent power sanctions, this Court finds Chovanes acted in bad faith. Because this Court has had extensive experience with Chovanes and Ryan over the past seven months over many hours of hearing arguments and a Mandatory Settlement Conference, this Court has become very familiar with both attorneys. See generally Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990) (“Deference to the determination of courts on the front lines of litigation [that sanctions are warranted] will enhance these courts’ ability to control the litigants before them.”); see also Aloe Vera of Am., Inc. v. United States, 376 F.3d 960, 965, 966 (9th Cir. 2004). Based on this Court’s extensive experience with Chovanes, her
conduct at the deposition was hardly surprising. It was simply a drastically amplified version of the conduct that the Court had witnessed first-hand in the past. Given the totality of the deposition transcript, this Court finds that Chovanes acted with knowledge, with the intent to harass Ryan, and to delay and obstruct the questioning of Gardner as much as possible. The Court further finds that her conduct was frivolous and that she acted with subjective bad faith.

*23 Chovanes demonstrated a knowing intent to harass Ryan based on the long-held belief that this case is “garbage”—a belief that Chovanes has repeated multiple times during on-the-record discovery conferences before this Court prior to the deposition and even during the very hearing the Court held on this sanctions motion. Based on that long-standing belief, Chovanes unleashed her harassing, obstructive behavior full force against Ryan during a critical moment in Plaintiff’s case—the deposition of the founder of Defendant that could potentially yield valuable information for Plaintiff’s case. The transcript amply demonstrates that Chovanes’s conduct was not inadvertent, accidental, or negligent—it was knowing, intentional, and willful. And the transcript is littered with example after example of frivolous objections, comments, arguments, and attacks—many so ludicrous that any competent attorney would refrain from employing. In addition to the frivolity of the objections, comments, and interruptions, Chovanes’s improper purpose is plainly evident in the transcript. She intended to harass and obstruct Ryan’s questioning as much as possible based on the staunch belief that this is a “garbage” case brought to harass Defendant. Obviously, the more frequently Chovanes interrupted Ryan and engaged him in distractions and argument for extended periods, the more of the seven hours allotted for Gardner’s deposition would be consumed by Chovanes speaking rather than Gardner answering questions that could harm Defendant’s case. And that is precisely what happened here, as the transcript is littered throughout with Chovanes’s wasteful, frivolous interruptions.

In her defense, all Chovanes can muster is that Plaintiff suffered no prejudice despite her conduct because Ryan was ultimately able to ask his questions and stated at the end of the deposition that he had no further questions. Chovanes has never acknowledged that her conduct was in any way improper. Unfortunately, Chovanes’s weak defense falls flat because sanctions under the Court’s inherent powers are available even if an attorney’s conduct was not frivolous if that conduct was for an improper purpose. Fink v. Gomez, 239 F.3d 989, 992-94 (9th Cir. 2001). And for purposes of section 1927, the relevant inquiry is not whether the victim suffered prejudice, but whether the improper tactics were intended to increase expenses or delay proceedings. See New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1306 (9th Cir. 1989) (“Tactics undertaken with the intent to increase expenses, or delay, may also support a finding of bad faith.”).

Here, of course, Chovanes’s conduct was frivolous and, as the Court concludes above, her conduct was undertaken for an improper purpose to harass, obstruct, and delay the orderly questioning of Gardner to which Ryan was entitled. Chovanes’s repeated and unyielding interference with Ryan’s efforts to conduct a professional, orderly deposition revealed her true motive—to improperly frustrate Gardner’s deposition. This obstructive tactic, which has no place in the legal process, was conceived and executed in bad faith.

Chovanes accordingly violated the basic standards of professionalism expected of all attorneys appearing before this Court. See S.D. Cal. Civ. L.R. 83.4 Chovanes was not courteous or civil; acted in a manner detrimental to the proper functioning of the judicial system; disparaged opposing counsel; and engaged in excessive argument, abusive comments, and delay tactics at Gardner’s deposition. The sheer volume of Chovanes’s antics belie any notion of mistake or negligent conduct on her part but rather disturbingly reveal a systematic effort to obstruct Ryan for no good or justifiable reason or purpose. Chovanes undeniably acted in bad faith.

F. Amount of Sanctions

Plaintiff seeks a two-fold sanctions award of $7,242.03 in costs incurred by Dianne York, the President of Plaintiff La Jolla Spa MD, Inc., and $21,360 in its attorney’s fees incurred for the Gardner deposition and these sanctions proceedings. Although Defendant has now had two opportunities to challenge the propriety or amount of costs and fees, Defendant failed to argue these amounts were either improper or excessive. Defendant’s opposition made no such attempt, and Chovanes also made no such attempt at the sanctions hearing. The only objection to these amounts is as follows: “The sworn statements seeking the thousands of dollars lack any back up documents and counsel and his client tell different stories about what happened and their supposed expenses.” (Doc. No. 94 at 5) First, with respect to the “back up documents,” the Court finds York and Ryan’s sworn declarations sufficient and reliable evidence of their fees and costs. Ryan’s declaration sets forth his hourly rate, the
time spent on each billing entry, and describes each entry with reasonable particularity to allow the Court to review its propriety. This is common practice for plaintiffs’ attorneys who seek fees or sanctions. And York’s declaration sets forth sufficient details and supporting documentation to justify the costs incurred. This Court has no reason to doubt the accuracy or veracity of the declarations or the amounts set forth therein.

*24 Second, it is of no moment that the two declarations differ as to the date on which Ryan travelled for the Gardner deposition. Whether he travelled on May 1 or May 2, there is no dispute that he actually travelled to Philadelphia for the deposition. He was there, and he incurred costs and fees to get there. The trivial discrepancy between the declarations does nothing in this Court’s mind to discredit the declarations in toto.

Other than the objection discussed above, Chovanes has not provided any other specific basis or challenge to the amount Plaintiff requests in sanctions. Nor has she even argued that sanctions amount is generally excessive. At the sanctions hearing, although the Court specifically addressed Chovanes’s failure to do so, she again failed to raise any challenge to the amount or portions thereof. As a result, no reduction is appropriate. See Bylin Heating Sys. v. Thermal Techs., Inc., No. 11CV1402-KJM-KJN, 2014 U.S. Dist. LEXIS 30809, at *13-14 (E.D. Cal. Mar. 10, 2014) (imposing $32,851.29 in sanctions and finding: “In any event, by twice failing to oppose plaintiffs’ motion for attorneys’ fees and costs after appropriate notice, defendant has waived any argument that the time spent on any particular task, and/or the total number of hours spent on this case, are unreasonable.”); see generally Gates v. Rowland, 39 F.3d 1439, 1449 (9th Cir. 1994) (fee opponents failed to meet burden of rebuttal, because opponents failed to point out with specificity any charges that were excessive or duplicative); Columbia Pictures Tel. v. Krypton Broad. of Birmingham, Inc., 106 F.3d 284, 296 (9th Cir. 1997), rev’d on other grounds, 523 U.S. 340 (1998) (rejecting argument that certain hours should have been excluded, because no specific objection was raised in district court); see also Smith v. Rogers Galvanizing, 148 F.3d 1196, 1199 (10th Cir. 1998) (district court did not abuse discretion in refusing to reduce hours as to which fee opponent made no specific objection); Sheets v. Salt Lake City, 45 F.3d 1383, 1391 (10th Cir. 1995) (fee opponent who argued merely that fee request was exorbitant and duplicative failed to carry burden of opposing fee, and waived issue for purposes of appeal). In any event, the Court has independently reviewed both declarations and requests for sanctions and finds the hourly rate, total amounts, and bases for sanctions reasonable and proper. See Gates v. Deukmejian, 987 F.2d 1392, 1401 (9th Cir. 1992) (court has duty “to independently review plaintiffs’ fee request even absent defense objections”).

IV. CONCLUSION

*25 Never before in this Court’s nearly ten-year tenure have the sanctions the Court imposes today been more fitting and more deserved by an attorney. Chovanes’s atrocious conduct at the Gardner deposition in particular fell far below the standard of professional conduct becoming an attorney practicing before this—or any other—Court. There may be a fine line between zealous advocacy and unprofessional conduct, but Chovanes trampled that line long before barreling past it. Chovanes’s frivolous, willful, vexatious conduct greatly expanded the Gardner deposition far beyond what the proceedings would have lasted without her unending unjustified interruptions and harassment of Ryan. Plaintiff’s motion for sanctions is GRANTED, and Chovanes is sanctioned for the conduct, reasons, and under the authority set forth above. Accordingly:

1. Without reimbursement from Defendant, Chovanes is sanctioned in the amount of $28,502.03 payable to Ryan’s trust account on or before September 17, 2019.

2. Chovanes shall self-report to the State Bar of Pennsylvania on or before September 24, 2019. The reporting shall consist of a copy of this Order, the full transcript of the Gardner deposition, the full transcript of the August 16, 2019 sanctions hearing, and the 128 video clips submitted as part of Plaintiff’s sanctions motion. On or before October 1, 2019, Chovanes shall file a declaration under oath that confirms compliance with this Order and that all documents and video clips were submitted to the State Bar of Pennsylvania.

3. Chovanes shall henceforth attach a copy of this Order as an exhibit to any pro hac vice application for admission to practice before the United States District Court for the Southern District of California. This requirement shall have no expiration date and shall remain in effect in perpetuity.

IT IS SO ORDERED.
All Citations

Slip Copy, 2019 WL 4141237

Footnotes

1 This discovery conference resulted in extension of the fact and expert discovery deadlines to April 23, 2019 and June 17, 2019, respectively. (Doc. No. 76 ¶ 7.)

2 The only restrictions the Court had placed on the deposition was that it be taken over the course of one day, in two-hour blocks, with 30-minute breaks, and for seven hours, exclusive of breaks. Because Defendant did not seek a protective order despite the opportunity the Court had provided, there were no substantive restrictions on the deposition aside from the standard restrictions applicable to all depositions.

3 Unless otherwise noted, all citations to documents filed on the CM/ECF docket refer to the electronic page numbers generated by the CM/ECF system, not to the document’s original pagination. However, citations to the Gardner deposition transcript refer to the transcript’s original page numbers.

4 The cold typewritten words of the deposition transcript fail to do justice to the truly hostile environment Chovanes created at the deposition. To be sure, the transcript conveys great tension and hostility, but the video shows the true story. The Court has reviewed each of the 128 video clips Plaintiff submitted in support of its sanctions motion. Chovanes’s aggressive, argumentative, accusatory, and hostile tone of voice greatly amplified the thick tension and hostile atmosphere of the room even beyond what the transcript conveys.

5 Because the Court’s imposition of sanctions will necessarily require discussion of the specific conduct and findings thereon, the specifics of these 133 examples—and other examples the Court found in the transcript—will be set forth in greater detail in Part III below. In addition to these 128 clips, the full deposition transcript evidences other instances of Chovanes’s unjustified obstructive, cantankerous behavior.

6 As an initial matter, this was not a leading question. The question sought confirmation or denial of the nature of the document Ryan referenced. But in any event, of course Ryan was allowed to ask leading question of Gardner, who was a witness identified with an adverse party. Fed. R. Evid. 611(c)(2). This objection and admonition was frivolous, unnecessary, and another example of the frivolous and incessant haranguing Ryan endured throughout the deposition. (See also Doc. No. 93-6 at 79:11-12; 103:12-13.)

7 In fact, Ryan’s question was exceeding simple.

8 Of course, lay witnesses—like Gardner was—may provide opinion testimony if the opinion is “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701. In any event, even if Gardner’s testimony eventually would not be admissible at trial, Rule 30(c)(2) nonetheless did not allow Chovanes to instruct Gardner to not answer or to completely preclude questions that called for opinion testimony. The testimony should have proceeded subject to the objection. These are basic principles that are not confusing, ambiguous, or subject to differing interpretations.

9 Chovanes began the deposition by insisting that Ryan produce the Rule 30(b)(6) deposition notice and enter it into the deposition record. This Court is not aware of any requirement for such a procedure. Nonetheless, Chovanes refused to allow Gardner to answer questions until Ryan produced the notice (Doc. No. 93-6 at 14:16-17; 14:21-22; 15:7-10; 16:8-16) and threatened to terminate the deposition if he did not do so (id. at 14:32-15:4). Apparently seeing that he would get nowhere without capitulating to Chovanes’s demand, Ryan finally yielded and marked the notice as an exhibit. (Id. at 17:7-13.)

10 While she herself demanded she not be interrupted and be allowed to finish statements (see, e.g., Doc. No. 93-6 at 10:5-6; 13:16-18; 151:13-14, 174:16-20), Chovanes repeatedly interrupted Ryan and did not allow him the same courtesy (see, e.g., id. at 26:21-22; 27:1-2; 62:9-11; 160:11-14).

11 Of course basic foundational or background information is plainly a proper area to question a witness.

12 Chovanes repeatedly pushed this Rule 30(b)(6) deposition notice scope issue, which was neither a valid basis for objecting nor instructing Gardner to not answer questions. The Court addresses this issue of Chovanes’s dubious instructions elsewhere in this Order.

13 This Court issued no orders limiting the substantive scope of the deposition. Although this Court provided Defendant the opportunity to file a motion for a protective order for this very deposition (see Doc. No. 82 ¶ 2), Defendant failed to eve file any such motion.
Docket Entry 47 was Defendant’s opposition to Plaintiff’s motion for leave to file a third amended complaint. Docket Entry 47-3 contained ten color photographs attached as exhibits to the opposition. The opposition included a declaration signed by Chovanes, stating that these specific exhibits were “true and correct copies of images of products and invoices that LaJolla [sic] provided Avidas in discovery.” (Doc. No. 47-1 ¶ 27.) Here, Chovanes challenges the very exhibits her own client filed on the case docket.

Of course Ryan had no reason not to ask about the document since Chovanes had admittedly not marked it as covered by the general Protective Order that covered the confidentiality of documents and information in this litigation. (See Doc. No. 63.) Regardless, to appease Chovanes, Ryan hung up the telephone call with his client. (Id. at 176:7-8.) But after briefly discussing the document, Chovanes conceded it was not covered by the Protective Order after all. (Id. at 177:3-7.) This is yet another example of an unnecessary diatribe that wastefully consumed Ryan’s available deposition time. The email communication in question was a forwarded message from Kuchta (Defendant’s buyer) to Gardner (Defendant’s founder).

The video clip shows Chovanes standing and leaning across the examination table with her arm half extended across the table. At the sanctions hearing, Chovanes briefly mentioned displeasure with the videographer’s choice of camera angles. However, the camera was placed directly in front of Gardner and did not show either of the attorneys until Chovanes stood up and leaned across the table and into the video frame. The video angle is standard, and the Court finds nothing questionable about the videographer’s positioning of the camera.

Although a finding of bad faith is not required for Rule 30(d)(2) sanctions, this Court expressly finds Chovanes’s impeding, delaying, and frustrating Gardner’s fair examination was in bad faith. (See, infra, Part III(E).) However, this conclusion does not end the section 1927 analysis. Because subjective bad faith is relevant to both section 1927 sanction and “inherent powers” sanctions, the Court will discuss Chovanes’s subjective bad faith below.

Accord Grochocinski v. Mayer Brown Rowe & Maw LLP, 452 B.R. 676, 686 (N.D. Ill. 2011) (exercising discretion to impose section 1927 sanctions for counsel’s unprofessional and childish behavior because plaintiff’s counsel, during plaintiff’s deposition, repeatedly obstructed questioning with improper interruptions, objections, insults, and accusations that defendants’ motions were fraud); Unique Concepts, Inc. v. Brown, 115 F.R.D. 292 (S.D.N.Y. 1987) (finding attorney was personally liable, without reimbursement from client, for costs of deposition of plaintiff where counsel’s “contentious, abusive, obstructive, scurrilous, and insulting conduct” resulting in comments and statements other than objections to form of question apparent on 132 out of 147 pages of deposition transcript, constituted bad faith, intended to harass and delay and reflected willful disregard for orderly process of justice); Brignoli v. Balch, Hardy & Scheinman, Inc., 126 F.R.D. 462, 466-67 (S.D.N.Y. 1989), modified, 1989 U.S. Dist. LEXIS 14190 (S.D.N.Y. Nov. 30, 1989) (finding attorney was subject to sanctions for discovery behavior in asking repetitive questions, making improper objections and directing clients not to answer proper questions, and made speaking objections even after court expressly prohibited them, resulting in deposition proceeding lasting hours longer than necessary.)
On January 13, 2020, the City of Medford filed a Motion for Summary Judgment (#51) and requested oral argument. Plaintiff's response, originally due on February 3, 2020, was extended to February 28, 2020 via stipulated motion. On February 28, 2020, Plaintiff filed his Response (#58) consisting of 40 pages of memoranda and nearly 800 pages of exhibits. Defendant's reply memorandum was originally due March 13, 2020. Defendant's reply memo deadline was then extended to April 10, 2020 via unopposed motion, based upon "the voluminous summary judgment record and due to a temporary swell in workload caused by a temporary period of short-staffing in the undersigned's office." (#66 and #67).

On April 3, 2020, Defendant City of Medford filed a second Motion for Extension of Time with request for expedited consideration. This time, the motion was opposed. In his declaration in support of the second motion for extension, City Attorney Eric Mitton, explained that the need for a second extension related to the current global pandemic of COVID-19. Specifically, Mr. Mitton stated,

Since that first motion for extension of time occurred on March 9, circumstances changed substantially. The COVID-19 pandemic took hold and increased at an exponential rate. Legal work related to COVID-19 response ended up taking over the vast majority of my workload for several weeks. The State of Oregon declared a state of emergency on March 12. Medford's Mayor declared a local emergency on March 16, ratified by Medford's City Council on March 19. The emergency declaration, and researching and advising policy-makers on precisely what actions that authorized and how, required substantial legal research and legal involvement. The City of Medford closed its City buildings to the public and transitioned a substantial portion of its workforce to work-from-home status on March 20. The work up to this transition required substantial legal research and legal involvement in the associated Human Resources matters. The City is continuing to take other COVID-related actions requiring substantial legal research and legal work, such as an executive order from the City Manager establishment of additional temporary transitional housing for homeless individuals on March 30th to help mitigate the pandemic's effect on the homeless population. Throughout this time, the a great deal of my time has been spent researching and helping implement these various COVID-related matters; my normal work load has had to take a back seat to these emergency matters.
Mitton Decl. at 2 (#69). Under such unprecedented emergency circumstances, the Court would expect no objection. However, Mr. Mitton confirmed that the City’s motion for extension was opposed because Plaintiff’s attorney withheld his consent on the condition that he be given the right to file a sur-reply. The City of Medford understandably declined to agree to this condition:

I respectfully disagreed, pointing out the types of briefing set forth in Local Rule 7-1(f) (unless otherwise ordered by the Court, briefing consists of the motion, the response, and the reply). After more discussion on this issue, Plaintiff’s counsel reemphasized that he would agree to the extension of time as part of a package deal that also included Plaintiff gaining the right to file a sur-reply to the City’s motion for summary judgment:

Well Eric. You’re asking for a second, long extension. I am happy to give it, but would like a sur reply. Let’s give the judge a stipulation to an extension and sur reply. I doubt he would say no.

The City needs an extension of time because of my COVID-19-related work discussed above, which had to take priority over normal matters. But I do not wish to surrender substantive rights of the City in order to obtain this extension, including the right of a moving party to have the last word on its own motion, as set forth in LR 7-1(f).

Mitton Decl. at 3.

After considering the City of Medford’s motion and supporting declaration, the Court granted the Second Motion for Extension of Time on April 6, 2020. (#70). Remarkably, on the morning of April 13, 2020, the Court received an ex parte email from Plaintiff’s counsel stating, “I am wondering why Defendant’s request for an extension was granted, when it was opposed, and the Court did not give me time to respond. There are legitimate concerns regarding the granting of the extension, and I did not get a chance to put them in front of the court. I am requesting that the approval be rescinded until such time as I have had a chance to respond.”

DISCUSSION

Reflecting this court’s and this state’s long tradition of professionalism in the practice of law, Local Rule 83-8, entitled “Cooperation Among Counsel,” provides in relevant part:
The Court may impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel. In a case where an award of attorney fees is applicable, the Court may consider lack of cooperation when setting the fee.

Local Rule 83-8(b). Under normal circumstances, lawyers arguing over the propriety of a three-week extension for filing a reply when the record is particularly voluminous and oral argument has not yet been set would contravene the local rule’s directive. Under the current national health emergency, refusal to agree is incomprehensible.

Context feeds common sense here. On March 23, 2020, Governor Brown issued Executive Order 20-12 in which, following the president’s March 13, 2020 declaration of a national health emergency because of the COVID-19 virus and her previous March 8, 2020 declaration of a state-wide health emergency, she ordered Oregonians to stay at home. Executive Order 20-12, at 1, 3. She prohibited the operation of “non-essential” businesses (which term includes law firms and law offices), ordered closed all Oregon colleges and universities in the state, and imposed severe restrictions on the ability of childcare facilities to continue operating. Id., at 1, 4.

The health emergencies announced, and safety protocols implemented by national and State of Oregon authorities, have created unprecedented challenges and changes to the manner in which personal needs and occupational endeavors are accomplished. The effects of the current health emergency have been felt equally in this court, as evidenced by Standing Orders 2020-4, 2020-5, 2020-7, 2020-8 issued by Chief Judge Marco Hernandez between March 12, 2020 and March 31, 2020, as well as the page on the court’s website dedicated to information about COVID-19’s effect on court operations. See https://www.ord.uscourts.gov/index.php/information-regarding-coronavirus-disease-covid-19-and-court-operations, last visited April 13, 2020. Thus, criminal trials have been continued, civil jury trials have been suspended, court
hearings are by phone or video conference, and non-essential court staff have been directed to telework.

This context proves true the underlying bases for Mr. Mitton’s declaration. As the City Attorney for the City of Medford, Mr. Mitton is responsible for providing legal advice to the City’s policy-makers, including advising those policy-makers during the unprecedented circumstances of the COVID-19 pandemic. Mr. Dimitre cannot credibly dispute the current health emergency’s impact upon Oregonians and the important role that Mr. Mitton plays in keeping the community of Medford safe. The court is left to wonder, then, both why Mr. Dimitre refused to agree to an extension and what “legitimate concerns” he has now as a basis for asking the Court to rescind its Order granting the extension.

As presented in Mr. Mitton’s declaration, it appears that Mr. Dimitre was willing to consent to the extension on the condition that Plaintiff be granted the right to file a sur-reply to the pending summary judgment motion. Mitton Decl. at 3. The Court finds this condition unreasonable. As Mr. Mitton pointed out to Mr. Dimitre, and pursuant to Local Rule 7-1(f), briefing consists of the motion, the response, and the reply. Once a reply is filed, no additional memoranda, papers or letters may be filed without court approval. Local Rule 7-1(e),(f). Therefore, it would be improper and impermissible for Mr. Mitton to agree to such a condition, as only the Court can grant leave to file a sur-reply. Moreover, under general standards, a sur-reply is permitted only when new arguments are raised in the reply. See JG v. Douglas County School Dist., 552 F.3d 786, 803 n.14 (9th Cir. 2008) (district court did not abuse discretion in denying leave to file sur-reply where it did not consider new evidence in reply); Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996) (new evidence in reply may not be considered without giving the non-movant an opportunity to respond). For Mr. Dimitre to anticipate the need for a sur-reply prior to having received a reply is contrary to the basic rules of motion practice.
For these reasons, the Court finds both Mr. Dimitre’s refusal to consent to the extension and attempt to condition his consent upon an agreement that he may file a sur-reply unreasonable. If Mr. Dimitre has legitimate reasons for why the Order granting the extension should be withdrawn, he is granted leave to file an affidavit under oath explaining those reasons by five o’clock p.m. on Wednesday, April 15, 2020.

ORDERED and DATED this 13th day of April, 2020.

/s/ Mark Clarke
MARK D. CLARKE
United States Magistrate Judge
UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

TAMMY THOMSEN, personal representative of the Estate of
DALE L. THOMSEN, deceased,

Plaintiff,

v.

NAPHCARE, INC., an Alabama Corporation; and WASHINGTON
COUNTY, et al.,

Defendants.

Case No. 3:19-cv-00969-AC
ORDER

ACOSTA, Magistrate Judge:

This Order GRANTS defendant NaphCare, Inc., and related defendants’ Motion (ECF No. 99) for Extension of Time to Respond to Plaintiff’s Motion to Take Additional Depositions, and imposes sanctions on plaintiff’s counsel for violation of this court’s Local Rule 83-8(b). Defendant NaphCare, Inc., is awarded $472.00 in attorney fees pursuant to Local Rule 83-8(b).

Page 1 – ORDER
Background

Plaintiff represents the estate of her husband, who allegedly died of alcohol withdrawal while in custody at defendant Washington County’s jail, for which NaphCare provides medical services. On March 25, 2020, plaintiff filed a Motion (ECF No. 94) for Leave to Take Additional Depositions (“Depo Motion”). She seeks to take ten additional depositions: five additional Rule 30(b)(6) depositions of NaphCare corporate representatives and five additional depositions of NaphCare fact witnesses. Plaintiff already has deposed seven NaphCare employees, and she represents in the Depo Motion that she and defendant NaphCare previously agreed that she may take an additional four depositions of NaphCare employees. Thus, at the time plaintiff filed the Depo Motion, she had taken and would be taking eleven total depositions of NaphCare employees (a total separate from any depositions she has taken of the Washington County employees and representatives), one more than permitted by Federal Rule of Civil Procedure 30(a)(2)(A)(i)’s ten-deposition limit.

On April 2, 2020, one of NaphCare’s lawyers, Alexander Bluestone, filed an opposed Motion for Extension of Time to Respond to Plaintiff’s Motion to Take Additional Depositions (“Extension Motion”). NaphCare seeks a two-week extension of the April 8, 2020 deadline by which to file its response to the Depo Motion. In the supporting declaration (ECF No. 100), Mr. Bluestone states:

3. Defendants’ response to the motion for leave to take additional depositions is currently due on April 8, 2020. Defendants seek an extension to April 22, 2020 for their response to the motion.

4. The extension is requested to allow defendants’ counsel to complete the response. Counsel is working from home due to the COVID-19 pandemic, and is caring for small children due to statewide school closures.

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5. Defendants are medical providers whose attention is presently focused on providing medical care amidst a global pandemic. Obtaining information from defendants which would be necessary to prepare a response brief is taking longer than usual, given the current circumstances. Further, to the extent defendants expect an opportunity to review and provide input regarding counsel’s response drafts, this is also taking longer than usual.

6. Counsel for defendants conferred with counsel for plaintiff regarding the requested extension. Counsel for plaintiff indicated he would consent to an extension to April 15, 2020, but refused to consent to defendants’ proposed extension to April 22, 2020.

(ECF No. 100, at 1.)

Later on April 2, after receiving and reading the Extension Motion, the court entered this minute order:

SCHEDULING ORDER by Judge Acosta: Plaintiffs’ counsel is to confirm to the court no later than noon tomorrow, April 3, 2020, whether in fact they do object to the additional one-week extension, to April 22, defendants ask the court to allow. If plaintiffs’ counsel confirms they do so object, then the court ORDERS one of them is to submit a declaration, explaining in detail and under oath why, given the facially legitimate reasons for the requested extension described in defendants’ counsel’s declaration, and in the current circumstances of a global pandemic, the governor’s stay-at-home directive, the closure of schools state-wide, and the court’s suspension of all in-person proceedings – including criminal jury trials – plaintiffs’ counsel’s objection is reasonable and this court should not impose sanctions for his having made that objection. See USDC Oregon Local Rule 83-8(b) (“The Court may impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel. In a case where an award of attorney fees is applicable, the Court may consider lack of cooperation when setting the fee.”). Failure to submit the ordered declaration by noon, April 3, will be deemed confirmation of plaintiffs’ counsel’s objection, and the court will rule on the record before it. There will be no extensions of the noon, April 3, 2020 deadline. (pgj)

(ECF No. 101.)

Shortly before noon on April 3, Tim Jones, one of plaintiff’s lawyers, filed a declaration (ECF No. 102) in response to the court’s minute order. He stated that “Plaintiff withdraws any objection and stipulates to Defendants’ request for an extension of time to April 22, 2020[.]”
(ECF No. 102, at 1.) He also listed the six previous occasions since July 2019 on which plaintiff “has stipulated to each and every request from defense counsel for extensions of time during the course of this case[.]” (ECF No. 102, at 1.) In his declaration, Mr. Jones does not refute Mr. Bluestone’s description of their conferral on the Extension Motion or contest Mr. Bluestone’s representations of his good-cause reasons for the requested extension. Nowhere in Mr. Jones’s declaration does he provide the reasonable basis for refusing NaphCare’s two-week extension request in the first instance, nor does he offer any justification, including avoidance of prejudice, for insisting on only a one-week extension.

Discussion

Reflecting this court’s and this state’s long tradition of professionalism in the practice of law, Local Rule 83-8, entitled “Cooperation Among Counsel,” provides in relevant part:

The Court may impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel. In a case where an award of attorney fees is applicable, the Court may consider lack of cooperation when setting the fee.

Local Rule 83-8(b). Under normal circumstances, lawyers arguing over the propriety of a two-week rather than one-week extension to file a response to a non-routine motion such as the Depo Motion, which seeks a substantial exception to the Federal Rule of Civil Procedure 30(a)(2)(A)(i), would contravene the local rule’s directive. Under the current national health emergency, refusal to agree is decidedly inexplicable – an observation proved by Mr. Jones’s own declaration, which omits any explanation for plaintiff’s previous refusal to agree to NaphCare’s facially legitimate request.

Context feeds common sense here. On March 23, 2020, Governor Brown issued Executive Order 20-12 in which, following the president’s March 13, 2020 declaration of a
national health emergency because of the COVID-19 virus and her previous March 8, 2020 declaration of a state-wide health emergency, she ordered Oregonians to stay at home. (Executive Order 20-12, at 1. 3.) She prohibited the operation of “non-essential” businesses (which term includes law firms and law offices), ordered closed all Oregon colleges and universities in the state, and imposed severe restrictions on the ability of child care facilities to continue operating. (Id., at 1, 4.) Previously, the governor had ordered closed all K-through-12 schools in the state. (Id. at 1.)

The health emergencies announced, and safety protocols implemented by national and State of Oregon authorities, have created unprecedented challenges and changes to the manner in which personal needs and occupational endeavors are accomplished. The effects of the current health emergency have been felt equally in this court, as evidenced by Standing Orders 2020-4, 2020-5, 2020-7, 2020-8 issued by Chief Judge Marco Hernandez between March 12, 2020 and March 31, 2020, as well as the page on the court’s website dedicated to information about COVID-19’s effect on court operations. (See https://www.ord.uscourts.gov/index.php/information-regarding-coronavirus-disease-covid-19-and-court-operations, last visited April 5, 2020.) Thus, criminal trials have been continued, civil jury trials have been suspended, court hearings are by phone or video conference, and non-essential court staff have been directed to telework.

This context proves true the underlying bases for Mr. Bluestone’s declaration. Mr. Jones cannot credibly dispute the current health emergency’s impact upon Oregonians, such as Mr. Bluestone, and Mr. Jones does not refute or challenge Mr. Bluestone’s under-oath explanation for the requested extension. The court is left to wonder, then, both why Mr. Jones refused to agree to that extension and why he deemed reasonable such refusal.
Mr. Jones's recitation of the six previous occasions he, on behalf of plaintiff, agreed to NaphCare's and the Washington County defendants' respective extension requests does not provide the answer, despite the apparent suggestion that it should do so. Quite the contrary, as that previous willingness makes more inexplicable the refusal to agree to NaphCare's request in this specific instance. Further, a lawyer's previous instances of cooperation with opposing counsel do not create a line-of-credit against which one may charge an instance of unreasonable refusal to cooperate. That same willingness should have been extended here but, because it was not, NaphCare's counsel had no alternative but to file the Extension Motion.

For these reasons, the court finds unreasonable Mr. Jones's refusal to agree to NaphCare's request for a two-week extension. That Mr. Jones withdrew plaintiff's objection and now stipulates to NaphCare's extension request does not undo the violation of or nullify the appropriateness of sanctions under Local Rule 83-8(b), because only after NaphCare filed the Extension Motion did plaintiff agree to the extension request. Federal Rule of Civil Procedure 37, entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions," subsection (a)(5)(A), provides guidance on this point:

If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.

Local Rule 83-8(b) authorizes the court to impose a sanction for failing to accommodate a reasonable request and here a sanction is appropriate, in the form of the attorney fees NaphCare incurred to prepare and file the Extension Motion. This court uses the most recent Oregon State Bar Economic Survey to determine the reasonableness of fee requests generally and hourly billing
rates specifically. (See “Message from the Court Regarding Fee Petitions,” https://www.ord.uscourts.gov/index.php/rules-orders-and-notices/notices/fee-petitions, last visited April 5, 2020.) Mr. Bluestone’s resume shows that he first was admitted to the practice of law in 2018, here in Oregon, after graduating from Willamette University’s College of Law that same year. The 2017 OSB Economic Survey\(^1\) shows a mean hourly billing rate of $236.00 for Portland lawyers with 0-3 years of private practice experience. (See 2017 OSB Economic Survey, at 38.) Based on its experience both as a lawyer and as a judge, the court estimates that the Extension Motion required two hours of Mr. Bluestone’s time to prepare for, write, file, and serve.

 Accordingly, plaintiff’s counsel is ORDERED to pay $472.00 in attorney fees to NaphCare as a sanction for violating Local Rule 83-8(b), such payment to be delivered to or received by NaphCare’s counsel’s office no later than April 16, 2020.

 IT IS SO ORDERED.

 DATED this 26th day of April, 2020.

 [signature]

 JOHN V. ACOSTA
 United States Magistrate Judge

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\(^1\) The PDF version is available at https://www.osbar.org/surveys_research/snrroc.html.
Why ‘Kill All the Lawyers’?

How Shakespeare helps us define professionalism for Oregon’s lawyers and judges

By Hon. Wallace P. Carson Jr. and Barrie J. Herbold

William Shakespeare wrote Henry VI, Part II, around 1590; it is one of his 10 “Histories” dramatizing the chaos of leadership in England during the 15th century. Set in England in 1445-55, it brings to life efforts of Henry VI to retain his monarchy in the face of a challenge by the competing House of York, dissatisfaction with his rule among the English nobility and a peasant revolt. When Henry sends the Duke of York to put down a rebellion in Ireland, York arranges with the English rebel John Cade to make life difficult for Henry in York’s absence.

In Act IV, scene ii, Cade, a commoner, gathered with his supporters at Blackheath in preparation for a march on London, announces that he has a claim to the throne as a purported grandson of the Earl of March. He speaks of how the world will be different when he is king:

CADE: Be brave then; for your captain is brave, and yon's reformation. There shall be in England seven halfpenny loaves sold for a penny…

ALL: God save your majesty!…

DICK (a rebel): The first thing we do, let’s kill all the lawyers.

CADE: Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment, being scribbled o’er, should undo a man? Some say the bee stings; but I say, ‘tis the bee’s wax; for I did but once a thing, and I was never mine own man since.

At this point, the unfortunate clerk of Chatham, who is said to be able to “write and read and cast accompt” appears on the scene:

CADE: Here’s a villain!
SMITH: Has a book in his pocket with red letters in’t.
CADE: Nay, then, he is a conjurer.
DICK: Nay, he make obligations, and write court-hand.
CADE: … Come hither, sirrah, I must examine thee…Dost thou use to write thy name? Or hast thou a mark to thyself, like an honest plain-dealing man?
CLERK: Sir, I thank God, I have been so well brought up that I can write my name…

CADE: Away with him, I say! Hang him with his pen and inkhorn about his neck!

When in Act IV, scene vi, the rebels march on London, Cade commands destruction of the Iams of Court and orders his followers to “burn all the records of the realm” saying “[m]y mouth shall be the parliament of England.”

Indeed, it is an historical fact that in 1450, 30,000 peasants sympathetic to the Duke of York marched on London seeking land reform. Viewed in both their literary and historic context, the words “kill all the lawyers,” coming from the mouth of an English commoner, as imagined by one of the great creative geniuses in the history of the world, take on a significance that give us guidance almost 400 years later about the power of knowledge, the degradation of those who are deprived access to the use of knowledge and the harm that comes to society as a result of that deprivation. It is the height of irony that Shakespeare’s words, so often quoted to depict lawyers as parasites in society, instead express the very essence of the importance of law and lawyers.

When the quote is viewed in context, it becomes clear that lawyers, and indeed all those who held the keys to the legal
and commercial structure of that time, were not the abusers of the poor and oppressed. They were not those who sought money and power and should therefore be destroyed, as Shakespeare's language is so often used to imply. Cade and his friends wanted to "... kill all the lawyers" because to them lawyers and others with knowledge and education were the gatekeepers of the legal system. Crucial to the plot to overthrow the king was to eliminate all lawyers and others of learning who stood between the rebels and the destruction of the monarchy.

Shakespeare's articulation of this idea is stated with brilliant clarity when Cade, referring to the poor clerk of Chat-
values" as to which there is substantial agreement. These values are taught in many contexts – in the family, in religious organizations, in community gatherings, in schools, in professional training and in many other ways. Michael Josephson of the Josephson Institute for the Advancement of Ethics, a well-known and respected writer and speaker regarding ethics, identifies the “six pillars of character” as caring, fairness, respect, trustworthiness, citizenship and responsibility.

These values are mostly other-directed; that is, they encourage us to treat others in positive, supportive ways while promoting our own integrity and acknowledging our individual accountability and responsibility. In the legal profession, similar values that direct us to take responsibility for others – honesty, trustworthiness, courage, a sense of fairness and accountability – all are subsumed under the notion that we must ethically represent our individual clients consistently and concomitantly with the promotion of the fair and efficient administration of justice in our state. That is, those of us who are privileged with the gifts of intelligence and access to knowledge sufficient to obtain and maintain a license to practice law should use those gifts for the common good, just as those with other gifts should use theirs in other contexts. We can expand the reach of our good works far beyond the needs of our individual cases and clients if we take responsibility for making the system work.

If we consider this “core value” of professionalism in light of other definitions of professionalism, we see a common thread. The OSB Statement of Professionalism states, “Professionalism sensitively and fairly serves the best interests of clients and the public, fosters respect and trust ... between lawyers and the public, promotes the efficient resolution of disputes, and simplifies transactions...” Quoting Roscoe Pound, The Lawyer from Antiquity to Modern Times 5 (1953), The Ethical Oregon Lawyer, section 2.2 (1994) agrees that professionalism “reaches beyond the minimum standards” of the disciplinary rules and “emphasizes the pursuit of a learned art not only as a means of earning a livelihood but also in the spirit of public service.”

Moreover, when one considers specific “professionalism” concerns repeated by article after article and group after group, it is clear that our over-arching standard – that we as lawyers and judges must accept responsibility for the overall efficacy of Oregon’s justice system – creates a structure within which all such concerns can be simply and constructively analyzed.

These are examples:

**Lawyers’ obligation to support legal services for low income people.**

At a CLE program given a few years ago by the commission on professionalism, participants were asked if they believed that lawyers have a different obligation than non-lawyers to contribute to the provision of legal services to the poor. About two-thirds of those in the room agreed that they do. Certainly a basic tenet of the notion of professionalism we articulate here includes ensuring low income people’s access to legal services – by giving money (to the Campaign for Equal Justice or various programs such as St. Andrews Legal Clinic), or by giving time through any of a variety of groups (such as the Volunteer Lawyers Project or...
the Senior Law Project). The November 1998 Access to Justice Conference is another example of lawyers working to improve access to the courts for all Oregonians.

Promotion of diversity among lawyers.

While this goal can and should be seen as encouraging an increase in the numbers of minority lawyers within the state for the simple reason that it is of benefit to those individuals, it is important to remember that real access to the system often depends upon the public's ability to find lawyers with whom they feel comfortable and can communicate. This "fit" may or may not be racially driven, but ensuring that Oregon has lawyers of every color and ethnic background can only assist in making the system more accessible.

The elimination of bias within the system.

It seems a proposition too obvious to state that any kind of discrimination within the system does just what bias against the commoners of 15th century England did - it shuts people out. Oregon's judges and lawyers have a continuing obligation to ensure fair treatment, including the provision of interpreters and others when necessary to assist those who cannot fully participate in the system otherwise.

The accessibility and use of alternative dispute resolution.

Douglas County Circuit Judge Joan Seitz ("Professionalism, Viewed from the Bench", page 72) discusses the important role that judges and lawyers can play in leading parties to settlement of difficult dissolutions. The OSB's Statement of Professionalism similarly encourages lawyers to offer ADR early and often. When the overriding goal of making the system work effectively and efficiently is considered in this context, it is easy to see why eager and constructive participation in mediation must be a trait of the professional Oregon lawyer and judge.

Courtesy and civility.

Lawyers should be courteous, reasonable and responsive - not simply so that we can enjoy our practices, although that is a valuable goal. Incivility creates tensions that waste time and energy, leading to negative rather than positive outcomes. The system works best when the practice of law is conducted in a polite and positive way. Moreover, it is clear that when we act with civility we are also mod-

eling behavior that is one of the key parts of our societal standards as a whole.

Use of the court to enforce professionalism requirements.

It appears to be a controversial issue whether the Oregon courts should become involved in issues arising from unprofessional conduct among lawyers. If this question is considered in light of the standard that our fundamental goal is to ensure that the system works, it becomes clear that it is the task of the trial judge to get involved in such disputes to the extent necessary to see that all participants are behaving in such a way that the matter will be concluded as quickly, efficiently and fairly as possible.

"Rambo" tactics.

As Michael Long points out in his excellent discussion of "cut-throat" trial techniques in this issue, "according to this theory, civil and criminal litigation are merely mercenary games played by opposing sides ..." The notion that, as lawyers, we are engaged in a battle to win at any cost, even of the truth, is a pervasive idea. It is seen as such an impediment to professional behavior that the Multnomah Bar Association's Summit on Professionalism recommended that the word "zealous" be removed from the title of DR 7.107 regarding advocacy. When so-called "Rambo tactics" are considered in light of our professional responsibility to see that the system promotes justice for all, we see that they are undoubtedly unprofessional. Moreover, deposition, discovery and courtroom tactics that are oppressive, unreasonable, time-consuming or mean-spirited clearly prevent the system from operating fairly and efficiently. We all know that these tactics are unprofessional. If we make reference to our basic standard, we know why.

As lawyers and judges, we live out who we are by our actions. Professionalism is not something to don at the office or take off with our suits and our robes; our behavior continuously demonstrates who we are. We can improve our own lives and spirits, those of our clients, opposing counsel and parties and the community as a whole, if we simply remember that our part in this system gives us tremendous power, to make life better for every citizen of Oregon. If every lawyer and judge in the state would analyze every action she or he takes in light of the good of ensuring that the system works fairly and efficiently for everyone, questions about professionalism would simply disappear - and tremendous good would result for our community.

About the Authors

Wallace P. Carson Jr. is chief justice of the Oregon Supreme Court. Barrie J. Herbold, a Portland attorney, is member of the Oregon Bench/Bar Commission on Professionalism.
Supreme Court of Indiana
Jacqueline WISNER, M.D. and The South Bend Clinic, L.L.P., Appellants (Defendants below),
v.
Archie L. LANEY, Appellee (Plaintiff below).
No. 71S03–1201–CT–7.

Background: Patient brought medical malpractice action against physician, alleging failure to diagnose and treat a transient stroke. Following a jury trial, the St. Joseph Superior Court, Margot Reagan, J., entered judgment for patient and denied patient's motion for prejudgment interest. Physician appealed, and patient cross-appealed. The Court of Appeals affirmed in part, reversed in part, and remanded in part. Transfer was granted.

Holdings: The Supreme Court, David, J., held that:
(1) denial of physician's motion for relief from judgment based on opposing party's misconduct was not abuse of discretion;
(2) physician's witness's interaction with patient did not violate separation of witnesses order;
(3) patient's written offer of settlement complied with prejudgment interest statute's requirement that offer provide for payment of settlement offer within 60 days; and
(4) written offer of settlement was untimely under prejudgment interest statute.

Trial court affirmed.

Opinion, 953 N.E.2d 100, vacated in part.

West Headnotes

[1] Judgment 228 k–375

228 Judgment
2281X Opening or Vacating

228k372 Misconduct of Party or Counsel
228k375 k. Fraud in preventing defense or procuring judgment. Most Cited Cases

Denial of physician's motion for relief from judgment based on misconduct of patient's counsel at jury trial of medical malpractice action was not abuse of discretion; although patient's counsel repeatedly returned to lines of questioning that trial court had forbidden and acted contemptuously of physician's counsel throughout trial, physician's counsel also engaged in similar misconduct, and trial court was in best position to gauge impact of misconduct of both parties on the jury. Trial Procedure Rule 60(B)(3).

[2] Appeal and Error 30 k–982(2)

30 Appeal and Error
30XVI Review
30XVI(1) Discretion of Lower Court
30k982 Vacating Judgment or Order
30k982(2) k. Refusal to vacate. Most Cited Cases

Appellate court reviews denial of motion for equitable relief from judgment for abuse of discretion. Trial Procedure Rule 60.


228 Judgment
2281X Opening or Vacating
228k372 Misconduct of Party or Counsel
228k375 k. Fraud in preventing defense or procuring judgment. Most Cited Cases

Judgment 228 k–379(1)

228 Judgment
2281X Opening or Vacating
228k379 Meritorious Cause of Action or Defense
228k379(1) k. Necessity. Most Cited Cases

In order to obtain relief from judgment based on misconduct of adverse party, the moving party

must show that (1) misconduct occurred; (2) the misconduct prevented the moving party from fully and fairly presenting the case at trial; and (3) the moving party has a meritorious defense. Trial Procedure Rule 60(B)(3).


30 Appeal and Error
  30XVI Review
    30XVI(H) Discretion of Lower Court
    30XVI(B) Power to Review
    30XVI Cited Cases
    30k946 k. Abuse of discretion. Most Cited Cases

An "abuse of discretion" occurs if the trial court's decision was against the logic and effect of the facts and circumstances before the court.


228 Judgment
  228X Opening or Vacating
    228k372 Misconduct of Party or Counsel
    228k375 k. Fraud in preventing defense or procuring judgment. Most Cited Cases

When considering motion to set aside judgment based on misconduct of opposing party, trial judge is in the best position to gauge the behavior of the attorneys and whether or not it impacts the jury and in what context. Trial Procedure Rule 60(B)(3).


30 Appeal and Error
  30V Presentation and Reservation in Lower Court of Grounds of Review
  30V(B) Objections and Motions, and Rulings Thereon
    30k207 k. Arguments and conduct of counsel. Most Cited Cases

Physician waived argument on appeal in medical malpractice action that patient's counsel improperly referred during closing argument to medical records allegedly lost by clinic that had been dismissed from case and that physician thus was entitled to new trial based on such misconduct, where physician did not object to patient's counsel's closing argument at trial.

[7] Trial 388 C≈41(5)

388 Trial
  388V Reception of Evidence
    388V(A) Introduction, Offer, and Admission of Evidence in General
    388k41 Separation and Exclusion of Witnesses
    388k41(5) k. Violation of rule. Most Cited Cases

Physician's expert witness's interaction with patient did not violate separation of witnesses order in patient's medical malpractice action against physician; witness simply asked patient how patient was feeling during chance encounter, and witness did not ask about anything related to trial. Rules of Evid., Rule 615.

[8] Appeal and Error 30 C≈206

30 Appeal and Error
  30V Presentation and Reservation in Lower Court of Grounds of Review
  30V(B) Objections and Motions, and Rulings Thereon
    30k202 Evidence and Witnesses
    30k206 k. Reception of evidence. Most Cited Cases

Appellate court does not disturb trial court's determination regarding a violation of a separation of witnesses order absent a showing of a clear abuse of discretion. Rules of Evid., Rule 615.


30 Appeal and Error
  30V Presentation and Reservation in Lower Court of Grounds of Review
  30V(B) Objections and Motions, and Rulings Thereon
    30k207 k. Arguments and conduct of counsel. Most Cited Cases

Physician waived argument on appeal in pa-
A patient's medical malpractice action that physician was entitled to a new trial based on improper questions concerning insurance coverage that patient's counsel asked during voir dire, where physician did not argue to trial court that jury pool had been tainted or otherwise object to statement or ask for specific relief.


230 Jury
236V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(1) k. In general. Most Cited Cases

A question regarding a juror's relationship, financial or otherwise, with a specific insurance company on voir dire examination is not error if the question is asked in good faith.


30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(1) k. In general. Most Cited Cases

Interest 219 C--->39(2.10)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.10) k. Discretion in general. Most Cited Cases

An award of prejudgment interest is discretionary; accordingly, appellate court reviews trial court's ruling on a motion for prejudgment interest for abuse of discretion.

[12] Interest 219 C--->39(2.50)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.50) k. Torts; wrongful death. Most Cited Cases

A written settlement offer must be made within one year following the filing of a claim to be eligible for prejudgment interest, although settlement offer can also be made prior to filing of a lawsuit. West's A.I.C. 34-51-4-6(1).

[13] Interest 219 C--->39(2.50)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.50) k. Torts; wrongful death. Most Cited Cases

Patient's counsel's settlement letter to physician's counsel containing an offer to "resolve this matter at this time" met requirement to identify 60-day settlement requirement period in prejudgment interest statute, as offer to settle "at this time" was offer to settle by payment within 60 days, although better practice would be to cite prejudgment interest statute in settlement letter and make clear that letter was intended to invoke statute. West's A.I.C. 34-51-4-6.

[14] Interest 219 C--->39(2.50)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.50) k. Torts; wrongful death. Most Cited Cases

Patient's counsel's settlement letter to physi-
cian's counsel sent two years and five months after patient's medical malpractice lawsuit against physician was originally filed was untimely under one-year deadline in prejudgment interest statute, even though letter was sent within one year of patient's dismissing original lawsuit without prejudice and refiling second lawsuit alleging same claim. West's A.I.C. 34-5:1-4-6.

[15] Interest 219 C-39(2.10)

219 Interest
  219II Time and Computation
  219k39 Time from Which Interest Runs in General
  219k39(2.5) Prejudgment Interest in General
  219k39(2.10) k. Discretion in general.

Most Cited Cases

An award of prejudgment interest is committed solely to the discretion of the trial court if the statutory prerequisites are satisfied. West's A.I.C. 34-51-4-7, 34-51-4-8.

*1203 Edward L. Murphy, Jr., Heidi K. Koeneman, Fort Wayne, IN, Attorneys for Appellants.

Timothy S. Schafer, Timothy S. Schafer, II, Merrillville, IN, Attorneys for Appellee.

On Petition to Transfer from the Indiana Court of Appeals, No. 71A03-1007-CT-382

DAVID, Justice.

In this case, the jury returned a verdict for plaintiff in the amount of $1.75 million. The issues presented focus on two separate, but significant, matters.

The first is whether the trial court erred by denying defendants' FN1 motion for a new trial based upon the cumulative effect of plaintiff's counsel's alleged unprofessional conduct during the trial. The second issue is whether the trial court erred when it refused to grant plaintiff prejudgment interest.

FN1. The record indicates the St. Joseph Superior Court granted a motion for directed verdict and dismissed plaintiff's claims of negligence against the South Bend Clinic, leaving them as a named defendant for purposes of respondent superior liability to Dr. Wisner. The record further indicates defendants' counsel represented both South Bend Clinic and Dr. Wisner at trial and now on appeal.

We affirm the trial court, as did the Court of Appeals, on the denial of defendants' motion for a new trial. Under the circumstances of this case, we defer to the judgment of the trial court. However, this decision does not lessen our dissatisfaction and frustration with the behavior of counsel during the trial, particularly plaintiff's counsel.

Professionalism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and civility are the mainstays of our profession and the foundations upon which lawyers practice law. The public expects it. Fellow lawyers expect it. Our profession demands it.

Further, we affirm the trial court's decision to deny the discretionary award of prejudgment interest.

Facts and Procedural History

In 2001, Archie Laney was at work when she became dizzy, lightheaded, weak, and had difficulty walking. She was sixty-six-years old. Laney called her daughter, who drove her to the South Bend Clinic where Laney's primary care physician worked. When they arrived, Laney learned that instead of her primary care physician being on duty, Dr. Jacqueline Wisner was on duty that evening. Dr. Wisner conducted an examination consisting of an oral history of Laney's symptoms and an examination of Laney's eyes, ears, lungs, and stomach. Dr. Wisner further conducted an Accu-Check blood glucose test, as well as a hemocue test for anemia. Dr. Wisner observed considerable wax build-up in
Laney's ears. Dr. Wisner diagnosed Laney with vertigo due to an inner ear infection, and discharged her with medication for the dizziness and an antibiotic. Dr. Wisner advised Laney the medication could take up to three days to work and instructed Laney to return to her primary care physician if the symptoms continued.

Two days later, Laney called her daughter and told her she could not move her right arm or right leg. Her daughter drove Laney to the Emergency Room at St. Joseph Medical Center. Laney was evaluated that evening and diagnosed as having suffered an ischemic stroke affecting the right side of her body.

The stroke has rendered Laney unable to use her right side, thus Laney now struggles with independent living.

On November 26, 2002, Laney filed a complaint with the St. Joseph Superior Court alleging negligence by Dr. Wisner and The South Bend Clinic on eleven different counts, generally relating to the failed diagnosis of a transient stroke, which later caused Laney to suffer a disabling stroke. The complaint also alleged that Dr. Wisner or the Clinic negligently failed to maintain the medical record from Laney's March 9, 2001 visit to the Clinic.

In 2006, the original complaint was dismissed without prejudice, pending the adjudication of the proposed complaint before the Indiana Department of Insurance, a statutory condition precedent to the filing of the court complaint, which plaintiff had not done here. FN2

FN2. This Court gave a detailed analysis of the steps taken in medical malpractice cases in Ramsey v. Moore, 959 N.E.2d 246, 250 (Ind.2012).

On August 6, 2007, Laney filed virtually the same complaint in the St. Joseph Superior Court, alleging negligence by the Clinic and Wisner. In March 2010, a five-day jury trial was held. The jury returned a verdict in favor of Laney and against Dr. Wisner and The South Bend Clinic in the amount of $1.75 million. The trial can best be described as hotly contested, not only as to the disputed facts but also to the rate of objection by the attorneys.

On March 12, 2010, Dr. Wisner and the clinic filed a motion for reduction of the verdict and judgment to the statutory maximum prescribed by the legislature in the amount of $1.25 million. Laney objected to the reduction and also asked for an award of $100,000 in prejudgment interest based on Indiana Code section 34-51-4-7. On March 18, 2010, the trial court granted the motion to reduce the award and entered judgment in favor of Laney for the amount of $1.25 million, the maximum allowable under Indiana Code section 34-18-14-3, but on April 14, 2010, denied the motion for prejudgment interest.

On April 15, 2010, defendants filed a motion to correct error, requesting a new trial pursuant to Indiana Trial Rules 59(J) and 60(B)(3). Trial Rule 59(J) allows for the court to correct any error it determines to be "prejudicial or harmful." Ind. Trial Rule 59(J). Trial Rule 60(B)(3) allows for the court to relieve a party from a judgment for "fraud ..., misrepresentation, or other misconduct of an adverse party." T.R. 60(B)(3). Specifically, defendants alleged the following: (1) the trial court erred when it failed to order a mistrial based on the consistent, unprofessional and prejudicial conduct of plaintiff's counsel, which deprived defendants of a fair trial; (2) the trial court erred in allowing plaintiff to argue the missing 2001 record should be attributed to Dr. Wisner; (3) the trial court erred in allowing the testimony of plaintiff's expert witness, Dr. Campbell, after learning he violated a separation of witnesses order; and (4) the court erred in not admonishing plaintiff's counsel for asking voir dire questions that were in violation of the motion in limine order.

The trial court held a hearing and denied defendants' motion to correct error. Defendants appealed the trial court's denial of their motion to cor-
rect error, and Laney cross-appealed on the issue of the propriety of the trial court's order denying prejudgment interest. The Court of Appeals affirmed the trial court's order denying the motion to correct error, but reversed the trial court's order denying prejudgment interest. We granted transfer.

**I. Behavior of Laney's Counsel**

[1][2][3][4] Dr. Wisner and the clinic contend the behavior of plaintiff's counsel was so unprofessional and so permeated the entire trial that it tainted the proceedings and therefore the cumulative effect was prejudicial enough to warrant a mistrial. We review denial of a Trial Rule 60 motion for abuse of discretion. *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65, 72 (Ind.2006). When the motion is based on Trial Rule 60(B)(3), the appellant must show that (1) misconduct occurred; (2) the misconduct prevented the appellant from fully and fairly presenting the case at trial; and (3) the appellant has a meritorious defense. *Id.* at 73–74. An abuse of discretion occurs if the trial court's decision was against the logic and effect of the facts and circumstances before the court. *McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind.1993).

Dr. Wisner and the clinic argue the trial court's finding Laney's counsel in contempt of court on day three of the trial and instructing the jury to disregard certain statements made by Laney's counsel were insufficient remedies that failed to undo the cumulative effect and prejudice caused by such conduct. Defendants cite to several exchanges in the record that were particularly harmful to such a degree they claim that the harm could not be undone. The first are instances where Laney's attorney asked specific questions in front of the jury in violation of the trial court's order not to broach a certain subject.

While questioning plaintiff's daughter, plaintiff's counsel asked if Laney was still seeing a particular physician. This was met with an objection, which was sustained by the trial court. Immediately following the sustained objection, plaintiff's counsel asked another objectionable question and again the trial court sustained the objection and prohibited the inquiry.

Following an overnight break, counsel resumed questioning plaintiff's daughter along the very same lines that the trial court forbid the day before. Defendant's counsel objected, and a side bar conference was held where the trial court again found the desired testimony to be irrelevant. Undeterred by the trial court judge, immediately following the side bar conference, plaintiff's counsel once again went right back to the same line of questioning, drawing yet another objection from defendant's counsel and yet another side bar conference.

At the second side bar conference, the trial court made it clear that this prohibited area of inquiry would not be ventured into again by plaintiff's counsel. Nonetheless, plaintiff's counsel would pursue the prohibited testimony once again, this time attempting to solicit the prohibited testimony through the plaintiff herself. Ultimately, the court instructed the jury to disregard the previous questions and not to consider at all the questions that had been asked by plaintiff's counsel on this subject.

On the following day of trial, the trial judge held yet another side bar conference and warned plaintiff's counsel that if he brought up that particular issue again during the next witnesses cross-examination a fine of $500 would be imposed for contempt of court.

This example is one of many displays of inappropriate behavior of counsel. There were excessive objections by both counsel, over eighty by the defendant's counsel and over thirty by plaintiff's counsel. While objections are clearly permitted if made in good faith and on sound substantive grounds, repeated objections despite adverse rulings already made by the trial court are not appropriate. However, far more problematic for the trial judge in this case was the unnecessary sparring and outright contemptuous conduct of each attorney directed to-
ward the other.

The record reveals at least five instances where the trial court judge had to admonish the attorneys about their behavior. Furthermore, by any conservative measure there were at least ten instances of questionable behavior by each attorney during the trial. Examples are bountiful throughout the record, but a few examples are highlighted below.

Plaintiff's counsel stated during the trial,

"There was no discussion of the testimony here in court. He's wasting our time, Judge. There's no violation.... I've about had it. Cut the scenes in front of the jury.... Yeah. Judge, this conduct's got to stop by Mr. Murphy. This has got to stop."

"We don't want to hear about your unsolicited advice. I don't care for your unsolicited advice."

"What are you talking about Murph.... You're slipping, Murph."

"No, no. I never said that at all. That's an outright lie."

"Well, I must be wrong. I must be wrong for the fifth time, but I think I'm going to show Mr. Murphy has been wrong every time he's objected and I'm going to show later on.... He keeps telling me I'm wrong, Judge. The record's going to bear me out. How about this? Loser pays a thousand dollars it wasn't faked? ... There's something unprofessional going on here, I'll agree. It's going to come back."

[Tr. at 607, 98, 179, 192, 957, respectively.]

Defendants' counsel stated during the trial,

"Your Honor, I think it's really unfortunate that we start off with a misrepresentation to the Court."

"He's already violated it twice."

"Are we going to put up with this?"

"I would prefer you not talk to me. You talk to the Judge. I'll do the same."

"Keep your hands off me. I don't get with this, Judge."

[Tr. At 14, 47, 737, 272, 286, respectively.]

[5] We hope this is not the way attorneys conduct themselves at trial. As specifically found by the trial court judge, "the trial was replete with improper behavior, in this judge's opinion, by both attorneys." The trial court ultimately concluded there was no substantial prejudice resulting from counsel's actions. The trial judge is in the best position to gauge the behavior of the attorneys and whether or not it impacts the jury and in what context. Strack & Van Til, Inc. v. Carrier, 803 N.E.2d 666, 677 (Ind.Ct.App.2004). We cannot conclude this decision was against the logic and facts before the court. Here, defendants failed to show the alleged misconduct prevented them from fully and fairly presenting their case at trial.

The contentious nature of the relationship between plaintiff's and defendants' counsel was evident at the beginning of trial. It apparently began during depositions with defendants' counsel remarking that no competent lawyer would conduct a deposition in the manner plaintiff's counsel was. There were accusations of misrepresentations, lying, and not following the rules. The five-day jury trial was filled with unnecessary comments back and forth between counsel. Plaintiff's counsel did not care for defendants' counsel's unsolicited advice. The attorneys would frequently interrupt each other.

The trial judge even noted one time, "I don't want you both to behave like this and *1207 I don't want to embarrass you either because I'm not going to put up with it." On another occasion, the trial judge remarked "I'm just concerned about what the jury is thinking right now. I think you guys are representing the legal profession and I don't think you're helping each other."
Near the end of the trial, the trial judge even directed plaintiff's counsel to apologize to the jury for personal comments about defendants' counsel. Even during the subsequent hearing on the motion to correct error, some four months later, the lawyers could not behave civilly toward each other. \textsuperscript{FN3}

\textsuperscript{FN3} The acrimony between plaintiff's and defendants' counsel did not end at the trial. During the June 2010 hearing on the motion to correct error, the poor behavior began anew. Mr. Murphy accused Mr. Schaffer of bragging about his numerous sanctions having no effect on him, describing his conduct as unprofessional and making gestures during the trial, while Mr. Schaffer called Mr. Murphy an "outright liar" on two occasions.

A jury trial is not a free-for-all. It is a civil forum in which advocates represent their clients before a panel of citizens, in front of a judicial officer who is responsible for enforcing the rules of procedure and rules of evidence and assuring the proper behavior of everyone in the courtroom. It is similar to an athletic event with two opposing teams competing and a referee observing to ensure all of the rules are followed. In this trial, both plaintiff's counsel and defendants' counsel committed fouls. Did plaintiff's counsel commit more fouls? Yes. However, defendants' counsel also committed fouls. It is important that attorneys not lose control of their passion for their client or cause and become too emotionally involved and make the cause personal. In such circumstances they risk harm to their client, their reputation, and our profession.

All attorneys in Indiana take an oath and each and every statement in the oath is sacred. One particular statement is, "I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged." Ind. Admission and Discipline Rule 22. Our law schools are trying to train our law students in certain core values of the legal profession, and some of the most important for the future of our profession are collegiality, professionalism and civility. At every trial, indeed at every moment of our practice, we have the opportunity to better our profession. Here, the trial judge presided over the entire trial and had the benefit of observing the overall conduct of both attorneys, not only in the presence of the jury, but outside their presence. The trial judge redirected both counsel on numerous occasions, admonished both counsel on occasions, and even used her contempt powers in an attempt to manage the conduct of counsel and ensure a fair trial. Again, the trial court judge is in the best position to determine when enough is enough and whether or not the behavior of counsel would warrant a new trial.

While we find that the judge did not abuse her discretion in denying the motion to correct error, we nonetheless express our displeasure with the conduct of counsel, particularly that of plaintiff's counsel.

Professionalism and civility must be the foundation of the practice of law. Upon this foundation we lay competency, honesty, dedication to the rule of law, passion, and humility. Every lawyer and every judge is charged with the duty to maintain the respect due to the courts and each other. Our clients and the public expect it. Our profession demands it.

*1208 II. Closing Argument

[6] Defendants also contend that the trial court erred in denying their motion to correct error relating to the closing argument of Lany's counsel. Their argument is that once the clinic was removed as an independent party from the case, any references to alleged misconduct in not producing the medical records should warrant a new trial, when taken together with the previous behavior by Lany's counsel. The relevant portion of plaintiff's closing statement is as follows:

And what's worse is there's no records. The records are conspicuously missing. The one record on the one day we need just happens to be miss-
ing. And we would submit, ladies and gentlemen, if we had that record it would show exactly what was done, and more importantly, exactly what was not done in this case.

Even more ironic is Dr. Wisner had no independent recollection of what happened. Very convenient. And we had no nurses called to try to rebut what we're saying.

So none of the evidence they show was consistent with what their diagnosis was. They gave nothing whatsoever to support it. The one doctor said vertigo earlier today, remember, and it was gone. It was gone by the time she got to Monday. None of the other doctors ever diagnosed it, none of them. All the doctors that saw her at Saint Joe right after Sunday night, none of them found vertigo. None. Isn't that something? It went away. Another coincidence.

Missing record. Coincidence.

The evidence showed there was no treatment for TIA. The evidence will show there was absolutely no tests run to rule out a TIA. And the evidence showed that they failed to hospitalize and all the doctors said that's what should have been done here. Instead, she was sent home without any additional medication, sent out the same way she came in and...

We believe, as we have stated previously, the trial court was in a better position to determine any prejudicial affect from Laney's counsel's closing statements. We summarize affirm the analysis of the Court of Appeals, noting also that neither Wisner nor the Clinic objected to these statements and waived the issue. Wisner v. Laney, 953 N.E.2d 100, 108 (Ind.Ct.App.2011).

III. Testimony of Laney's Expert Witness

[7][8] Defendants next contend the trial court erred by not granting a new trial due to a violation of the separation of witnesses order. Indiana Rule of Evidence 615 states, "at the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses." Ind. Evidence Rule 615. We do not disturb a trial court's determination regarding a violation of a separation of witnesses order, absent a showing of a clear abuse of discretion. Jordan v. State, 656 N.E.2d 816, 818 (Ind.1995). A review of the record reveals that any violation was merely accidental. The alleged violation stems from a chance encounter of Dr. Campbell and Laney, and one merely asking how the other was feeling. At no time did Dr. Campbell ask about their testimony or anything related to trial. The trial court did not abuse its discretion in concluding no impropriety occurred. It is clear to this Court that no violation of separation of witnesses occurred. We are in agreement with the excellent analysis of the Court of Appeals.

IV. Voir Dire

[9] Defendants further argue the trial court erred in not granting a new trial *1209 based on questions by plaintiff's counsel during voir dire, about insurance coverage. We view this as another argument about the misconduct on the part of plaintiff's counsel. We note that plaintiff's counsel asked the prospective jurors whether they worked for ProAssurance Insurance Company or owned stock in that company. There was no objection from defendants' counsel as this question was not inappropriate. Next, plaintiff's counsel asked if the jurors were opposed to injured parties asking for damages. Again, a proper question. Then counsel asked if anyone was employed in the healthcare industry. Again, a proper question. One prospective juror raised their hand and the following interaction took place:

[PLAINTIFF'S COUNSEL] Do you think that would anyway affect you, lean a little toward a healthcare side of this, or you heard stories about lawsuits or have feelings about lawsuits?

[PROSPECTIVE JUROR] Yes, I have.

[PLAINTIFF'S COUNSEL] What have you
[PROSPECTIVE JUROR] I've heard both sides where I don't know how to put this in a general sense. Specifically, I don't know of any specific suits, but the association with the different doctors and everything else, I've heard things said about how high the—what's it called? The cost of their insurance and everything else is and how difficult it is for them to be in practice. This is just general stuff that I've heard. I don't know anything specific.

[10] Thereafter, a side bar conference was held to discuss the question before voir dire resumed, and defendants' counsel dropped the subject. Defendants' counsel did not move immediately for a mistrial or argue the jury pool had been tainted. He did not ask for any specific relief or otherwise give the judge an opportunity to cure any potential defect. For this reason, we believe this argument was ultimately waived. Notwithstanding waiver, we would note that "a question regarding a juror's relationship, financial or otherwise, with a specific insurance company on voir dire examination is not error if the question is asked in good faith." Stone v. Stakes, 749 N.E.2d 1277, 1281 (Ind.Ct.App.2001). Again, the trial court was most certainly in the best position to make these determinations. In our review, absent any evidence of bad faith, the trial court's decision to deny a mistrial was not an abuse of discretion.

V. Prejudgment Interest


Laney filed her original complaint with the trial court on November 26, 2002. She then filed a written settlement offer on April 6, 2005. In 2006, the original complaint was dismissed without prejudice. On August 6, 2007, Laney refiled her complaint in the St. Joseph Superior Court. The applicable statutory provision provides that for TPIS to apply, the plaintiffs (1) must make a written offer of settlement to a party against whom the claim is filed within one year of filing the claim in court; (2) the terms of the offer must provide for payment of the settlement offer within sixty*1210 days after the offer is accepted; and (3) the amount of the offer does not exceed one and one-third the amount of the judgment awarded. Ind.Code § 34–51–4–6 (2008).

At issue is Laney's April 6, 2005 letter, which states:

As a follow-up to our deposition of Dr. Wisner, it appears that there is liability against the clinic as well as Dr. Wisner for failure to properly diagnose Mrs. Laney's condition and failing to properly treat her on March 9, 2001 resulting in a stroke three (3) days later and substantial and irreversible permanent impairment, specifically a stroke to the left side of her brain with resulting impairment to her right upper and lower extremities as well as impairment to her cognitive functions.

The clinic, as well as Dr. Wisner, can each be held liable for $250,000.00 plus pre-judgment interest up to four (4) years according to statute and case law for a total amount of $660,000.00. Please be advised my client has authorized me to settle this matter for a structured settlement in the amount of $250,000.00 with a present value of $187,001.00 which is the minimum structured settlement permitted to allow my client to proceed to the Patients' Compensation Fund. I think it would be in the best interest of all parties to amicably resolve this matter without a trial on the merits since it is likely that Mrs. Laney would obtain a substantial verdict in light of her per-
mamend injuries and the conspicuously missing medical records of the clinic regarding March 9, 2001 day in question.

Would you kindly discuss this matter with your clients as well as their insurance carrier and advise me as to your position within the next thirty (30) days. If we are able to resolve this matter at this time, it will avoid any further inconvenience to Dr. Wisner and eliminate her necessity to travel from Baltimore, Maryland to Indiana for a trial on the merits and thereby avoid any further litigation expense. I will await your response.

Laney argues her letter is clearly an offer to settle within the guidelines of TPIS.

There are two lines of analysis at play in this case. The first is whether this letter met the requirements of Indiana Code section 34-51-4-6. The second is whether prejudgment interest must be awarded if the statutory requirements are met.

Laney's original complaint was filed November 26, 2002 and her settlement letter to Dr. Wisner was written on April 6, 2005. She then dismissed her suit in 2006, only to file it again on August 6, 2007. Laney argues we should not take into consideration the original complaint from 2002 in determining the timeliness of the letter because the lawsuit was dismissed without prejudice, and thus we should act as if the 2002 suit had never been brought at all. By doing this, plaintiff contends the letter of April 6, 2005 properly preceded the subsequent lawsuit of 2007. This appears to be one way to attempt to bypass a failure to follow the prejudgment interest statute—dismiss the suit without prejudice, prepare a settlement letter, and file suit anew.

In order to seek prejudgment interest, Indiana Code section 34-51-4-6(1) requires a party to make their written settlement offer within one year of the claim being filed. The trial court determined "within one year" meant the settlement offer could not be made until the claim was filed and that it must be made within one year thereafter. In other words, the trial court found a starting line existed with the filing of a claim and ended one year later at the deadline. We disagree with the trial court's analysis and instead we agree with the Court of Appeals analysis that the one-year requirement "defines the deadline for the submission" of a settlement offer,

Not ... whether the settlement offer may be filed before or after the filing of a claim. In other words, the written offer of settlement may be submitted to the defendants before or after the filing of suit, but ... it may not be submitted later than one year after the filing of suit.

Wisner v. Laney, 953 N.E.2d 100, 113 (Ind.Ct.App.2011). Thus the Court of Appeals held there was no starting line, only a deadline, which was one year after the filing of a claim. If the statute is to be interpreted otherwise, it would serve to discourage settlement of lawsuits before a lawsuit is filed. Certainly the legislature did not intend to limit the effective use of the TPIS and settlement negotiations.

This position is further supported by the statute addressing when prejudgment interest begins to accrue. Under Indiana Code section 34-51-4-8(a), prejudgment interest may not exceed forty-eight months and "begins to accrue on the latest of the following dates:

(1) Fifteen (15) months after the cause of action accrues;

(2) Six (6) months after the claim is filed in court if IC 34-18-8 and IC 34-18-9 do not apply;

(3) One hundred eighty (180) days after a medical review panel is formed to review the claim under IC 34-18-10 (or IC 27-12-10 before its repeal).

Ind.Code § 34-51-4-8(a).

If subsection (3) permits prejudgment interest
to begin accruing 180 days after the review panel is formed, regardless of the date a complaint is filed in court, then Indiana Code section 34-51-4-8 permits prejudgment interest to accrue before the filing of a complaint.

[12] Thus, we hold today that a written settlement offer must be made within one year following the filing of a claim to be eligible for prejudgment interest. However, a settlement offer can also be made prior to the filing of a lawsuit. We believe this interpretation is broader and more in line with the legislature's intent to facilitate and encourage settlement of claims amicably without legal recourse, but also to give real meaning and effect to the prejudgment interest statute. The trial court's interpretation would potentially foreclose meaningful settlement talks until the filing of a complaint.

FN4. Indiana Code section 34-51-4-6 also allows for a longer period of time than one year if the trial court determines it necessary and upon a showing of good cause.

[13] In addition to whether or not the settlement letter is timely filed, we must also examine whether the letter identifies the sixty-day settlement requirement period. In other words, does the letter itself comply with the statute. The case most closely on point is Cahoon v. Cummings, 734 N.E.2d 535, 546 (Ind.2000), where a letter stated the plaintiff was “offering to settle this claim now for $75,001.” This Court wrote on the sixty-day requirement,

The whole point of the statute is to address the cost of delay in payment. Accordingly, an offer to settle “now” is an offer to settle by payment within sixty days. The delay is solely for the benefit of the defendants, and the defendants had the power to accept [Plaintiff’s] offer immediately.

Id. at 547. In our view, Laney’s offer to “resolve this matter at this time” meets the same threshold as we discussed in Cahoon. The key is to include the time-limiting language in the offer. However, *1112 rather than run the risk of a trial court being forced to decide whether a settlement letter did or did not comply with the requirements of Indiana Code section 34-51-4-6, we believe the better practice for lawyers in the future would be to cite the statute in the settlement letter and make it very clear that the letter is intended to invoke the statute, including the sixty-day settlement window and the possibility of prejudgment interest.

[14] Despite the fact that the letter itself satisfied the statutory requirements as to content, it was untimely sent in this case. The first complaint was filed with the trial court on November 26, 2002. Laney’s counsel wrote a settlement letter two years and five months after the original claim was filed. This falls squarely outside the one year window as discussed previously. While plaintiff dismissed that original action, she failed to send a subsequent settlement letter and now attempts to rely on the settlement letter, which would have been untimely filed but for the dismissal of the previous lawsuit. Laney’s counsel should have sent a new settlement letter after the dismissal of the first lawsuit, either prior to the filing of the second, or within a year of the filing of the second. Neither was done in this case. The TPIS is not intended to serve as a trap for the unwary. It is designed to put the adverse party on notice of a claim and provide them with an opportunity to engage in meaningful settlement and if they do not do so, they run the risk of incurring the additional obligation of prejudgment interest.

[15] Finally, had the settlement letter been timely sent, we note Laney is not automatically entitled to prejudgment interest. TPIS permits the trial court to award prejudgment interest, but does not require an award of prejudgment interest. See Ind.Code § 34-51-4-7 (“The court may award prejudgment interest as part of a judgment.”); id. § 34-51-4-8 (“If the court awards prejudgment interest, the court shall determine the period during which prejudgment interest accrues”) (emphasis added). Thus, an award of prejudgment interest is
committed solely to the discretion of the trial court if the statutory prerequisites are satisfied. This is consistent with the TPIS serving as a tool for the trial court to encourage settlement and incentivize the expeditious resolution to cases.

Conclusion
Although plaintiff's counsel's behavior was most troubling, both attorneys should have acted in a manner more becoming of our profession. The duty to zealously represent our clients is not a license to be unprofessional. Here the trial court determined that the conduct of counsel did not prevent the jury from rendering a fair and just verdict. The trial court did not abuse its discretion in denying defendants' counsel's request for a new trial. We also affirm the trial court denial of plaintiff's request for prejudgment interest. Laney's 2005 letter did not meet the requirements for awarding of prejudgment interest. The awarding of prejudgment interest is not mandatory and is left to the discretion of the trial court. The trial court was most certainly within its proper discretion in declining such an award.

DICKSON, C.J., and RUCKER, MASSA, and RUSH, JJ., concur.

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The Supreme Court of South Carolina has issued “four or five opinions that are strictly on civility, including three in one year and one for a lawyer hitting an opponent in a deposition.”

—Lesley Coggiola

William Gary White III was accused of being so uncivil and unprofessional that the South Carolina Supreme Court suspended him in 2011 for 90 days and ordered him to complete the state bar’s legal ethics and professionalism program.

White was found to have violated a slew of South Carolina’s ethics rules in a letter to his client, an Atlantic Beach, S.C., church that had received a town notice that it needed to comply with zoning laws. White’s letter, copied to the town manager and later made part of the published opinion, was a scorcher:

“You have been sent a letter by purported Town Manager Kenneth McIver. The letter is false. You notice McIver has no order. He also has no brains, and it is questionable if he has a soul. Christ was crucified some 2,000 years ago. The church is His body on Earth. The pagans at Atlantic Beach want to crucify His body here on Earth yet again. ...

“First-graders know about freedom of religion. The pagans of Atlantic Beach think they are above God and the federal law. They do not seem to be able to learn. People like them in S.C. tried to defy federal law before with similar lack of success.”

A town council member filed the disciplinary complaint that led to White’s suspension. In its opinion, the state supreme court held that White ran roughshod over an oath it implemented in 2003 mandating that lawyers act with “fairness, integrity and civility, not only in court, but also in all written and oral communications.”

White says he’s learned from the experience. He says his client told him to make the comments in the letter and at the time believed them to be political statements regarding a religious matter. “I thought it was free speech,” he explains.

“I think the rules are clearer now; I didn’t consider it a breach of ethics before that. I considered it representing a client.”

South Carolina is just the latest in a string of states formally demanding their lawyers treat others with respect. But it’s been only recently that the state’s highest court has punished lawyers solely for uncivil acts, as it did with White.

“Until two years ago, we didn’t have any public opinions or sanctions simply on civility,” says Lesley M. Coggiola, disciplinary counsel for the Supreme Court of South Carolina. “There might have been problems with communication, diligence and any number of other issues, and the court would say, ‘By the way, we’ll cite the oath as well.’ We now have four or five opinions that are strictly on civility, including three in one year and one for a lawyer hitting an opponent in a deposition.”

The South Carolina court may just be warming up. “We take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication,” it said in a 2011 opinion. “We are concerned with the increasing complaints of incivility in the bar.”

MULTILATERAL APPROACH

It’s impossible to say whether incivility in law is escalating or there’s simply more grueling about it. But the profession’s leaders are calling out what they say is a troubling lack of civility, and states like South Carolina are cracking down. However, the most effective tools for erasing incivility in the profession may be the judges and lawyers willing to tamp down uncivil behavior the moment it emerges.

Coggiola’s agency doesn’t track complaints about incivility, nor do other states. And even anecdotally, some aren’t discerning a spike. “We haven’t seen it here,” says Wallace B. “Gene” Shipp Jr., bar counsel at the District of Columbia Bar. “We’re not receiving complaints about that sort of thing.”

However, there is unmistakably more talk about a troubling
“Young lawyers are hungry for information on the proper balance between advocacy and civility. ... They want to do the right thing, but don’t know what the right thing is.”
—Jonathan Smaby

growth in incivility. “My speech to the opening assembly at the 2011 ABA Annual Meeting was all about civility,” then-President Stephen N. Zack recalls. “At the same meeting, former Supreme Court Justice Sandra Day O’Connor, Justice Stephen G. Breyer and the chief justice of Canada’s highest court all talked about civility. We didn’t plan it, but we all ended up on the same page.”

Lawyers posit a range of theories on why incivility is so often directed. Some believe it’s more prevalent in large cities. Others say they’ve seen entirely too much directed at young female associates, often to gain a tactical advantage. Yet the more important question may be why incivility may be becoming the norm.

Lawyers blame incivility on:
• Over-the-top portrayals of lawyers on TV and in films.
• Inexperienced lawyers and a lack of mentoring.
• The fuzzy line between aggressive advocacy and rudeness.
• The broad platform provided by today’s technology, coupled with the ability to act anonymously online.
• The country’s current, fractious public discourse.

By far, technology is cited most often as the foundation for boorish behavior. Coggiola says she feels old saying it, but she attributes a good deal of the problem to the ability of the everyday jerk lawyer to broadcast views online. “We’ve had some serious issues, and they’re all related to social media,” she explains. “Our court has already spoken on the First Amendment—you give some of that up when you become a lawyer. But we’re really struggling with a case sitting at the court right now. A lawyer is blogging, and it’s just vile, insulting everybody from Hispanics to women to ‘midgets.’ It’s horrible.”

Because South Carolina’s civility oath applies only to opposing parties and counsel, Coggiola’s office has asked the court to sanction the lawyer for bringing the profession into disrepute. The argument? If he were personally blogging or posting the comments on Facebook, without identifying that he’s a lawyer, the bar couldn’t touch him. “However, if you say you’re a lawyer, and if there’s a nexus between you being a lawyer and what you’re posting, then we’re going to come back to this rule and find it a ground for discipline,” contends Coggiola. “We need the court to come out and say this is not OK.”

A close second and third place behind technology are just-licensed lawyers who perhaps watch too many rogue lawyers on TV and in movies. The labor market has forced many to hang their own shingles without the mentoring they’d have through a traditional employer.

“Young lawyers are hungry for information on the proper balance between advocacy and civility,” says Jonathan Smaby, executive director for the Texas Center for Legal Ethics in Austin. “They get mixed messages from law school and the media, which portrays lawyers in movies, television and fiction—and sometimes in real life—as much more cutthroat and cutting corners than really goes on.

“They want to do the right thing,” he says, “but don’t know what the right thing is.”

FIGHTING BACK

Lawyers aren’t just complaining about incivility. They’re fighting back—civility, of course.

Bar organizations and disciplinary bodies are flooding the zone with training. Florida’s Orange County Bar has reached out to local law schools to provide more professionalism education to students. A recent topic, according to James Edwards—a shareholder at Zimmerman, Kiser & Sutcliffe in Orlando, who’s headed his state and local bar’s professionalism committees—covered the interplay between professionalism and civility on one hand and technology and social media on the other. Coggiola and her staff are also providing more frequent opportunities for civility education.

“One thing we do in this office is speak [to legal audiences]
On switching from litigation to transactional work: "Civil litigation is all about fighting over money, and I don't need an ulcer or heart attack fighting over people's money."

—Mick Meagher

all the time," she says. "I've made it very clear that if somebody wants us, we’re there—and we always cover civility. I often say it baffles me that we had to change the oath to tell people to be nice to each other. But clearly the court thought it was necessary."

Other state courts have also felt obligated to formalize a civility requirement. Florida is among the latest, revising its oath of admission to include a duty of civility in 2011, citing the American Board of Trial Advocates' similar inclusion. Also in 2011, the ABA's policymaking House of Delegates endorsed a renewed commitment to civility. And in 2012, ABOTA published an online Civility Matters tool kit to provide ideas and direction for sessions teaching civility.

Courts are also more often sanctioning egregious behavior. But that requires lawyers and judges to report out, which can still be a roadblock.

"I don't think people are often willing to report," Coggiola says. "They like to complain about other lawyers, but they don't want their name on it. We also speak to judges and tell them that if they see this behavior, they've got to report it."

First, however, judges have to know the basics of civility themselves, something that can be disputed. In March 2010, the Plain Dealer in Cleveland reported that Cuyahoga County Common Pleas Court Judge Shirley Strickland Saffold used her office computer to comment on cases before her under the online username "lawmiss." A later search revealed comments attacking Arabs, Asians and white men on at least 10 other websites using that name. Saffold denied making comments about any cases before her, while her daughter admitted to making some under the lawmiss moniker.

"Judge Saffold has always recognized the fine line between civility and enforcing decorum in the courtroom," says her lawyer, Brian Spitz of South Euclid, Ohio. Saffold and her daughter sued and later settled with the company that administers the newspaper's website over the release of their names to reporters, according to the Plain Dealer. The best judges set an example and rein in bad behavior before it becomes the norm. "My father was a judge for 20 years, and he was very strict," Edwards says. "People frequently tell me they were afraid of him because he required absolute adherence to the rules and politeness, and if you didn't do right you were in trouble."

That's the opposite of what Calvin House, a partner at Gutierrez, Preclado & House in Pasadena, Calif., recently saw in court. While waiting for a case to be called, House witnessed a lengthy argument between a lawyer and a judge that included the lawyer accusing the judge of violating a bankruptcy stay.

"It was a very heated discussion throughout, and to accuse a judge of basically committing a criminal act—which violating a bankruptcy stay is—was pretty extreme," says House. "That comment the judge sort of rolled with. Eventually he got visibly angry and said, 'We're done!' But that was after, I'd say, 30 minutes of interchange."

House was not only taken aback at how personal and persistent the lawyer's behavior toward the judge became, but also astounded at how long the judge tolerated the lawyer's rant.

"One thing that's surprised me is the amount judges will sometimes put up with before they get to that point," House says. "I get it. From their standpoint, if they're harsh early on, they run the risk of not getting information they need and not appearing fair. But that's part of the problem. There were probably three other cases besides mine while this was going on, so four sets of attorneys were observing what happened. That lawyer got a $4,000 reduction in what his client had to pay. So someone just learning the business might get the message that this is the way to represent your client."

A judge in that situation risks losing credibility with lawyers and lay observers, neither of which is good for the administration of justice. "I think judges get involved in exchanges with
attorneys more often than they did 10 years ago," adds House.  "With that exchange, the judge seemed to feel the need to jus-
tify his position. I don't understand why he didn't say, 'Look, I've made my ruling. If you believe I'm wrong, you'll need to ap-
peal.' Let's move on. Where that's done, it can be effective, and it doesn't have to be done in a vehemence or rude way."  

Edwards says most judges he appears before do just that. Most, but not all: "One told me—and I was sad to hear it—that if you're too tough on people, you're going to draw an opponent in the next election. How can you worry about that? If you do a good job, all the good lawyers will stand up for you."

IT TAKES A VILLAGE

Lawyers are also policing their peers. In the past few years, Edwards has begun to try to set a professional tone by calling opposing counsel at the beginning of each case to pledge cooperation. "I say, 'I really hope we can get along because we'll have enough to fight over without fighting over the petty details,'" he explains. "Surprisingly, that works pretty well."

Many also advocate professionally pushing back as soon as an ugly incident erupts. M. David "Mick" Meagher, a solo litigator in Escondido, Calif., had his first experience with incivility about an hour and a half after he began practicing. "It was a fairly simple dispute, and this attorney just went off on me on a phone call," he recalls. "He was attacking me personally and I was completely caught off guard."

A friend suggested a tactic Meagher has employed ever since. "I send a confirming letter spelling out as closely as I can recall everything the person said," he explains. "In that case, this guy called me every name in the book, so I put all that in a letter. Later, I got a phone call from the lawyer complaining, 'My daughter's the secretary, and she had to read that letter!' I told him, 'Then I suggest you not use that language again.'"

Meagher says calling out the behavior is especially important when incivility occurs in public. A lawyer recently shook Meagher's hand and exchanged pleasantries—and then walked into court and told the judge Meagher had lied and deserved to be sanctioned.

Stunned, Meagher called his bluff. "I suggested something I've now used several times," he explains. "I told the judge: 'Let's set a show-cause hearing. This attorney just accused me of gross misconduct in front of a whole gallery of people who don't understand the law, making all lawyers look bad. I think he should prove everything he just said. If he can't, you should sanction him.' Each time, the lawyer has backed down, Meagher says.

The difficulty for new lawyers is not only recognizing that they should stand up for themselves but also properly calibrating their response. "If I'm a young lawyer dealing with a particularly difficult opponent whom I think is trying to intimidate me, I may be tough back," explains Smaby of the Texas Center for Legal Ethics. "But as lawyers get more experienced, the good ones figure out how to handle the difficult opposing counsel just like they handle difficult clients. A more experienced lawyer may have more tricks in the tool bag to counter that."

One female family lawyer in Dallas told Smaby that when she runs into a nasty opposing counsel, she mails a copy of the Texas Lawyer's Creed, the state's professionalism and civility code.

"I've also seen young female lawyers not respond to intimi-
dation but make the older lawyer believe they're naive and not very sophisticated," Smaby adds. "Then at the proper time, they come in and wipe them out in court. I tell young lawyers that the most effective way to be a lawyer is to understand your own personality and use that."

Despite his ability to do that, Meagher has had enough. After 18 years of primarily litigation-based practice, he's transitioning exclusively to transactional work to escape the ugliness. "[Transactional work isn't] perfect—I get that," he says. "But it's better. Most of the civil transactional lawyers I have been very reasonable because their goal is solution-orien-
ted, not win-oriented. Civil litigation is all about fighting over money, and I don't need an ulcer or heart attack fighting over people's money."

CAN WE ALL GET ALONG?

Ultimately the best solutions, lawyers say, are those that bring diverse practitioners together. Patricia Lee Rebo, a litigation partner at Snell & Wilmer in Phoenix and former chair of the ABA Section of Litigation, supports the American Inns of Court.

"It organizes lawyers from all years of practice into small groups to meet to create an environment in which young, medi-
un and seasoned lawyers talk about the pressing issues of the day," she explains. "That also helps provide an opportunity for younger lawyers to be mentored by seasoned practitioners."

Specialized bar groups are also attempting to bridge divides. The National District Attorneys Association has created a committee to work with the defense bar to foster civility, says Scott Burns, executive director of the NDAA in Alexandria, Va. It's also working with the ABA to offer joint training ses-
sions with prosecutors and defense lawyers covering civility toward one another.

"I'm personally in close contact with the Innocence Project, the Constitution Project and the National Association of Criminal Defense Lawyers," says Burns. "They've all been very receptive about how we can come together and agree to handle criminal trials and deal with one another."

Burns' "pie in the sky" goal to increase cooperation among prosecutors and defense attorneys is the National Criminal Justice Academy, a facility backed by the S.J. Quinney College of Law at the University of Utah, the NDAA and leaders in the defense bar. So far, they've raised $1.2 million to launch the center, which would train prosecutors and defense attorneys under one roof.

"We'd each have our own training tracks, but there would also be a coming together of America's prosecutors and Amer-
ica's defense attorneys—and nothing but good can come from that," Burns says. "Those I've spoken with on both sides say that would go far in fixing our roles in civility. I truly believe if you bring people together, things get better."
IVORY TOWER

Interventions

Responding to Professionalism Dilemmas with Judges

By Judge Susie L. Norby
"We are all formed of frailty and error; let us pardon reciprocally each other’s folly—that is the first law of nature."

— Voltaire

Judges are human, and humans err. Judges’ legal errors can be challenged by appeal, of course—but behavioral lapses are trickier.

There are 175 state trial judges in Oregon, each with their own limitations. No matter how long each one practiced law before reaching the bench, practice rarely makes perfect. Judges hope for understanding when we falter, just as attorneys and parties hope for compassion from judges when their frailties are exposed.

If a lawyer encounters a judge who falters, what can or should be done? Judges work in ivory towers, separated from open social interaction to avoid the appearance of impropriety. Entry into the inner sanctum of judicial chambers is unusual, so those who feel slighted by a judge seem to have few options to clear the air.

Would communication make matters worse? Is a motion to disqualify necessary? Should a complaint be filed with the Judicial Fitness Commission? Or is it better to do nothing?

The law can unravel countless thorny dilemmas. But this one is different. Diplomacy and intuition solve many relationship problems, but it takes more to navigate the hierarchical pitfalls that clutter the legal landscape between lawyers and judges. The Code of Professional Conduct calls upon lawyers and judges alike to promote and embody collegiality.

Judges are often consulted by lawyers for advice about professionalism in practice. But many lawyers feel strongly inhibited from approaching a judge with a reminder of the reciprocal obligation for collegiality toward attorneys in and out of the courtroom. This is a guide to help identify the need for intervention after a judge falters, and the options available to do so.

Distinguishing Lapses in Judgment from Misconduct

Professionalism and our obligation to promote and embody collegiality require that we differentiate discrete transgressions from unmistakable misconduct. Both may create concern, but one is less urgent than the other.

An aberrant transgression allows the offended attorney to wait for the right time to consider the issue. Misconduct requires swifter action.

Some clashes between lawyers and judges arise from conflicting expectations. Lawyers may expect judges to honestly grasp nuances of unspoken struggles outside of court—with disabling clients, or spiteful opponents, or overwhelming workloads. (We can’t.) Judges may expect lawyers to strategically sift every bit of evidence, to anticipate which arguments the court wants to hear, and to eliminate the rest. (You can’t.) Friction arises when conflicting pressures and obligations clash with unrealistic expectations.

If a judge says or does something concerning in court, it’s best to take time to allow emotions to calm. Evaluate the severity of the event later, in retrospect. In court, emotions run high, and the severity of a judge’s actions or words may be misperceived in the heat of the moment. After the event, allow calm reflection to help you differentiate between words and actions that are merely frustrating and truly serious improprieties.

Among other things, consider whether there was unusual provocation or possible shared fault for the transgression, whether there could be an alternative inoffensive interpretation of what transpired, and whether the event was an aberration or part of a pattern of ongoing behavior. Was the behavior rooted in circumstance or was it personal? Was it persistent throughout the proceeding, or momentary? All these factors will shape a decision on what to do.

A similar analysis is helpful to assess whether a statement or action outside a courtroom merits a response. For example, when I was a deputy district attorney in the early 1990s, a male judge took me aside after a court trial to warn me that a female litigator who wears fitted pants at work will never be taken seriously as an attorney. Although his comments were unwelcome, he seemed to believe that my pant suit would imperil my career.

I considered whether to do something to express my concern, but I perceived that he was shaped by the customs of his more conservative generation, and he meant to help. I chose not to do anything about it. I did not believe it reflected poorly on his judicial ability, and his helpful intention offset the transgression enough.

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"A man carries within him the germ of his most exceptional action; and if we wise people make eminent fools of ourselves on any particular occasion, we must endure the legitimate conclusion that we carry a few grains of folly to our ounce of wisdom."

— George Eliot

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Collegiality-Focused Remedial Options

Direct Approach

Keeping in mind our professional duty to act collegially—even in response to someone who failed to do so—the threshold option to resolve concerns about judicial behavior is to speak directly to the judge in person.

Ideally, this kind of conversation will be delayed until after the conclusion of the court matter in which the troubling incident occurred. If it can’t wait, though, be sure to seek permission from your opponent to speak with the judge about "a topic unrelated to the case." If they won’t give permission, then ensure that your opponent is included in the private conversation to eliminate any risk of ex parte contact.

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Ask the judge's court clerk whether the judge will see you in chambers about a private matter. If that isn't allowed right away, then ask if there is a better time for you to return to talk. If all else fails, consider writing a polite and respectful email to request a meeting or convey your concern.

Ideally, approach the matter as an opportunity to learn, not to teach. Give the judge a chance to explain what happened from her perspective, then share the alternative point of view that raised the concern. Allowing the judge to save face in the moment creates the best context for future change, and instills a sense of gratitude in the judge for your sensitivity.

**Indirect Approach**

If a direct approach does not work out, or if the circumstances make a direct approach unlikely, the next option is to make an indirect approach, either through a judicial colleague of the offending judge or through a colleague in the bar who knows the judge better. This may be another judge who makes you feel more at ease, a colleague whom the offending judge already trusts, or it may be the presiding judge.

Share your concern with your chosen go-between and explain your reasons for an indirect approach. Also ask whether any further action by you could be helpful in resolving the concern for the future. If a go-between judge deems the concern significant enough, then he must report it under CJC Rule 3.11(A).

**Semi-Direct: Signed or Anonymous Letter**

If neither a direct nor an indirect personal approach fits the situation, the next option is to write a letter to the judge and mail it or have it delivered. Write the letter with respect and without insult, criticism or hyperbole. Objectively state the concern and consider noting that your respect for the judge and her role in the justice system are the reason you believe she deserves to be told that the concern exists and allowed the opportunity to weigh its validity.

**OAA Outreach**

Some concerns may raise suspicion that a judge is in personal distress. If there are such signs, or if the transgression is coming out of the clear blue sky from a judge who is known for patience, discretion and professionalism, then a call to the Oregon Attorney Assistance Program at (503) 226-1057 or (800) 321-6227 should be considered.

When a judge offends or acts unprofessionally, it may be reflexive to assume that power or status has propelled his behavior. But it is always prudent to begin with the converse assumption, by remembering that judges are human and at risk of indisposition by tragedy, medical conditions or issues of abuse just as we all are. The OAA is a confidential program, and its staff is committed to protecting the confidentiality of callers.

If you have clear and convincing evidence (not a mere suspicion) that a judge's performance is significantly impaired physically or mentally — or severely impacted by habitual or excessive use of intoxicants or controlled substances, temporarily or permanently — you may submit a complaint to the chief justice of the Oregon Supreme Court pursuant to ORS 1.303. This is an option for situations on the most severe end of the spectrum and beyond hope of informal resolution.

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"Intolerance is a form of egotism, and to condemn egotism intolerantly is to share it."
— George Santayana

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**Reconciling More Radical Options with the Duty for Collegiality**

**Immediate Reactionary Comments: Effectiveness of Collegial Comebacks**

When court is in progress and a concerning event transpires, it may be tempting to reexamine react. Court proceedings heighten emotions, which can impair efforts at restraint. Moreover, litigation is adversarial, and attorneys often arrive in court reader to lock horns than to breathe deep.

Regrettably, snarky commentaries and incautious criticism made in the moment are unlikely to facilitate instant insight by a judge into the compromised behavior you perceived. They are also unlikely to instill confidence in clients, parties and court observers that the justice system is a place of honor.

Planning ahead for this unfortunate contingency may give you a useful advantage if the need ever arises. Well-chosen words or actions may improve the circumstances if properly deployed in the moment. For example, it is sometimes helpful to interrupt the problematic behavior or exchange with the code phrase "Your Honor, I have a matter for the court. I request a conference in chambers or a sidebar." This gives the judge (and everyone else) a moment to pause and shift gears.

The topic of the conference or sidebar can be as simple as a question such as "May I have a recess to talk to my client?" The hearing has taken some unexpected turns I'd like to explain to him." This is the professional equivalent of a timeout and signals a judge that a moment of self-reflection may be appropriate.

Another way to prepare for this potential eventuality is to converse with attorney colleagues about courtroom stories of effective interventions they have implemented or seen that de-escalated perceived judicial misbehavior. This can be particularly helpful if the stories are specific to a judge you are likely to appear before. The most disarming rejoinders tend to be those in which the attorney expresses humility and receives the concerning judicial behavior gracefully.

Defusing a situation with refinement and respect can effectively neutralize all sorts of misbehavior and reverse the course of many types of troubling circumstances.

**Affidavits for Change of Judge: Impacts on Court Administration & Case Progress**

If you attempt to resolve a concern with a judge but are not satisfied with the result — or if you are unwilling to experiment with less drastic methods for resolving a concern — then a more extreme option is to avoid the judge entirely by filing motions to disqualify the judge. Under ORS 14.260 et seq. any attorney may request that a judge be disqualified from presiding over a court proceeding by filing a motion supported by an affidavit confirming the attorney's good-faith belief that the judge cannot be fair and impartial in the
proceeding. Although the judge is entitled to a hearing to challenge the affiant's good faith, judges rarely request one.

The timing of such motions is restricted by statute and local rules to ensure the court has notice of the need to procure another judge to handle the case. An attorney may disqualify up to two judges in any single proceeding.

Each jurisdiction chooses how it will handle such motions, and the processes are different from one jurisdiction to another. In larger counties, for example, the judges named in such motions are often not informed about disqualification requests; therefore, the attorneys' perspective and identity remain unknown to the offending judge.

In smaller counties (including those with only one judge), however, such motions have a greater impact on the court docket and cannot remain anonymous. It can be very difficult to secure a substitute judge in geographically remote areas, which may mean that resolution of the case is prolonged as the court struggles to procure a more acceptable judge for each appearance.

Some local rules require an attorney to consult with the presiding judge of the jurisdiction before filing a motion to disqualify. If the presiding judge is the only judge (or is the objectionable judge), this method may be problematic. Before considering this option, consult with the trial court administrator of the offending judge's jurisdiction to fully understand the transparency of the disqualification process and the practical impact that disqualification may have on the progress of your case.

Reports to Commission on Judicial Fitness: Failsafe for Clear Conduct Code Violations

If you believe that a judge has clearly violated a rule in the Code of Judicial Conduct, then another option is to lodge a complaint about the offending judge with the Commission on Judicial Fitness.

ORS 1.410–1.480 create the commission and describe its processes for investigating and addressing complaints about judges, while ORPC §3(b) states: "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

Before filing a complaint, however, professionalism dictates that a complainant should consider carefully the specific rule the judge may have violated, and the likelihood of misunderstanding the situation. Best practice is to confer with trusted colleagues about the concerning event and ensure that others support your perspective and agree that the issue rises to the highest level and merits the filing of a complaint with the commission.

The commission website describes its mission this way: "The Commission on Judicial Fitness and Disability reviews complaints about Oregon state judges and justices of the peace and investigates when the alleged conduct might violate the state's Code of Judicial Conduct or Article VII, Section 8 of the state Constitution. If the commission finds formal charges, a public hearing is held. The commission recommends action to the Supreme Court. Recommendations include dismissal of the charges, censure, suspension or removal of the judge."

The commission, which meets six times a year, can't change a judge's decision in a case or the case outcome. Instead, possible fi-
nal outcomes only include dismissal of the complaint due to lack of information and insufficient evidence, issuance of an informal disposition letter to the judge pursuant to Rule of Procedure 7(c), and prosecution. Information about specific complaints remains confidential under ORS 1.440, unless formal charges are filed.

The commission also investigates complaints that a judge has a disability, which significantly interferes with the judge’s job performance. If the disability appears temporary, the commission may hold a private hearing, but the judge can request a public hearing. Again, the Supreme Court makes the final decision.

The commission does not notify judges about the filing of a complaint unless corrective action is deemed necessary after the complaint is considered, or formal charges are filed. At its discretion, the commission may or may not notify the complaining party about how the complaint is resolved. Therefore, a complaint filed with the commission is unlikely to send a message to the offending judge in most circumstances. Unless corrective action is taken or formal charges are filed, the identity of complainants remains anonymous to the judge whom they reported.

A Risk of Inaction: Passive Reputation Destruction

Choosing a way to address a concern with a judge can be intimidating. But avoiding the need to take corrective action to address the concern can have unexpected negative consequences that extend beyond the risk that the judge’s misbehavior recurs.

It is human nature to dwell on wrongs we experience. Attorneys instinctively internalize perceived injustices and feel righteous indignation if an esteemed judge lets them down. Legal professionals’ reflexes are to defend against injustice. Therefore, if a decisive corrective step is not taken, the stilled urge to defend can devolve into deeper resentment and incurable bitterness.

The wronged person may find himself perseverating, repeatedly criticizing the offending judge to others and perpetually nurturing his own resentment. This passive, inadvertent crusade to destroy the judge’s reputation may offer moments of relief when the criticism meets a sympathetic ear, but it tends to burden the person dwelling on the event far more than it affects the judge they criticize.

It also magnifies an isolated experience with a single judge into a malcontented perspective that the justice system is wholly irreparable. The complainant’s suffering is revived indefinitely, while the judge likely remains oblivious that a problem ever existed.

Choosing a path to deal with a concern productively and taking that path is daunting, but also liberating. It creates a real possibility that the judge will improve and better represent the justice system itself because of the attorney’s brave intervention. And it allows the attorney to unburden himself without lowering himself to the same sort of unprofessionalism he feels he encountered.

"Give people the benefit of the doubt, over and over again, and do the same for yourself. Believe that you’re trying and that they’re trying. See the good in others, so it brings out the best in you."

— Liz Newman

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The suggestions offered here were curated with state court trial judges in mind. In other court contexts, such as municipal courts, justice courts and federal courts, their usefulness may be limited. One thing that judges in all courts have in common, though, is that all are human beings first, and judges second. It is fair and reasonable to assume that all try hard to bring their best self to the work of judging.

Like any other profession, judicial work impacts perspective, and a person who becomes a judge is likely to evolve and change over the arc of time. Judges’ perspectives on how to communicate within the constrictive procedural context changes, their understanding of how to best serve the public and the litigants changes, and their ability to shoulder the stressors of judicial work while striving to remain outwardly inscrutable changes.

Most of all, judges’ security and confidence in their own value changes.

Attorneys may perceive judges as unfeeling or disinterested in personal growth, but that is rarely (if ever) true. Many judges keenly feel the loss of opportunities for open dialog with colleagues in the legal community that disappear when they transition into their metaphorical ivory tower. An attorney with a concern may be pleasantly surprised by a judge’s receptivity to an open conversation about the frustrating event.

In the end, communication and belief in one another’s potential is not only a sign of true professionalism and a commitment to collegiality, it is often more powerful than a title or a robe. Earnest efforts at respectful communication keep all of us, and the justice system, we serve, revitalized and renewed.

Judge Susie L. Norby served as a deputy district attorney for Clackamas County and as senior legal counsel to the Clackamas County Board of Commissioners, the tax assessor and other county officials before she was elected to the Clackamas County Circuit Court in 2006. She is a member of the Oregon Bench and Bar Commission on Professionalism and the Council on Court Procedures.

ENDNOTES
1. OJC Rule 3.11(A) states: “A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge’s honesty, trustworthiness, or fitness as a judge in other respects, shall inform the appropriate authority.”
2. Many years ago, I sat in the gallery of a courtroom waiting for my case to be called. I watched as the judge expressed frustration with the attorney who had just spoken. When the judge finished his critical comments, the attorney paused, then said: “Judge, have you taken your meds today?” Some people gasped, some people laughed, and the judge averted the lecture. The professional relationship between the judge and the attorney broke down that day and was never repaired. The judge remembered the comment, and focused solely on its propriety, without reassessing his own demeanor and conduct. Nothing good came of the exchange.
3. For more information, go to courts.oregon.gov/programs/judicialeffectiveness.aspx.
4. Note that the Commission on Judicial Fitness has no jurisdiction over arbitrators, mediators, administrative law judges, hearing officers, municipal court (city) judges or federal judges.
ON PROFESSIONALISM

Professionalism for Litigation and Courtroom Practice

Conduct Counts

By Hon. Daniel L. Harris and John V. Acosta

Ensuring the quality of our professional lives and improving the public’s perception of our profession begins with our conduct toward each other. It also rests on our conduct in the courtroom, before judges, opposing counsel, juries and members of the public. Lawyers are educated and trained to exercise a high degree of skill and competence in representing individuals and organizations in the legal system. They should complement those attributes by exercising the highest standard of conduct when dealing with judges, clients and one another, whether verbally or in writing.

Professionalism differs from ethics in that ethics rules are mandated rules of conduct, while professionalism is a standard to which lawyers should aspire. The following suggestions for observing professionalism stem from years of litigation and courtroom experience — and some hard lessons learned during that time. This list was compiled from comments received from judges, attorneys and clients who were asked for suggestions on what can be done to improve professionalism. Integrating these suggestions into daily practice not only will improve the quality of your professional life, but will also make you a more effective advocate for your client.

1. Promote the efficient resolution of disputes.

In most cases, an attorney should advise the client of the availability of mediation and other appropriate methods for resolving disputes outside of the courtroom. A professional lawyer should always consider, and advise the client of, the most efficient way of resolving the dispute. This includes consideration of the effect litigation and particularly the trial will have on your client and the benefits to your client that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost; staying out of court usually accomplishes that goal. Attorneys should do everything they can to resolve pretrial disputes without involving the court. This is especially true with disputes over discovery issues — many motions to compel discovery can be resolved without using the resources of the justice system.

2. Be a counselor to your client, not a mere puppet.

Clients don’t always know what is and isn’t right. They aren’t familiar with the ethics rules that bind lawyers and the unwritten local conventions lawyers observe when working on cases with one another. Some clients want you to dislike the opposing party as much as they do and, thus, they expect you to make the other side’s life miserable. Some clients also might not appreciate that you and your oppo-

3. Keep your word.

Lawyers spend a lot of time putting things in writing, but in the daily practice of litigation a lot of routine business gets done verbally. Your ability to practice effectively will depend to a large degree on whether opposing counsel and co-counsel trust you. If your colleagues know they can trust you to do what you say, your professional life will be a lot easier. So, do what you say you will, and if you can’t do or agree to something, then say you can’t or agree to it. You’ll find that a little candor goes a long way.

4. Don’t fudge.

Credibility is everything. Some lawyers gain a reputation for being fudge-
ers. They oversate the facts in a case, misrepresent the holding in a case, or misstate the position of the opposing party. Some attorneys believe they are simply zealously representing their clients when they stretch or shade the truth. They are actually doing a disservice to their clients. Once this reputation sets in, it is difficult for a lawyer to regain credibility, and it ultimately diminishes the lawyer’s ability to be effective as an advocate. Credibility and reputation are earned from hard work, ethical practice and a believable and accurate representation. Credibility and reputation will get you a lot further during litigation and especially in a courtroom than any other aspect of your practice.

5. Disagree agreeably.

Lawyers don’t always agree, especially when they are on opposite sides of a case. But a disagreement between lawyers shouldn’t devolve into a declaration of war. Lawyers should keep in mind that disagreements are inherent in litigation and that each side has a job to do for his or her client. In doing that job it is inevitable that lawyers will disagree on the facts, legal or procedural issues, the credibility of a party or witness, or the value of a case. When the disagreement can’t be resolved, accept that the disagreement is a legitimate difference of opinion between two professionals and don’t take it as a personal affront.

6. Extend professional courtesies.

“Live by the sword, die by the sword.” It’s a maxim that applies to litigation and to litigators. The professional lawyer consents to reasonable requests for extensions of time, resets, rescheduling and other routine matters. If such a request won’t prejudice your client, there’s usually no legitimate reason not to agree to an opponent’s request. If you refuse a reasonable request and your opponent takes the matter to the judge and you can’t demonstrate prejudice to your client or unreasonable-ness by your opponent, think about how you’ll look to the judge. The time will come when you’ll need an extension, reset or rescheduling of a deadline or event. When that time comes, don’t expect your opponent to be reasonable toward you if you’ve refused similar requests from your opponent.

7. Be prepared.

The process of litigating a case and preparing it for trial can be more important than the trial itself. Being prepared is to know the rules of civil procedure and courtroom protocol and to follow those rules. This includes such things as conducting efficient and focused depositions; knowing cases cited in the briefs to address questions at oral argument; marking your exhibits and preparing an exhibit list before trial; exchanging your exhibits with the opposing counsel before trial; knowing what is and is not appropriate to mention in your opening statement; knowing how to offer an exhibit into evidence; carefully selecting and preparing jury instructions and understanding the hearsay rule. Professionalism begins with conducting all phases of litigation well and being prepared to enter the courtroom to conduct your business there in a competent manner.

8. Be on time!

Some lawyers have a hard time showing up at a deposition, a hearing or even the trial at the time it is scheduled to be conducted. Most lawyers work at showing up on time and if they can’t be there on time, they make an effort to notify their opponent or the court of the reason for their tardiness. But some lawyers have no problem with regularly being 10 or more minutes late for a scheduled appearance and never understand that showing up late for a scheduled proceeding or court appearance exhibits an attitude of disrespect for those who are being made to wait.

9. Be courteous and respectful.

A little courtesy and respect go a long way. You can’t belittle or mistreat courtroom staff or opposing counsel without affecting your standing with the judge or the trier of fact. Whether dealing with opposing counsel, a court reporter, courtroom staff or your own co-workers, showing respect toward everyone is often the most effective way to establish the basis for relationships that will serve you and your client well later on. Treating an opponent with respect and professional courtesy typically creates a cordial (if not friendly) dynamic that gives you credibility and influence with your opponent. Ultimately, these characteristics will translate into
better results for your client, regardless of whether the case settles or goes to trial.

10. Pay attention to your appearance.

Most lawyers are appropriately dressed and groomed when they participate in a case proceeding and come into the courtroom. Some forget where they are. Professional lawyers present themselves in such a way as to not detract from the presentation of their case.

11. Maintain an appropriate demeanor.

It is unprofessional to overreact in the courtroom to something you don't agree with—especially to a ruling by the judge on an objection. Some lawyers have the unfortunate habit of overreacting to testimony or to a ruling they don't agree with in the courtroom. This tends to undermine a lawyer's effectiveness and credibility in the courtroom. The advice of one judge is to "not take a judge's ruling or decision personally."

12. Object to the evidence in an appropriate manner.

Trial lawyers should be frugal with their objections. If it is not hurting your case, don't object. Seasoned trial lawyers object infrequently; rookies jump up and down constantly. It is unprofessional and ineffective to be registering constant objections. When an attorney makes an objection to the evidence, the attorney should stand and say "objection," and in a summary fashion state the basis for the objection, such as "relevance" or "heard." If the court wants the other attorney to respond, the court should so indicate. Lawyers can become sloppy and unprofessional with the objection process. Most judges do not appreciate "speaking objections," where the attorney ends up giving information to the jury that can't be obtained from a witness.

13. Write as if your reputation depended on it.

During a typical case your written communications will comprise the majority of your contact with the judge, your opponent and your client. In many cases, your written word is often the first contact you will have with each of them.

Don't write anything you wouldn't want to be known for among your peers or you wouldn't want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks.

Each time you compose a pleading, brief, letter or e-mail, you shape your professional reputation. With that in mind, don't write anything you wouldn't want to be known for among your peers or you wouldn't want read to a jury. Your written work product should be free of hyperbole, sarcasm, exaggeration, threats and personal attacks. Don't overstate the facts of the case, and be careful to accurately present relevant legal authority. Proofread your written work for grammar, spelling and typographical errors. Remember that each time you write you have the unique opportunity to build your professional reputation among judges, colleagues and clients, so make sure you're creating a reputation you can live with.

14. Avoid ex parte contacts with the court.

Any attempt to gain an advantage over your opponent through an ex parte contact with the court, or the court staff, will poison your reputation with a judge. This includes everything from direct contact with a judge on the merits of the case to supplying information to the court without adequate notice to opposing counsel. For example, it is not appropriate to place a motion or memorandum into the hands of the judge while mailing a copy of the document to opposing counsel, which may arrive at the lawyer's office two or more days later.

15. Don't take unfair advantage of opponents.

While it's part of the litigation process to capitalize on your opponent's mistakes or ineptitude, it's not necessary to deliberately embarrass, humiliate, intimidate or bully an inexperienced or less skilled opponent. Experienced lawyers should model appropriate professional behavior to less experienced lawyers. If we model rude and boorish behavior to less experienced lawyers, we will create the kind of lawyers that make practice more stressful and less enjoyable. Engaging in such inappropriate conduct might cause your opponent to work harder than he or she otherwise would, to the ultimate disadvantage of your client — and make you look foolish in the process.

16. Don't do something just because you can.

Justice Potter Stewart once said, "There is a big difference between what you have a right to do and what is right to do." No ethics rule prohibits lawyers from yelling at their opponents or engaging in intimidating behavior, and the ethics rules don't require that lawyers be cordial to one another. On the other hand, think about how you'd like to spend the next 40 years as a practicing lawyer. Do you want to build hostile and acrimonious relationships with lawyers against whom you might be practicing for decades? Probably not. It usually takes very little effort to be cordial to your opponent, and that small investment of goodwill will pay large dividends to you in the years to come.

17. Don't behave differently than you would in front of a judge.

The great bulk of litigation occurs outside the presence of a judge. The rules of professionalism aren't different just because the judge isn't present to watch your every move. If you wouldn't engage in the behavior in front of a judge, then don't do so when the judge isn't around.

18. Don't let your opponent control your behavior.

Some lawyers behave unnecessarily or harshly, or are consistently difficult precisely because they want you to lose your objectivity and shift your focus to "getting back" at them. They know that if they can get you to focus on them, then you'll spend less time working up your case. Once they get you thinking about how to get back at them and not about how to build your client's case, they've won. So
keep your balance. Your client deserves an objective, diligent advocate — not a hothead bent on vengeance against another lawyer.

19. Don’t take yourself too seriously.

A wise practitioner once said, “Take what you do seriously, but not yourself.” Keep in mind that the case is not about you. Many lawyers over-estimate the impact they have in the cases they try in the courtroom. The truth is that the trier of fact focuses on the message (i.e., the facts) and not the messenger unless, through inappropriate conduct, the messenger gives the trier of fact reason to focus on him or her.

The Hon. Daniel L. Harris is a circuit court judge in Jackson County. John V. Acosta is senior deputy general counsel for TriMet. Both are members of the Oregon Bench and Bar Commission on Professionalism.

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Judges and Lawyers in Partnership

The Practical Rationale for Professionalism

By the Hon. John V. Acosta and Richard J. Vangelisti

The role of lawyers and judges is to help people in our legal system simultaneously exercise their rights and reach the common good under a rule of law. Our mandate of professionalism emphasizes the roles that judges and lawyers alike have in maintaining the integrity of the judicial process, protecting the public and ensuring the future of our profession.

Why Professionalism?

Justice Sandra Day O’Connor explained: “Lawyers possess the keys to justice under a rule of law, the keys that open the courtroom door. Those keys are not held for lawyers’ own private purposes; they are held in trust for those who would seek justice, rich and poor alike.” Professionalism can be defined as the continuous affirmation in our day-to-day actions that we are striving for the higher ideal of justice for our clients and ultimately for the public good. When we step into the federal courthouse in Portland, lawyers are reminded of their solemn commitment to professionalism: “The First Duty of Society is Justice.” It’s difficult to convince clients, other lawyers and the court that you are fulfilling that duty if you are behaving as though you are ready to engage in a cage fight.

Professionalism and ethics are not synonymous. Ethics rules mandate minimum behavioral requirements, which if not met, usually result in some form of discipline from the state bar association, the regulatory body that oversees all lawyers. Professional-
ism embodies aspirational goals that lawyers, as practitioners of a distinguished profession, should strive to meet when dealing with each other, the court and clients. Conducting oneself professionally helps ensure public trust and confidence in the integrity of the justice system.

Professionalism also demonstrates the lawyer’s integrity and respect for the judicial process, which in turn engenders credibility. In our profession, credibility is the currency of the realm. No lawyer gets much accomplished for a client, whether in the courtroom or in the conference room, unless he or she has built a foundation of credibility upon which to conduct the client’s business. This enhanced credibility of the lawyer in the eyes of opposing counsel, the court and the jury inevitably helps a lawyer advocate towards an efficient and fair resolution of a dispute. Acting professionally helps to bridge focusing opposing counsel, the court or the jury on the issues for decision rather than on the conduct of the lawyers, avoiding a scenario that often leads to a written and oral record clouded with personal attacks and other boorish noise.

Professionalism and effective advocacy go hand-in-hand. Professionalism begets trust, and cooperation is sure to follow closely behind. This trust and cooperation translates to lower costs of litigation and a higher probability of an early and fair resolution.

Professionalism among lawyers and the court also makes the practice of law a more fulfilling life. A lawyer’s good reputation — the legacy that remains beyond one’s life — will be the better for having acted with professionalism.

Finally, professionalism is necessary to maintain the integrity of the judicial process and the public’s confidence in the judicial system. Professionalism increases public confidence in individual lawyers and judges as well as the judicial system. The public has a greater respect for the judicial process and the results of that process if the lawyers and judges exhibit professionalism while working through a dispute. If judges and lawyers do not act to ensure professionalism, through legislative action the public may seek changes to the judicial branch or alter the exclusive privilege of lawyers to represent clients before the courts or in legal matters.

Causes of Unprofessional Conduct

Unprofessional conduct is the result of a number of factors. First, unprofessional conduct may result from a belief that a lawyer is effective only if he or she acts like a “Rambo litigator,” “hired gun,” “junkyard dog” or “bulldog.” Some lawyers who labor under this belief are often compensating for a lack of experience, skill or confidence.

Second, client perceptions — that their lawyer must be obnoxious to achieve successful results or outcomes — are sometimes a factor in unprofessional behavior. Some clients are convinced that litigation should be conducted like armed combat against an enemy, and such clients may shop around until they find a lawyer or firm they perceive to have a “Rambo litigator” style. When we encounter prospective clients who subscribe to this philosophy, we should stop to consider whether we want to represent such clients. Often, they are the clients who criticize your judgment, find ways to dispute your fees and never seem to be happy with any result you obtain for them.

Third, the adversarial nature of the litigation process or a tense business transaction can be a factor. But while the legal process is adversarial it need not be acrimonious. We should strive to agree to disagree and not resort to personal attacks, condescending comments and threats of sanctions motions, whether orally, in briefs or in letters or e-mails, in an effort to get our way or to simply harass our opponent.

Fourth, the adversary system is inherently stressful. Practicing law is difficult enough without artificially ramping up the stress level. Be mindful that at any given time an opponent might be coping with stress, perhaps significant, because of workload, events in his or her personal life or other factors.

Fifth, the business of practicing law can be a factor — the bottom line of the law firm or law office environment. Billable hours, high case volumes, insufficient support staff, administrative chores, client expectations, marketing and other obligations and duties can result in a “piling on” feeling of despair. The sheer weight of these responsibilities can make it difficult for us to be civil to one another, and that’s when professionalism suffers.

Sixth, and finally, are size and technology. As the bar’s membership grows, there is less opportunity for its members to know each other. You’re less likely to be rude and harsh toward a lawyer you’ve known for some period of time and will deal with again, than you are toward a lawyer you’ve never met and likely won’t encounter again. Technology hampers collegiality because it allows us to insulate ourselves from direct, real-time contact with one another. Meetings and phone calls to discuss a new case, confer over a motion or discuss trial exhibits and jury instructions are more likely to foster professionalism between lawyers than sending e-mails, texting messages or faxing letters back and forth.

Costs of Unprofessional Conduct

For starters, the costs of unprofessional conduct include a diminished quality of professional and personal life. We aren’t hockey players. Do we want to spend eight, 10 or 12 hours a day engaging in the verbal and written equivalent of body-checking each other into the boards each time we interact with one another? We don’t, and common sense tells us why: we can’t behave badly after day after day, for weeks, months and years of practicing law without becoming that personality in all aspects of our lives. Ultimately, the pernicious effect on one’s family, friends and colleagues over the course of a 30- or 40-year career should be obvious.

Without professionalism lawyers are simply pieces in a game of survival of the fittest. In such a model, brute force dominates and what is right and just is often relegated to secondary importance or completely overlooked. In effect, lawyers devolve into mere agents of their respective clients’ interests without regard to the broader picture of public good.

Unprofessional conduct also distorts the judicial process and “Equal Justice Under Law,” increases financial, business and personal costs to parties; inflicts personal stress on clients, lawyers and judges; causes personal and professional relationships to deteriorate; erodes personal physical and mental health; damages or destroys your reputation among colleagues and the public at large; and diminishes your ability to attract desirable clients.

The Relationship Among the Rules and Professionalism

Oregon’s Rules of Professional Conduct (RPC or ethics) and
the various state and federal rules of procedure and evidence are mandatory rules. Professionalism, however, is a standard to which lawyers should aspire. Professionalism picks up where the ethics rules leave off. Professionalism means following the spirit of the rule, not just the letter of it, and the willingness to go beyond what is required to extend courtesies and accommodations to colleagues, including opponents, where doing so imposes no detriment on your client.

The Oregon State Bar’s current “Statement of Professionalism,” was adopted by the OSB House of Delegates and approved by the Oregon Supreme Court, effective Nov. 16, 2006. A “Statement of Professionalism” also has been adopted by the United States District Court for the District of Oregon. Other standards may apply in Oregon as well, as many professional organizations have adopted Professionalism goals. See, for example, the Multnomah Bar Association’s “Commitment to Professionalism,” adopted June 1, 2004. These documents may be found on the Oregon State Bar’s Professionalism web page, www.osbar.org/standards/professionalism.html.

Whether it’s a court or an organization that has adopted a statement of professionalism, the fact that it has embraced those ideals demonstrates the expectation that a standard of conduct higher than the floor created by the ethics rules applies. Simply put, a statement of professionalism sends a message that it is not enough for lawyers to comply only with the ethics rules or rules of procedure.

Moreover, as a self-regulating profession, lawyers have the primary responsibility of ensuring professionalism. While a wide range of options are available to a lawyer to effectively deal with the unprofessional conduct of another lawyer, instances exist when a lawyer must at some point present the issue to the court for resolution.

When to Bring Unprofessional Conduct to the Court’s Attention

Unprofessional conduct should be brought to the attention of the court only as a last resort when a party’s rights are prejudiced or there is a real threat of prejudice. Lawyers — the persons charged with resolving differences — are in the best position to resolve professionalism issues. A lawyer may take a number of steps to obviate the need for court intervention. If those efforts are unsuccessful or futile, then the matter should be presented to the court after the appropriate referral. Consider these three steps when confronting what you perceive to be a lack of civility.

First, before making a judgment about whether a lawyer has acted unprofessionally, determine the facts. A lawyer’s conduct is often caused by circumstances outside his or her control. For example, if a lawyer is not producing responsive documents in a timely manner, the delay may be caused by the actions of the client rather than the lawyer. Similarly, a delay in responding to requests for scheduling or referral may be caused by another professional commitment or even a personal issue. Effective communication can often reveal whether there is an issue of professionalism. A telephone call or e-mail to the lawyer, co-counsel or an assistant can often clear up the matter. The bottom line is to get your facts straight before operating on the assumption that a lawyer is acting unprofessionally. With a full picture of the facts, you can effectively respond.

Second, when faced with unprofessional conduct, the first strategy may be to ignore it. The conduct may not be worth acknowledging, and at times a decision to not respond to unprofessional conduct will send the signal to the offending lawyer that unprofessional conduct will be ineffective. Some lawyers, often those who are more experienced, use unprofessional conduct as a tool to throw their opponent off balance. The offending lawyer, however, may abandon the costly approach of unprofessionalism if it proves ineffective. Sometimes ignoring unprofessional behavior requires patience, even a lot of it, and it should never be ignored if there is a real threat of prejudice to the client. Mostly, however, demonstrating that the behavior won’t work and focusing on the merits of the case often is the best way to put an end to such tactics.

Third, after exercising judgment as to whether to respond to the unprofessional conduct, directly informing your opponent of the unprofessional conduct can be effective. Even those who act unprofessionally do not like to think of themselves as having acted in such a way. They might think of themselves as fighting hard or being zealous for their client. Reminding the other lawyer of basic principles of courtesy or fairness or referring to the applicable standards of conduct promulgated by the court, however, can cause the other lawyer to moderate or stop the behavior.

If informal efforts are not successful, an issue of unprofessional conduct should be presented to the court if the conduct is interfering with a party’s rights or the “just, speedy and inexpensive
determination" of an action. FRCP 1; ORCP 1 B. Unprofessional conduct between lawyers that is merely rude, bothersome or petty should not be brought to the attention of the court unless it begins to interfere with discovery or the case's overall progress. A good guideline is that unprofessionalism should be brought to the attention of the court either when an ethics or court rule is clearly implicated or when a history of sufficiently documented unprofessional conduct demonstrates a threat to the rights of a party.

Obviously, considerations of time and cost are at play, but these considerations must be weighed against the potential benefit of a favorable ruling and more generally addressing the unprofessional conduct.

How to Bring Unprofessional Conduct to the Attention of the Court

The nature of the conduct determines how the conduct should be brought to the court's attention. If the unprofessional conduct occurs during trial or hearing, the court usually will address it without the need for a lawyer to call attention to it by objection or request for a side bar. If the conduct occurs outside the presence of the court, a request for a pretrial conference may be appropriate to address the issue. If an issue arises during a deposition, judges often are available by telephone to immediately address the problem. Other instances will require a formal motion.

Before a motion can be filed, however, the lawyer must have a personal or telephone conference with opposing counsel on issues or disputes. Oregon's conferral rules, Local Rule 7.1 (federal) and UTCR 5.010 (state), require a "good faith" effort to confer.

These conferral rules require that the lawyers actually talk or explain in a certificate why conferral did not occur, and these rules are often strictly enforced.2

The conferral rules address the situation in which a lawyer may be obstructive or dilatory in the conferral process. If a lawyer refuses to confer, simply include that in the certification. A clear refusal to confer, however, does not happen frequently. The problems most often arise when a lawyer chooses not to provide sufficient information for a meaningful conferral. For example, some lawyers choose not investigate whether there may be responsive documents and simply "stand" on their objections. The failure of a lawyer to determine if requested documents actually exist can lead to the parties briefing and courts ruling on the discoverability of documents that do not exist. This scenario is costly to the parties and the court when it ends up ruling on hypotheticals.

Lack of Experience Can Play a Role

Often times, unprofessional conduct is the product of a lack of experience or a desire to compensate for inexperience. In some instances, inexperienced lawyers neither fully understand that they are expected to be professional, nor understand that a professional approach is the most effective, nor do they understand what is or is not professional. In yet other instances, an inexperienced lawyer may attempt to make up for lack of experience by engaging in short-sighted and obnoxious strategies to gain an advantage, however short-lived. Sometimes, inexperienced lawyers are told or "taught" that being subjected to sharp practices is just a right of passage — part of the hazing process. This "tradition" perpetuates unprofessionalism.
Responsible mentorship of younger lawyers is a key to instilling professionalism. Oregon law schools are answering the call to teach future lawyers that professionalism is expected and effective in law practice. The New Lawyers Division of the Oregon State Bar and various bar associations have mentorship programs. In addition to these formal programs, judges and lawyers at every opportunity should reach out to fellow lawyers — in words and deed — to spread the message of professionalism.

Conclusion

Professionalism is consistent with that shared value to do good that led us to law school. The citizens of Oregon and members of the bench and bar who each hold the privilege to serve the public expect and deserve professionalism in our judicial system. We must constantly renew our sense of commitment to our court system and the public good. The judges and lawyers of Oregon are in partnership to support one another to live the ideal of professionalism.

Whatever a lawyer may gain by unprofessional conduct is frequently short-lived. Unprofessional conduct is subject to the law of karma or that proverbial boomerang that returns to hit its thrower between the eyes. In our Oregon legal community, conduct unbecoming of our profession is noticed by other lawyers and eventually within the circle of judges. A lawyer can labor for years to build a good reputation, but a single act of unprofessionalism can cause that reputation to evaporate.

We should avoid engaging in unprofessional behavior even if the other side is doing so. We also should refrain in argument and written submissions from personal attacks or criticisms of opposing counsel. Model professional behavior when dealing with all others encountered in your daily practice, especially younger lawyers. These acts will reward the lawyer, the client and the public we serve.

The Hon. John V. Acosta is a magistrate judge of the U.S. District Court for the District of Oregon. Richard Vangelisti practices plaintiff’s personal injury law in Portland. The authors serve as members of the Oregon Bench and Bar Joint Commission on Professionalism.

Endnote

1 Speech, “Professionalism,” Associate Justice Sandra Day O’Connor, 78 Oregon Law Review 385, 390 (Summer 1999).
2 See, for example, Section 4(A)(3) of the Multnomah County Civil Motion Panel Statement of Consensus: “[The certificate] must either state that the lawyers actually talked or state facts showing good cause why they did not.”
Professionalism: A Judge's Perspective

By the Hon. John V. Acosta

Judges and lawyers are partners in ensuring professionalism. Each has a role to play in preventing and addressing unprofessional conduct that erodes the civility of practice and the quality of our professional lives. If judges and lawyers do not effectively respond to unprofessional conduct, or if they condone it by inaction, they effectively reward the actor to the detriment of the judicial process and the public's perception of our profession as a whole. Oregon lawyers and judges share a long and demonstrated commitment to ensuring that professionalism is always a foremost consideration. With all of this in mind, here is one judge's perspective on fulfilling the judicial role in addressing unprofessional conduct.

Court Authority to Address Issues of Professionalism

Yes. The court always may use its contempt power to address egregious behavior that occurs in its presence, but less severe behavior also can be — and is — the subject of court regulation. Best known are the obligations imposed on lawyers and parties under the civil rules' discovery provisions. Both the Federal Rules of Civil Procedure and the Oregon Rules of Civil Procedure permit the court to impose sanctions for violations of the rules and for disregarding court orders. But the rules also permit the court to impose sanctions for conduct that undermines the purpose of the discovery rules even if the conduct is not willful. For example, FRCP 37 is entitled "Failure to Make Disclosures or to Cooperate in Discovery: Sanctions," and subsection (a)(5)(A) of the rule makes clear that sanctions may be awarded without a finding that a party violated a court order or engaged in willful misconduct.

Imposition of sanctions under the rule turns on a reasonableness standard, a lower measure from the intentional misconduct standard that lawyers typically assume controls their discovery-related behavior. This standard has been applied in the District of Oregon. See, e.g., Trustees of Oregon-Washington Carpenters-Employers Trust Funds v. Van Zant Construction, Inc., 2008 WL 2381641, *3 (D. Or. June 3, 2008). Thus, although not willful misconduct, protracted procrastination in responding to discovery requests that forces the propounding party to file a motion to compel simply to get a response is sanctionable under Rule 37. See Bilyeu v. City of Portland, 2008 WL 4912048, *3-7 (D. Or. Nov. 10, 2008).

In addition, FRCP 83(a)(1) expressly authorizes district courts to "make and amend rules governing its practice," a source of authority that the District of Oregon has invoked to establish two rules that govern professional standards of conduct in the district. The first is LR 83-7, "Standards of Professional Conduct," providing that attorneys practicing in the District of Oregon must, among other things, be familiar and comply with the standards of professional conduct required of members of the Oregon State Bar and this court's Statement of Professionalism.

The second local rule is LR 83-8, "Cooperation Among Counsel," which prescribes certain behaviors between opposing lawyers and establishes the consequences for engaging in unprofessional behavior. Note that the rule authorizes the judge to impose sanctions against an attorney who unreasonably refuses to "accommodate the legitimate requests of opposing counsel." Here, a reasonableness standard is applied to conduct occurring outside the judge's presence.

Finally, professionalism also is embodied in mandatory conferral requirements adopted by both the U.S. District Court and the Oregon Circuit Courts. See LR 7-1(a)(1)(A), requiring the parties to certify that before filing a motion, they "made a good faith effort through personal or telephone conferences to resolve the dispute and have been unable to do so"; and Oregon Circuit Court Uniform Trial Court Rule 5.010, requiring lawyers to certify that they have conferred on motions as a precondition to their filing.

These rules convey the message that judges expect lawyers to talk and attempt to resolve disputes that could lead to motions, and they apply to virtually every motion. Failure to comply with these rules will incur risk of having the motion denied outright. Ultimately, conferral requirements force lawyers to meaningfully discuss a motion and resolve the issues that lead to the filing of motions. When that occurs, parties are spared unnecessary time and expense, the case moves forward more quickly, and the lawyers might establish a foundation for resolving other disagreements without court involvement.

When Should the Court Review an Issue of Professionalism?

Judges can review an issue of professionalism when a potentially unprofessional act occurs in the judge's presence or when the issue is brought to the court's attention.

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The extent of the court’s review will depend on the unique circumstances of each case. Keep in mind, however, that the court can on its own initiative inquire into conduct occurring outside the courtroom that appears to be unprofessional. For example, a constant flow of discovery or pretrial motions, especially when the motions are permeated with claims of unprofessional conduct, could result in the court ordering the attorneys to attend a hearing to explain their conduct. Judges do monitor their cases, and they will not look well upon conduct that clearly does not advance the merits of the case but instead could lead to unnecessary motions, delays in completing discovery, or unnecessarily prolonging the case. In federal court, a judge can shift to the parties the expense created by uncooperativeness by appointing a special master to preside over the parties’ discovery activities, see FRCP 53(a)(1) (C), and requiring the parties to bear cost of the special master. See FRCP 53(a)(3).

How Should the Court Respond to an Issue of Professionalism?

This depends on the circumstances of the unprofessional conduct. First, the easy situation is when the conduct occurs in the judge’s presence; the judge can often address it with an appropriate admonition. Remember that both state and federal courts in Oregon have established written expectations for professional behavior by lawyers, and the judge can give a pointed reminder of those expectations to the lawyer or lawyers. This could occur in the jury’s presence, and while judges might try to avoid admonishing an attorney in the jury’s presence, the attorney can always avoid such embarrassment by refraining from the behavior in the first place. Ultimately, the court must preserve the dignity of the court in the eyes of the jury and public in general, and doing that could require taking appropriate actions in front the jury or on the record.

Second, the court can address unprofessional content in lawyers’ written submissions, either in the court’s written decision or at hearing. Judges can remind counsel — on or off the record — that such language in a brief is neither helpful to the court nor professional.

Third, if a motion presents substantive violations of ethics, statutes or rules of procedure or evidence that also happen to be instances of unprofessional conduct, then the court can rely on those standards in imposing a commensurate sanction. See, for example, 28 U.S.C. § 1927 (sanctions for unreasonable or vexatious litigation conduct); FRCP 11(c) (sanctions); ORCP 17 D (same); FRCP 37 (expenses, sanctions, and expenses on failure to admit); ORCP 46 (same); UTRC 1.090(2) (sanctions for failure to comply with UTRC or SLR); UTRC 19 (contempt).

Fourth, if the judge anticipates issues of professionalism may arise in a case, there are always pretrial management procedures and rules for asserting greater control over the lawyers and their clients. See, for example, FRCP 16 (pretrial and scheduling conferences); UTRC 6.010 (conferences in civil proceedings); Multnomah County SLR 6.014 (pre-trial case management conferences in civil actions).

Why Is It a Challenge for Judges to Address Issues of Professionalism?

Most incidents of unprofessional conduct occur outside the presence of the judge. As an example, a discovery motion often involves accusations and counter-accusations, such that by the time it reaches the judge it’s usually impossible to determine who, if anyone, is at fault.

Also, a potential incident of unprofessional conduct often has a limited factual record from which a judge may make determinations and, if there is a factual record, it may be dense with detail. It’s difficult, sometimes impossible, and always time-consuming, for judges to try to determine who “started it.” Thus, keep in mind that if you file a discovery motion that involves such conduct as a component of the dispute, you may well be disappointed in the outcome. Simply put, time constraints often force judges to move past such allegations and focus on promptly resolving the discovery dispute so that the parties can get on with discovery and the case will continue to move forward.

Further, the claimed conduct may be a culmination of discrete actions rather than a distinct and overt incident, making particularly difficult the determination of whether there was any unprofessional conduct at all. Judges don’t live with a case the way lawyers do; they don’t regularly interact with the lawyers on all matters pertaining to the case, and thus, they don’t share the accusing lawyer’s sense of frustration or even anger over the relationship with opposing counsel. What might look like unprofessional conduct to the accusing lawyer with many months of personal experience might look different to the judge reading the motion.

Finally, keep in mind that the source of the unprofessional conduct may become unclear if the accusing lawyer responds in similarly unprofessional fashion. Before you file a motion that involves allegations of unprofessional conduct by the other lawyer, and especially if you are seeking sanctions, first make sure that the other lawyer will not be able to say the same of you in his or her response. If she can, then don’t be surprised when the judge denies your motion or admonishes both sides for unprofessional conduct.

The Hon. John V. Acosta is a magistrate judge of the U.S. District Court for the District of Oregon.
Enduring values

By Hon. Dan Harris
Senior Judge

I tried one of the most significant cases
of my career in 1991. It involved a
wrongful death action arising out of a
crash on the Siskiyou Pass. The stakes
were high. The competition between
attorneys was intense. It wasn't the ul-
timate verdict that made it significant for
me; it was the experience I had with the
other jurists. The judge and the three
other attorneys involved in this case all
graduated from law school in the 1940s
and 1950s. What I observed from this
experience gave me a better understand-
ing of what our profession was
like a generation ago and how it has
changed.

In this case I observed a judge and
lawyers who showed great respect for
each other. They were courteous at all
time to all involved in the process. They
were all well prepared and expected ev-
everyone else to be prepared. The lawyers
freely extended professional courtesies
and relied on verbal agreements with
each other through out the process. They
always kept their word. They played by
the rules. There was no fudging or corner
cutting. They maintained a steady and
professional demeanor and appearance —
even in the most intense situations —
and exercised great restraint and con-
trol when it came to what they said, how
they said it and what they objected to.

The lawyers regularly conferred when
issues would arise and only came to the
judge when they couldn't fashion a solu-
tion themselves.

Now I understand, more than 25
years ago, I was witnessing practices
and traditions that characterized our profes-
sion a generation ago, when the practice
of law was viewed more as an "esteemed
profession" and a "calling." We have
witnessed our profession become more
of a business and a career. I have observed
this change accelerate since I entered
the profession in the early 1980s, especial-
ly from my perspective on the bench where
I have had the opportunity to regularly
observe the performance of lawyers.

Trying to go back to reclaim our
profession's place in society, or recapture
some of the traditions of generations
past, is not realistic. We have to look
forward and work at preserving those
practices and values that have always
worked for lawyers: credibility, compe-
tence, restraint and loyalty.

Credibility

A lawyer's credibility is everything in
this profession. Credibility is earned from
hard work, ethical practice and a believ-
able and accurate advocacy. Some law-
ners, in the heat of competition, are
tempted to fudge with the facts or the
law. Some lawyers will insert provisions
into proposed judgments that go beyond
the court's directive. Some lawyers can-
not avoid the temptation to pass on in-
formation to a judge's staff that con-
stitutes an ex parte contact. All of these
practices undermine a lawyer's reputa-
tion. Once a reputation sets in for fudg-
ing, it is thereafter difficult to regain
credibility with attorneys and judges. As
stated by Justice John Paul Stevens: "An
advocate who does not command the
confidence of the judge bears a much
heavier burden of persuasion than one
who never misstates either the facts or
the law."

A lawyer's professional reputation is
the currency of our profession. Work
diligently at building it up and guard it
at all costs. Then spend it frugally and
wisely. And should you make a mistake
that might diminish your reputation, do
whatever you have to do to make
amends, including the simple act of of-
fering an apology.

Let your legal communications stand
on their own legal footing without resort-
in to expressions of opinion or over-
statement. Too often, attorneys use
useless words, like "outrageous" or "lu-
dicrous," to argue their point. This hurts
rather than helps their arguments and
takes away from the respect the court has
for the analysis. Keep it objective and to
the point.

Competence

The competent lawyer is first and
foremost prepared. The process of pre-
paring for trial is usually much more than the trial itself. Devoting the necessary time to preparation will not only improve your chances of success but, more importantly, will establish a credibility and reputation that will serve you well in the long run. An important part of preparation should include the practice of stipulating with opposing counsel on as many aspects of the trial as possible. Anticipate evidentiary issues and attempt to work out agreements in advance. In many cases you can stipulate in advance to most of the exhibits, to the order of witnesses, to the appropriate resolution of evidentiary issues and to the jury instructions.

Develop a reputation for knowing the rules of procedure and evidence, and the basic skills used in court. Too many lawyers “wing it” too often. This will undermine your effectiveness as an advocate. Know and practice the fundamental procedures followed in trial: from jury selection to opening statements, to offering exhibits into the record to effective cross examination to making the closing argument.

In the end, you want the judge to say in his or her mind: I know this person. This lawyer is always well prepared, anticipates and tries to resolve in advance issues at trial, has talked with opposing counsel about stipulations, tries an efficient and effective case, and doesn’t test the patience of the judge or jury.

Restraint
You can enhance your reputation and effectiveness as an advocate with the appropriate exercise of patience and restraint. Here are a few examples:

- Don’t do something just because you can.
  We all remember what Justice Potter Stewart once said: “Sometimes there is a big difference between what you have a right to do and what is right to do.” Before you decide to deny a good faith request for an extension or take advantage of opposing counsel for a missed deadline, consider how your actions will impact your reputation or future relationship with the other attorney. “Live by the sword, die by the sword,” is a maxim that applies to our profession. You will most certainly be in a position someday where you are counting on a fellow lawyer to show restraint by extending to you a professional courtesy.

- Don’t let your opponent control your behavior. We’ve all been there, in the heat of the contest, where we want to respond in kind to the way opposing counsel is characterizing you or our client. Don’t let your opponent take you away from your game plan. Your client deserves an objective, diligent advocate — not a hot head bent on getting even with the other lawyer.

- Learn to disagree, agreeably. Disagreements are inherent in our profession but they don’t have to devolve into a war of strong words, accusations and overstatements. Keep your discussion over disagreements cordial and objective — you will be a more effective advocate. Shakespeare reminded us of the more desirable practice in The Taming of the Shrew. Adversaries in law, he wrote, “strive mightily, but eat and drink as friends.”

Loyalty
We have an ethical duty of loyalty to represent clients with competence and diligence, while maintaining confidences and avoiding conflicts of interest. This duty should be taken very seriously. The duty to loyalty does not, however, require you to be a puppet to your client’s wishes. In the interest of preserving your credibility and reputation, you must insist at all time on being a counselor who balances a client’s interests with your professional goals. Too many lawyers will “perform” for their clients by saying or writing things that aren’t effective or credible. This may please a client in the short run but it almost always harms the client’s interests, and the attorney’s reputation, in the long run. Frankly, your reputation and credibility will rise or fall based on your ability to manage a client’s expectations and demands.

Our duty to loyalty also includes an obligation to advise clients of the most efficient way to resolve the dispute. This should include appraising clients of the availability of mediation and other methods for resolving issues outside the courtroom. Clients should be informed of the effect litigation will have on them and the benefits — financial and otherwise — that flow from resolving a dispute sooner rather than later. Most clients want a dispute resolved in a timely manner with minimal cost.

Our approach to the practice of law has rapidly transitioned from a time exemplified by Articus Finch into the 21st Century. Our profession is now very different in many ways, but fundamental values endure. They endure because employing these values will improve your effectiveness as an advocate while increasing the personal satisfaction you derive from your work.

1 The place of lawyers in American society has been recognized as holding a unique position of moral leadership since the founding of this Country. Alexis de Tocqueville in his famous study of American law and customs referred to lawyers at the Country’s natural aristocracy.

Dan Harris is a retired Jackson County Circuit Court judge and now fills in as a senior judge as needed around the state. He also serves as a mediator and arbitrator with Harris Mediation & Arbitration, PO Box 51444, Eugene, OR 97405. You can reach him at harrismediator@gmail.com or 541-324-1329.
Jan 20, 1993

Dear Bill,

When I walked into this office just now I felt the same sense of wonder and respect that I felt four years ago. I know you will feel that, too.

I wish you great happiness here. I never felt the loneliness some Presidents have described.

There will be very tough times, made even more difficult by criticism you may not think is fair. I'm not a very good one to give advice; but just don't let the critics discourage you or push you off course.

You will be our President when you read this note. I wish you well. I wish your family well.

Your success now is our Country's success. I am rooting hard for you.

Good luck -

[Signature]
CHAPTER 5

CIVIL MOTION PRACTICE

Xin Xu
Xin Xu Law
# Chapter 5

## Civil Motion Practice

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I. Introduction to Oregon State Court Civil Motions

There are dozens of different types of civil motions. This CLE focuses on the four most common motions you will likely come across in state court: ORCP 21 Motions, ORCP 23 Motion to Amend, Discovery Motions, and ORCP 47 Summary Judgment Motion.

A. Applicable Rules

i. Review and be familiar with Oregon Rules of Civil Procedure (ORCP), Uniform Trial Court Rules (UTCR), and Supplemental Local Rules (SLR) for the county of filing.

ii. Review UTCR 5.010 for when conferral is required prior to filing a motion, and the certificate of compliance.

- Conferral is required for motions under ORCP 21A(1)-(7), 23, and 36-46. UTCR 5.010. See Anderson v. State Farm Mutual Auto Ins. Co., 217 Or App 592, 595-96, 177 P3d 31 (2008) (court held defendant’s violation of conferral request in UTCR 5.010 compelled denial of its motion to dismiss; futility in conferral was no excuse).

- Certificate of compliance must state either that the parties conferred or contain facts showing good cause for not conferring.

iii. Be familiar with ORCP 10 for computing time periods.

iv. Make sure you pay the correct filing fee, if any, or risk the filing being rejected. The 2023 circuit court fee schedule is located at: https://www.courts.oregon.gov/Documents/2022_CircuitFeeSchedule_public_eff-2022-01-01.pdf

v. Review UTCR 5.100 for submission of proposed order on motions.

vi. Make sure your motion complies with UTCR 5.050 by stating whether oral argument is requested, estimated time for oral argument, and whether official court reporting services are requested. If you are requesting telecommunication, make sure you comply with UTCR 5.050(2).

B. Available Resources

i. Oregon State Bar Barbooks, e.g., Oregon Civil Pleading and Litigation (2020 ed.).

ii. Multnomah County:

- Multnomah County Attorney Reference Manual
The Attorney Reference Manual is updated regularly and provides an extremely valuable resource on practices and procedures in Multnomah County. It also provides sample motions and forms to be used in Multnomah County.


- The Civil Motion Panel Statement of Consensus Multnomah County judges have compiled an explanation of rulings on a variety of issues that arise in the civil cases that come before them. The statement of consensus is a good reference point for motions and responses under consideration.
  https://mbabar.org/assets/documents/multnomah%20county%20motion%20panel%20consensus%20statement%20august%202018.pdf

iii. Clackamas County:

- Clackamas Court Circuit Court Reference Manual. - The Reference Manual is similar to Multnomah County’s Attorney Reference manual and provides valuable resource on practices and procedures in Clackamas County Circuit Court.

iv. Court Clerks and Judicial Assistants:  If you cannot find the answer in the rules, the court clerks and judicial assistants (if your matter is assigned to a judge) are very helpful.

C. Practice Tips

i. Create a Motions bank for different types of motions.

- Ask others in your office or your mentors for samples of good motions, responses, and replies.

- Check OECI (state court) or Pacer (federal court) in your free time to add to your motions bank.

ii. Make sure you are relying on the most up-to-date rules and resources. There have been many recent changes to the rules, especially with e-Court.

iii. Just because you can file a motion does not mean you should. Some types of motions are particularly frowned upon by the court and should only be brought when absolutely necessary.
II. ORCP 21 Motions Against Pleadings

A. Motions to Dismiss – ORCP 21 A

i. Motions to dismiss are used by defendants to eliminate claims for relief or an entire action, or, by plaintiffs to eliminate affirmative defenses. ORCP 21 A specifies the following grounds for dismissal:

1. Lack of jurisdiction over the subject matter;
2. Lack of jurisdiction over the person;
3. There is another action pending between the same parties for the same cause;
4. Plaintiff does not have legal capacity to sue;
5. Insufficiency of summons or process, or insufficiency of service;
6. The party asserting the claim is not the real party in interest;
7. Failure to join a party under ORCP 29;
8. Failure to state ultimate facts sufficient to constitute a claim; and
9. The pleading shows that the action has not been commenced within the applicable statute of limitation.

ii. Unlike the other ORCP 21A motions, motions to dismiss brought under ORCP A(8)(Failure to state a claim) and A(9) (statute of limitations) are limited to the face of the complaint. In other words, these motions cannot be supported by matters outside the pleading, including affidavits, declarations, and other evidence. See Deep Photonics Corp. v. LaChapelle, 282 Or App 533, 548, 385 P2d 1126 (2016), rev den 361 Or 425 (2017); Kastle v. Salem Hospital, 284 Or App 342, 344, 392 P3d 374 (2017).

iii. Defenses Waived if Not Raised-Certain defenses are waived if not raised by motion before pleading, or in the first responsive pleading.

• ORCP 21 G(1) – Lack of jurisdiction over the person, insufficiency of summons or process, insufficiency of service, another action pending between the same parties on the same cause. These defenses are waived if not raised in the party’s first appearance.

• ORCP 21 G(2) – Plaintiff lacks capacity to sue, not real party in interest, and statute of limitations. These defenses are waived if it is neither made by motion nor included in a responsive pleading or, in limited circumstances, amendment thereof.

iv. Practice Tip: Consider whether the ORCP 21 A motion to dismiss will result in dismissal with or without prejudice if granted. If you want the court to dismiss the claim or action with prejudice, make sure you so state in your motion and order. If the order is silent as to whether the dismissal is with or without prejudice, then the dismissal shall be treated as without prejudice.
B. Other ORCP 21 Motions


ii. **ORCP 21 D Motion to Make More definite and certain:** Use ORCP 21 D to “require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense, or reply is not apparent.” *See Stewart v. Kids Incorporated of Dallas, Or.,* 245 Or App 267, 272, 286, 261 P3d 1272 (2011), rev dismissed, 353 Or 104 (2012) (affirmed dismissal where complaint failed to allege facts to show why defendants were on reasonable notice of unreasonable risk of harm).

iii. **ORCP 21 E Motion to Strike:** Use ORCP 21 E(1) to strike any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated. Use ORCP 21 E(2) to strike redundant matter from the complaint.

- A “sham” allegation appears false on the face of the pleading and may be stricken. *Rowlett v. Fagan*, 262 Or App 667, 682, 327 P3d 1 (2014), aff’d in part, rev’d in part, 358 Or 639 (2016); *Kashmir Corp. v. Nelson*, 37 Or App 887, 891, 588 P2d 133 (1978); *Warm Springs Forest Products Ind. v. EBI Co.*, 300 Or 617, 619 n 1, 716 P2d 740 (1986) (“Good in form but false in fact; * * * a pretense because it is not pleaded in good faith.”).

- A “frivolous” pleading under ORCP 21 B “is one which, although true in its allegations, is totally insufficient in substance.” *See Kashmir Corp. v. Nelson*, 37 Or App 887, 892, 588 P2d 133 (1978)

- An “irrelevant” pleading pertains to matters that “are not logically or legally germane to the substance of the parties’ dispute.” *Ross and Ross*, 240 Or App 435, 440-41, 246 P3d 1179 (2011). A pleading may be stricken as either frivolous or irrelevant if it is legally insufficient. *Id* at 440.
iv. Practice Tips

- Conferral is required for all ORCP 21 motions except for motions brought under ORCP 21 A(8)(failure to state a claim) and ORCP 21 A(9)(statute of limitations).

- If you are filing an ORCP 21 D motion to make more definite or certain or ORCP 21 E motion to strike, make sure you comply with UTCR 5.020(2).

III. ORCP 23 Motion to Amend and Relation Back

A. ORCP 23A Amendment
ORCP 23A provides that a “pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days after it is served”. Otherwise, a party may amend a pleading only with written consent of the adverse party or court approval. The court shall freely grant leave to amend “when justice so requires.”

B. ORCP 23 B Amendment
When issues not raised by the pleadings are nonetheless tried with the express or implied consent of the parties, the pleadings may be amended to conform to the proof. ORCP 23 B; see Agrons v. Strong, 250 Or App 641, 282 P3d 925(2012). If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to show prejudice.

C. ORCP 23 C Relation Back
When the need for amendment becomes apparent after the statute of limitations has run, consider the application of ORCP 23 C which provides:

Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, 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. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, such party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining any defense on the merits, 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 party brought in by amendment.
New allegations or claims: An amendment adding a new claim or defense against the same party or parties will relate back to the date of original filing when it arises “out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading.” ORCP 23 C; See Conciennie v. Asante, 273 Or App 331, 359 P3d 407 (2015) (permitting relation back where predicate facts, injury and damages are the same and defendant had adequate notice of claim).

New parties: An amendment adding or substituting a party will be allowed to relate back to the date of original filing when the party to be added received actual notice of the action within the statute of limitations and knew or should have known, but for the mistake, it would have been named as a party to the action. ORCP 23 C; McLain v Maletis Beverage, 200 Or App 374, 115 P3d 938 (2005); see also Smith v. American Legion Post 83, 188 Or App 139, 71 P3d 136, rev den, 336 Or 60 (2003). This means actual notice within the statutory period, not including any extension for service under ORS 12.020. McLain v. Maletis Beverage, 200 Or App 374, 377-81, 115 P3d 938 (2005) (Rule 23 C requires notice within the statutory period, not service); Richlick v. Relco Equipment, Inc., 120 Or App 81, 852 P2d 240, rev den, 317 Or 605 (1993) (court held the amendment did not relate back when party had no notice of the action within the period of limitations).

Practice Tip: A common issue arises when plaintiff realizes there was an error in naming the defendant and files an amended complaint to correct the error after the statute of limitations had expired. Whether the amendment constitutes a “change in party” and therefore requires the defendant to receive notice within the statute of limitations depends on if the error is a “misnomer” or “misidentification.” A misnomer occurs when there is an “error in stating what the Defendant is called.” Worthington v. Estate of Davis, 250 Or App 755, 760 (2012). A misidentification occurs when plaintiff makes “a mistake in choosing which person or entity to sue.” Id. at 760. A misnomer triggers just the first sentence of ORCP 23 C and does not trigger the notice requirement. On the other hand, a misidentification constitutes a change in party and triggers the additional notice requirements for relation back as imposed in the second part of ORCP 23 C. Id. at 759.

IV. Discovery Motions

A. Motions to Compel – ORCP 46
If the opposing party or a nonparty fails to respond to discovery requests or if the response is inadequate, the requesting party may file a motion to compel discovery pursuant to ORCP 46 A. The moving party must establish that the material sought is discoverable, e.g., that the material is not privileged or subject to an exception to the privilege claimed. Kahn v. Pony Express Courier Corp., 173 Or App 127, 133
The court may award reasonable expenses, including attorney fees, to the party that prevailed on bringing or opposing the motion. ORCP 46 A(4).

B. Discovery Sanctions- ORCP 46 B
The trial court may impose a variety of sanctions for a party’s failure to obey an order to permit or provide discovery. ORCP 46 B(1)-(3), C, D. Sanctions for the failure must be just, but may include striking pleadings, limiting proof at trial, and dismissal. ORCP 46 B(2), 46 D. See Burdette v. Miller, 243 Or App 423, 431-32, 259 P3d 976 (2011) (Court of Appeals held no abuse of discretion in striking defenses of defendant who failed repeatedly to appear for deposition or for sanction hearing). The party compelling compliance is also entitled to reasonable expenses, including attorney fees, unless the court finds that the opposing party’s failure to obey the order was substantially justified “or that other circumstances make an award of expenses unjust.” ORCP 46 D.

C. Motion for Protective Order-ORCP 36 C
A party opposing a request for discovery may (1) object to the discovery request or (2) move for a protective order under ORCP 36 C—an order “that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”

D. Practice Tip
The parties must confer before filing any motions under ORCP 36-46. These motions are disfavored by the court. The moving party should make every attempt to resolve the issues and document in writing all of the efforts to resolve the dispute before filing the motion.

V. Summary Judgment Motions

A. Summary Judgment Standard
A summary judgment motion is a dispositive motion designed to eliminate the opponent’s case or portions of the case without a trial. The motion is not designed to resolve factual disputes, but to determine whether there is any genuine issue of material fact to justify a trial. ORCP 47 C; Bonnett v. Division of State Lands, 151 Or App 143, 145-46 n 1, 949 P2d 735 (1997).

When the moving party does not have the burden of proof at trial, it may move for summary judgment without coming forward with evidence in support of its motion. Rather, the adverse party must produce admissible evidence on every issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. ORCP 47 C. Failure to do so entitles the moving party to summary judgment.

A plaintiff seeking to recover on a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment, may obtain summary judgment if it is established that “there is no genuine issue as to any material fact” necessary to prove a claim, that none of the affirmative defenses asserted by defendant raise a genuine issue of material fact, and that judgment should be entered in plaintiff’s favor under applicable law. ORCP 47 A; ORCP 47 C; see William C. Cornitius, Inc. v. Wheeler, 276 Or 747, 757, 556 P2d 666 (1976) (summary judgment was appropriate when, inter alia, “none of the affirmative defenses raised any triable issue”).

A defendant may obtain summary judgment on a showing that “there is no genuine issue as to any material fact” necessary for the plaintiff’s claim and that defendant is entitled to a judgment based on the applicable law, or when one or more affirmative defenses are established in the same manner. ORCP 47 B; ORCP 47 C; King v. Warner Pac. Coll., 296 Or App 155, 172, 437 P3d 1172 (2019).

B. Responding to Summary Judgment Motions
After the moving party has pointed out the lack of any genuine issue of material fact and that it is entitled to judgment as a matter of law, the adverse party must produce admissible evidence sufficient to meet a burden of production on any issue on which that party would bear the ultimate burden of persuasion at trial. ORCP 47 C.

C. Type of Evidence Allowed in Summary Judgment
Both the moving party and adverse party may only rely on admissible materials for purposes of summary judgment. See ORCP 47 D; Deberry v. Summers, 255 OR App 152, 166 n6 (2013). Affidavits, declarations, depositions, responses to requests for admissions are typical materials used in summary judgment proceedings.

An affidavit or declaration must be based on personal knowledge and must “set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein.” ORCP 47 D; Spectra Novae, Ltd. v. Waker Associates, Inc., 140 Or App 54, 58, 914 P2d 693 (1996). The declarant satisfies the requirement for personal knowledge when the affidavit is read as a whole, and an objectively reasonable person would understand that the statements are made from the affiant's

If evidence presented in support or oppose summary judgment is inadmissible, the other party should seek to strike the evidence. When evidentiary challenges are raised, the court will assess the admissibility of particular evidence. *See Perman v. CH. Murphy Clark-Ullman, Inc.*, 220 Or App 132, 138, 185 P3d 519 (2008) (analyzing admissibility of lay opinion under OEC 701).

**D. Motion to Strike**

A party must make evidentiary objections before the motion for summary judgment is decided. Otherwise, the evidence may be considered. *Aylett v. Universal Frozen Foods Co.*, 124 Or App 146, 154, 861 P2d 375 (1993).

Examples of objections include:

- **Hearsay** – Hearsay statements not falling within any exception to the hearsay rule are inadmissible and should not be considered.

- **Opinions** – “Opinions as to liability are legal conclusions and are not the proper subject of a witness’s testimony.” *Olson v. Coats*, 78 Or App 368, 717 P2d 176 (1986).

- **Legal conclusions** – An affidavit that merely states legal conclusions is not sufficient to create a question of fact. *Spectra Novae Ltd.*, 140 Or App 54, 59, 914 P2d 693 (1996).

- **Irrelevant averments** – Affidavit statements that are irrelevant should play no part in the court’s consideration.

**E. Expert Declarations**

Expert testimony may be required on specific claims, such as claims for medical or other professional negligence. *See e.g. Getchell v. Mansfield*, 260 Or 174, 179, 489 P2d 953 (1971) (expert testimony required to establish the standard of care in the community).

When a party opposing summary judgment is required to provide the opinion of an expert to establish a genuine issue of material fact, ORCP 47 E permits the party’s attorney to submit an affidavit or declaration “stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact[.].” ORCP 47 E is designed to protect the expert’s identity and opinions from disclosure before trial. *Stotler v. MTD Products, Inc.*, 149 Or App 405, 408, 943 P2d 220 (1997); *Moore v. Kaiser Permanente*, 91 Or App 262, 265, 754 P2d 615, rev den, 306 Or 661 (1988).
An ORCP 47 E affidavit or declaration must be made in good faith and be based on admissible facts or opinions of a qualified expert. *Two Two v. Fujitec Am., Inc.*, 355 Or 319, 328-29, 325 P3d 707 (2014) (if ORCP 47 E affidavit is filed in bad faith, offending party pays reasonable expenses incurred by other party as a result and may be subject to sanctions).

The submission of an ORCP 47 E affidavit or declaration does not automatically create an issue of fact. *VFS Financing, Inc., v. Shilo Management Corp.*, 277 Or App 698, 706, 372 P3d 582 (2016), *rev den* 360 Or 401 (2016). It will create an issue of fact only when the expert testimony is “‘required’ to establish a genuine issue of material fact” and not otherwise. *Id.*

**F. Considerations When Moving for Summary Judgment**

Motions for summary judgment can be time consuming and expensive. Additional considerations before filing include:

- The stage of discovery
- Factual records
- Strength of legal position and likelihood of success
- Educating opponent
- Targeting all or part of the case and impact on the balance
- Timing
CHAPTER 6

ESTATE PLANNING AND ADMINISTRATION; GUARDIANSHIPS AND CONSERVATORSHIPS

Melissa F. Busley
*Dunn Carney LLP*
Chapter 6

ESTATE PLANNING & ADMINISTRATION;
GUARDIANSHIPS & CONSERVATORSHIPS

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Circuit Court letter to the Personal Representatives of the Estate, September 2016

*Capacity Issues in Representing Clients, Oregon Estate Planning and Administration Section Newsletter, April 2010*
ESTATE PLANNING AND ADMINISTRATION; GUARDIANSHIPS AND CONSERVATORSHIPS

INTRODUCTION

The estate planning and administration area, including guardianships and conservatorships, is an ideal choice for a practitioner who wants to be challenged intellectually, have minimal contentious negotiations, and experience a sense of service to and interpersonal connection with individuals and families.

I. WHAT IS THE SUBSTANCE OF THIS PRACTICE AREA?

This practice area includes establishing wills and trusts, powers of attorney and advance health care directives for clients, as well as guardianships and conservatorships for individuals who are unable to manage their health care, residential decisions and/or financial matters due to incapacity. Some practitioners in this area also handle litigation matters and negotiate prenuptial agreements; some even cross into pure domestic relations work, handling divorces and custody disputes. Others blend a general business practice with their estate planning practice, which works nicely when your firm clientele includes many small business owners. Estate planning attorneys regularly become generalists, to some extent, because our clients face so many issues – as employees, as business owners, as real property owners, as landlords, as parents, and so on. If you want to practice in this area and do not want to be a generalist, you will quickly learn that having a referral list for trusted attorneys who provide services that are complementary to your own gives you a value-added service you can provide to your clients.

A. Components of an estate planning practice. Estate planning is more of a process than a product. Executing a will, for example, is just one piece of the overall practice. We provide a service that generally results in the delivery of a product (i.e., estate planning documents). Working with clients through the estate planning process often involves a great deal of client education so that the client has an understanding of how the pieces of his or her plan fit together to accomplish the client’s goals.

1. Developing a client base. This, of course, occurs over time. The practice of law is truly a relationship-driven practice. As you develop relationships in your community (with other lawyers in your firm and elsewhere, with clients, with CPAs and financial planners, with brokers, fellow alumni, and so forth) and those relationships are based on mutual respect, the work will come through referrals. In this practice area, knowing your referral sources and taking care of them is a very important key to success. It is even more important to simply do good work: be responsive, respectful and pragmatic in all of your dealings. The most valuable referrals you receive will be those that begin with the following declaration: “I received your name from my friend who worked with you on her estate planning. She highly recommended you.”

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1 Thank you to my colleague Heather L. Guthrie for graciously allowing me to use her presentation materials.
2. **Establishing the relationship.**

   a. *Engagement letter.*

   b. *Joint representation memo.* Representing both spouses in their estate planning is common, but informed consent of the jointly represented clients is a must.

   c. *First meeting(s).* The most important thing to do in an initial meeting with clients is to listen. Ask open-ended questions and let the clients tell you their stories. By doing this, and listening actively, you accomplish two things: first, you immediately establish who the important people in the room are – this process is all about the *client.* Second, you learn what is important to the clients so that you can identify issues and build a plan that is right for the client. You cannot create an estate plan that accomplishes your client’s goals until you understand what those goals are. Do not be surprised when, even in multi-million dollar estates, the clients are more interested in talking about their children’s special challenges with money – or other issues – than about reducing their overall estate tax risk. Your job is to deal with both of these issues, but pay attention to what matters most to the client. By letting your client know that you are listening to what they have to say and problem-solving around their concerns, you establish credibility and trust. Often, I have just one initial meeting with clients and in the next meeting we sign documents, working through drafts by telephone and email. However, some clients have such complicated plans that it can take more than a year and many meetings before a plan is finalized.

   d. *Educate the client.* Estate planning is not something clients do every day and many clients will only have a basic understanding (at best) of what it entails. A common assumption is that the passage of all of one’s assets will be governed at death by the individual’s will. However there are lots of different methods for passing property at death that can affect the overall distribution of assets following one’s death. Be prepared to educate your clients about these different methods and how they will be used to carry out the overall distribution scheme desired by the client.

3. **Evaluating challenges and strategies for the particular client.** The unique challenges of a client may be myriad. While listening to your client’s story, you will need to identify issues which may include any or many of the following:

   a. Blended family issues. Second marriages and children from previous marriages or relationships. Support obligations to previous family.
b. Special needs of children or grandchildren.
c. Anticipated inheritances.
d. Non-traditional families. Unmarried and/or LGBTQ clients.
e. Taxable gift issues. Did the clients make a substantial gift recently to help a child buy a first home? Did they give beyond the gift tax exemption threshold?
f. Real estate in multiple states or out of the country.
g. Children in troubled marriages.
h. Charitable inclinations and goals.
i. Beloved pets. To whom should these pets go? Is a pet trust wanted or warranted?
j. Care for parents of the clients. Many children support their parents in some way. How should that care continue after your client dies if the parents survive?
k. Health issues of the client.
l. Rental property issues. If the clients own rental property, do they own it outright or in an entity? Who manages the property? Do they have adequate insurance? Is entity ownership advisable?
m. Death tax exposure at the state and/or federal level.
n. Selecting fiduciaries. Who will care for minor children? Who will manage money for the beneficiaries? Who will make health-care decisions for the client in the event of incapacity?
o. Business ownership and transition planning.

4. **Drafting documents.** Every estate plan should consist of the following documents at a minimum:

a. **Will.** This document establishes how property (that is owned by the client in his/her own name and which will not pass by beneficiary designation) will pass at the client’s death. The document must be carefully drafted and properly executed (two witnesses).

b. **Power of Attorney.** Preparing for incapacity with a power of attorney is a critical part of this process. If the client has a stroke, for example, the Will does nothing – it speaks only at death – and absent a power of attorney (or trust – see below), it may be necessary to commence conservatorship proceedings to manage assets.

c. **Advance Directive.** An important part of this process is to discuss with your clients whether or not they would like to execute an advance directive giving decision-making authority related to end-of-life circumstances and giving advance direction about the client’s wishes regarding tube feeding and life support.
Many estate plans will also include trusts of one sort or another, whether revocable living trusts (as a privacy and probate-avoidance vehicle, and an alternate mechanism for managing assets in the event of incapacity) or irrevocable trusts as part of a death-tax minimization plan (such as an Irrevocable Life Insurance Trust or ILIT). Also, it is not uncommon for a client’s Will to create trusts (testamentary trust) that are funded after death. These testamentary trusts don’t typically avoid the need for probate, but can be helpful in dealing with different client concerns (such as minor beneficiaries).

5. **Executing documents and following-up on executing the plan.**

a. **Execution and Safe-keeping of Documents.** Overseeing the proper execution of and providing guidance about safe-keeping of estate planning documents is also part of the process.

b. **Beneficiary designations.** Providing the client with beneficiary designations that are tailored to dovetail with the client’s plan and advising the client about updating their beneficiary designations are essential. This is becoming an increasingly important piece of estate planning as many clients have much of their wealth in retirement plans that pass based on beneficiary designations.

c. **“Funding” a Trust.** If the client has entered into a trust agreement, transferring assets to the trust – so-called “funding” of the trust – is essential. You should provide instructions to the client that explain exactly what needs to be done: how should the new accounts be titled? How can they change title to their cars? What about time-share interests? Specific instructions for each type of asset should be provided. Prepare deeds where appropriate. Advise clients to obtain lender consents, where applicable. Provide alternative recommendations for POD designations. Explain. Note: funding a trust does not occur until after a client’s death, if you only have testamentary trusts.

6. **Staying in touch with the client.** The key to staying in touch with clients is maintaining a good database of client information that allows you to search for, for example, all clients with tax-planning documents so that when a change in the tax laws occurs, you are able to readily sort through your clients to determine who should receive a letter from you regarding the change and any updates that the client should consider. Many clients will execute their plan and you will not hear from them again for years. Other clients have plans of such complexity that the process involves several phases (establishing the basic plan; enhancing that plan with irrevocable trust(s) and the like) and demands regular maintenance. Some clients will become friends with whom you have regular contact.
B. Administration. Administering trusts and estates is all about putting the plan into action after death.

1. Probating a Will. The process of probating a Will involves the following basic steps:

   a. Preparing a petition asking the court to admit the Will to probate and appoint the person designated in that Will as personal representative.
   b. Sending notice of the probate to heirs and devisees.
   c. Publishing notice of the probate and appointment to commence the period during which creditors may bring claims against the decedent's estate. Giving notices to known creditors.
   d. Preparing and filing an inventory of assets that are probate assets (assets not passing by beneficiary designation or by survivorship).
   e. Preparing and filing an affidavit of compliance with respect to certain duties of the personal representative.
   f. Reporting to the court all acts of the personal representative, including accounting for all income and expenditures, and asking the court to approve distribution of assets.
   g. Confirming the filing of fiduciary income tax returns (with the taxing authorities, not the court, but an important step nevertheless).
   h. Distributing assets in accordance with the Will, obtaining and filing receipts for distributions, discharging the personal representative and closing the estate.

If the decedent died without a Will, the same basic steps are followed except that: (1) assets pass to the decedent's heirs by the laws of intestacy; (2) the statute establishes an order of preference for individuals who may serve as personal representative; and (3) bonding of the personal representative may be required. Probate can take anywhere from 6 months to several years, depending on a myriad of complicating factors. Every estate is different, and the foregoing is intended as a general outline to give you a sense of the basics. Probate is a cooperative process between attorney and client; paralegals can be invaluable in this process to track deadlines, draft documents and coordinate with the client while keeping fees as low as possible.

2. Administering a Trust. Trust administration includes many of the same basic steps as probating a Will (e.g., determining who the beneficiaries are, determining what the assets are and taking control of them, filing necessary tax returns (income and estate), reporting to the beneficiaries, and so forth), but without court oversight. Instead of working from the Will and the statutes, trust administration is controlled by the terms of the trust agreement itself; it is fundamentally a matter of contract. If a trust agreement calls for outright distribution, trust administration can be quite brief. If it calls for assets to continue in trust, it may continue for many
years. You should become familiar with the provisions of the Oregon Uniform Trust Code in order to comply with reporting requirements that are imposed by statute, some of which can be waived by the terms of the trust agreement but some of which cannot. See ORS Chapter 130.

3. **Estate Tax Returns.** Estate tax returns can be required whether you are administering a probate estate or doing a post-mortem trust administration. Whether they are required depends on the fair market value of the decedent’s assets on the date of death rather than on the estate planning vehicle used. Some CPAs will prepare these returns; however, in most cases the attorney is better positioned to prepare them because so much of how assets are valued and reported for estate tax purposes is driven by an estate plan developed by the attorney.

4. **Administering Based on Estate Planning Documents Prepared by Another Attorney.** Keep in mind that not every administration will be an administration of documents you prepared; quite often, you will never have seen the documents before. Your job is to figure out what was intended based on the words of the document. Keep this in mind when you are drafting, too. Someone else may be administering your documents twenty years from now, so *draft clearly and carefully*.

C. **Guardianships and Conservatorships.**

1. **Guardianships.** Establishing a guardianship is necessary when an individual is unable to make health-care or residential decisions for him/herself. Typically, the need arises when an elderly person with some mental disability becomes combative and unwilling to go along with a caregiver’s plan. Guardianships may also be necessary in the case of a minor whose natural parent is deceased or otherwise unable to care for the child. Note the following standard that must be met in order to establish a guardianship: “A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person. A guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence of the protected person and may be ordered only to the extent necessitated by the person’s actual mental and physical limitations.” ORS 125.300. See ORS 127.505-660 regarding Advance Directives for health care. See ORS 127.700-737 regarding Declarations for Mental Health Treatment.

2. **Conservatorships.** Establishing a conservatorship is necessary when an individual is unable to make financial decisions in his/her own best interests. Typically, the need arises when an elderly person begins mismanaging money or in the event of a stroke or similarly debilitating condition that limits the person’s ability to handle his or her own financial affairs. A conservatorship may also be necessary in the case of a minor who is entitled to receive funds but as a matter of law is deemed to not have capacity to manage those funds. Note the following standard that
must be met in order to establish a conservatorship: “Upon the filing of a petition seeking the appointment of a conservator, the court may appoint a conservator and make other appropriate protective orders if the court finds by clear and convincing evidence that the respondent is a minor or financially incapable, and that the respondent has money or property that requires management or protection.” ORS 125.400. See ORS 125.005(3) for definition of financially incapable.

3. **Generally.** The tests relating to and the process of establishing guardianships and conservatorships are set forth in ORS Chapter 125. Often, a debilitating condition makes it necessary to establish both a guardianship and a conservatorship at the same time, though the need for a conservatorship can generally be avoided if the individual has an adequate Power of Attorney in place. Guardianship and conservatorship practice is generally a fairly small part of most estate planning and administration practices because in many cases, if a plan is in place that includes incapacity planning – as any such plan should – a guardianship or conservatorship can often be avoided. With respect to conservatorships for minors, there are mechanisms for avoiding a conservatorship altogether in certain circumstances, such as where the dollar amount is relatively small or where the conservatorship is thought to be needed solely to settle a claim. See ORS 126.700 and ORS 126.725.

D. **Resources.** The following are some helpful resources for this practice area:

1. **Administering Oregon Estates.** Oregon Bar Association Continuing Legal Education publication, updated periodically.
2. **Administering Trusts in Oregon.** Oregon Bar Association Continuing Legal Education publication, updated periodically.
3. **Elder Law.** Oregon Bar Association Continuing Legal Education publication, updated periodically.
4. **Guardianships, Conservatorships and Transfers to Minors.** Oregon Bar Association Continuing Legal Education publication.
5. **Oregon Revised Statutes chapters 111 through 130.**
7. **The list-serv of the Estate Planning and Administration section of the Oregon State Bar, as well as periodic publications by this group, which in many cases are available on-line.**
8. **OSB site generally for form letters, conflicts waivers, etc.**

II. **WHAT IS AN AVERAGE DAY LIKE IN THIS PRACTICE AREA?**
III. WHAT ARE THE PROS AND CONS OF THIS PRACTICE AREA?

A. **Pace of practice – the prospect of balance.** One of the reasons I have chosen to practice in this area is that for the most part I can control the pace. Whereas the pace of many practice areas is purely client driven (such as in the business transaction environment), the estate planning area is usually a fairly calm and controlled process that allows me to maintain some balance between my personal and professional life. Exceptions include client illness and client travel plans, among other things. On the administration side of practice, there are statutory deadlines that drive much of the practice.

B. **Litigation – knowing your limits.** Fortunately, I practice in a firm where I have litigators who are available to handle contentious matters that are headed for court. However, many estate planning and administration attorneys handle litigation as part of their practice.

C. **Profitability – the small matter challenge.** Keeping the estate planning and administration balance in your practice is important because while the estate planning side often consists of small matters that generate minimal fees relative to the administrative tasks involved (opening the file, running conflicts, overseeing or doing the work in a cost-effective fashion), the administration side generally involves much more time and generates more significant fees. This is a business reality that practitioners deal with in different ways, but doing both sides of the practice – planning and administration – also makes you a better resource for your clients and helps you develop a better skill set because you know how the plan you drafted works out in practice.

D. **Working independently.** Many who practice in this area work very independently. If you are conscientious and detail-oriented, this can be a plus – no one is looking over your shoulder. On the other hand, not having a second set of eyes reviewing your work and not having a second brain to help you think through difficult concepts means you must be meticulous in your drafting and in your communications with your client.

E. **Personality characteristics of a good estate planning and administration practitioner.** The following is a list of personality characteristics that are important to have in order to succeed and enjoy practicing in this area:

   1. A good listener
   2. Compassionate
   3. Detail-oriented
   4. Practical
   5. Patient
   6. Must enjoy working with elderly people
IV. CONCLUSION

Practicing in this area can be tremendously rewarding, both personally and professionally, but it is not for everyone. If you crave the challenge of the courtroom or if you thrive on the adrenaline of fast-paced transactional work, working solely in this practice area is probably not for you. On the other hand, if you are looking for a practice that offers a sense of service to individuals, a richness of intellectual challenge, and a relatively controlled pace, you should consider pursuing the estate planning and administration area.
Overview

- Estate planning
- Probate and trust administration
- Guardianships and conservatorships
Client Education

- You need to learn about the client:
  - Who are they and their family?
  - What are their assets?
  - Any "special" challenges?

- You need to educate the client:
  - Different ways for assets to pass
  - Different tools for different tasks
  - A good estate plan is tailored to the client

Evaluating Challenges and Strategies: Issue Spotting

- Family issues
- Asset issues
- Tax issues
- Other issues
Evaluating Challenges and Strategies: Issue Spotting

• Family issues may include:
  o Blended family situation
  o Special needs of children or grandchildren
  o Non-traditional families
  o Children in troubled marriages
  o Care for parents of the clients

• Asset issues may include:
  o Anticipated inheritances
  o Real estate in multiple states or out of the country
  o Rental property issues
  o Business ownership and transition planning
  o Retirement plans, annuities and life insurance
Evaluating Challenges and Strategies: Issue Spotting

• Tax issues may include:
  o Taxable gift issues
  o Death tax exposure at the state and/or federal level
    • What states may be able to tax
    • Oregon exemption is $1,000,000
    • Federal exemption in 2022 is $12,060,000
    • Federal estate tax portability
    • Basis consistency reporting
    • Marital deduction elections and portability require timely filing

• Other issues may include:
  o Charitable inclinations and goals
  o Beloved pets
  o Health issues of the client
  o Selecting fiduciaries
Drafting Documents: The Essentials

- Will
- Power of attorney
- Advance directive for health care decisions

Executing Documents and Follow-Up

- Execution ceremony and document safekeeping
- Beneficiary designations – this can be critical
- “Funding” trusts
- Staying in touch
Post-Mortem Administration

- Wills – probate
- Trusts – post-mortem trust administration
- Estate tax returns
- Survivorship and beneficiary designations
- Administering based on documents prepared by other attorneys

Probate Administration

1. Determine if testate or intestate
2. If bond is required, check if nominated PR is bondable
3. Prepare petition and other initial documents
   - Determine probate assets and estimated value
   - Determine interested persons
   - Notices for interested persons and publication should be ready once court appoints PR
4. Give your PR client a roadmap
Trust Administration

- Governed by Oregon Uniform Trust Code (Chapter 130), as modified by the Trust Agreement
- Review trustee, distribution and survivorship provisions
- Review asset ownership -- confirm assets are held by trust (or whether probate is required)
- Notices to beneficiaries

Other Administration

- Estate tax evaluation
- Work through beneficiary designations
- Consider disclaimers
Guardianships and Conservatorships

- What they are
  - Guardianship: Decisions about the person
  - Conservatorship: Decisions about the person's stuff

- How to avoid them
  - Powers of attorney
  - Trusts
  - Advance directives

Guardianships and Conservatorships

- Process and follow-up
  - Petition and appointment
  - Annual reporting
The Realities of Estate Planning

“In this world nothing can be said to be certain, except death and taxes.”

Benjamin Franklin, 1789

Developing a client base
  - Relationship, relationship, relationship

Establishing the client relationship
  - Your first meeting(s)

Evaluating challenges and strategies for the particular client
The Pros and Cons of this Practice Area

- Pace of practice and prospect of balance/control
- Litigation
- Profitability
  - The small matter challenge
- Working independently
  - Details, details, details
- Who is happy doing this kind of work?

Questions?

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CHAPTER 6

ESTATE PLANNING & ADMINISTRATION;
GUARDIANSHIPS & CONSERVATORSHIPS

Resources

*Duties of a Conservator*, Professional Liability Fund

Circuit Court letter to the Personal Representatives of the Estate, September 2016

*Capacity Issues in Representing Clients*, Oregon Estate Planning and Administration Section Newsletter, April 2010
CONSERVATORSHIP DUTIES

This document summarizes your duties as a conservator for a minor or a financially incapable person. You must exercise scrupulous good faith in managing the protected person’s affairs. Everything you do must be for the benefit of that protected person and to protect his or her economic interests. Oregon law imposes significant financial penalties for financial or physical abuse of a protected person and on the failure to report such abuses. If you have any questions about specific rights or duties involved in the conservatorship, please ask an attorney. The following list describes some of your important duties as conservator:

1. You must take possession of all the property of substantial value of the protected person, although you may permit the protected person to retain possession and control of property and funds for living requirements, depending on the needs and capacities of the protected person.
2. You must take possession of any rents, income, or profits that accrue from the property of the protected person, whether they accrue before or after your appointment as conservator. You cannot sell a protected person’s home without obtaining prior court approval.
3. You also must take possession of the proceeds of any sale, mortgage, lease, or other disposition of the protected person’s property.
4. If real property of the protected person is located in a county other than the county of appointment, you must file a certified copy of the inventory or a real property abstract in the county or counties where that real property is located.
5. Within 90 days of your appointment as conservator, you must file with the court an inventory of all property of the protected person that has come into your possession or knowledge. If you subsequently acquire possession or knowledge of any additional property that is not included in that inventory, you must file a supplemental inventory within 30 days after receiving possession or knowledge of the property.
6. You must pay the valid debts of the protected person that are chargeable against the conservatorship estate. Debts which you believe are suspect or fraudulent can be denied. You should consult an attorney to assist with the denial process.
7. You must make prudent investments with the conservatorship assets. In most cases, this will require the advice of a professional.
8. When managing the conservatorship assets, you must take into consideration any known estate plan of the protected person, including any will of the protected person, trusts, or joint-ownership or payable on death arrangements. Obtain prior court approval before making any changes which would impact the protected person’s estate plan, including changing beneficiaries on insurance or annuities or surrendering policies for cash.
9. You must evaluate the need to obtain insurance on conservatorship assets and obtain such insurance if advisable.
10. You must pay, contest, or settle claims submitted against the conservatorship estate. (You are also authorized to prosecute valid claims of the protected person and deny payment of invalid claims.)
11. You must prepare and submit necessary state and federal income tax returns on behalf of the protected person, using an individual tax return as opposed to a fiduciary tax return. Also note there is a nine-month deadline for the OR-706.
12. You may set up a separate conservatorship checking, savings and investment account to hold unrestricted assets. Set up restricted accounts to hold assets restricted by Order of the Court. Depending on the county in which the conservatorship is filed, you may be required to have the checks returned to you by the bank and to submit those canceled checks or electronic vouchers to the court with your periodic accountings.
13. You must carefully account for all money or property received and all expenditures and disbursements made in regard to the conservatorship estate. You may not withdraw any money from restricted accounts without prior court approval/Court Order.

PLF Practice Aid Updated 12/2021
14. You must prepare and file with the court written accountings each year within 60 days of the anniversary of your appointment as required by law, including an annual accounting (which must be filed within 60 days after each anniversary of your appointment). In addition, you must file an accounting within 60 days after (a) the protected person dies, (b) a minor protected person reaches age 18, or (c) an adult protected person becomes able to manage his or her financial resources. You must also file a final accounting within 30 days after your removal, your resignation, or the termination of your authority.

15. With each accounting filed with the court, you must submit a list of receipts and disbursements, including check numbers, in chronological order, as well as statements from depositories showing current balances. Some counties may require you to file the original canceled checks or electronic vouchers.

16. You must serve copies of the accountings with notice of time to file objections on certain persons, including the protected person (if he or she is 14 years of age or older), the protected person’s spouse, the parents of a protected person under age 14, any guardian appointed for the protected person or personal representative of the estate, and other persons either requesting notice through the court or directed to be notified by the court. See ORS 125.060(3).

17. You must obtain court approval before payment can be made to you as conservator for services rendered to the protected person, or to a lawyer who is the lawyer for you as conservator. Any other attorneys employed by you as conservator should also have their fees approved before payment from a protected person’s funds.

18. When a minor for whom a conservatorship was established reaches the age of 18, or when the court is satisfied that the protected person is no longer financially incapable, you may pay all claims and expenses of administration as approved in a final accounting filed with the court, and distribute all remaining funds and properties to the former minor or protected person as soon as possible.

19. You must not enter into any transaction in which there is a potential conflict of interest. Any sale or encumbrance of conservatorship assets to a conservator, the spouse, agent or business partner of the conservator is voidable, unless first approved by the court.

20. You must obtain court authority to resign as conservator and must file a final accounting with the court, even if the protected person dies.

21. Upon the death of the protected person, you must deliver to the court any will of the deceased that has come into your possession, inform the personal representative or a beneficiary named in the will that you have done so, and preserve the conservatorship estate for delivery to the personal representative of the deceased protected person, claiming successor, trustee or other person entitled to the assets. You must file a final accounting of conservatorship assets.

I have provided this list of duties to the conservator.

________________________________ _________________
Attorney for Conservator Date

I have read these duties and understand that I must fulfill these duties as conservator.

________________________________ _________________
Conservator Date
IMPORTANT NOTICES

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
1021 SW Fourth Avenue Portland Oregon 97204
Probate Department 503-988-3022 Opt.4

2016

Re: In the Matter of: [Decedent Name]
Case No. [Case No.]

Dear [Personal Representative Name(s)],

The Court has appointed you Personal Representatives of this estate. You are now officers of and responsible to the Court for the proper administration of the estate’s assets. Court rules require that you have an attorney. Please seek your attorney’s advice on all matters concerning the estate, but pay special attention to the following rules:

1. If your case was filed on or after February 2, 2015, you must complete Non-Professional Fiduciary Education and Training within 60 days. You must schedule your training within 15 days of appointment. Included with this letter is additional information regarding this requirement as well as directions for scheduling your class.

2. Immediately take possession of all of the decedent’s assets now belonging to the estate. Within 60 days of your appointment you must file an inventory with the Court listing your estimated values of all of the estate’s assets as of the date of decedent’s death.

3. Keep the money and property of the estate separate from your own assets and from any other person’s assets. Do not commingle or mix assets of the estate in your personal bank or brokerage accounts. Do not mix any estate money with your own or anyone else’s.

4. Do not lend funds of the estate to anyone without first obtaining permission from the Court by Court Order. Never borrow money from the estate for yourself.

5. Make estate checks payable to the provider of goods or services, not to “cash” or yourself. Keep estate funds in accounts for which the financial institution provides you a written record showing the date, payee and amount for each disbursement from the account. The record may be an original canceled check, a copy of the canceled check showing it has cleared the bank, or information printed in a regular statement from the financial institution. Keep accurate records of all receipts of funds. Every receipt and disbursement must be separately itemized. Avoid cash transactions.

6. Do not pay any bill of the estate without determining that you have the authority to do so. Use estate funds, not your own funds, to pay estate expenses whenever possible. If you have paid estate expenses, such as funeral expenses, from your own funds, and if you have a receipt or other proof of the payment, you may reimburse yourself from estate funds. Keep all payment proofs for filing with the Court. If the decedent owed a debt to you, you must have a written order from the Court before you pay that debt.

7. Do not give any estate property to any heirs or other persons without the prior written approval of the Court.

8. You must be able to file an accounting of all receipts and expenditures in the estate. It must also show assets on hand at the beginning and end of the accounting period. Written proof of payment and the first and final statements for each bank or other account in the estate must be filed with the accounting. If you are unable to file a final accounting within a year plus 60 days of your appointment, you must file an annual accounting at that time.

Your compliance with these requirements and your prompt attention to any notices from the Court will simplify your task and will be appreciated by the Court. The Court cannot offer legal advice, so please consult your attorney if you have any questions. Thank you for your cooperation.

Cc: [Personal Representative’s Attorney]
MANDATED TRAINING for NEW NON-PROFESSIONAL TRUSTEES and PERSONAL REPRESENTATIVES
Effective February 2, 2015

Effective February 2, 2015, all non-professional trustees and personal representatives appointed by the Multnomah County Circuit Court must, within 15 days of their appointment date, register for an Oregon fiduciary education class. Non-professional fiduciaries should select a session keeping in mind that they must complete Oregon fiduciary education within 60 days of their appointment date.

Oregon fiduciary education classes are one hour classes about the responsibilities of Trustees and Personal Representatives. There are separate classes for trustees and personal representatives. The class will orient non-professional fiduciaries to decision-making, laws, working with the court and attorneys; and give practical tips about successfully managing the issues that are common for non-professional fiduciaries.

Currently, the mandated content is delivered by the non-profit Guardian Partners. This class is held at least once a month. Please contact Guardian Partners for the scheduled time and place. For people who live more than 2 hours from Portland or for whom it is impossible to attend, remote learning opportunities may be available. You can request more information on this option when you register.

The fee for the class is $100 per trustee or personal representative. To see the class schedule, register, and pay go to guardian-partners.org. If you do not have internet access, please call Guardian Partners at (971) 409-1358.
Capacity Issues in Representing Clients

By Mark M. Williams, Gaydos Churnside & Balthrop

Introduction

Pornography and legal capacity have two things in common: (1) they are difficult terms to define, and (2) we tend to rely on the standard of “we know it when we see it” in making case-by-case determinations, as Justice Potter Stewart famously framed the issue of defining pornography in Jacobellis v. Ohio, 378 US 184, 197 (1964).

To establish an attorney-client relationship with an adult, a client’s legal competency to make and articulate decisions is a threshold question. The attorney should understand the standards for the capacity required to perform legal acts and what steps can be taken to maximize a client’s decision-making ability. An understanding of the legal requirements for capacity is crucial for an attorney to effectively represent clients who may have diminished capacity. Finally, the ethical obligations of the attorney vary widely with the ability of the client to evaluate the attorney’s advice and give the attorney direction.

Estate planning lawyers are routinely called upon to determine the capacity of clients. Do they have the ability to articulate their wishes? Are they able to enter into a contract of employment? Do they need a surrogate decision-maker? What fiduciary standard will be applied in making decisions for the client? What standard applies to the particular legal question at hand? How is legal capacity determined?

Few of us have formal training in capacity assessment, but we have some excellent guides available to us. The Oregon State Bar has published The Ethical Oregon Lawyer with an entire chapter (18) entitled “Representing Clients with Diminished Capacity and Disability” by Michael Levelle. It provides a summary of a “sliding scale” of capacity appropriate to different situations. The American Bar Association in conjunction with the American Psychological Association (ABA/APA) has also published Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers. Both of these publications are available online at no charge to Oregon attorneys.

The ABA/APA publication includes a helpful chapter, “Capacity Worksheet for Lawyers,” which includes observational signs from cognitive functioning (memory, language, calculation skills, disorientation) and emotional functioning (distress, liability) to behavioral functioning (delusions, hallucinations, hygiene). Then we are asked to record mitigating factors and consider the varying standard of legal capacity. The form is a useful tool in assisting a lawyer with marshalling the information that supports a conclusion regarding capacity. It is not a mental status exam, which is the province of highly trained professionals, and it is not a substitute for the diagnosis or opinion of medical or psycho-social professionals.

Consider three different, but typical, scenarios from my practice: (1) estate planning for a client with bickering devisees; (2) filing a guardianship/conservatorship petition against
an alleged incapacitated person; and (3) filing a guardianship/conservatorship petition against a client whose capacity has deteriorated since my initial representation and legal services.

Estate Planning for a Client with Bickering Devisors

Early in my career I had a terminally ill woman referred to me for estate planning by her son. It turned out that the son was alcoholic and dependent fiscally and psychologically on his mother. It also turned out that he had a sister who was fiercely independent and highly suspicious of anything her mother did to benefit her brother. Mother wanted me to prepare a will for her. We established at the outset that mother was my only client, but her son brought her to the initial appointment and it was apparent that her estate plan was to be skewed to his substantial benefit. Mother’s terminal illness had her on hospice care, and there were significant issues about her mental health. Did mother have the capacity to enter into a retainer agreement with me? Was she being unduly influenced by her son to articulate the choices she made in defining her estate plan? Did she have testamentary capacity to sign the documents I prepared for her? All of these questions require answers.

After meeting with her, I felt confident that she had the capacity to engage me and direct me, but what was that confidence based upon? I met with her several times, and she had a lively personality, she was oriented to time and place, she understood the gravity of her health conditions, she knew that her time on this Earth was limited, she was able to articulate reasons for her decisions about who should be in charge of her affairs and how her assets should be divided, and she was consistent in her analysis and determinations. Over the course of the relationship I came to be acquainted with her personality and her biases. I also got to meet both the son and the daughter and had various interactions with them, which were consonant with her descriptions of them. She certainly knew the natural objects of her bounty and was familiar with the nature and extent of her assets, so I determined that I was willing to sign her will as a witness to her testamentary capacity.

But I am a lawyer, and I also had concerns about the impending will contest that seemed likely to follow, so I wanted to have some back-up. I called in a gero-psychiatric specialist to administer a formal mental status exam and had my client release those test results to me for future use in defending her capacity. I also had the specialist sign as the second witness to attest to her capacity. No will contest was ever filed.

Was this necessary, prudent, or even advisable under the circumstances? Soon after going through this process, I heard noted will contest attorney Jim Cartwright speak at a CLE program and ask the rhetorical question: If you sought a professional evaluation for this client, but did not do it for every client, isn’t that evidence that you doubted your client’s capacity? It was a statement that struck me dumb. Since most clients would not begin to consider the added cost and inconvenience of a mental status test, requiring every client to get one is infeasible. I have relied on my own determination of testamentary capacity ever since, relying on my ever-increasing years of experience to buttress my ability to make that determination. I consider a number of factors from my observation of the
client’s cognitive, emotional, and behavioral functioning, but in the final analysis, it comes back to the pornography standard: I know it when I see it.

**Filing a Petition for Guardianship/Conservatorship Against an Incapacitated Person**

I think of guardianship and conservatorship as solutions to assist someone with medical and financial decision-making. Of course, there are limits. ORS Chapter 125 provides that the court may only impose this solution if it is the least restrictive alternative available to accomplish the purpose of keeping a person or his or her money safe from his or her own inability to make appropriate decisions. How do lawyers get sufficient information to make this determination and get a court to sign a limited judgment appointing another person to serve as a decision-maker?

Remember that reasonable investigation is required. When a client suggests a need for a guardianship for another person, the attorney for the petitioner must establish that (1) the need exists (and the court will likely recognize that need), and (2) the proposed guardian is appropriate for the role. This is usually done based on information provided by the petitioner and without contact with the proposed protected person. The attorney is required to make a reasonable investigation before filing a petition and must believe the petition is well founded in law and fact. ORCP 17; *Whitaker v. Bank of Newport*, 101 Or App 327, 333, 795 P2d 1170 (1990), aff’d, 313 Or 450 (1992).

The need exists when the proposed protected person is “incapacitated,” that is, suffering from an impairment that affects the person’s ability to receive and evaluate information or to communicate decisions to such an extent that the person presently lacks the capacity to meet the essential requirement for physical health or safety. “Meeting the essential requirements for physical health or safety means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.” ORS 125.005(5).

ORS 125.400 provides that “upon the filing of a petition seeking the appointment of a conservator, the court may appoint a conservator and make other appropriate protective orders if the court finds by clear and convincing evidence that the respondent is a minor or financially incapable, and that the respondent has money or property that requires management or protection.” “Financially incapable” means a condition in which a person is unable to manage his or her financial resources effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance. ORS 125.005(3). These requirements bootstrap from one to the other to the logical and legal conclusion of the need for appointment of a conservator.

To get an order from the court, it is simplest if medical evidence is offered. A letter from the treating or primary care physician of the proposed protected person stating that there is a medical condition warranting the imposition of the guardianship or conservatorship...
may be obtained under some circumstances but not in others. A particular diagnosis, for example, that the person has Alzheimer’s disease, is not sufficient. See Schaefer v. Schaefer, 183 Or App 513 (2002). The impairment must be shown. See In the Matter of Baxter, 128 Or App 91 (1994) (holding that double amputee status did not equal financial incapacity). Important information may be provided by social workers, caregivers, and other persons with the ability to observe the functioning of the proposed protected person. Depending on the credentials of these individuals (RN, LCSW, MSW, PhD), their evidence may be sufficient to support a petition. Sometimes the lawyer may need to rely solely on the observations of friends and neighbors. In such a case, an opportunity to observe and the length and nature of the relationship are important factors to describe in the petition.

The lawyer must always consider lesser measures than a full-blown guardianship/conservatorship to achieve the purpose of protection. See ORS 125.150(7)(c). Intervention and support from a local area agency on aging may be adequate to meet the needs of the proposed protected person. A power of attorney, an advance directive for health care, and a living trust may exist or be creatable. The lawyer should make certain these avenues have been explored. If they have, they may provide additional evidence to support the petition.

**Filing a Petition for Guardianship/Conservatorship Against an Incapacitated Client**

What happens when a person who apparently needs a guardian or conservator is your own client whose capacity has deteriorated over time since your last contact? Oregon Rule of Professional Conduct 1.14 provides some guidance, exhorting the maintenance of a “normal client-lawyer relationship” “as far as reasonably possible” when the client is incapacitated and the taking of reasonable action to protect the client as deemed necessary by the attorney.

There is no Oregon case law interpreting the current ethical rule. The Oregon State Bar has given us Formal Ethics Opinion 2005-41, which does little more than recite the above rule when asked what duties a lawyer has when a current/former client begins to demonstrate a lack of capacity that is damaging. The American Bar Association has given us ABA Formal Ethics Opinion 96-404. The ABA analysis is this: Attorneys should not bring an action against a client to seek the initial appointment of a fiduciary in a protective proceeding, but may do so if the determination that it is necessary and reasonable has been made by the attorney. And once a court has made a determination that the client is incapacitated, the lawyer may represent the fiduciary appointed by the court to protect the client.

A lawyer may refer the matter to another appropriate party and continue to represent the client in the ensuing protective proceeding. The altruistic view of this posture is that it allows the attorney to ensure that the proceeding is fair and the client has every opportunity to avoid the imposition of authority against him or her, but it allows the attorney with a long-term relationship with the client to remain in the role of advisor and protector of the client, while advocating for the long-time judgments of the client.
Continuing to represent a client deemed by the attorney to be incapacitated raises its own issues. How does the attorney take direction from the incapacitated client? What position does the attorney take if the client changes long-held views regarding estate disposition, fiduciary preferences, or other matters expressed when the client’s capacity was not in question?

**Conclusion**

Incapacity can be devastating to a client. Recognizing incapacity may be as simple as knowing it when you see it, but making the appropriate determination of how to proceed as an attorney once the incapacity is recognized requires a sophisticated analysis of the psycho-social, legal, and ethical components of appropriate representation of a client.

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CHAPTER 7

FAMILY LAW

Amanda C. Thorpe
Cauble and Whittington LLP
# Chapter 7

## Domestic Relations

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In preparing the materials for the course, I have chosen to emphasize the practical skills that I wish I had known early in practice as well as the ways in which Domestic Relations differs from other forms of civil litigation. At the end of the materials you will find a list of supplemental materials that are useful to draw on for the rules and regulations, forms, and substantive legal issues.

**Domestic Relations is distinct in practice from other areas of Civil Litigation:**

- Often you have a designated family court in which the matters are heard.
- Mandatory discovery statutes
- Mandatory mediation in custody matters
- Frequently used emergency and temporary remedies, including automatic statutory protections
- Less “winner take all” than other areas of law
- The cases are a “zero-sum game”- you are dividing what the parties already have- not adding to it, you are dividing time with children, which you cannot add to.
- More frequent client contact and troubleshooting often due to the frequent and ongoing contact between the parties
- Statutory priority of matters and expedited time frames in certain proceedings
- Opportunities to offer “unbundled services”
- Opportunity to help someone transition into a new stage in life
- Rewarding opportunities to have a positive impact on families and for children

**PRACTICAL GUIDE TO DOMESTIC RELATIONS PRACTICE**

I. **SCREENING POTENTIAL CLIENTS**

A. Who screens? Staff. Be wary of taking calls that may result in information being exchanged that creates a conflict you are not documenting in your conflicts system. There is no “quick question.” The best staff to field incoming calls will be firm, organized and kind.

B. Inquire as to: conflicts, practice area, venue/jurisdiction, time frame (deadline to respond, hearing dates and/or trial dates).

C. Disclose: consultation fee, procedure, and request they bring information/documents.
D. Practical considerations: time investment, ethics, calendaring (name, phone number, email address, issue), reminders.
E. Look out for warning signs. If you are working with experienced staff, trust them in the screening process.

II. INITIAL CONSULTATION
A. Formalities: Intake sheet, payment, conflict check, third parties.
B. Read the room: A potential client making small talk needs to be eased into the conversation. Take the time to engage with the potential client briefly to make the client comfortable before broaching the subject of the meeting. If a potential client appears eager to discuss issues, by leading with questions or talking about looking forward to the appointment, be responsive by moving right to the issues.
C. Balance the story telling with the time at hand: It is important for the potential client to tell his story, to feel heard by you. Potential clients will have different areas of emphasis, different points of origin, different details that they will want you to know. You can always politely ask for them to clarify or elaborate, or you can politely redirect. Allow the potential client to speak in a narrative format (not question and answer) if that is more comfortable and conversational. Issue spot during the narrative and then ask your questions to get the details you will need to answer questions. After the narrative, ask if the potential client has specific questions. Often the potential client is looking for a general assessment, but will sometimes have specific areas or issues. However, be mindful of the time. You may need to redirect and move on to the specific questions.
D. Feel free to ask the potential client if he/she is looking to hire an attorney or if he/she is just looking for information. This is often apparent from the conversation, but it can help you shape the information you give. Do not be discouraged when people only want information. Even these consultations provide indispensable advice to people who really need it and helps grow your professional reputation.
E. SET EXPECTATIONS: You will never have a better chance to tell a client “no” than the initial consultation. Set reasonable expectations of the process, expenses, time, and outcome of the proceeding.
F. Don’t over extend yourself. If you do not know the answer to an issue, look it up. If you can’t reasonably look it up in the time available, then consult a colleague or look the issue up after the appointment. It is okay to not have a complete analysis of the matter during the consultation. However, regularly committing to additional work can be difficult to manage.
G. It’s okay to decline representation. It may take some time to develop a comfort level with the emotionally charged and sometimes uncomfortable nature of domestic relations matters. While I would urge you not to be too quick to judge a potential client, you should also trust your instincts. You are not doing the client a good service by taking on a case that makes you uncomfortable or taking on a client with whom you will not have a good working relationship.
H. Discuss fees: present the client with a written fee agreement, set a retainer, be clear about the steps to retain you.
J. Send a non-engagement letter to everyone unless you were retained on the spot. Even a potential client who plans to come back should get a letter stating that you are not taking further action until the retainer (if any) is paid and the fee agreement is signed and returned.

III. STARTING THE CASE
A. Retainer and fee agreement: Make sure you have a signed fee agreement, the retainer, and provide the client a copy of the fee agreement.
B. Deadlines: Deadline to respond, hearings, trial, response to request for production should be calendared.
C. Documents: Ask for copies of any documents served upon the client and also pull documents from ecourt. (Don’t overlook possible RFPs served with initial pleadings.)
D. Calendar a deadline to draft initial documents, consider scheduling a signing to increase your accountability to your client; if responding send an ORCP 69 letter.
E. Allot sufficient time for the client to review drafts before client signs. Remind the client to review for accuracy (not just rubber stamp).
F. Advise the client prior to filing of any orders that will go into place at the time of filing, such as the mutual asset restraining order.
G. Consider any temporary motions that may be appropriate: temporary protective order of restraint, motion for temporary support, motion for exclusive use, motion for suit money.
H. Calendar out deadlines from the date of filing- even for those tasks that do not have a hard deadline. Service? Deadline for opposing party to respond? Send RFP? File USD?
I. Send an introductory letter to the client. Advise the client of common issues, such as preferred communication, ways to reduce expenses, timeline, and what the client can expect. Remind the client of anything that is required of the client, such as coparenting education class and mediation.
J. Review the SLRs for the county in which you are litigating. Many counties procedure on motion practice and deadlines varies significantly. Review SLR Chapter 5 for Civil Cases and Chapter 8 for Domestic Relations proceedings.

IV. DISCOVERY
A. ORS 107.089 includes mandatory discovery provisions, but rarely are these relied upon. Typically parties represented by counsel will exchange requests for production with a fairly standard set of roughly 25 requests in dissolution cases.
B. Consider creating a template of requests for standard cases including custody cases and modifications.
C. Be mindful of ORCP 36 scope of discovery and ORCP 43 format when drafting requests and responding.
D. Review any requests you receive for appropriate objections.
E. Send the request for production you receive to your client with a detailed letter explaining how to produce documents to you. Most clients are open to doing the legwork if it reduces their legal fees. Encourage clients to produce documents to you with copies in lieu of originals if possible, and organized by response number. Require clients to indicate whether documents exist (whether provided or not), do not exist, and/ or who has the documents if the client does not. Be sure the client knows that if he can get the documents from the third party he is required to do so (bank statements, credit card statements, paystubs.) Advise the client NOT to write notes to you on the documents. Discovery, while routine to you, is not routine to the client and can feel burdensome, intrusive, and scary. A little explanation goes a long way. Set a deadline for the client to produce documents to you (sufficiently in advance of the deadline to respond).
F. Provide discovery to others the way you would want it provided to you: organized. Consider utilizing electronic copies as both your means of delivery and means of storage.
G. Review the documents most carefully for records that are privileged or otherwise not required to be produced. Look for handwritten notes. The notes may be standard (“paid on 5/25”) OR may be a note to you (“I paid her car payment”). Notes to you are privileged and should be redacted.
H. Consider other means of discovery: request for admissions, subpoenas to third parties, depositions.

V. EXPERTS
A. If experts may be needed in the case, discuss the possibility with your client early including the financial and time constraints.
B. Common experts will include custody and parenting time evaluators, real estate appraisers, business appraisers, forensic accountants, and personal property appraisers. Familiarize yourself with the rates and services available so you can spot appropriate cases and provided needed estimates.
C. If you want to retain an expert, communicate with the expert about fees, documents needed and time needed to complete the services.
D. Seek a court order or stipulation as may be appropriate.
E. Consider the issue of privilege when hiring experts.

VI. SETTLEMENT
A. Most cases will settle without trial. Providing an honest assessment of strengths and weaknesses and potential outcomes throughout the case will aid in resolution.
B. Your assessment of the financial issues will be advanced by securing a USD and other documentation from your client early in the case.
C. Consider keeping a running asset spreadsheet as the case develops including a notation of the date and source of any figures used on your asset spreadsheet. It will allow you to assess the financial considerations as the case develops and consolidate information into an easy reference point.

D. Be mindful of the level of communication your client needs. Most discussions of the terms of settlement should be made by phone, by video conference, or in person. They are huge decisions for the client and require a significant exchange of information.

E. Encourage clients to be mindful of additional considerations including time, stress, conflict, and the opportunity for more creative solutions than if the case proceeds to trial.

F. Remind clients that parties are more likely to comply with a court order that is stipulated than one determined by the court alone.

G. Encourage clients to follow the 3-3-3 rule: how will you feel about this in 3 days? 3 months? 3 years?

H. When drafting an offer, be thorough and be sure to include whether or not attorney fees will be included. Review the pleadings and communications to be sure you are not missing any issues.

I. When drafting an offer, consider your audience (pro se, counsel, personality) and draft accordingly.

J. If an agreement is reached just before trial (which often happens) put it on the record if a written stipulation cannot be prepare and signed before the trial date.

VII. TRIAL AND HEARINGS:

A. Work with opposing counsel/ opposing party to narrow the issues and articulate those remaining issues and any stipulations clearly for the bench.

B. Schedule a hearing prep appointment with the client sufficiently in advance that you can spot any holes in the documents you will present and in time to line up additional witnesses as necessary.

C. Subpoena your witnesses even if they have agreed to appear voluntarily.

D. Screen your witnesses carefully. Ask the questions you want to know as well as the ones you anticipate the other party will inquire. Sometimes a witness cuts both ways. Also assess whether the witness is capable of giving answers to difficult questions at trial. Often your witnesses will be, or at one time were, close to both parties. Make sure they are prepared to give the testimony even when confronted with the other party in court.

E. Be mindful of deadline to submit trial documents and other required forms.

F. Calendar important deadlines backwards from trial to allot yourself enough time.

G. Organize and clearly mark your exhibits and review them with your client in advance.
VIII. PREPARING THE JUDGMENT
A. Promptly and carefully draft the judgment. Carefully review the terms of settlement or the court’s decision to be sure that you have included all of the issues.
B. Allow sufficient time for your client to review the judgment for accuracy.
C. Be mindful to include the proper information on real property and vehicles if you intend for the judgment to be self-executing.
D. Draft in language that is clear and precise.
E. Double check that you have attached all exhibits and in the proper order.
F. Include all language required by statute (such as required child support language.)
G. Be open to request for revision when the revisions are for clarity and still consistent with the court’s order or stipulation.

IX. CONCLUDING THE REPRESENTATION
A. Provide client with a copy of the entered judgment along with a letter of explanation of any additional steps the client needs to take such as hiring an attorney to complete a QDRO or establishing a collection with Division of Child Support.
B. Withdraw from the case.
C. Send a closing letter.

ADDITIONAL RESOURCES
PLF Practice Aids and Forms: https://osbplf.org/practice-management/forms.html

Oregon State Bar BarBooks Family Law (2021 ed.):

Oregon Judicial Department Forms: https://www.courts.oregon.gov/forms/Pages/default.aspx

DOJ Division of Child Support Tools for Professionals (child support calculator, rules, etc.):
https://www.doj.state.or.us/child-support/for-professionals/tools-for-professionals/

Oregon Judicial Department UTCRs, SLRs, and forms:
https://www.courts.oregon.gov/programs/utcr/Pages/default.aspx#:%3A:text=Supplementary%20Local%20Court%20Rules%20%28SLR%29%20The%20SLR%20are, Oregon%20Rules%20of%20Civil%20Procedure%2C%20and%20state%20law.

Oregon Revised Statutes (see especially chapters 25, 33, 107, and 109):
https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx

I strongly recommend the OSB CLE Course: Handling Domestic Relations Cases as a primer on Domestic Relations and an excellent resource of forms and how tos.
https://ebiz.osbar.org/ebusiness/ProductCatalog/Product.aspx?ID=1702
LEARNING THE ROPES
DOMESTIC RELATIONS

A HORSE OF A DIFFERENT COLOR

Family law differs from many other forms of civil litigation:
- Highly emotionally charged and sensitive topics
- Statutory priority and expedited timeframes
- Mandatory discovery
- Mandatory mediation
- Quick motion practice
- High client contact and trouble shooting
- “Zero-sum game”
- Unbundled services
Typical Day of a Domestic Relations Attorney

- Review daily calendar of appointments, schedule and deadlines
- Check and respond to emails regarding developments in cases
- Meet with potential clients on new matters (route file to staff)
- Check and respond to emails regarding developments in cases
- Review and revise drafts of initial pleadings or motion practice
- Check and respond to emails
- Follow up with clients on status of drafts, offers, and other correspondence
- Confer with client about an offer, hearing prep or trial prep
- Check and respond to emails
- Draft Judgment or review judgment following decision or settlement/or prepare documents for upcoming trial/hearing
- Follow up with staff regarding to do list, calendar and client contact

Hand Holding

“Hand Holding”

Yes, Domestic Relations sometimes gets a reputation for being a field requiring extensive “hand holding”. However, it is really just a matter of communication and follow up. With a skilled staff, the client is able to communicate well with the office and stay informed, reducing the client’s anxiety. Developing a good working relationship with the client, including setting appropriate boundaries, makes the case manageable and mutually beneficial. You do not want to be out of the loop and neither do they.
SCREENING

Your time is precious. Protect it with effective screening and intake processes. Proper procedure save your time and head off ethical issues. If there is an issue, don’t set an appointment. Doing so only wastes the time of the potential client and risks delaying or harming their proceedings.

CONSULTATIONS

• Sit in on consults with other attorneys to observe different styles.

• Be prepared, organized and professional.

• It is an exchange of information—not a sales pitch.

• Find the style that works for you.
Yay! They hired you! Now what?
Take care of business
Get organized
Set Deadlines
Be thorough
Research
Communicate

DISCOVERY

ORGANIZATION IS KEY
Assign tasks to staff
- Documents from Client
- Title Requests
- Mandatory Discovery
- Requests for Production
- Requests for Admission
- Subpoenas
- Depositions
EXPERTS KNOW WHEN TO USE THEM AND HOW BEST TO UTILIZE THEM

SETTLING THE CASE
It’s your job but it’s the client’s life. The ability to resolve a case is a mix of having set reasonable expectations, strong client rapport and case preparedness. Fully advise on possible outcomes and leave room for negotiations. Prepare offers strategically and have the client approve all offers.
APPEARING IN COURT

- Prepare effectively
- Be organized
- Be courteous
- Give your client pen and paper
- Be mindful you are being recorded
- Focus on the issues
- Keep your client focused and (if possible) comfortable
- Raise objections thoughtfully

Drafting a Judgment

- Time to bring it all home!
- Be thorough and specific
- Review pleadings and memos to be sure you didn’t miss anything.
- If stipulated work from the writing that forms the agreement.
- If working from a decision letter follow the language wherever possible.
- Be mindful that findings are included but if possible not inflammatory.
- Have the client review and also get another set of eyes on it.
- Don’t neglect necessary exhibits.
Wrap it up

- Prepare any supplemental documents needed such as deeds (if any).
- Refer on for division of assets such as preparation of QDRO.
- Check to see if client has questions or needs assistance with finalizing exchanges of personal property, etc. (This is mostly needed in high conflict cases.)
- Provide client with information about setting up child support collection.
- Send a closing letter outlining any remaining steps and advising regarding file storage.
- Refund retainer or follow up on balances due
- Withdraw
CHAPTER 8

COURTROOM PRIMER

Lydia Anderson-Dana
Stoll Berne PC

Ben Eder
Thuemmel Uhle & Eder
Courtroom Primer – Tips to becoming a better trial lawyer

1. **Litigators come in all shapes and sizes**
   a. The most important quality is to be passionate about trial work.
   b. Lawyers that prepare for trial have their cases in order.
   c. The most experienced trial lawyers still get nervous, anxious and stressed but you don’t see it.
   d. The best lawyer doesn’t always win the case.
   e. Every case can be lost. Not every case can be won.

2. **Always be honest**
   a. Never over-promise anything to a judge, opposing counsel or your client.
   b. Professionalism and candor are not optional.

3. **Respond to clients, court staff and opposing counsel without delay**

4. **Always work on becoming a better lawyer**
   a. Find a mentor because it’s easier to learn from a good teacher that has already learned through their own experiences.
   b. Watch good trial lawyers and copy what you like but don’t copy things that don’t fit your style.
   c. Watch trials like you are studying a craft.
   d. Conversations with other lawyers and non-lawyers can teach us to be better lawyers.
   e. Listservs are great tools.
   f. A good CLE is worth its weight in gold.
   g. Books/Podcasts are great for learning even if the topic is not on trial skills.
   h. Public speaking events can be CLEs.
      i. Wedding toasts, speeches etc....
   i. Storytelling is fun, important and has a lot of technical aspects.
      i. Practice your story telling.
   j. Think about potential danger zones for appeal- verdict form, jury instructions, exhibit objections, etc.

5. **Know the courthouse and procedures**
   a. Don’t sign up first if you are new because you can learn from watching.
   b. Let lawyers who have a scheduling conflict to skip the line.
   c. Always be nice and don’t object to resets.
   d. Always assume the courthouse is not private.
   e. Be kind to court staff- they have a lot of experience, including in trials, and can be helpful with questions.

6. **Make your client comfortable but don’t have to be a babysitter**
   a. Tell your clients how security, the courtroom, etc. will work, what to wear, when to be there- courthouses can be really intimidating to clients.

7. **Judges are human**
   a. Judges deserve respect but they might not be as familiar with the caselaw or specific area.
   b. Make your arguments succinct.
   c. Respond to the judge’s questions/concerns.

8. **Always show up early to court**

9. **Always report the case for longer than you think it should take**

10. **File motions in advance**
11. The morning of trial is not fun
   a. Nervousness is part of being a trial lawyer.
      i. Nobody sleeps well the night before trial.
   b. Trials are slow and rarely start without a lot of waiting around time.
   c. Stay calm in the morning.
   d. A lot of mistakes can be forgiven if you are kind.
   e. We all make mistakes so don’t take it personally if a judge is condescending. That happens to new lawyers even if experienced lawyers make the same mistakes.

12. Trial skills
   a. Find your style which needs to be true to yourself.
   b. Take time to reflect on what you could have improved upon.
   c. Losing hurts but it can’t hurt for more than a day or two.
   d. Get excited to go to trial but make sure it’s the best thing for your client/justice.
   e. Discuss areas of stipulation with the other side.

13. Juror tips
   a. Don’t waste their time.
   b. First impressions matter.
   c. Think about your narrative/case strategy. Then do your jury selection.
   d. Stay organized (using a chart can help).

14. Don’t use your court skills in your personal life, because nobody likes being cross-examined.

15. Smile because trials can be really fun!
BUSINESS LAW/ BUSINESS TRANSACTIONS

W. Todd Cleek  
_Cleek Law Office LLC_

Anne E. Koch  
_Wyse Kadish LLP_
1. **Introduction**

2. **What do Business Lawyers Do?**
   a. **General Description – 30,000-foot view**
      - Entity selection and formation
      - Real estate development (purchase and sale)
      - Financing – equity and debt
      - Mergers & acquisitions
      - Employment advice
      - Compensation and benefits
      - Securities
      - Intellectual property
      - Regulatory compliance
      - Contract review
         - Vendor agreements
         - Service agreements
         - Goods agreements
      - Succession planning
      - Buying and selling of business assets
      - Licensing and other regulatory advice
      - Tax
      - Secured transactions
   b. **Specific Examples**
      - Mergers and Acquisitions
      - Representing Small Businesses

3. **Day in the Life**
   a. Negotiating and advising through emails, meetings, conference calls etc
   b. Document drafting and review
      - Nondisclosure agreements
      - Term Sheets/Letters of Intent
      - Purchase and Sale Agreements
         - Real Estate
         - Asset purchases
         - Equity purchases
         - Goods and services
         - Other
      - Leases
         - Real Estate
         - Equipment
      - Licensing and other regulatory documents
      - Entity Documentation
         - Operating Agreements and other formation documents
         - Consent Resolutions
      - Loan Documents
         - Promissory notes
         - Loan agreements
         - Trust deeds
• Guaranties
• Collateral assignments
• Construction contracts
• Other Real Estate-related agreements
  ➢ Easement and licenses
  ➢ Environmental indemnities

c. Lawyer to counselor/strategic advisor

Speakers will take questions at the end of this segment.

4. Characteristics of a Successful Business Attorney
   a. Problem solver/strategic thinker and advisor
   b. Pragmatic – focused on practical solutions
   c. Skilled at listening to the client to determine what they really are trying to accomplish, want, and need.
   d. Organized
   e. Able to analyze risks and articulate them in a way clients can understand
   f. Negotiator
   g. Emotionally intelligent/People skills – ability to relate well with clients and also be able to evaluate what risks your clients present
   h. Initiator/planner/self-motivated and able to pace yourself
   i. Attention to detail
   j. Passion/“Fire in the belly”
   k. What personal characteristics does transaction work draw on for Laura and Todd

5. Advantages of Practicing as a Business Attorney
   a. Common goal
   b. Collaborative
   c. Long-term relationships with clients
   d. Helping clients with an opportunity they want
   e. Allows for efficiencies
   f. Schedule can be flexible

6. Disadvantages of Practicing as a Business Attorney
   a. Risks can be difficult to quantify and analyze
   b. Urgency - this varies depending on the deal and client
   c. Predictability can vary widely

Speakers will take questions at the end of this segment.

7. Business Development and other Practice Tips
   a. Finding and Developing Clients
      • Where to go and who to network with – industry groups; other professionals
      • How to reach people in a way that encourages them to hire you as their lawyer
      • Presenting yourself in a way that makes your strength and interests clear
   b. Know your own limits - associate other lawyers as co-counsel/get help; establish a network of professionals in various fields; learn what cases to reject
   c. Know your client base and where your money is coming from; have a sufficiently diverse base for law practice sustainability
   d. Find mentors
   e. Attend substantive CLEs

Speakers will take questions at the end of this segment.
8. **Resources and Practice Tools:**
   a. Free resources
      - Bar Books
      - FastCase
      - PLF forms
      - Law libraries
   b. Other resources
      - Practical Law (affiliated with Westlaw)
      - Onecle
      - Friedman on Leases
      - RealDealDocs.com
      - American Arbitration Association forms
      - JAMS Mediation, Arbitration, ADR services and forms
      - National Venture Capital Association (NVCA) forms
      - Building Owners and Managers Association (BOMA) forms
      - Lexis Nexis Forms and Templates
      - Nolo.com
      - Podcasts in your industry of interest; podcasts on practice management
I. Agreements to Become Familiar With:
- Operating Agreement
- Shareholders Agreement
- Stock Purchase Agreement
- Asset Purchase Agreement
- Security Agreement
- Independent Contractors Agreement
- Master Services Agreement (MSA)
- Non-Disclosure or Confidentiality Agreement
- Employment Agreement
- Commercial Lease
- Loan Agreements & Promissory Notes
- Real Property Purchase & Sale Agreement

II. Some Basics to Know:
- Forming new entities
- Taxation of entities
- Buy-Sell provisions in Operating Agreements & Shareholders Agreements
- Commercial lease review
- Intellectual property basics: trademarks and copyrights
- Difference between a stock sale and an asset sale
- Difference between non-compete and non-solicitation provisions
- Ethical requirements of representing business entities

III. General Tips / Miscellaneous Thoughts:
- Get to know CPAs. Talk with the client’s CPA during a transaction. Don’t be afraid to ask them questions. Unless you have an LLM or a tax background, you don’t need to advise on complicated partnership tax concepts (for example). With that said, in addition to understanding how the different entities are taxed, know specific forms, filing deadlines, and other practical advice (on the federal, state, and county level). This will be helpful for you too if you ever open your own practice.
- Be helpful. You’ll need to provide a lot of practical advice and there is value for the client in this. Many questions won’t be legal questions. Understand what you can/can’t answer. Be prepared to answer basic questions about how to file a form (for example). Keep track (or ask your legal assistant to) of deadlines for clients.
- Draft agreements that clients can read, understand and use.
- Don’t worry about sounding like a lawyer. Sometimes it’s better to explain things in layperson terms so a client can understand. Most business clients want to work with someone who is approachable.
- Start a documents roster so you can keep track of what you’ve already drafted and can use these agreements going forward.
- Start a mentor / attorney resources roster. Establish relationships with specialty attorneys you can turn to when an issue is outside of your comfort zone.
- Be an active listener.
- Always be responsive, but also establish boundaries with clients.
Criminal Defense Practice
From John Adams to Bryan Stevenson: Join the Fight for Social and Racial Justice

Why Criminal Defense?

- A Constitutionally Protected Role
- Guarding the Sanctity of Human Liberty
- You Are Providing Acute Care at a Time of Great Need
- You get to go to court, hold hearings and try cases. And, sadly for the system but happily for your career, it happens quick.
- The compelling stories, narratives and situations you get to be a part of.
What Life is Like
on a Day to Day Basis

- Court - waiting in cattle call dockets.
- A visit to the jail.
- Client and family phone calls.
- Meeting with experts and investigators.
- Consultations and calls to law enforcement - triaging serious situations.
- Negotiating with Prosecutors.
- Doing case law research for motions.
- Preparing for hearings and trials.
- Trying to self-care through the secondary trauma.
This is Compelling, Nerve Wracking, Important Work

But How Do You Defend “Those People”?
Who You Deal With

- Clients
- Families
- Witnesses
- Social Services
- DHS
- Law Enforcement
- Prosecutors
- Judges
- The Media

Specialties

- Juvenile Delinquency
- Public Defense
- DUII
- Felonies v. Misdemeanors
- Sex Cases
- Appeals
- Post-Conviction Relief
What it Can Mean

- Standing Up for the Underdog
- Advocating for Systemic Change
- Liberty’s Last Champion

“Do it for love. Do it for justice. Do it for self-respect. Do it for the satisfaction of knowing you are serving others, defending the Constitution, living your ideals. The work is hard. The law is against you. The facts are against you. The judges are often against you. Sometimes even your clients are against you. But it is a great job—exhilarating, energizing, rewarding. You get to touch people’s hearts and fight for what you believe in every day.”

How to Be Most Successful

- Treat Your Clients Like Real People
- Listen Deeply To Them and Their Witnesses
- Work Hard
- Be Honest, humble, Compassionate, Respectful, Ethical and Creative
- Train with the Best Criminal Defense Attorneys
- Ask Questions, Do Research, Slow Things Down
Guiding Ethics

- Be prepared. 3x the amount of time you will be in court at least.
- Do what you say you are going to do.
- Do not over promise because you want things to be better.
- Charge what you are worth, whether or not you are going to get it. After a while, you will get it.
- Let people know what you want to handle and what you would like to refer out.
- Treat others the way you want to be treated.
- Negotiate with compassion.
- Always have the baseball bat behind your back - go to trial!

Resources

- Oregon Criminal Defense Lawyers Association
- Local Public Defenders Office
- Federal Public Defender
- OSB Criminal Law Section
- PLF Resources
- OSB Mentor Program
- National Association of Criminal Defense Lawyers
- National Criminal Defense College
Clarence Darrow

"You can only protect your liberties in this world by protecting other people's freedom. You can only be free if I am free."

"As long as the world shall last there will be wrongs and if no man objected and no man rebelled, these wrongs would last forever."

Themes, Theories, and Storytelling

+ Don't forget, when it comes to trial or mitigation - you are a storyteller.
+ Set the theme and theory of the case and work backwards from your closing argument.
+ Write your cross-examinations and openings in order to get to that point. Don't try and pull everything from every witness.
+ There are really 6 defenses:
  + 1. This didn't happen.
  + 2. It happened, but my client did not do it.
  + 3. It happened, my client did it but it is not a crime.
  + 4. It happened, my client did it, it was a crime but not this one.
  + 5. It happened, my client did it, it was a crime but he should not be held responsible.
  + 6. It happened, my client did it, it was a crime and he's responsible but that dude had it coming.
Things to Know for Your First Case

- What theories and themes help you tell the story?
- What are the charges?
- What does the statute say? The indictment? The information?
- What does the standard jury instruction say?
- What pretrial motions are available to you?
- What experts or investigation might help you?
- What are your potential defenses?
- What case law can you find on the topic?
- What does your client say?

The Hardest, Best, Most Rewarding Days of Your Life Are Ahead
CHAPTER 11

TIPS, TRAPS, AND TOOLS FOR SUCCESSFULLY NAVIGATING NEGOTIATIONS AND PROFESSIONAL RELATIONSHIPS

The Hon. Angela F. Lucero  
*Multnomah County Circuit Court Judge*

The Hon. Katharine von Ter Stegge  
*Multnomah County Circuit Court Judge*
**Chapter 11**

**TIPS, TRAPS, AND TOOLS for SUCCESSFULLY NAVIGATING NEGOTIATIONS AND PROFESSIONAL RELATIONSHIPS**

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NEGOTIATION STRATEGIES

By Jane Clark

Timing of Negotiations

There is no right or wrong time to negotiate. Much will depend on the nature, strengths and weaknesses of the case, the attitudes of the parties and or/insurance adjusters and the preferences and personalities of the attorneys. One thing is sure however - there will never be a settlement without at least some disclosure and exchange of information. Cases can potentially settle at any time in the litigation or pre litigation process. The advantages and disadvantages of settling at different points in the life of a case are set out below.

Pre litigation settlements

Cases will only likely settle pre litigation where the plaintiff has a strong case on liability, can demonstrate this and the defendant is motivated to avoid a lawsuit. Oftentimes plaintiff’s counsel will send a Demand Letter before filing a lawsuit offering the defense an opportunity to evaluate the case and make an offer. In order to evaluate the case, the defense will need information about the plaintiff’s case and usually details of the supporting evidence. One disincentive to early settlement is that often, plaintiff’s counsel will not have all this evidential information without formal discovery in the case. However, if it appears relatively straightforward in terms of liability e.g. a rear end collision with a police report available, and plaintiff can provide documentation e.g. through medical and employment records of the injuries sustained, the economic loss claims and the current status re both, it should not be too difficult to prepare a formal and detailed demand letter. In clear cut cases of liability, car accident cases are one of the more likely types of cases where pre suit settlement is possible and this often does occur. Oftentimes however, pre suit offers are so low, it is necessary to file the case to pressurize the defense into increasing the offer. Many times these cases will proceed to a trial on damages only, unless information has come to light during discovery that causes either or both parties to change their view of the case.

If however you have a strong case there are clearly advantages to settling pre litigation - the most significant of which is the saving in time and money of having to litigate and possibly try the case. In cases where the expenses will be significant, e.g. medical malpractice cases or other complex cases involving costly experts and requiring more extensive discovery, the cost of litigating can be substantial.

With saving in cost and time being the primary advantage of early settlement, what are the disadvantages? Often in a case, discovery is needed to fully evaluate the strengths and weaknesses and only limited information may be available before litigation - in particular the testimony of opposing witnesses. Sometimes the plaintiff feels strongly that he or she wants their day in court - and this desire may change only after they have been through deposition with a fast approaching trial date and a sense of the risk of loss. Without knowledge of the opposition’s case, the attorneys will likely have a one sided and maybe unrealistic view of the case, making it more difficult to settle due to unrealistic expectations.
Another disincentive to settle is a fear of “showing your hand” to your opponent. Oftentimes to obtain a settlement, the defense will need information. Oftentimes the information you have may not be discoverable in litigation before trial e.g. the opinion of a supportive expert. Some attorneys worry that if they reveal key information about their case too early, their opponent will use it against them and they will lose the element of surprise. This is particularly so in states such as OR where there is generally not disclosure of experts. If however you are litigating in Washington, federal courts or a state where there is disclosure of experts, you will have to assess whether tactically it is to your client’s advantage or disadvantage to reveal information such as expert opinions too early in the case.

In a clear cut case of liability and damages, early settlement should at least be considered. Whether you achieve a settlement at this stage will depend on the nature and value of the case and the personalities of the parties and attorneys involved. Often you will work with the same opposing attorneys and oftentimes the same insurance adjusters on multiple cases. If you are viewed by your opponent as being reasonable and fair with integrity, and if your credibility is maintained, the likelihood of early settlements will increase.

**Settlement during the course of the case**

Of course, settlement can occur at any point during the progression of a case. Oftentimes, as discussed above, the parties simply need information that can be obtained from the discovery process to allow them to evaluate the strengths, weaknesses and potential value of the case. Litigation can be a costly business and you should bear this in mind when you develop your discovery and settlement strategies. It can be tempting to take the deposition of everybody even remotely involved in the case and hire multiple experts to testify. This is entirely appropriate and reasonable if the case so justifies. You should always bear in mind the potential value of the case when considering what costs should be incurred and be strategic about the timing of discovery. Are you positioning a case for trial or settlement? How you proceed with discovery and even the questions you ask during the discovery process may be influenced by this decision. For example, if you know the case is unlikely to settle, you may want to save those “killer” cross examination questions for trial and not alert or rehearse the witness during the deposition process.

After a case has been filed, give early thought to what discovery is required to give both parties the information they need to at least consider settlement. Identify the key witnesses that need to be deposed and the key documents that need to be obtained and reviewed through discovery to allow that evaluation to occur. After that “key discovery stage” has been concluded, evaluate the case and explore the possibility of a settlement. If attempts are made at settlement and fail, you know that you are in “trial mode” and can prepare the rest of the case accordingly.

**When to consider making a demand or offer**

Consider doing so when your case it at its strongest and before the weaknesses in your case become apparent during the discovery process. If you have a particularly good
witness or a document that strongly supports your case, following disclosure of that
document or deposition of that witness may be a good time to consider trying to engage
in settlement negotiations. Similarly if you know you have a witness about to be deposed
who will harm your case consider trying to settle before that deposition takes place.

Settlement negotiations will often start after the parties have completed the discovery
stage of the case and before trial preparation starts. If you have not already considered
settlement or started negotiations by this point in the case, you should consider doing so
before you spend the hours needed to prepare for trial.

Settlement before or during trial

Some cases are settled at the door of the courtroom or even during trial. There are many
reasons for this. Oftentimes discovery is not completed until shortly before trial and
parties therefore do not have the information they need prior to this to engage in
meaningful negotiations. In other cases, attorneys for the parties are not fully engaged
and realistically evaluating the strengths and weaknesses of the case until they start to
prepare it for trial. In other cases, the procedures of the insurer may delay settlement until
close to the trial date.

Of course settlement can and often does occur during trial as counsel continue to assess
the strengths and weaknesses of each side of the case as the trial progresses. Cases even
settle while the jury is out - a time when parties and their attorneys become anxious and
may second guess their earlier evaluation of the case. Even after a verdict and pending
appeal cases may settle. Better the certainty of a settlement than the uncertainty and
possibility of an adverse ruling on appeal and possible retrial.

Negotiation tips and tactics

Credibility and Integrity

The first rule in negotiation is maintain your credibility and integrity. As soon as you
lose your credibility you lose your ability to negotiate effectively from a position of
strength. Therefore throughout the case and even before you reach the point of starting
negotiations, do not make promises or threats you cannot follow through on. Of course it
can and does sometimes happen that witnesses do not testify as you expect them to testify
and the face of your case can change during the litigation process. However, if you make
representations to your opponent that you cannot fulfil they will not trust you in
negotiations and any information you communicate as part of the negotiation process will
be regarded with suspicion. This makes it very difficult to argue a strong case and
maximize your client’s position in settlement negotiations. Cases are far more likely to
settle when the opposing attorneys trust and respect each other and are willing to listen to
each other’s positions.

Listen and advocate

The key to successful negotiations is listening and advocating. You must listen to what
your opponent is saying about his case, evaluate that information and then advocate your
client’s position. Your opposing attorney may give you information during settlement
negotiations that could impact your view of the case and its settlement value. Therefore
hear what he is saying and acknowledge that you have done so. If your opponent believes
that you have heard and understood his position and you have maintained your credibility
during the case in terms of exchange of information and representations of facts and
evidence, he is more likely to listen to and understand your position when you advocate
for your client. The more credible you have been during the case, the more credible will
be your arguments supporting your offer or demand.

You must also be prepared to advocate your client’s position - in much the same way as
you would do during a closing argument. If you represent a plaintiff and want the
defendants to increase their offer, you have to be able to explain and justify why you
believe the case has a higher value with reference to the facts and the evidence.

Sometimes attorneys are unprepared for settlement negotiations. If you are not prepared,
do not be afraid to delay discussions until you are. If for example you get a call out of
the blue one day from your opposing counsel wanting to discuss settlement and making a
demand or an offer and asking for your evaluation of the case and reaction to the offer,
do not be afraid to put off such a discussion until you have had time to formulate a
response. Of course, you generally cannot respond to any demand immediately without
consulting with your client (unless you already have authority to settle up to a certain
amount). However, without giving the matter some thought, you likely will not do your
case justice. Before calling your opponent back, consider making a list of all the points
you want to make regarding your case and your response to the points he made to ensure
that you do not forget anything.

When making your counter demand or offer - be prepared to justify your response by
reference to your evaluation of the strengths and weaknesses of the case.

Disclosure of authority

The defense will typically have a limit of authority placed on the case by the insurer.
Oftentimes the insurer will give the attorney authority to negotiate a settlement up to a
certain amount. Sometimes additional funds are available in addition to that authority or
the adjuster may need to seek an increase in the authority. If you are defense counsel and
are asked the limit of your authority - how do you respond? Oftentimes you will not want
to give this away early in the settlement negotiations. Just because you have authority up
to a certain amount does not mean that you have to offer the complete amount of your
authority. However, you cannot lie to your opponent and advise that you have authority
less than you do - this would be wrong ethically and goes to the issue of credibility
discussed earlier. Be prepared for this question and know how you will respond. An
answer such as “I am not at liberty to disclose that at this time” or “ that information is
confidential at this stage of the negotiation” will usually suffice. Your opponent cannot
force you to disclose your authority.

“Bottom line” representations

Attorneys commonly represent an amount as being the “bottom line” and then go beyond
the bottom line. Sometimes this is not unreasonable. Bottom lines can of course change
as the litigation proceeds and information comes to light that changes the evaluation of
the case. Sometimes a client will refuse to go beyond a certain figure and represent that as the bottom line but change their mind after further consideration.

Again - from a credibility perspective, be wary of consistently going beyond your bottom line - if you do this you will lose credibility in future negotiations. Your opponent may well say “Oh Jo always says $100,000 is his bottom line but always end up settling for 50% of that”. If you do so, and on the day you have that case where $1000,00 really is your bottom line, you may be unable to settle it!

**Initial demands and offers - how to position them**

Most cases have a settlement range. That is a figure within a range that the defense will be prepared to pay and the plaintiff will be prepared to accept to avoid the risk of trial. If the case has such a range, the case will likely settle within it irrespective of the opening demand and offer amount. However, how long it takes to reach that figure in settlement negotiations and how much credibility the attorneys maintain during the process will depend on the amounts of the opening demand and offer.

As a general rule, if the opening demand is excessively high the opening offer will be unreasonably low. That is because the defense will want to leave sufficient room to increase offers during the negotiation process but still ending up in the settlement range. For example, if the settlement range on a case is $50-$60,000, parties will likely reach that range much more quickly if the opening demands and offers are realistic and closer to that range.

However, the risk of making a demand close to that range - particularly if you have not worked previously with your opposing counsel, is that your opponent will believe that as you have made a demand of $80,000, you probably value it at around $20,000. It is only with experience and ongoing relationships with your opponent can you reach a point where you have sufficient credibility to be able to make a demand close to the settlement range and know that it will settle within this range, as your opponent knows from experience that you are credible and realistic in your negotiations. Until you reach that type of relationship, make initial demands sufficiently high to give yourself plenty of room for negotiation but not so high that the defense is not even willing to engage in discussions believing there is no possibility of settlement. You also lose credibility if you demand $500,000 and ultimately settle the case for $30,000.

On the defense side - the same rules generally apply. As the defense holds the purse strings, their position it a little easier. When you are at your authority and there is no more money, the plaintiff must then take it or leave it. If that take it or leave it offer is in the settlement range the case will likely settle. If however your opening offer is unreasonably low plaintiff may be reluctant to engage in negotiations and simply prefer to take his chances and spend his time preparing for trial.

**Direct Negotiation or Mediation?**

There are advantages and disadvantages to direct negotiation versus mediation. One advantage is that it is cheaper - you avoid the mediator’s fee, which is more of a factor in smaller value case. Oftentimes, defense counsel will put the authority out there on the
table and it will be a take it or leave it situation with mediation unlikely to be effective in changing what the insurer will pay. There are cases however where mediation is justified both in terms of the value of the case and efficiency of the process. Oftentimes during direct negotiation, parties will go back and forth over a number of weeks, sometimes even months. That whole process can take place with a mediator over the course of a few hours.

Another advantage of mediation is that many mediators are “evaluative” mediators. This means that they evaluate the case and give feedback to the parties during the course of the mediation process. Oftentimes, having a neutral party with experience in the relevant legal field mediate and evaluate the case can help to change the positions of the parties and reach a faster settlement. This is particularly so where the parties and/or the attorneys perhaps have an unrealistic view of the case in terms of its strengths or valuation. A mediator who has experience in handling personal injury cases either as an attorney or judge, may be useful in helping to educate a plaintiff who has unrealistic expectations regarding the value of the case and what they will likely recover at trial. The same may be true of an insurance adjuster who is taking an unrealistic position and failing to understand the issues in the case.

The parties must agree on the identity of the mediator and the personality of the mediator will often be a factor in the selection process. Some mediators are very “let’s get down to it and move this forward”, others like to talk about other cases and their other experiences and others are willing to listen. Many good mediators will do some or all of these things depending on the case. If however you have a case where you represent a plaintiff who really wants to tell her story and you know a particular mediator wants to get down to business- that person may not be the best mediator in the case. The case is more likely to settle if the parties trust the mediator and feel that their side of the case has been heard and communicated by the mediator to the other side.

Typically the cost of mediation is split between the parties - although sometimes one party is willing to pay the cost. Sharing the cost typically engages both parties in the process - rather than just coming along for the ride because the other side is paying with no real willingness to settle the case.

**Preparing your clients for settlement negotiations.**

**Preparing Plaintiffs**

Preparing your client for settlement negotiations can be a challenging process, particularly when representing plaintiffs. On the one hand you want to maintain your role as being a strong advocate for and believing in the case. On the other hand you need to be realistic with your client regarding what the likely outcome is of the trial and what lies in store if the case does not settle. One thing that is certain is that the outcome of a trial is uncertain. Clients need to understand this and all you can do is give them your considered opinion as to the likely range of outcomes if the case does not resolve. It is then for the client to decide whether they want to “roll the dice”.

Attorneys often have problems with clients who have unrealistic expectation with regard to outcome. Some clients simply do not want to accept or acknowledge that they may get
less than $200,000 on a whiplash case or that the failed root canal and need for 4 other procedures is not worth $500,000 because they could not eat for three months. All you can do is to educate and advise your client as to likely value with a plaintiff verdict at trial and represent the percentage risk of a loss at trial with no recovery, explaining that this has to be factored into the settlement process.

It is a useful tool, before discussing settlement with your client to have formed an opinion as to the likely verdict range in the event of a plaintiff verdict with an evaluation of the percentage likelihood of prevailing at trial. As a starting point, if it is a case with a likely value of $40-$50,000 with a 50/50 chance of prevailing at trial, you may represent a reasonable settlement range to be $20-$25,000. Be prepared to discuss your rationale with your client.

Having discussed the acceptable settlement range, you should then discuss with your client, what demand you should make to allow sufficient room to negotiate down to your range. Oftentimes, this will depend on the nature and value of the case and the nature of your relationship and prior dealings with opposing counsel.

If you have not agreed the settlement range with your client before making a demand and explained to them the reason for making a demand higher than the settlement range you run the risk of having a client who is upset with you for having “sold them short” in settlement. You want to avoid a situation where, having achieved what you consider to be a great settlement for your client, they are unhappy because “you told the defense in the demand that my case was worth $100,000 so why did we end up settling for $50,000?” This can be avoided if you communicate your reasoning to the client ahead of time.

In situations where your valuation of the case is different to that of your client and you consider your client to have unrealistic expectations, you may want to consider bringing in a mediator whose role in part will be to educate your client. An attorney with a lot of experience in the relevant field of law involved in the case or a retired judge will make excellent mediators in this kind of situation.

When you get into the negotiation process - whether it be direct negotiation or mediation - warn your client to expect low offers at the beginning and not to be offended. I will never let my client walk out of a mediation until at least 4 or 5 exchanges have taken place. Early on in the negotiations the parties are testing the waters and to disengage from the process at this stage is not to be recommended. Tell your client “you will likely be offended by the first offer”. That way when they are offended they are expecting it and are not so offended by it.

Preparing Defendants and Insurers

Where there is insurance available, the defendant is often not involved or engaged in the negotiation process. Remember however that the defendant is still your client and entitled to be involved and consulted if they so wish. In some cases e.g. medical malpractice cases, the defendant will have a say in whether the case settles and therefore should be involved
in the process. Of course, in cases where the restitution sought is something other than monetary compensation e.g. reinstatement in an employment case, the defendant will be very actively involved in the process as will the parties in a divorce case.

The primary rule again is to ensure that your client is educated as to what to expect, the possible outcomes at trial and the percentage chance of a favorable verdict at trial. If you are dealing primarily with an insurance company - ensure that you have followed all their procedures and provided to them the information and documentation they need to come up with appropriate authority. If you fail to provide key information and authority is granted not having taken that information into account, the case may not settle and the client and insurer may be compromised at trial.

If you are engaged in direct negotiations, consider asking the insurer to give you authority up to a certain amount so you do not have to go back to them with each offer. Whether the adjuster will do this will depend on the nature and size of the case and your previous dealings and relationship with them. Some adjusters want to take more control over the negotiations than others. Some may even prefer to do the negotiation direct with plaintiff’s counsel. If the case proceeds to mediation, it is preferable that the adjuster or person with authority is present. If they are only available by phone - they are not getting the benefit of the communication of information that may impact how they view and evaluate the case.

**Conclusion**

Negotiation is a skill that comes with practice. Do not be afraid of it. Remember the basic rules:

1. Be prepared;
2. Have integrity and credibility
3. Listen to your opponent
4. Advocate for your client
5. Be realistic
CHAPTER 12

ESSENTIAL GUIDE TO PRACTICE MANAGEMENT

Isaac Alley
Rachel Edwards
Monica H. Logan

Professional Liability Fund
Practice Management Attorneys
Essential Guide to Practice Management

1. PowerPoint Slides
2. Resources from the PLF provide a great variety of free CLEs, practice aids, publications, newsletter articles, and blog posts. Use the search box to help you locate materials.
   a. PLF publications available at https://www.osbplf.org/services/resources/#plf_books
   b. PLF CLEs available at https://www.osbplf.org/services/resources/#cles
   c. PLF practice aids available at https://www.osbplf.org/services/resources/#cles
   d. PLF blog, InPractice, at https://www.osbplf.org/blog/inpractice/
   e. PLF newsletter, InBrief, available at https://www.osbplf.org/services/resources/#inbrief

3. Resources for Topics Covered Today:
   a. Trust Accounting
      i. PLF Practice Aids see Trust Accounting
         a) Accepting Credit Cards
         b) Client Ledger Card and Trust Journal
         c) Closing Your IOLTA Account
         d) Embezzlement Happens: Protect Your Firm
         e) Frequently Asked Trust Account Questions
         f) How to Set Up Your Trust Account in QuickBooks
         g) Notice to Financial Institutions- Opening an IOLTA Account in Oregon
         h) Trust Account Reconciliation
         i) Trust Accounting Rules for Washington Practitioners
   b. Attorney Fees
      i. PLF Practice Aids see Engagement Letters and Fee Agreements
         a) Engagement Letters and Fee Agreements
         b) Fee Agreement – Authorization to Charge Credit Card
         c) OSB Model Explanation of Contingent Fee Agreement
   c. Calendaring
      i. PLF Practice Aids see Office Systems and Procedures
         a) Docketing & Calendaring Checklist
         b) Reminder and Tickler Systems
         c) Docket Control Follow-Up
   d. Conflicts
      i. PLF Practice Aids see Conflicts of Interest
         a) Checklist for Avoiding Phantom Clients
         b) Conflict of Interest Systems and Procedures
         c) Declined Prospective Client Information Sheet
         d) Request for Conflict Search and System Entry
         e) Conflict of Interest Self Audit
         f) Business Transactions with Client Disclosure
         g) Conflict Disclosure and Consent Letters
         h) Conflict Informed Consent Checklists
   e. File Management
      i. PLF Practice Aids see Office Systems and Procedures
         a) File Retention and Destruction Guidelines
b) File Closing Checklist
c) Mail Handling
d) New Client Information Sheet with Disclaimer
e) Production of Client File
f) Setting Up an Effective Filing System

ii. PLF Practice Aids *see Paperless Office and Cloud Computing*
a) Checklist for Going Paperless
b) Checklist for Scanning Client Files
c) Documenting Email as Part of the Client File
d) Paperless in One Hour
e) Saving Text Messages as Part of the Client File

iii. *InBrief* Articles
a) January 2019- Malpractice Risk Factors and How to Avoid Them Part II
b) October 2018- Malpractice Risk Factors and How to Avoid Them

f. **Safe Use of Technology**
   
   i. PLF Practice Aids *see Cybersecurity and Data Breach*
a) Information Security Checklist for Small Businesses
b) Notice to Clients re Theft of Computer Equipment
c) Protecting Yourself and Your Law Firm from Data Breach
d) Removing Metadata
e) What to Do After a Data Breach

   ii. *InBrief* Articles
   a) September 2019- Protect Your Data by Using Encryption
b) June 2019- Cybersecurity and Employee Training
c) January 2019- File Retention and Destruction Procedures: Additional Safeguards to Protect Your Firm from Lost or Exposed Client Data
d) April 2017- Unwanted Data: How to Properly Destroy Data in Hardware
e) December 2016- What's Backing Up Your Data?

   iii. PLF Practice Aids *see Using Technology*
a) Checklist for Migrating Data to New Software
b) ABA Technology Resources
c) Disclaimers
d) How to Backup Your Computer
e) Technology Resources for Mac Users

   iv. PLF Practice Aids *see Paperless Office and Cloud Computing*
a) Floating in the Cloud (The Ethics of Electronic Client Files)
Essential Guide to Practice Management

Practice Management Attorneys:
- Rachel Edwards
- Monica Logan
- Isaac Alley

- Trust Accounting
- Attorney Fees
- Calendaring
- Conflicts
- File Management
- Safe Use of Technology
Trust Accounting

Types of trust accounts
Key responsibilities

The proper mindset

A lawyer should hold property of others with the care required of a professional fiduciary
Lawyer
Trust
Account:
Where unearned money belongs

Types of Trust Accounts

- Cannot earn net interest
  - IOLTA

- Can earn net interest
  - Separate interest-bearing trust account
### Formula to calculate net interest:

Principal $\times \text{Interest Rate/12} \times \text{Number of Months} = \text{Interest}

<table>
<thead>
<tr>
<th>Example:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal = $10,000</td>
</tr>
<tr>
<td>Interest rate = 5%</td>
</tr>
<tr>
<td>Number of months = 1</td>
</tr>
<tr>
<td>Cost = $25</td>
</tr>
<tr>
<td>Monthly fee = $7.50</td>
</tr>
</tbody>
</table>

\[
\$10,000 \times \frac{0.05}{12} \times 1 = \$41.67
\]

Net positive interest return:
\[
\$41.67 - \$25 \text{ cost} - \$7.50 \text{ fee} = \$9.17
\]

---

**Key Responsibilities**
1. Keep funds separate
   - No commingling your money and client funds in same account

2. Know each client’s balance
   - Keep and review individual client ledgers
3. Maintain records
   - Client ledger
   - Trust journal
   - More...

   Keep for 5 years

4. Wait for funds to be available
   - Use 3-5-10 day rule
   - Avoid overdrafts
5. Do 3-way reconciliation

<table>
<thead>
<tr>
<th>Law Office LLC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Three-Way Reconciliation</td>
</tr>
<tr>
<td>RECONCILED</td>
</tr>
<tr>
<td>Bank Name:</td>
</tr>
<tr>
<td>Bank Account Name:</td>
</tr>
<tr>
<td>Bank Account #:</td>
</tr>
<tr>
<td>Statement Period: 10/1/22 - 10/31/22</td>
</tr>
</tbody>
</table>

1. **Book Balance**
   - Beginning balance on 10/31/22: $5,210.00
   - Plus cleared deposits: $7,724.00
   - Less cleared payments: ($3,813.00)
   - Ending balance on 10/31/22: $10,131.00

2. **Bank Balance**
   - Ending balance on 10/31/22: $10,131.00
   - Plus deposits in transit: $0.00
   - Less outstanding payments: ($175.00)
   - Reconciled bank balance: $10,056.00

3. **Client Ledger Balance**
   - Client Name | Balance as of 10/31/22 |
   - John Doe | $5,470.00 |
   - Jane Smith | $3,600.00 |
   - Sue Lee | $961.00 |
   - Total Client Ledger Balances | $10,051.00 |

6. Account to Clients
   - Explain billing procedures
   - Send billing statements
   - Use written fee agreements
7. Use accounting software

### Practice management software:
- Clio
- mycase
- CosmoLex
- PRACTICEPANTHER
- rocket matter
- zola i SUITE

### General accounting software:
- intuit quickbooks
- xero
- FreshBooks

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Beware of unclaimed property

- Take steps to find person
- Return to whomever is “entitled” to it
- Abandoned after 2 years
- Report to Oregon State Treasury
- Remit funds to OSB
Attorney Fees

Ethical obligations
Third party payments
Accepting credit cards

Fees cannot be excessive

- Cannot charge or collect illegal or clearly excessive fees
- OSB Formal Ethics Opinion 2005-151 (fixed fees)
- See ORPC 1.5(b) to determine reasonableness
Put it in writing

**Contingent fee**
- Cannot be used in domestic relations or criminal matters
- Comply with ORS 20.340
- ORPC 1.5(c)(1)-(2)

**Earned upon receipt flat fee**
- Will not be deposited into lawyer trust account
- Entitled to refund
- ORPC 1.5(c)(3) and 1.15-1(c)

---

**Third party payments**

ORPC 1.8(f)
- Informed consent
- No interference
- Maintain confidentiality

Specify in writing who receives refund
Accepting credit cards

- If single merchant account, it must be a trust account
- Consider transaction fees as cost of doing business
- Set-up fees, monthly fees, or annual fees are the lawyer’s responsibility

OSB Formal Ethics Opinion 2005-172

Calendaring

Common issues
Tips to avoid missing deadlines
Missed deadline common issues

- Not entering deadlines
- Not knowing SOLs
- Miscalculating deadlines and SOLs
- Filing at the last minute
- Clerical errors
- Not verifying dates
- General neglect

Tips to avoid missing deadlines
1. **Use calendar to:**

- Docket all deadlines and reminders
- Set recurring reminders to retrieve and review files

---

**What to calendar?**

- SOLS and case-related deadlines
- Client-imposed deadlines
- Self-imposed deadlines
- Court appearances
- Appointments
- Tasks to be completed
Good calendaring habits

- Enter dates immediately
- Have one entry point
- Capture dates from email, intake sheets, incoming documents
- Synchronize calendars

2. Know statutes of limitation
3. Know how to calculate deadlines

- Calculate manually
- Use rules-based calendaring software

Rules-based calendaring software

<table>
<thead>
<tr>
<th>Stand-alone rules-based calendaring software</th>
<th>Practice management software integrates w/ stand-alone tools</th>
<th>Practice management software w/ built-in rules-based calendaring</th>
</tr>
</thead>
<tbody>
<tr>
<td>LawToolBox</td>
<td>PracticeMaster</td>
<td>Firm Central</td>
</tr>
<tr>
<td>CALENDARRULES</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
4. Don’t Wait to File
   • Create a ‘cushion’
   • Consider eFiling issues

5. Double check entries
   Check for:
   • Plain errors
   • Typographical errors
   • Omissions
6. eCourt Notices & Calendaring

1. Notification via email
2. Link to court notice
3. Calculate deadline if necessary and calendar immediately

Conflicts
Types of Conflicts
The Golden Rules
Types of conflicts

ORPCs 1.7, 1.8, 1.9, 1.10, 1.11, 1.12

• Former clients
• Current/prospective clients
• Personal interests
• Imputation of conflicts
• Former government employee
• Former judge/neutral

The Golden Rules

• Establish a reliable system
• Know what to capture
• Know how to use the system
• Know when to run a conflict check
• Document search and result
Rule 1:
Establish a Reliable System

Use software program

Stand-alone:  

All-in-one:  

Clio  
CosmoLex  
PRACTICEPANTHER  
rocket matter®
Rule 2: Know What to Capture

- Clients
- Adverse parties
- Related parties
- Declined clients
- Prospects
- Pro bono clients
- Addresses
- Firm members
- Personal conflicts

Rule 3: Know How to Use Your System

- William, Bill, or Willy?
- Elizabeth or Liz?
- Former Names
- SSN or TIN
- DOB
- 123 ABC Street
Rule 4: Know When to Run a Conflict Check

- At first contact
- When the file is opened
- Whenever a new party enters the case

Rule 5: Document Conflict Search & Result

- Who performed search
- When and where search was performed
- Result and conflict analysis
Screen & Prepare

Screen incoming lawyers

Prepare outgoing lawyers

Keep your own conflict list

Practice Tips

• Circulate ‘New Matter’ list weekly
• Update your system at closing
• Be aware of consent requirements
File Management

Client File
Documentation
Retention
Storage

Client Files
What is the client file?

In most instances, the entire client file will include documents and property that the client provided to the lawyer; litigation materials, including pleadings, memoranda, and discovery materials; all correspondence; all items that the lawyer has obtained from others, including expert opinions, medical or business records, and witness statements. The client file also includes all electronic documents, records, and information that the lawyer maintained for use in the specific client matter, such as e-mail, word-processing documents on a server, audio files, digital photographs and even text messages.

OSB Formal Ethics Opinion No. 2017-192

Typical Documents to Keep in Client File

- Client Intake Form
- Conflicts Disclosure and Consent
- Engagement Letter
- Nonengagement Letter
- Disengagement Letter
- Correspondence
- Fee Agreement
- Timekeeping Records
- Billing Statements
- Documents
- Records
- Attorney Notes
Documentation

- Conveys information in writing to clients
- Prevents misunderstanding
- Helps the lawyer articulate thought process
- Wards off a claim for legal malpractice
- Provides lawyer with evidence to defend against malpractice claim

Ways to document

- Promptly follow up by email or letter
- Promptly write memo to the file
- Take notes during the conversation
What to document

- Commencement, scope, and termination of representation
- Client’s instructions and lawyer’s advice
- Important conversations with clients, opposing parties, and other parties involved
- Major events and milestones in the matter
File Retention Guidelines

- Retain copy of file for 10 years
- Research and evaluate additional factors particular to practice area, cases, and clients
- Treat digital and paper files the same!
- See our File Retention and Destruction Guidelines

Storage

- Physical files v. electronic files
- Physical location v. cloud or hard drive
- Think 10 years ahead
It is never a good time to lose your data. **Back it up.**

<table>
<thead>
<tr>
<th>DEVICES</th>
<th>SOFTWARE</th>
<th>DEVICES W/SOFTWARE</th>
</tr>
</thead>
</table>
| - External hard drive  
- External solid state drive  
- Network attached storage  
- Backup server | - Windows Backup  
- MAC Time Machine  
- Acronis Cyber Protect  
- AOMEI Backupper  
- EaseUS Todo Backup  
- Cloud backup service (Backblaze, Carbonite, iDrive, SpiderOak) | - Seagate Backup Plus drive  
- Western Digital My Passport portable drive  
- Samsung SSD T5 |

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**Safe Use of Technology**

Metadata  
Cloud computing  
Hardware and data destruction  
Social media
Metadata lurking in your document

- Comments, track changes, versions and ink annotations
- Document properties and personal information
- Header, footer and watermarks
- Hidden text
- Document server properties
“Oregon RPC 1.6(c) requires that a lawyer must use reasonable care to avoid the disclosure of confidential client information, particularly when the information could be detrimental to a client. With respect to metadata in documents, reasonable care includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent. What constitutes reasonable care will change as technology evolves.”

OSB Formal Ethics Opinion No. 2011-187 (Revised 2016)
Remove from MS Word:

- Click on File
- Click on Info
- Check for Issues
- Inspect Document
- Click on Remove All

Print to PDF:

- Click on File
- Click on Print
- Select Adobe PDF from printer menu list
- Click on Print
- Rename and save the PDF file
OSB Formal Ethics
Opinion No. 2005-150
[Revised 2016]
(Competence and Diligence: Inadvertent Disclosure of Privileged Information)
Security Concerns

• Is data encrypted?
• Who has access?
• Where are servers located?

Take reasonable steps:

• Ensure vendor will reliably secure client data
• Keep information confidential
• Vet the vendors; and
• Review terms of service and user agreements

Hardware and Data Destruction

ORPC 1.6 Confidentiality
Options to destroy data completely:
1. Use specialized software to overwrite data
2. Physically destroy the hard drive

Software

Data Destruction
• DBAN (Darik’s Boot & Nuke)
• CBL Data Shredder
• HDDGuru
• KillDisk

File Destruction
• zDelete
• Eraser
• Freeraser
• File Shredder
• Secure Eraser

Use if you want to recycle, refurbish or donate computer
Use if you want to keep computer but permanently delete unwanted files
Physically Destroy Hard Disk

- Do it yourself
- Bring it to a professional

Social Media

- ORPC 1.1: Competence
- ORPC 1.4: Communication

Clients want to talk about their case

- Clients may damage their case
- Contact may be prohibited by court order
Social Media

• You want to boast about a big win
• You want to defend against a bad review

• ORPC 1.6: Confidentiality
• Professionalism

RESOURCES

https://www.osbplf.org > Services
  ▪ Forms ▪ Books ▪ CLEs ▪ In Practice blog ▪ In Brief Newsletter ▪ Practice Management Assistance Program (PMAP) ▪ Oregon Attorney Assistance Program (OAAP)

https://www.osbar.org
  ▪ Bar Counsel Articles ▪ Ethics Opinions ▪ BarBooks ▪ Legal Ethics Helpline: 503-431-6475 ▪ CLEs ▪ Member Groups
eCourt Resources

Oregon Judicial Department

eFiling Website: https://oregon.tylerhost.net/ofsweb
  ♦ Web training sessions ♦ Training videos ♦ User guides

Official Website: https://www.courts.oregon.gov
  ♦ FAQs ♦ UTCRs – Chapter 21 ♦ Policies & Standards for eFiling

Professional Liability Fund (www.osbplf.org)
  ♦ Services > CLEs & Resources > Forms > eCourt >
    Oregon eFiling Checklist for First Time eFiler

Contact Us

https://www.osbplf.org
503-639-6911 | 800-452-1639

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Isaac Alley
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Free and confidential
CHAPTER 13

CREATING A FIRM

SOLO SUCCESS: LAUNCHING YOUR OWN PRACTICE

Rachel Edwards
Professional Liability Fund
Practice Management Attorney
Solo Success: Launching Your Own Practice

Overview

• Planning
• Equipping the office
• Office systems and procedures
• Marketing and client development
• Assessment
• Resources
Planning

Practice Area

• Know your practice area(s)
• Types of clients
• Avoid general practice
Firm Name

• Cannot be false or misleading
• Trade names allowed if no connection implied with a government agency or other organization

Choice of Entity

• Sole proprietorship
• Single shareholder PC
• Single member LLC

www.osbplf.org > Services > CLEs & Resources > Forms > Entity Formation for Lawyers
Location

- Changing legal landscape
- What are you and your clients’ needs?
- Accessibility
- Office sharing

Business Description

<table>
<thead>
<tr>
<th>Vision Statement</th>
<th>Mission Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where do you want your firm to be in the next 3-5-10 years?</td>
<td>How do you intend to achieve your firm’s vision?</td>
</tr>
</tbody>
</table>

www.osbplf.org/services/resources/#forms > Opening or Moving a Law Office > Law Office Business Plan Worksheet
Vision Statement

• WHO are you?
• WHAT problems do you want to solve?
• WHERE are your services needed?
• HOW do you reach those clients?

Sample Vision Statements

• To be the premier personal injury firm in the Pacific Northwest.
• We strive to be the standard for excellence in the field of marital and family law.
• To serve as the state’s leader in the field of employment and labor law.

Mission Statement

How do you achieve your vision?

<table>
<thead>
<tr>
<th>Purpose</th>
<th>Business</th>
<th>Values</th>
</tr>
</thead>
<tbody>
<tr>
<td>At ABC Law Firm, we help families overcome their differences and put their lives back on track.</td>
<td>Our firm is committed to delivering top-notch traditional and non-traditional legal services tailored to clients of all financial abilities.</td>
<td>We take our time to listen to and understand our clients’ concerns and customize a solution that directly responds to their individual needs.</td>
</tr>
</tbody>
</table>

Startup Budget

- Hardware/software
- Furnishings and décor
- Supplies
- Research
- Marketing
- Entity registration
- Bar/PLF dues
Monthly Budget

- Rent/utilities
- Phone/Internet
- Recycling/shredding
- Supplies
- Bar/PLF dues
- Organization dues (e.g., local bar associations)
- CLEs
- Business insurance
- Marketing
- Subscriptions (ex. Paid research, software)
- Tax withholdings
- Accountant/bookkeeper
- Credit card processing
- Miscellaneous (e.g., lunches, travel)
- Salary

Opening Bank Accounts

- General office
- IOLTA
  - Oregon Law Foundation Tax ID
  - Proper naming
  - Bank charges
  - Management

https://www.osbplf.org/services/resources/#forms
Trust Accounting > Notice to Financial Institutions- Opening an IOLTA Account in Oregon
Equipping the Office

Type of Office

- Know your desired setup
- In-office
- Hybrid
- Virtual
- Be ready to work remotely
- Efficient office space
Remote Options

Furniture and Supplies

- Desk
- Chair
- Headset
- Office supplies
Hardware and Software

- Desktop/laptop/tablet
- Internet
- Phone system
- Printer/scanner/copier
- Word processing
- PDF
- Email
- Calendar
- Conflict checking
- File management
- Timekeeping/billing
- Accounting

Software Options

<table>
<thead>
<tr>
<th>Practice Management Software</th>
<th>Standalone Software</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="logo.png" alt="Clio" /></td>
<td>• Accounting</td>
</tr>
<tr>
<td><img src="logo.png" alt="mycase" /></td>
<td>• Antivirus</td>
</tr>
<tr>
<td><img src="logo.png" alt="actionstep" /></td>
<td>• Client relationship management</td>
</tr>
<tr>
<td><img src="logo.png" alt="CosmoLex" /></td>
<td>• Cloud storage</td>
</tr>
<tr>
<td><img src="logo.png" alt="rocket matter" /></td>
<td>• Dictation</td>
</tr>
<tr>
<td><img src="logo.png" alt="PRACTICE PANTHER" /></td>
<td>• Document automation</td>
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<td>• Electronic signature</td>
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<td>• Encryption</td>
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<td>• Notetaking</td>
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<td>• Payment processing</td>
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<td>• Videoconferencing</td>
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<td>• Virtual private network</td>
</tr>
</tbody>
</table>
Office Systems and Procedures

- Opening
- File organization and storage
- Calendaring
- Closing
- File retention/destruction

- Closing
- File retention/destruction

- File management

- Timekeeping
- Accepting payment

- Timekeeping and billing

- Regular communication
- Setting reasonable expectations
- Disengagement
- Feedback

- Client management

- Initial contact
- Screening
- Initial consultation
- Conflict checking
- Nonengagement
- Intake
- Engagement letter/fee agreement
- Open file

- Client intake

- Fee structure
- Timekeeping
- Billing

- Client intake and management

- Initial contact
Client Intake

1. Initial contact
2. Screening
3. Initial consultation
4. Conflict checking
5. Nonengagement
6. Intake
7. Engagement letter/fee agreement
8. Open file

https://www.osbplf.org/blog/inpractice/client-intake--making-it-more-effective-and-efficient/

Client Management

- Regular communication (ex. Client portal)
- Setting reasonable expectations
- Disengagement
- Feedback
File Management

1. Opening
2. File organization and storage
3. Calendaring
4. Closing
5. File retention and destruction

https://www.osbplf.org/services/resources/#forms > Office Systems and Procedures > Setting Up an Effective Filing System

Timekeeping and Billing

• Fee structure
• Timekeeping
• Billing
• Accepting payments
Attorney Fees

• Hourly
• Flat
• Contingent
• Hybrid
• Subscription
• Alternative

https://www.osbplf.org/blog/inpractice/establishing-reasonable-fees/

Track Your Time

• Track immediately
• ALL time and expenses (administrative, flat, project, etc.)
• Be diligent
• Be consistent

https://www.osbplf.org/blog/inpractice/managing-our-time-managing-ourselves/
Getting Paid

- Online payments
- Flat fee earned upon receipt (ORPC 15(c)(3) and 1.15(c))
- Accurate retainer
- Evergreen (replenishable) retainer
- Follow up
- Payment plan
- Discounts for aged invoices

https://www.osbplf.org/blog/inpractice/options

Online Payments

<table>
<thead>
<tr>
<th>Practice Management Software</th>
<th>Standalone Software</th>
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<tbody>
<tr>
<td>Clio</td>
<td>HEADNOTE</td>
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<tr>
<td>mycase</td>
<td>LAWPay</td>
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<tr>
<td>rocket matter</td>
<td>LawPay</td>
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<tr>
<td>CosmoLex</td>
<td>lexcharge</td>
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<tr>
<td>PRACTICE PANTHER</td>
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</tbody>
</table>
Market Analysis and Goals

- Market Need
  - Market size
  - Demand

- Target Market
  - Practice area(s)
  - Ideal clients
  - Demographics
  - Geography

- Competition
  - Direct or indirect competitors
  - Advantage

- Set goals
- Track marketing
- Adjust marketing and intake strategies accordingly
Online Tools

• Website creation
• Search engine optimization
• Pay per click
• Social media
• Blogging

Offline Tools

• Print ads
• Billboards
• Newspapers
• Transit ads
• TV/radio
Referrals

- Client referrals
  - Customer service
  - Exit survey/request
- Network referrals
  - Attorneys
  - Non-attorneys

Networking (attorneys)

**General**
- New lawyer mentoring (OSB & MBA)
- OSB committees
- County bar associations
- Oregon New Lawyers Division
- Oregon Women Lawyers

**Practice-Area Specific**
- OSB sections
- Oregon Trial Lawyers Association
- Oregon Criminal Defense Lawyers Association

**Local**
- American Bar Association

**National**
- American Immigration Lawyers Association
Networking (attorneys)

- Current contacts
- Listserves
- Attending CLEs
- Attending social events/fundraisers
- Writing projects
- Cold calls/emails

Networking (non-attorneys)

Know your target industry | “Location” | Best way to reach

* Remember ORPC 7.3 (solicitation) *
Client Development

Leads

A person or business that you can reach

Prospects

Leads with potential to become clients

Clients

Prospects who have hired you to complete legal work for them

Conversion

• How many leads become clients?
• Track your conversion rate
  • # of clients/# of leads × 100
  • 20 leads → 2 new clients = 10% conversion rate
Marketing Effectiveness

How are leads/prospects finding you?
Know your conversion rate
Measure each marketing campaign

Client Relationship Management (CRM)

<table>
<thead>
<tr>
<th>Practice Management Software</th>
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<td>Clio</td>
<td>Lawmatics</td>
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<td>HubSpot</td>
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</table>
### Assessment

### Financial Health

<table>
<thead>
<tr>
<th>Purpose</th>
<th>Calculation</th>
<th>Income Statement</th>
<th>Balance Sheet</th>
<th>Cash Flow Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Profitability during a specific time period (e.g., 1/1/21 to 2/28/21)</td>
<td>Revenue earned minus expenses incurred</td>
<td>Income Statement</td>
<td>Balance Sheet</td>
<td>Cash Flow Statement</td>
</tr>
<tr>
<td>Snapshot of firm's financial position at a point in time (End of year)</td>
<td>Assets, liabilities, owner's stockholder's equity</td>
<td>Balance Sheet</td>
<td>Balance Sheet</td>
<td>Cash Flow Statement</td>
</tr>
<tr>
<td>Change in cash flow over a specific period of time (e.g., 1/1/21 to 12/31/21)</td>
<td>Cash coming into the firm</td>
<td>Income Statement</td>
<td>Balance Sheet</td>
<td>Cash Flow Statement</td>
</tr>
</tbody>
</table>

[https://www.osbppf.org/inpractice/the-basics-of-your-financial-statements/](https://www.osbppf.org/inpractice/the-basics-of-your-financial-statements/)
Measure Progress

• Maintain written, measurable goals
• Track information
  • Financial
  • Number of leads/prospects/clients
  • Conversion rate
• Adjust as necessary

Hire?

• Administrative vs. billable hours
• Budget
• Know your needs
• Attorney/non-attorney
• Employee or independent contractor
• Hiring process
• Supervisory duties

https://www.osbplf.org/services/resources/#forms > Staff
PLF Resources

https://www.osbplf.org > Services

- Forms
- Books
- CLEs
- InPractice blog
- InBrief Newsletter
- Practice Management Assistance Program (PMAP)
- Oregon Attorney Assistance Program (OAAP)

Contact Us

Practice Management Attorneys
www.osbplf.org
503-639-6911 | 800-452-1639

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Monica Logan  monical@osbplf.org
Isaac Alley  isaaca@osbplf.org

free and confidential
Solo Success: Launching Your Own Practice

1. PowerPoint Slides
2. PLF-covered attorneys by county in Oregon: https://www.osbplf.org/blog/inpractice/you-may-be-needed-elsewhere--how-a-market-analysis-can-help/
3. ABA Technology Resources: https://assets.osbplf.org/forms/practice_forms/ABA%20Technology%20Resources.pdf
4. Resources from the PLF Risk Management Services provides a great variety of free CLEs, practice aids, publications, newsletter articles, and blog posts:
   a. PLF publications available at https://www.osbplf.org/services/resources/#plf_books
      i. A Guide to Setting Up and Running Your Law Office
      ii. A Guide to Setting Up and Using Your Lawyer Trust Account
   b. PLF CLEs available at https://www.osbplf.org/services/resources/#cles
   c. PLF practice aids available at https://www.osbplf.org/services/resources/#forms
   d. PLF blog, InPractice, at https://www.osbplf.org/blog/inpractice/
   e. PLF newsletter, InBrief, available at https://www.osbplf.org/services/resources/#inbrief
      (use the search box to help you locate articles on topics you are interested in)
5. Resources for Topics Covered Today:
   a. Client Relations
      i. PLF Practice Aids see Client Relations
         a) Client Relations Best Practices
   b. Engagement Letters and Fee Agreements
      i. PLF Practice Aids See Engagement Letters and Fee Agreements
         a) Engagement Letters and Fee Agreements
   c. Disengagement and Nonengagement
      i. PLF Practice Aids see Disengagement and Nonengagement
         a) PLF blog articles
            a. Drawing the Line for Nonengagement
               (https://www.osbplf.org/blog/inpractice/drawing-the-line-for-nonengagement/)
   d. Entity Formation
      i. PLF Practice Aids see Entity Formation for Lawyers
         a) Choice of Entity for a Legal Practice in Oregon
   e. Marketing
      i. PLF Practice Aids See Marketing
         a) Create a Marketing Plan for Your Small Law Firm
         b) Marketing and Business Development Worksheets
         c) Marketing and Business Development: Crucial Skills
         d) Marketing Plans- Sample and Completed
         ii. PLF blog articles
            a) If You Build It They Will Come: Make It Easier For Potential Clients to Contact You
               (https://www.osbplf.org/blog/inpractice/if-you-build-it-they-will-come--make-it-easier-for-potential-clients-to-contact-you/)
            b) Marketing: Your Law Firm, Yourself
               (https://www.osbplf.org/blog/inpractice/marketing--your-law-firm-yourself/)
f. Office Systems and Procedures
   i. PLF Practice Aids see Office Systems and Procedures
      a) File Retention and Destruction Guidelines
      b) Creating an Office Procedures Manual
      c) Docketing and Calendaring Checklist
      d) Mail Handling
      e) Office Systems Review Checklist
      f) Reminder and Tickler Systems
      g) Setting Up an Effective Filing System
      h) New Client Information Sheet with Disclaimer
   ii. PLF blog articles
      a) Making the Work Flow (https://www.osbplf.org/blog/inpractice/making-the-work-flow/)
      b) Don’t Underestimate the “Obvious”: Document, Document, Document
      c) Manage Your Trust Account Like You Care For Your Dog
         (https://www.osbplf.org/blog/inpractice/manage-your-trust-account-like-you-care-for-your-dog/)
      d) Billing Software: Explore Your Options
         (https://www.osbplf.org/blog/inpractice/billing-software--explore-your-options/)
      e) Phone Systems: What Works for Your Firm?
         (https://www.osbplf.org/blog/inpractice/phone-systems--what-works-for-your-firm/)
      f) Manage Your Law Office with Documented Systems and Procedures
         (https://www.osbplf.org/blog/inpractice/manage-your-law-office-with-documented-systems-and-procedures/)
      g) Client Intake: Making it More Effective and Efficient
         (https://www.osbplf.org/blog/inpractice/client-intake--making-it-more-effective-and-efficient/)
      h) Electronic Payment Processing Software for Law Firms
         (https://www.osbplf.org/blog/inpractice/electronic-payment-processing-software-for-law-firms/)
      i) Reduce Malpractice Risk by Properly Managing Files
         (https://www.osbplf.org/blog/inpractice/reduce-malpractice-risk-by-properly-managing-files/)
   iii. CLEs
      a) Practice Management Software: Know What You Want Before Making the Switch
   g. Opening a Law Office
      i. PLF Practice Aids see Opening or Moving a Law Office
      a) Checklist for Opening a Law Office
b) Office Sharing Guidelines

c) Home-Based Law Office

d) Law Office Business Plan Worksheet

e) Start-Up Budget

f) Monthly Budget

g) Cash Flow Worksheet 12 Months

ii. PLF blog articles

a) Why is More Than a Question: Understanding Your Firm’s Purpose
   (https://www.osbplf.org/blog/inpractice/why-is-more-than-a-question-understanding-your-firms-purpose/) 

b) Getting it All Done as a Solo (https://www.osbplf.org/blog/inpractice/getting-it-all-done-as-a-solo/) 

c) Business Planning for Your Practice
   (https://www.osbplf.org/blog/inpractice/business-planning-for-your-practice/) 

d) The Basics of Your Financial Statements
   (https://www.osbplf.org/blog/inpractice/the-basics-of-your-financial-statements/) 

h. Staff

i. PLF Practice Aids see Staff

a) Checklist for Hiring Staff

b) Checklist for New Staff

c) Confidentiality in the Law Office

d) Delegation Memo

e) Ethics for Support Staff

ii. CLEs

a) Staffing for Solo and Small Firms: Assembling an Effective Teams
CHAPTER 14

SOLO SUCCESS: STAYING THE COURSE

Monica Aguilar Campbell
Monica Aguilar Campbell Law Office LLC

Jeff Hinman
Hinman Law PC

Jessica M. Nomie
Jessica Nomie Law

Monica H. Logan, Moderator
Professional Liability Fund
Practice Management Attorney
SOLO SUCCESS: STAYING THE COURSE

Speakers: Jeff Hinman, Jessica Nomie, Monica Aguilar Campbell
Moderator: Monica Logan

Planning & Set-up

• Reason for solo practice
• Decisions like choice of entity, location, and practice area
• Hardware and software programs
Costs & Fees

• Operating expenses and costs
• Determining your hourly rate or fee structure

Client Development

• Finding new clients
Legal Support

- Decision to hire
- Hire vs. contract out for support services

Questions?
CHECKLIST FOR OPENING A LAW OFFICE

- Decide what form of entity your business will be. (For sole, sole practitioner, professional corporation, single-member LLC. For multi-member firms, professional corporation, partnership, LLC, LLP.)

- Name your business. If you form a PC, LLP, or LLC, comply with statutory requirements. See ORS 65.115, ORS 67.825, and ORS 63.094, respectively.

- The name of your business must not be misleading on the identity of the lawyers practicing under the name. Use of “and Associates” violates the Rules of Professional Conduct if there are no associates or no relationship exists among lawyers in an office share attempting to use this designation. “Group” violates the rule if the practice comprises a sole proprietor and no other lawyers. (The common meaning of “group” implies two or more individuals.) See OPC 7.1 and 7.1(a).

- Use of trade names and fictional names of deceased or retired lawyers is permitted. For more information, review Tyler E. Stiles, “What’s in a Name: Things to Consider before Hanging that Sign.” Oregon State Bar Bulletin (November 2006), available online at https://www.osbar.org/publications/ourfirst/ourfirst/barbulletin.html

- Choose a location (downtown, suburb, virtual, or home office).

- Choose space option (rent office space, share office space, executive suite, virtual office, and/or home office).

- Determine office needs:
  1. Furniture:
     a. Lawyer’s office (desk, chair, guest chairs, file cabinet, file shelf, wastebasket)
     b. Reception area (chairs, coffee table, lamp, pictures, magazine rack)
     c. Staff (desk, chair, staff mail, wastebasket, file cabinet)
     d. Conference (table, chairs)
  2. Equipment:
     a. Dedicated business telephone – landline, VoIP, or cellphone
     b. Voicemail or virtual receptionist!
     c. Secure Internet connection
Business Plan Worksheet

Written materials:
- A Guide to Setting Up and Running Your Law Office
- Start-up budget
- Monthly budget
- Business plan worksheet

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CHAPTER 15

SUCCESS TIPS: JOINING A FIRM (PART I)

Justice J. Brooks, I
Foster Garvey PC
Sydney Duong Holmes
Larkins Vacura Kayser LLP
Holly J. Martinez
Perkins Coie LLP
Traci Ray, moderator
Barran Liebman LLP
Learning the Ropes 2022
Success Tips for Lawyers Joining Firms

The Top 10 List – Things You Need to Do to Be a Successful Associate

1. **Do good work.**
   - This is the minimum.
   - A “draft” document is a myth. Every “draft” finished should be polished and complete.
   - Make yourself available.
   - Learning your craft is an investment in yourself.

2. **Communication skills / take responsibility for mistakes.**
   - Adapt your style to your client’s, your staff, and the partner-in-charge.
   - Mistakes are expected, but inform the partner-in-charge as soon as possible.
   - Ask questions. The more direction you get from the partner, the higher quality the work product and the more efficient you will be.

3. **Perspective—be client focused.**
   - Everyone is your client—associates, partners, and the firm’s actual clients.
   - Be client focused and put yourself in their shoes—what would they want?
   - Take the initiative.
   - The Portland legal community is very small.

4. **Understand that law is a business.**
   - Understand the finances.
   - Add value.
   - Manage and bill your time—learn how to write effective billing narratives.
   - Have a system and do it consistently.

5. **Have a plan and set goals.**
   - Set short-term and long-term goals that are measurable.
   - Make sure your goals are realistic (equity vs. nonequity partners; myth vs. fact).
   - Put those goals down on paper in a career development plan.
   - Revisit the plan regularly with someone who will hold you accountable.
   - One of your goals should be to build a book of business.

6. **Build relationships.**
   - Clients can come from anywhere.
   - Follow your passions.
   - Think of rainmaking as a team activity.
   - Don’t forget internal / existing clients.
   - Seek out champions and mentors; they are different roles.
7. **Work well with staff.**
   - Learn how to delegate.
   - Support staff talk to one another and between firms.
   - The support staff will know more than you do. Accept it and get over any attorney vs. legal assistant hierarchical misconceptions.
   - Set your boundaries with the support staff.

8. **Understand the culture and politics of the firm.**
   - Pay attention to and understand the firm culture—whether as a potential applicant or as an associate already working there—and remember that culture may vary substantially between practice groups.
   - Be yourself while also being professional and in touch with the firm’s culture.
   - Seek mentors within the firm to help you understand the firm’s culture and navigate its political landscape.

9. **Take care of yourself.**
   - Drink water and get sleep.
   - Find ways to combine personal health and professional development.
   - Don’t feel guilty about spending a little time or money on self-care.

10. **It’s a career, not just a job.**
    - Think of yourself as a portable asset.
    - Don’t burn bridges

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Traci Ray
*Barran Liebman LLP*  
Justice J. Brooks, I
*Foster Garvey PC*

Sydney Duong Holmes
*Larks Vacura Kayser LLP*  
Holly J. Martinez
*Perkins Coie LLP*
Success Tips: Joining a Firm
Additional Resources

American Bar Association:
   Young Lawyers Division: http://www.americanbar.org/groups/young_lawyers.html
   Publications: http://www.americanbar.org/groups/young_lawyers/publications.html
   21-Day Racial Equity Habit-Building Challenge
   https://www.americanbar.org/groups/labor_law/membership/equal_opportunity/

Oregon State Bar Oregon New Lawyers Division: http://www.osbar.org/onld

Multnomah Bar Association:
   Multnomah Lawyer newsletter: https://mbabar.org/newsletter
   Young Lawyers Section: https://mbabar.org/YLS

Oregon Attorney Assistance Program: www.oaap.org
   InSight newsletter: https://www.oaap.org/insights/

The Curmudgeon's Guide to Practicing Law, by Mark Herrmann
CHAPTER 16

JOINING A FIRM

SUCCESS TIPS FOR LAWYERS JOINING FIRMS (PART II)

Gemma A. Nelson
*Elliott Ostrander & Preston PC*

Bryan R. Welch
*Oregon Attorney Assistance Program*
Chapter 16
SUCCESS TIPS FOR LAWYERS JOINING FIRMS (PART II)

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INTROVERT’S SURVIVAL GUIDE FOR NETWORKING EVENTS, inSIGHT SEPTEMBER 2012 .................................................................................................... 16-11

ABA JOURNAL ARTICLE LINK
https://www.abajournal.com/magazine/article/most_lawyers_are_introverted_and_thats_not_necessarily_a_badThing
Success Tips for Lawyers Joining Firms

A. Finding Your Niche

1. OAAP Attorney Counselors assist many lawyers and law students with career-related concerns. Lawyers who request assistance from the OAAP typically represent a broad spectrum of the legal profession:

- New admittees searching for their first law job.
- Experienced lawyers evaluating whether to switch practice areas or firms, or leave private practice to work a law-related, or non-legal job.
- Lawyers seeking to effectively balance their work, family and personal life.
- Lawyers who find themselves out of job.
- Lawyers who are reentering the legal profession after working in other fields, or taking a leave from practice to focus on health issues or their families.
- Lawyers seeking to find work more suited to their values, skills, interests and personal preferences.
- Lawyers starting to consider retirement.

2. The OAAP is available to you at any stage of your legal career. We are here to help you find your niche and to offer our support as you navigate the stress of searching for a job, adjusting to a new job, taking on the challenging aspects of your job, balancing your career with your personal life, or making a job change:

- We offer confidential career counseling. Attorney Counselors are available to meet individually to discuss circumstances, administer self-assessments, brainstorm alternatives and strategies, and provide referral resources when appropriate.
- We conduct a six-session networking and support group for lawyers in the process of making a career change, “Finding Meaningful Work.” The group is designed to help lawyers create and execute a job search plan, develop a mission statement and elevator speech, learn and practice networking, as well as refine their job search skills.
- We periodically hold a “Job Satisfaction through Self-Assessment” workshop.
- We offer “Lawyers in Transition” presentations that occur during the lunch hour. Presentations feature guest speakers who share their personal experiences and successes with career change.
- We sponsor career-related seminars yearly, some of which are available on CD and DVD.

If you are interested in accessing any of our career-related resources, please visit our website at www.oaap.org or contact the OAAP at (503) 226-1057.
B. Resilience and Well-being in the Practice of Law

1. Resilience allows lawyers to successfully cope with the stressful demands of legal practice. Resilience is both an ongoing process and an outcome. When viewed as an outcome, it means being able to bounce back from stressors (recovery); endure and remain engaged in a positive way despite the stressors (sustainability); and learn as well as build new capacities from the stressful experiences (growth) (Arewasikporn, Davis, & Zautra, 2013). In its absence, we are more likely to see the shadow side of stress such as burnout, compassion fatigue, or unhealthy use of substance. Two of the best resilience resources within your reach are yourself and your social connections.

2. Building Blocks of Resilience: Cultivating resilience can be characterized by the acronym ABC. To strengthen your resilience while practicing law and, in turn, your well-being, consider:

   **Acknowledge.** Acknowledge and adhere to those matters that contribute to your positive emotional experiences. Research shows us that possessing a positive affect can have the powerful effect of deterring the influence of negative events such as stress and pain. These include:

   - *Identifying and reframing negative thoughts.* The way you view adversity or challenges can impact your productivity, creativity, and self-worth. Viewing stressful events as a challenge or an opportunity instead of a hardship can shift our beliefs and the resulting consequences. Kelly McGonigal (2013), a health psychologist, referred to it as “transforming” stress, and she explained that being in a state of flow (i.e. at work) is a stress response much like when we are threatened or overwhelmed. Seeing stress as a source of energy, resource, or meaning for ourselves can increase the activities in the same areas of our brain that are associated with the type of focused attention we encounter when rising up to a challenge (McGonigal, 2013). Similarly, finding ways to dispute a limiting thought such as by asking ourselves for the evidence that support that negative thought can stop a downward spiral (Levine, 2018) and allow for constructive possibilities.

   How are you confronting your negative thoughts?

   - *Practicing Self-Compassion.* Kristin Neff, a professor and self-compassion researcher, defines self-compassion as "being kind and understanding toward oneself in instances of pain or failure, rather than being harshly self-critical; perceiving one's experiences as part of the larger human experience, rather than seeing them as isolating; and holding painful thoughts and feelings in mindful awareness, rather than over-identifying with them.” (Seppala,
When we practice self-compassion, we take on an attitude of kindness and understanding toward ourselves much like a trusted and loving friend who listens to us with empathy, and is encouraging and validating. Self-compassion has been associated with lowered anxiety while allowing us to see shortcomings with greater calm and as a learning opportunity (Seppala, 2011).

*How might you be kinder and more understanding toward yourself today?*

- **Exercising Gratitude.** Gratitude elicits positive feelings and leads to emotional well-being. A study of a three-month trial of gratitude journaling showed a significant favorable impact on well-being, affect, and depression (O’Connell, O’Shea, & Gallagher, 2017). Setting up a diary of positive experiences provide the opportunity to experience these emotions again and again when re-reading the diary entries (Seligman et al. 2005). Keeping a journal, a file, or record of events with favorable outcomes can help you cultivate gratitude.

*How else might you see yourself practice gratitude?*

- **Identifying your strengths, assets, and resources.** Individuals who use their strengths experience greater subjective well-being, which is related to mental and physical health-related quality of life (Proctor, Maltby, and Linley, 2010). Make a list of your strengths such as your skills, attitudes, aptitudes, talents, or qualities, and keep it nearby so you can easily be reminded of it. If you are seeking to find your strengths, recall past instances when you overcame a stressful or traumatic situation. *What did you do that was helpful during the event?*

*What else may your strengths be?*

- **Engaging in Self-Care:** Discovering or rediscovering relaxing, refreshing, and enjoyable activities can help replenish your energy and prepare you for the next challenge.

*How do you (or might you) practice self-care?*

**B: Balance.** Balance the needs of the different dimensions of your life to increase your resolve, sense of self, and well-being. Regularly checking in with yourself and the ways you are supporting these areas can help you find the balance that works best for you. The report of the National Task Force on Lawyer Well-Being lists six dimensions of well-being:
1) Occupational: Finding satisfaction, meaning and financial stability through work.

2) Emotional: Being able to regulate our emotions.

3) Physical: Engaging in physical activity, healthy diet, and sufficient sleep.

4) Intellectual: Pursuing creative or intellectual outlets for continued personal or professional growth and development.

5) Spiritual: Being attuned to those qualities that allows us to find meaning in daily experiences, or to transcend physical and emotional discomfort.

6) Social: Supporting our need for belonging.

(Lawyer Well-Being Tool Kit, 2018).

How are you doing in each of the dimensions mentioned above? Which areas might you spend more time on?

C: Connect. Connect with and maintain a socially resilient environment. Research informs us that having a sense of shared community and accountability where individuals are encouraged to be there for each other and help one another creates a socially resilient environment (Arewaskiporn, Davis & Zautra, 2013). More specifically, among the social environmental factors that promote resilience (as seen in children and adults) are 1) being in contact with caring people who value the person’s individuality; 2) being engaged in activities that allow a person to be part of a cooperative endeavor and which encourage helping others; and 3) involvement in groups within the community (e.g. church) that regard connection, provide meaning, and foster growth (Arewaskiporn, Davis & Zautra, 2013). To foster a socially resilient environment, find like-minded people with whom to connect, or create your own community. Reach out to friends, family, colleagues, peer, or mentors and expand your support system. Remain open to asking for help. Contact professionals such as clinicians or counselors, including the OAAP, for added support.

How else might you stay connected and maintain a socially resilient environment?
C. Brief Resilience Scale (BRS)

The Lawyer Well-Being Took Kit (https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_well-being_toolkit_for_lawyers_legal_employers.authcheckdam.pdf) has a list of individual assessments (pp. 25-28) for lawyers seeking to engage in self-assessment. Among the listed assessment is the Brief Resilience Scale (BRS), which can be found at https://ogg.osu.edu/media/documents/MB%20Stream/Brief%20Resilience%20Scale.pdf (a hard copy has been provided below). The BRS is one way of evaluating your current level of resilience.

BRS scores can be interpreted as follows (Smith et al., 2013, p. 17):

<table>
<thead>
<tr>
<th>BRS Score:</th>
<th>Interpretation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.00-2.99</td>
<td>Low resilience</td>
</tr>
<tr>
<td>3.00-4.30</td>
<td>Normal resilience</td>
</tr>
<tr>
<td>4.31-5.00</td>
<td>High resilience</td>
</tr>
</tbody>
</table>

Brief Resilience Scale (BRS)

<table>
<thead>
<tr>
<th>Item</th>
<th>Statement</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>BRS 1</td>
<td>I tend to bounce back quickly after hard times.</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>BRS 2</td>
<td>I have a hard time making it through stressful events.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>BRS 3</td>
<td>It does not take me long to recover from a stressful event.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>BRS 4</td>
<td>It is hard for me to snap back when something bad happens.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>BRS 5</td>
<td>I usually come through difficult times with little trouble.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>BRS 6</td>
<td>I tend to take a long time to get over set-backs in my life.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>

**Scoring:** Add the responses varying from 1-5 for all six items giving a range from 6-30. Divide the total sum by the total number of questions answered.

**My score:** _____ item average / 6

References


Networking is to business what exercise is to health: while everyone agrees it’s essential, it is something that people frequently avoid, are uncomfortable with, or feel that they can’t do well – if at all!

Many people say, “Networking comes naturally to outgoing, chatty types, but not me. I’m quiet, and I feel anxious in large gatherings or meeting new people. I’ll never be able to walk up to strangers and start talking about myself.” If you find yourself agreeing with all or part of that statement, don’t feel like you’ll never be able to enjoy the benefits of networking. Follow a few of these suggestions, and with a small effort you may be surprised at the results.

Realize That You’re Not Alone!

While some people embody Will Rogers’ philosophy that “A stranger is just a friend I haven’t met yet,” the rest of us experience varying degrees of unease when meeting new people. One step to conquering anxiety is to realize that other people might also be uncomfortable and to take ourselves less seriously. Don’t feel that you have to apologize for taking up someone’s time. Ideally, you’ll be listening more than you are talking, and most people like to talk about their work or their interests.

If your networking goal is career-related, remember that most successful people got help along the way. You are giving people an opportunity to feel good by helping you – even if it’s only for a 20-minute informational interview. Everyone begins his or her journey at the starting line.

Start Small

Don’t wear yourself out when you begin your networking. Set a modest, achievable goal, like going to a local group that meets monthly. (Often these meetings include helpful self-introductions.) The next month, you might decide to chat with one or two people.

If that seems too daunting, practice on familiar territory: talk to your friends and family members. You may be surprised at the contacts they have or what you learn when you strike up a conversation about their backgrounds and interests.

If you still feel intimidated about starting a conversation with someone you don’t know, recruit a friend to attend an event with you. If he or she is more outgoing, have your friend introduce you to a few people, and then try meeting some others on your own. If your friend is more reserved, circulate independently for 20 minutes, and then regroup. Either way, the buddy system can initially be more comfortable than striking out on your own, and having someone around for support makes it more likely that you’ll stick to your goal.

Work From Your Strengths

At times you won’t be in your comfort zone, but always be aware of your particular strengths. Many people who are uncomfortable in large gatherings do well when talking with one person. Shy people frequently learn that one way to avoid talking about themselves is to ask other people questions. Approach people who are standing alone – they might be feeling awkward, too!
Break the ice by asking a simple question, like “Where did you get your coffee? I didn’t see any when I came in,” or comment on the surroundings: “This is a great room – I’ve never been in this building before.” Simple comments can lead to a longer conversation.

Practice networking skills at events you enjoy. You’ll be more motivated to attend, and it will be easier to talk with people about the topic.

**Tried-and-True Techniques**

You may have received some of the best advice about meeting new people on your first day of grade school: get there early, stand up straight, look people in the eye, and have a purpose.

Dale Carnegie, who authored the classic *How to Make Friends and Influence People*, provided these timeless tips: Don’t forget to smile – it helps you relax and puts other people at ease. Keep your business cards handy, and ask others for their cards. Make a note of how you met the person and his or her area of interest, so you can follow up effectively. Use the person’s name in conversation. It makes the conversation more personal, and it helps you remember them.

**Be Prepared!**

Experienced athletes warm up and prepare before their events, and the same drill applies to networking. Have a few conversational icebreakers in your repertoire before attending a meeting or event. These should be simple questions that require more than a “yes” or “no” answer. “What kind of work do you do?” “How did you get into that field?” “What do you like most about your job (or your area of practice)?” “What do you find most challenging?” “What would make your job easier?” “What would you change if you could?” are all good conversation starters.

These types of open-ended questions are also the basis of a great informational interview, with a few additions. At the end of an informational interview, always thank the person for spending time to talk with you and ask if he or she can suggest anyone else who might be helpful for you to meet. If so, ask permission to use the interviewee’s name when you introduce yourself to his or her contact.

Before entering into the networking arena, hone your “elevator speech” – a catchy, one-minute introduction. Here’s a suggested formula for a memorable elevator speech: I/We + Help + (Target Market) + (Benefit). For example, “I help companies protect and defend their intellectual property assets.” If you’re not among other lawyers, make your introduction easy for a non-lawyer to follow: “I’m a criminal defense attorney who represents people accused of a DUI.” Use natural language, and practice it until it becomes second nature. In time, you can add one more element: what makes you unique.

Be prepared with responses for questions that might not have a simple answer, particularly if you are in a career transition. If you’re currently out of work, consider whether you want to share that information with new contacts up front. It can be helpful to have your network of existing contacts know that you are actively looking for work, but you might not want to lead with that when meeting someone for the first time. If you are currently employed but looking at other opportunities, have a response ready for the person who says, “Hey, what are you doing here? You’re not looking to leave your firm, are you?”

**If All Else Fails . . .**

If you try some of these suggestions and feel like you’ll never be comfortable with networking, don’t give up! Try a structured networking group that helps its members to build business through word-of-mouth referrals. (Be mindful of ethics rules prohibiting lawyers from giving or receiving reciprocal referrals. Also be aware of the ethics rules governing personal follow-up on referrals.) Don’t forget your college and law school alumni associations, which provide access to preexisting connections as well as networking groups based on ethnicity, gender, or special interests.

E-mail can be a good supplement to in-person “meet and greet,” allowing you to get in touch with lawyers who were mentioned in the news or who authored articles on a specific topic. Meeting someone for coffee can frequently be more productive than mingling at a cocktail party or large dinner event. Don’t neglect the world of social networking sites, either. Try LinkedIn (www.LinkedIn.com ) for direct business networking, and consider starting a blog or using Twitter (www.twitter.com) as a marketing tool.

**Finally**

Analyze your results: Which techniques worked for you? Which ones were unproductive? Remember
to pace yourself. Getting out of your comfort zone can be challenging, but long-term success is attained by gradual changes over time. Doing too much too soon can lead to burnout.

Remember to follow up with the people you meet. The key to successful networking isn’t merely making a lot of contacts; it is developing those contacts into mutually beneficial relationships that will provide rewards over a career lifetime.

Meloney C. Crawford
OAAP Attorney Counselor

Four Great Books on Networking

- Harvey Mackay, Dig Your Well Before You’re Thirsty: The Only Networking Book You’ll Ever Need (Currency Books: 1999)
- Jay Conrad Levinson and Monroe Mann, Guerrilla Networking: A Proven Battle Plan to Attract the Very People You Want to Meet (AuthorHouse: 2009)
INTROVERT’S SURVIVAL GUIDE FOR NETWORKING EVENTS

I’ll admit it — networking is one of my least favorite parts of my job. I wish everyone just knew who I was, thought I was fabulous, and that my phone was ringing off the hook with more business than I can handle. Unfortunately, that’s not the case. So every week I attend two to four networking events — even though casual chit-chat with strangers over mini appetizers is not necessarily my favorite way to spend an evening.

As an Introvert, You’re in Good Company

Despite the fact that I’m a professional public speaker, I’m a big introvert. I dislike attending most events that involve large crowds because they make me feel claustrophobic. I am uncomfortable at events that are so crowded that you have to yell to be heard by the person next to you. When business groups try to entice me by telling me over 1,500 people will attend their event, I cringe. I take comfort from reminding myself that I’m not the only person who feels this way.

As a business owner, it’s important to make connections within my community. Here are some of the lessons I’ve learned that help me navigate networking events as an introvert.

1. If the event room is loud and crowded, head for the hallway. You will find your fellow introverts there, enjoying their space and speaking at a normal volume for conversation.

2. If the event has an educational component, go to it. It will give you a smaller group to start with and a basis for starting conversations.

3. Go to events for business professionals, not just for lawyers. Lawyer groups can lead to referrals, but business groups will put you directly in front of potential clients.

4. Attend groups and events that interest you. When you’re comfortable, you’ll be more effective at networking. When you go to events that interest you, you’ll be more likely to meet people who are like-minded and more likely to hire you.

5. Don’t be afraid to branch out beyond the traditional networking events. Some networking groups do more unusual things like go-carts instead of happy hours. You can also network at sci-fi conventions, hiking groups, and book clubs.

6. Go to lunch and breakfast events. You might be more comfortable talking to people over a meal with your hands occupied with silverware. These events tend to be smaller, too.

7. Give yourself permission to leave early. It’s okay to set a goal for the number of contacts you want to make and leave once you achieve it.

If you’re ever uncomfortable at an event and you want to leave, it’s okay. You can always say you have another event to attend. No one has to know that the appointment is with your family, a book, or your pillow.

Ruth Carter
The Carter Law Firm
The author’s weekly blogs can be read...
CHAPTER 17

PRO BONO, LEGAL AID, AND OTHER TOOLS TO REACH JUSTICE FOR ALL

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*Statewide Pro Bono Manager, Legal Aid Services of Oregon*

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*Oregon State Bar Referral and Information Services Manager*

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*Oregon State Bar Assistant Director of Oregon Law Foundation and Legal Services Programs*
# Chapter 17

**PRO BONO, LEGAL AID, AND OTHER TOOLS TO REACH JUSTICE FOR ALL**

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Access to Justice in Oregon

Presented by
Maya Crawford Peacock
Executive Director, Campaign for Equal Justice

Jill Mallery
Statewide Pro Bono Manager, Legal Aid Services of Oregon

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Learning the Ropes
November 9, 2022
Having fair access to the justice system is one of the most basic ways we protect ourselves and our families from harm. Fair access to the justice system protected Kelly from an abusive ex-partner, and fair access to the justice system protected her children when she couldn’t protect them on her own.

When Kelly started the divorce process, her ex-husband hired a lawyer and started threatening to put all of his resources into getting custody of their three children. Kelly couldn’t afford a lawyer of her own, but she knew her children wouldn’t be safe in her ex-husband’s custody. She had been granted a restraining order because of his abusive behavior, and he had continued his belligerence at parenting time exchanges. By the time the divorce was finalized, he had violated the restraining order multiple times.

When Kelly’s local legal aid office saw that her ex-husband was engaging in a pattern of behavior that presented a real safety risk to Kelly and her children, they stepped in to help. Kelly’s ex-husband wasn’t cooperative and refused to respond to any of the settlement offers they presented. Ultimately, legal aid was able to get Kelly custody of her children, and the parenting plan she had requested and felt would be safe for the children. Exchanges of the children happened under supervision, and Kelly’s restraining order was renewed.

Kelly tells us that “[legal aid] was amazing—super helpful...and always gave good advice.” Without the help of a lawyer, Kelly worries she would have had to give in to her ex-husband’s demands. “It wouldn’t have been a good outcome, or safe for the children.... I couldn’t be more grateful to the whole legal aid office.”
I. Introduction

Legal aid provides free civil legal services to low-income and elderly Oregonians. Legal aid plays a critical role in providing access to justice and a level playing field for low income people statewide. Civil legal aid helps people protect livelihoods, health, and families: veterans denied rightfully earned benefits, women trapped in abusive relationships, and families facing wrongful evictions and foreclosures.

Our legal system is complex, and courts can be like a maze for non-lawyers. Without lawyers, people cannot meaningfully access the legal system to present meritorious claims and defenses. Civil legal aid makes it easier for people to access information and understand their rights.

Legal Aid Provides:
- Free civil legal services to low-income and elderly Oregonians.
- Brochures, court forms, and self-help materials to help people navigate our justice system.
- Websites with accessible legal information available to all Oregonians.
  - https://oregonlawhelp.org
  - https://oregondisasterlegalservices.org
- Resources to help stabilize families and prevent a further slide into poverty.

When we say the Pledge of Allegiance we close with “justice for all.” We need programs like civil legal aid to ensure that the very principle our founding fathers envisioned remains alive: justice for all, not just the few who can afford it.

Lawyers know first-hand the value and necessity of quality legal representation. Lawyers have a professional responsibility to help others in our community gain access to the justice system to protect their rights, their freedom, their homes, their livelihood, and their families. There are ways that lawyers and other civic minded Oregonians can make a difference in access to justice.

A Brief History of Legal Aid in Oregon: Legal aid in Oregon began in 1936 in Multnomah County. It was started by Oregon lawyers. In 1971, at the request of Governor Tom McCall, the Oregon State Bar conducted the first statewide legal needs study which led to the formation of a statewide legal aid program.

Oregon’s legal aid programs consist of two statewide programs, Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC); and one countywide program, the Center for Non-
Profit Legal Services (CNPLS) in Jackson County. Services are provided to low-income clients through community-based offices located in 18 communities throughout Oregon.

**General facts about legal aid in Oregon**

- Legal aid served over 15,500 low income citizens directly in 2021.

- Legal aid served 200,000 Oregonians through impact litigation in 2021.

- Legal aid served hundreds of thousands of Oregonians through administrative advocacy in 2021.

- Oregon’s three legal aid programs had a total of 131 attorneys in 2021. This is an 18% increase from 2020 when there were only 111. Legal aid lawyers make up less than 1% of the OSB.

- According to 2021 Census data (American Community Survey) – 663,988 Oregonians are low-income (defined here as at 125% of the Federal Poverty Income Guidelines or below). This is the income threshold that legal aid uses to determine who is eligible for services (more info on the income guidelines later).
  - This is 16% of Oregon’s population
  - This means that for each legal aid lawyer in the state, there are 5,068 low-income individuals who might need a lawyer.
  - ABA defines “minimally adequate access to justice” as 2 attorneys for every 10,000 low-income people. Oregon now meets this “minimally adequate” standard after many years of not meeting the standard.
  - We can and MUST do better than “minimally adequate.” However, look what can be accomplished when the number of legal aid attorneys goes from 111 to 131!
  - There are about 15,000 active attorneys in the OSB. That means there is 1 attorney for every 277 Oregonians.

- Oregon’s legal aid programs balance 80 different sources of funding, and funding from most sources declined during the recession.

- Legal aid stretches limited resources by providing self-help materials and through pro bono programs. OregonLawHelp.org, legal aid’s educational website, had more than 467,000 unique visitors.

- About 76% of legal aid’s clients are women—most with children to support.
II. What Are the Civil Legal Needs of Low-Income Oregonians?

Barriers to Justice: A 2018 Study Measuring the Civil Legal Needs of Low-Income Oregonians

Substantive Areas of Need
With the support of the Oregon Department of Justice, the 2018 Civil Legal Needs Study was commissioned in partnership with the Oregon Law Foundation, Oregon State Bar, Campaign for Equal Justice, Oregon Judicial Department, Legal Aid Services of Oregon, and Oregon Law Center to assess the current ability of low-income individuals to access the civil justice system. The findings were released in February 2019 in the Barriers to Justice report. A brief summary of the report follows:

General Study Findings:
- Problems are widespread
- Problems are related
- Civil legal help is needed

Legal problems seriously affect the quality of life for low-income Oregonians. A vast majority of the low-income Oregonians surveyed experienced at least one legal issue in the last year. These legal problems most often relate to basic human needs: escaping abuse, finding adequate housing, maintaining income, living free from discrimination, and accessing healthcare. Even though their legal problems are serious, most people face them alone. We are still only meeting 15% of the civil legal needs of the poor.

Most Pressing Legal Issues: The legal needs survey asked a series of questions intended to reveal the kind of problems people experienced. Each question was designed to reveal an experience where it is likely that legal help could ease a problem or legal advice could clarify rights and obligations. The goal was to determine the issues that low-income Oregonians experienced where civil legal aid could help.

The report reveals the most harmful and the most common legal problems people face. The report also outlines the types of legal issues people have within a particular category. For example, within the housing arena, the report lays out the specific problems that people are having, whether it is habitability issues, or lack of affordable housing.
**Disparate Effects:** Survivors of domestic violence and sexual assault (DV/SA) suffer civil legal problems at significantly higher rates compared to the general population. Their legal problems go beyond family law and abuse issues. They experience a greater rate of legal problems in nearly all of the legal subject areas in the survey.

<table>
<thead>
<tr>
<th>Households with DV/SA survivors were:</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.2 times more likely to experience the effects of homelessness</td>
</tr>
<tr>
<td>3.7 times more likely to have an education-related issue</td>
</tr>
<tr>
<td>3.0 times more likely to have an employment issue</td>
</tr>
<tr>
<td>2.1 times more likely to have a rental housing problem</td>
</tr>
</tbody>
</table>

African Americans and Native Americans suffer legal problems at significantly higher rates across nearly all legal areas studied. Latinx Americans suffer significantly higher rates in more than half of the areas studied. Along with higher rates of civil legal problems, these populations reported suffering more harm than others surveyed. Housing related issues (homelessness, rental housing, and mobile homes) and education related issues dominate the issues with the most disparate effect, and Latinx Americans encounters an extraordinarily disproportionate share of immigration legal issues.

<table>
<thead>
<tr>
<th>African Americans were:</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.3 times more likely to experience homelessness</td>
</tr>
<tr>
<td>2.1 times more likely to experience an education issue</td>
</tr>
<tr>
<td>1.8 times more likely to experience an issue with policing</td>
</tr>
<tr>
<td>1.6 times more likely to experience a rental housing issue</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Latinx participants were:</th>
</tr>
</thead>
<tbody>
<tr>
<td>15 times more likely to experience immigration issues than non-Latinx Oregonians</td>
</tr>
<tr>
<td>1.8 times more likely to experience homelessness</td>
</tr>
<tr>
<td>1.7 times more likely to experience an education issue</td>
</tr>
<tr>
<td>1.3 times more likely to experience rental issues</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Native Americans were:</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.7 times more likely to experience a veteran status issue than non-Native Americans</td>
</tr>
<tr>
<td>1.9 times more likely to experience an elderly or disability-related issue</td>
</tr>
<tr>
<td>1.9 times more likely to experience a mobile home issue</td>
</tr>
<tr>
<td>1.5 times more likely to experience homelessness</td>
</tr>
<tr>
<td>1.5 times more likely to experience a health care issue</td>
</tr>
</tbody>
</table>

**Developments Since 2018:** The Legal Services Corporation recently released their [2022 Justice Gap Report](https://www.lsc.gov/sites/lsc.gov/files/resources/Justice%20Gap%20Report%202022%20final.pdf) bringing updated information about some of the effects of the pandemic on the legal needs of people with low incomes. LSC found that 33% of Americans with low incomes experienced at least one COVID-related legal problem in the prior year. 92% of those surveyed did not receive any or enough legal help with their problems; this is an increase from the similar 2017 LSC Justice Gap Report and the 2018 Oregon Legal Needs Study. LSC additionally found that only 19% reported seeking legal help for the problems they experienced with 46% of those who did not seek help saying concerns about costs were why they did not seek help.
The Solution: Increased access to legal aid is the best way to meet the legal needs of low-income Oregonians. Lack of funding is the biggest obstacle preventing legal aid from playing a greater role in the community’s solutions to systemic poverty and reaching more families when they need legal help. Oregon’s legal aid programs increase fairness in the justice system, empower individuals, and eliminate many of the barriers that block families living in poverty from gaining financial stability. Legal aid is deeply connected to the communities it serves, with established programs and diverse community partnerships to reach people in need.

Breaking Through Barriers to Justice: According to national standards set by the American Bar Association, the “minimally adequate” level of staffing for legal aid is two legal aid lawyers for every 10,000 poor people. In Oregon we have two legal aid lawyers for every 13,000 poor people. We must recommit ourselves to the reasonable and necessary goal of providing “minimum access to justice.” The 2014 Oregon Taskforce on Legal Aid Funding, which included elected officials and leaders in the legal community, concluded that we need to double the resources for Oregon’s legal aid programs in order to have minimally adequate access to justice.

What Can Oregon Leaders Do to Address the Civil Legal Needs of Vulnerable Oregonians?

Take Action!

When we say the Pledge of Allegiance, we close with “justice for all.” We need programs like civil legal aid to ensure that the very principle our country’s founders envisioned remains alive: justice for all, not just for those who can afford it.

Educate

Talk about the importance of access to justice. Let people know that civil legal aid is there for those who need help. Share this report. The information in this report is not widely known and it is hard to solve problems that no one is talking about. Let’s amplify the conversation.

Speak Up

Oregon has broad bipartisan support for legal aid at the local, state, and federal levels. As a community, let’s continue our sustained focus on a fair and accessible legal system—a system where our neighbors can know their rights and get the help they need.

Fund Legal Aid

Legal aid is a state, federal, and private partnership. Legal aid receives funding from the State of Oregon, the federal government (Legal Services Corporation), private foundations, Interest on Lawyer Trust Accounts (Oregon Law Foundation), and private donations (Campaign for Equal Justice). The single best way to increase access to justice is to help us create more legal aid attorney positions.

The full report and underlying data can be found at: [https://olf.osbar.org/lns/](https://olf.osbar.org/lns/). If you would like a printed copy of the report, please let the CEJ know, and we will send you one in the mail. Also see the June 2019 OSB Bulletin for a great article about the study.
III. Where is Legal Aid Located?

Oregon’s legal aid programs

- Legal Aid Services of Oregon (LASO) (statewide)
- Oregon Law Center (OLC) (statewide)
- Center for Non-Profit Legal Services (Jackson County)

There are legal aid offices in 18 communities in Oregon, including satellite offices (St. Helens and McMinnville), and these offices serve all 36 Oregon counties.

- Civil legal aid offices are located in areas based on population – many offices are along the I-5 corridor.
- Offices are placed so that low-income Oregonians have relatively equal access to justice throughout the state.
- It is difficult for a small staff to cover the large geographic service areas that makes up much of the state. For example, the Ontario service area is the size Massachusetts and Connecticut combined. With current funding, only three attorneys staff the Ontario office to serve clients in this region.

IV. Who is Eligible for Legal Aid?

As a general rule, all clients must have gross income under 125% of the federal poverty level in order to receive services. In some cases, clients with a higher gross income may be served if they have unusually high expenses in certain areas, like medical bills.
### 2022 Federal Poverty Measures

<table>
<thead>
<tr>
<th>Number in Family</th>
<th>125% of Federal Poverty Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$16,988 per year, $1,416 per month</td>
</tr>
<tr>
<td>2</td>
<td>$22,888 per year, $1,907 per month</td>
</tr>
<tr>
<td>3</td>
<td>$28,788 per year, $2,399 per month</td>
</tr>
<tr>
<td>4</td>
<td>$34,688 per year, $2,891 per month</td>
</tr>
</tbody>
</table>

The federal government’s measure of poverty was developed in the 1960s and was tied directly to the costs of food. It is widely accepted that this measure is not accurate, as expenses like housing and healthcare overwhelm most family budgets.

### Additional Poverty Facts
- Poverty is higher for Black, Indigenous, and other People of Color in Oregon.
- The Economic Policy Institute has a “Family Budget Calculator” that estimates what it takes for a family to have a modest yet adequate standard of living. The calculator takes into account the cost of housing, food, child care, transportation, health care, other necessities, and taxes. The calculator does not include savings for retirement, rainy day, or college. It is based on 2022 costs.
  - For example, in Multnomah County, the budget for 1 adult and 2 children is $7,686 a month or $92,232 total.
  - [https://www.epi.org/resources/budget/](https://www.epi.org/resources/budget/)
- Food Insecurity Definition: the estimated percentage of individuals who have limited or uncertain access to adequate food. Food insecurity has profound negative impacts on the well-being and success of individuals, families and communities. During 2020, an estimated 1 million Oregonians, close to 1 in 4 people experienced food insecurity.
  - Oregon Hunger Task Force: [https://www.oregonhungertaskforce.org/](https://www.oregonhungertaskforce.org/)
- There is not a single county in OR where a full-time minimum wage worker can afford even a one-bedroom apartment at what the US Department of Housing and Urban Development determines to be the Fair Market Rent.

### V. How Does Legal Aid Help?

#### Priority Setting
The Oregon State Bar Legal Services Standards and Guidelines help ensure that Oregon has a statewide system of legal services centered the needs of the client community. Oregon’s legal aid programs seek input from judges, lawyers, community service providers and other non-
profit organizations in determining the legal needs of low-income individuals in each particular community. Because legal aid is unable to provide services to all of those who seek services (or even a substantial majority), they must prioritize those areas of highest need.

Efforts to Meet Critical Civil Legal Needs
The Oregon State Bar Legal Services Program “works to ensure that the delivery of services is efficient and effective in providing a full spectrum of high quality legal services to low-income Oregonians.” Oregon Legal Services Program Standards and Guidelines, Rev. August, 2005, Section 1, Mission Statement. The OSB Standards are based on national ABA Standards of legal aid programs.

- Key elements of the OSB standards include:
  - “An integrated, statewide system of legal services…that eliminates barriers…caused by maintaining legal and physical separation between providers”
  - “Centered on the needs of the client community”
  - “Efficient and effective” by deploying limited resources in a manner that maximizes the system’s ability to provide representation…”
  - “Full spectrum of legal services…The broadest range of legal services required to serve the needs of clients.”
  - “High quality legal services”

- Services are typically focused on critical civil legal needs, like food, shelter, and physical safety.

2021 Case Types
Legal aid assists low income people with a full spectrum of high priority civil legal problems. See the client stories on the first page for a few success stories or go to [www.cei-oregon.org/success.shtml](http://www.cei-oregon.org/success.shtml). Legal aid helped clients with the following types of cases in 2021:
Legal aid stretches limited resources in several ways:
- Telephone & video advice hotlines
- Special purpose clinics
- Pro bono recruiting and coordination
- Self-help booklets
- Classes to help prevent legal problems and also to help some clients to act on their own behalf in areas like uncontested divorce.
- Many materials published by legal aid are located at www.oregonlawhelp.org.

Legal Aid Pro Bono Opportunities
Volunteer lawyers contributed thousands of pro bono hours in 2021. Pro Bono opportunities at legal aid have been carefully designed to focus on high priority areas for clients that also work well for volunteers from the private bar. Programs are evaluated for the efficiency in serving clients. Legal aid staff generally participates in screening clients, placing clients, providing and maintaining training and mentors for pro bono lawyers, and regularly evaluating the program.

Legal aid needs you! If you are interested in handling a pro bono matter (and receiving training to do so), please check out www.probonooreton.org.

Statewide Strategic Planning
Legal aid regularly engages in strategic planning. A strategic planning group completed the most recent plan in October 2019. The group included representatives from a broad range of interested stakeholders. They reviewed client demographics, community based needs assessments from across Oregon, client needs, client priorities, client services, case opening and case closing statistics, current staffing, current distribution of revenue, current placement of offices, service delivery structures used in Oregon, and emerging service delivery structures being studied and tested in Oregon and across the United States. Legal aid managers, attorneys, and staff are providing information throughout the process. The Committee made findings about how to best deploy resources in a manner that maximizes the system’s ability to efficiently and effectively respond to the most important legal needs.

VI. How is Legal Aid Funded?

Overview of Funding: Oregon’s legal aid programs are a state, federal, and private partnership. The three programs receive funding from about 80 different sources. The chart on the next page reflects the breakdown of funding from 2021.
What follows here is a more detailed description of the major sources of funding. Total available revenue for Oregon’s legal aid programs in 2021 was about $23 million.

Details on Sources of Funding:

- **State Funding:**
  - **Filing Fee/Statutory Allocation/Pass-through Funding:** Beginning in 1977, a portion of legal aid’s funding came from state court filing fees. Oregon was the second state in the nation to provide funding for legal aid through state court fees, and 32 states followed suit. In 1996, at the urging of then Senator Neil Bryant, the legislature adopted ORS 9.572, which created the Oregon State Bar Legal Services Program (OSB LSP) to ensure independent government standards, guidelines, evaluation, oversight, and enforcement for the nonprofit corporations providing legal aid. The legislation required the OSB to manage the funds, develop Standards and Guidelines for providers, and create a LSP Committee to provide ongoing oversight and evaluation to ensure compliance with the Standards and Guidelines and to further the program’s goals.

  In 2011, following the work of the Joint Justice Revenues Committee, the structure changed. Instead of receiving funding from a fee added to certain court filings, which were adjusted periodically with overall funding increasing as filings increased, legal aid began to receive a statutory allocation of $11.9 million per biennium — or $5.95 million annually — from the general fund. The allocation was not increased between 2011 and 2019.
In 2019, the structure for state legal aid funding changed again. Legal aid’s funding will now be distributed via pass-through funding through the Oregon Judicial Department budget, via the general fund. Funding for the 2021-23 biennium is $12,784,050, an increase of about 7% over the amount designated in 2011.

- **General fund**: Legal aid also periodically receives additional funds from legislative general fund appropriations. For example, $1 million for eviction defense work in the most recent biennium.

- **Federal funding**: Funding for legal aid through the Legal Services Corporation (LSC), which provides federal funding for legal aid, has varied from year to year since it began in 1976. Thanks to strong bipartisan support, Congress allocated $489 million for LSC for FY 2022, an increase of $25 million the previous year. Here in Oregon, legal aid has a long history of strong bipartisan support in the state legislature and among our federal representatives.

- **IOLTA/Oregon Law Foundation (OLF)**: In 1989, the Interest on Lawyer Trust Account (IOLTA) program in Oregon became mandatory. A lawyer must hold all client property, including client monies, in a trust account. In cases where the clients’ deposits are large enough and/or held for a significant period of time, the interest on the account is returned to the client. When the deposit(s) for an individual client are too small in amount or held for too short of a time to earn interest net of bank charges or fees, these funds are placed in a pooled interest-bearing trust account. The interest on pooled trust accounts is sent to the Oregon Law Foundation and distributed to law-related public interest programs, with legal aid as a “tier A” recipient that receives about 75% of the available funding. With the support of Leadership Banks and Credit Unions that pay higher-than-market rates on IOLTA accounts, the OLF was able to distribute over $1.6 million in grants in 2021. The Oregon Law Foundation works with the Campaign for Equal Justice (CEJ) to get the word out to lawyers about the importance of banking at a leadership bank. CEJ includes information about leadership banks in its events around the state, includes information in its Call to Action, and celebrates leadership banks at its Annual Awards Luncheon.

- **Campaign for Equal Justice (CEJ) Annual Fund**: Since 1991, the Campaign has helped raise more than $32 million in unrestricted funds for legal aid through an annual fundraising campaign focused on Oregon attorneys. Funding has increased over the years, and with the assistance of Meyer Memorial Trust both in 1991 and again in 2005, the Campaign has grown to over $1 million annually. In 2021, the CEJ raised just under $1.5 million dollars. The CEJ also manages an endowment fund, which has surpassed two million dollars, which means that the Campaign is able to add one more source of stable funding for legal aid. CEJ holds events around the state, and also works on increasing state and federal funding for legal aid, and additional private support. CEJ assists legal aid with communications about civil legal services for the poor.
• **Foundation Support/State and Federal Grants:** Legal aid receives grants from the state and federal governments and many private foundations. Grant funding is typically short term, between one to three years, so additional funding must always be sought to continue positions and projects created with grant funding.

• **Other Funding**
  
  o **Abandoned Property — IOLTA funds.** In 2009, the Oregon legislature directed abandoned client funds in lawyer trust accounts to the OSB LSP for distribution to legal aid programs. ORS 98.386(2). The statute went into effect in 2010. Previously the funds were directed to the Department of State Lands.

  o **Pro Hac Vice Fees.** Out-of-state lawyers who are not licensed to practice law in Oregon may appear in Oregon courts subject to certain rules. ORS 9.572. By statute, the fee for such appearances goes to the OSB LSP to fund legal aid. Pursuant to UTCR 3.170(6), the fee is $500. The fees result in about $250,750 annually for legal aid.

  o **Cy Pres.** “Cy Pres” means next best or nearest – when a member of the group in a class action cannot be found at the end of the settlement to receive their portion of the award, the amount that is unclaimed is given to a nonprofit or organization that helps people that are similar to those in the class, as near as the court can determine.

    In 2015 the Oregon legislature passed a cy pres bill, requiring that 50% of residual class action funds be used to support legal aid. These unclaimed funds will go to the Oregon State Bar Legal Services Program in trust for legal aid. The other 50% of unclaimed funds will go to organizations directly related to the case at hand or an organization beneficial to the interests of those who filed the lawsuit.

    In 2019 legal aid received a large cy pres award resulting from a settlement in a consumer protection suit (Scharfstein vs BP West Coast Products). Through this settlement, legal aid received approximately $80 million dollars. Funds are held and invested by the Legal Services Program of the Oregon State Bar. The funds from this settlement will help improve the lives of low-income and vulnerable Oregonians across the state. Strategic and financial planning for these funds was completed in December 2019.

    This award is not an adequate replacement for ongoing, stable funding. To put things in perspective, last year, the combined budgets of the three legal aid programs was $23 million dollars. So, this award is roughly the equivalent of 3.5 years of funding.

    Outside of this uniquely large settlement, annual cy pres funding for the previous three years averaged less than $24,000 a year.
As word of this exciting news spreads, we want to make sure that legal aid donors, volunteers, community partners, legislators, and others know that they are just as important now as ever. If we are to make progress toward the goal of getting legal aid to an annual budget of $30 million – as set out by the 2014 Civil Legal Aid Funding Taskforce – we need to double down on ALL of legal aid’s sources of funding.

- **Campaign for Equal Justice Endowment Fund.** In 2002, the CEJ, the OSB, and the OLF launched the Oregon Access to Justice Endowment Fund to support the future of legal aid. The Oregon Access to Justice Endowment fund was merged with the Campaign for Equal Justice in 2007 in order to save on administrative costs and is now called the “Campaign for Equal Justice Endowment Fund.” As of June 2022, the Campaign had about $1.8 million in its endowment, with an estimated $2.4 million in legacy pledges. Endowment funds are held by the Oregon Community Foundation. The Campaign for Equal Justice began to make annual distributions from the earnings on endowment funds in 2018, once the fund surpassed $1 million.

**The Task Force on Legal Aid Funding**

In 2014, Task Force on Legal Aid funding brought together Oregon lawyers, the courts, bar associations, legislators and other elected officials, and foundations to address the legal aid funding crisis. In order to have a minimally adequately funded legal aid program, the Task Force on Legal Aid Funding found that funding needed to double, from $15 million (in 2014) to $30 million annually. The Task Force adopted its Final Report in June 2014, which includes a series of short term and long-term goals to increase funding. It is clear that funding must come from a number of different sources in order to reach even minimally adequate funding levels. The Task Force concluded:

Oregon must recommit itself to the reasonable and necessary goal of providing “minimum access” to justice. The amount of revenue must be significantly increased and the sources of revenue broadened in order to provide the minimum acceptable level of access to justice for low-income people. More revenue must come from sources that remain consistent during times of economic downturn when the largest number of clients will be the most desperate for service. There must be sufficient stable revenue to provide at least two legal aid lawyers per ten thousand low-income clients in order to achieve the goal of minimally adequate access to justice in Oregon.

**Bar Involvement in Legal Aid**

- HOD Resolution—attached
- A Call to Action—attached
- Legal Aid Pro Bono Opportunities – attached
Oregon State Bar
House of Delegates Resolution
Resolution in Support of Adequate Funding for Legal Services to Low-Income Oregonians
Proposed for the October 28, 2022 HOD Meeting

Whereas, providing equal access to justice and high quality legal representation to all Oregonians is central to the mission of the Oregon State Bar;

Whereas, equal access to justice plays an important role in the perception of fairness of the justice system;

Whereas, programs providing civil legal services to low-income Oregonians is a fundamental component of the Bar’s effort to provide such access;

Whereas, since 1998, pursuant to ORS 9.572, the Oregon State Bar has operated the Legal Services Program to manage and provide oversight of funds allocated by the State of Oregon for legal aid. This is done in accordance with the Bar’s Standards and Guidelines, which incorporate national standards for operating a statewide legal aid program;

Whereas, Oregon’s legal aid programs do not have sufficient resources to meet the civil legal needs of Oregon’s poor;

Whereas, the health and financial impacts of the COVID-19 pandemic are disparately impacting people from Black, Indigenous, and other people of color (BIPOC) communities, and low-income communities;

Whereas, assistance from the Oregon State Bar and the legal community is critical to maintaining and developing resources that will provide low-income Oregonians meaningful access to the justice system.

Resolved, that the Oregon State Bar;
(1) Strengthen its commitment and ongoing efforts to improve the availability of a full range of legal services to all citizens of our state, through the development and maintenance of adequate support and funding for Oregon’s legal aid programs and through support for the Campaign for Equal Justice.

(2) Request that Congress and the President of the United States make a genuine commitment to equal justice by adequately funding the Legal Services Corporation, which provides federal support for legal aid.

(3) Work with Oregon’s legal aid programs and the Campaign for Equal Justice to preserve and increase state funding for legal aid and explore other sources of new funding.
(4) Actively participate in the efforts of the Campaign for Equal Justice to increase contributions by the Oregon legal community, by establishing goals of a 100% participation rate by members of the House of Delegates, 75% of Oregon State Bar Sections contributing, and a 50% contribution rate by all lawyers.

(5) Support the Oregon Law Foundation and its efforts to increase resources through the interest on Lawyers Trust Accounts (IOLTA) program, and encourage Oregon lawyers to bank with financial institutions that are OLF Leadership Banks, meaning that they pay the highest IOLTA rates.

(6) Support the Campaign for Equal Justice in efforts to educate lawyers and the community about the legal needs of the poor, legal services delivery and access to justice for low-income and vulnerable Oregonians.

(7) Encourage Oregon lawyers to support civil legal services programs through enhanced pro bono work.

(8) Support the fundraising efforts of those nonprofit organizations that provide civil legal services to low-income Oregonians that do not receive funding from the Campaign for Equal Justice.

**Presenters:**

Peter A. Werner, OSB#091722  
House of Delegates, Region 1

Kristi Gibson, OSB#990528  
House of Delegates, Region 2

Elizabeth Knight, OSB#992454  
House of Delegates, Region 5

Vanessa Nordyke, OSB#084339  
House of Delegates, Region 6

Heather Decker, OSB#962589  
House of Delegates, Region 7

**Background**

The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services and by increasing access to justice. One of the three main functions of the bar is to ‘advance a fair, inclusive, and accessible justice system.

The Board of Governors and the House of Delegates have adopted a series of resolutions supporting adequate funding for civil legal services in Oregon (Delegate Resolutions in 1996, 1997, 2002, 2005–2021). This resolution is similar to the resolution passed in 2020.
The legal services organizations in Oregon were established by the state and local bar associations to increase access for low-income clients. The majority of the boards of the legal aid programs are appointed by state and local bar associations. The Oregon State Bar operates the Legal Services Program pursuant to ORS 9.572 to distribute the state statutory allocation for civil legal services and provide methods for evaluating the legal services programs. The Campaign for Equal Justice works collaboratively with the Oregon Law Foundation and the Oregon State Bar to support Oregon’s legal aid programs. The Bar and the Oregon Law Foundation each appoint a member to serve on the board of the Campaign for Equal Justice.

Oregon’s legal aid program consists of three separate non-profits that work together as part of an integrated service delivery system designed to provide high-priority, free, civil legal services to low-income Oregonians in all 36 Oregon counties through offices in 18 communities. There are two statewide programs, Legal Aid Services of Oregon (LASO) and the Oregon Law Center (OLC); and one county wide program, the Center for Non-Profit Legal Services (Jackson County). Because the need is great and resources are limited, legal aid offices address high priority civil legal issues such as safety from domestic violence, housing, consumer law, income maintenance (social security, unemployment insurance, and other self-sufficiency benefits), health, employment and individual rights. In 2021, about 24% of legal aid’s cases were family law cases, usually helping victims of domestic violence. Another 37% of cases were related to maintaining housing. All of these programs work to stretch limited resources through pro bono programs and self-help materials. Last year legal aid directly served 15,556 clients. An additional 200,000 Oregonians were served through impact litigation. Furthermore, hundreds of thousands of Oregonians were served through administrative advocacy. Legal aid’s website, www.oregonlawhelp.com received over 467,000 unique visitors a year. Additional Oregonians who were victims of wildfires received vital self-help information and referrals through legal aid’s disaster service website, https://oregondisasterlegalservices.org.

Last year 13% of lawyers contributed to the Campaign for Equal Justice each year, but in some Oregon regions (Central Oregon, Jackson County, and Lane County, for example), participation is as high as 30%. Prior to the pandemic over 20% of OR lawyers contributed to the CEJ.
CALL TO ACTION


- **Give** to the Campaign for Equal Justice. The best way to increase access is to create more legal aid staff attorney positions.

- **Review** your IOLTA account for abandoned client funds. The funds are paid to the Oregon State Bar for appropriation to legal aid through the Oregon State Bar’s Legal Services Program.

- **Shop.** Support legal aid when you shop at Fred Meyer by linking your rewards card to CEJ (www.fredmeyer.com) and when you shop at Amazon through Smile.Amazon.Com. It costs you nothing, but supports legal aid.

- **Educate.** Talk about the importance of access to justice. Let people know—civil legal aid is there for those who need help. Host a Campaign for Equal Justice CLE for one hour of Access to Justice credit for attorneys.

- **Endow.** Take simple steps to endow your annual gift to the Campaign’s endowment fund.

- **Volunteer** through one of legal aid’s many volunteer lawyer projects and clinics, or help the Campaign for Equal Justice raise money for legal aid.

- **Speak Up.** Let state, federal and private funders know that access to justice is important.

- **Learn** how legal aid services are delivered in your community so that you can make appropriate referrals for low-income clients.

- **Move** your IOLTA accounts to a financial institution that is an Oregon Law Foundation Leadership Bank or Credit Union. If all lawyers took this step, funding for legal aid could increase by as much as $1.7 million—enough to fund two small rural legal aid offices. Contact the OLF at www.oregonlawfoundation.org.

- **Connect.** Ask your bar group to take action to support statewide legal aid programs in Oregon. Contact the CEJ for ideas.

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FOR MORE INFORMATION ON HOW YOU CAN BE INVOLVED CONTACT THE CAMPAIGN FOR EQUAL JUSTICE.

www.cej-oregon.org
503.295.8442
Has your bar or legal professional group signed on to the Call to Action?

We need help from all lawyers, bar and legal professional groups, and the community in providing access to justice for low-income Oregonians. Please join us!

Contact the CEJ at 503-295-8442 to sign on today.
Legal Aid Services of Oregon

Volunteer Lawyers Project
Pro Bono Project Descriptions

Thank you for your interest in Volunteer Lawyer Project (VLP) opportunities with Legal Aid Services of Oregon (LASO). This is a list of statewide and area-specific opportunities.

Training materials are available on legal aid’s pro bono website at: www.probonooregon.org
Mentorship and support are provided by legal aid and private attorneys.

Bankruptcy Clinic
The Oregon State Bar Debtor-Creditor Section and LASO sponsor the Bankruptcy Clinic. The project consists of two components, a bankruptcy class and a legal clinic. A recorded class is available on www.oregonlawhelp.org. Volunteer attorneys help low-income individuals assess their options and provide ongoing representation in a Chapter 7 when bankruptcy would be appropriate. This is currently a virtual clinic and cases are directly referred to volunteers.

Domestic Violence Project
Oregon has seen a rise in domestic violence cases during the pandemic. Organizations that assist survivors have also seen an increased need for services. This project provides critical legal assistance to survivors of abuse and stalking. Attorneys represent survivors in contested restraining order hearings in Clackamas, Multnomah and Washington Counties. These cases tend to have short timelines, limited issues and require a court appearance. DVP is an excellent opportunity for lawyers seeking courtroom experience and attorneys who cannot commit to long-term cases. Most volunteers are not family law lawyers and are not expected to assist clients with family law issues. Training and materials are available.

Expungement Clinic
Over 1.4 million people in Oregon have a criminal record. Expungement helps reduce barriers to safe housing, employment and education caused by criminal records. Attorneys assess whether clients are eligible for an expungement and complete all necessary court paperwork for those who qualify. We offer 2 clinics – Virtual Expungement Clinic in partnership with Intel, and an in-person Expungement Clinic in partnership with the Clackamas County Bar Association and Clackamas County Law Library. Training and materials are available.

Family Law Forms Project
In Oregon, 67 to 86 percent of family law case involve at least one person representing themselves, the majority of whom cannot afford a lawyer. Attorneys with little (or no) family law experience can assist clients in completing their forms. Experienced family law attorneys can provide limited assistance to clients requiring discrete legal advice or document review. Attorneys are NOT expected to provide ongoing representation and clients sign a retainer agreement detailing the limited scope of the attorney-client relationship. Training and materials are available. This is a virtual project with in-person opportunities coming soon.

Housing Notice Clinic
Oregon is in the midst of an affordable housing crisis. In eviction cases, the vast majority of landlords are represented by an attorney or agent while very few tenants have any representation. While Legal Aid represents thousands of tenants a year, demand for assistance exceeds our limited resources. Your help is needed to preserve stable housing for members of our community. Through the clinic, pro bono attorneys provide critical legal assistance to low-income tenants. Attorneys review notices of termination, advise tenants on the validity of the notice, draft demand letters and negotiate settlements when defenses are present. Trainings and materials are available. This is a virtual clinic.

Senior Law Project
Seniors account for 18% of the population in Multnomah County and are one of the fastest-growing populations. The Senior Law Project consists of twenty monthly legal clinics scheduled through eight senior centers in Multnomah County. Attorneys provide a 30-minute consultation on a variety of civil legal issues to clients 60 or older (or who are married to someone 60 or older), regardless of their income. SLP volunteers provide continuing pro bono services for clients who meet LASO’s financial eligibility. Training and materials are available. In-person and remote opportunity.
UI Benefits Panel  Unemployment insurance (UI) is the sole means of temporary wage replacement for workers and is critical in preventing individuals and families from spiraling into poverty. Help LASO expand its pro bono attorney panel for low-income Oregonians with controversies involving UI benefits. Attorneys provide legal advice and possible representation at an administrative hearing. This is an excellent opportunity for those seeking hearing experience and introduction to administrative law. Training and materials are available. Most hearings are conducted by phone.

Legal Aid Night Clinic  Attorneys from Stoel Rives LLP and Dunn Carney LLP staff the Night Clinic in a partnership with LASO. Volunteer attorneys screen the cases and provide legal representation to clients on a range of civil legal issues, including consumer law, small claims advice, landlord/tenant, and estate planning.

ProBonoOregon  Legal aid offices around the state post pro bono opportunities on our website Oregon Advocates. Listings include the area of law, type of case, assistance expected and a brief description of the issue. To view current opportunities, visit: www.probonooregon.org

Disaster Assistance Panel  The Oregon wildfires have been described by Oregon authorities and experts as unprecedented; more than 1 million acres of land burned, hundreds of homes lost, and entire communities destroyed. The Disaster Assistance Panel assists wildfire survivors with FEMA disaster benefit appeals and disaster related legal issues. Trainings and materials are available on https://oregonndisasterlegalservices.org. This is a statewide virtual opportunity.

NAPOLS Project  The 2018 Barriers to Justice noted that Native Americans are 1.9 times more likely to experience an elder law or disability-related issue, such as homelessness. In 14 of the 17 categories surveyed, Native Americans experience problems at higher rates than non-Native people. Native American Program Legal Aid Services (NAPOLS) represents Native clients in tribal, state, and federal courts, as well as in administrative proceedings, on issues specific to an individual’s Native status. Pro bono attorneys provide assistance to Native clients around the state on a diverse range of matters, including consumer law and fair debt collection issues, family law, landlord/tenant, public benefits, elder law, and estate planning for clients with assets involving federal or tribal jurisdiction. Please contact Fabio Apolito at Fabio.Apolito@lasoregon.org.

Statewide Tax Clinic  This clinic provides advice and representation to low-income clients who have a tax controversy with the IRS and related cases with Oregon Department of Revenue. Cases cover a range of state and federal personal income tax issues including collections, examinations (audits), innocent spouse claims, and tax court cases. Please contact Shannon Garcia at Shannon.Garcia@lasoregon.org.

For more information or to volunteer, please contact:

Brett Cattani, Pro Bono Coordinator: brett.cattani@lasoregon.org
Shelby Smith, Pro Bono Coordinator: shelby.smith@lasoregon.org
Jill Mallery, Statewide Pro Bono Coordinator: jill.mallery@lasoregon.org

Thank you to the Multnomah Bar Association for their continued support of the VLP.
An aspiration: 80 hours of pro bono services.
Direct legal service to people with low incomes: 20 to 40 hours or two cases.
Restoring Justice

Legal Aid in Oregon

More than 61% of legal aid cases involved safety and/or shelter.

15,556 clients directly served in 2021.

36 counties served (that’s all of them).

467,000 unique visitors consulted oregonlawhelp.org for legal information.

Nearly 200,000 clients served through impact litigation in 2021.

18 communities with legal aid offices.

100s of 1000s of clients served through administrative advocacy.
Barriers to Justice
A 2018 STUDY MEASURING THE CIVIL LEGAL NEEDS OF LOW-INCOME OREGONIANS

The Study Findings Are Stark

Legal Problems are Widespread
75% of survey participants live in a household that experienced a legal problem in the previous 12 months.

Legal Problems Multiply
5.4 legal problems were experienced by the typical low-income household in Oregon in the last 12 months.

The Need for Legal Aid Outpaces Resources
84% of people with a legal problem did not receive legal help of any kind.
Most Common Legal Issues

Credit/Debt/Fraud: 49.4
Healthcare: 37.9
Rental Housing: 35.7
Discrimination: 31.2
Govt Assistance: 27.6
Crime/Policing: 23.8
Family/Abuse: 22.7
Employment: 21.6
Aging/Disability: 11.5

Most Harmful Legal Issues

Immigration: 70
Aging/Disability: 65.8
Veteran Status: 63
Employment: 62.3
Legal System Barriers: 59.1
Homelessness: 58.1
Govt Assistance: 57.3
Rental Housing: 57.1
Family/Abuse: 56.1
Discrimination: 54.8
Crime/Policing: 51.8
## Disparate Effects

Those with records had:  
- 9.8x more homelessness  
- 6.7x more farmworker issues  
- 4.5x more tribal issues  
- 3x more policing issues  
- 2.8x more homeowner issues  

Assault survivors had:  
- 6.2x more homelessness  
- 3.7x more education issues  
- 3x more employment issues  
- 2.1x more rental issues  

## Disparate Effects

<table>
<thead>
<tr>
<th>African Americans:</th>
<th>Latinx Americans:</th>
<th>Native Americans:</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.3x more homelessness</td>
<td>15x more immigration issues</td>
<td>2.7x more veteran issues</td>
</tr>
<tr>
<td>2.1x more education issues</td>
<td>1.8x more homelessness</td>
<td>1.9x more disability issues</td>
</tr>
<tr>
<td>1.8x more policing issues</td>
<td>1.7x more education issues</td>
<td>1.9x more mobile home issues</td>
</tr>
<tr>
<td>1.6x more rental issues</td>
<td>1.3x more rental issues</td>
<td>1.5x more homelessness</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1.5x more health issues</td>
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</table>
33% of low-income Americans experienced at least one civil legal problem linked to the COVID-19 pandemic in the past year.
2022 Income Eligibility

<table>
<thead>
<tr>
<th>Number in Family</th>
<th>125% of Federal Poverty Level</th>
</tr>
</thead>
</table>
| 1                | $16,988 per year  
|                  | $1,416 per month               |
| 2                | $22,888 per year  
|                  | $1,907 per month               |
| 3                | $28,788 per year  
|                  | $2,399 per month               |
| 4                | $34,688 per year  
|                  | $2,891 per month               |
Volunteering with Legal Aid
Legal Aid Pro Bono Programs

- Bankruptcy Clinic
- Domestic Violence Project
- Expungement Clinics
- Family Law Forms
- Housing Notice Clinic
- Senior Law Project
- Unemployment Benefits Panel
- Statewide Tax Clinic
- NAPOLS Project
- Night Clinic

Domestic Violence Project
Volunteer Attorneys review tenants’ notice of termination.

Advise, draft demand letters and negotiate settlements.

Opportunities for continued assistance available.

Attorneys sign up to receive case referrals via email.

Online CLE and extensive materials available.

Excellent opportunity for new attorneys.

Virtual volunteer opportunity.
Expungement Clinics

- Volunteer attorney review client criminal records to assess eligibility for set aside.
- Attorneys complete all necessary paperwork for court when client is eligible.
- Great opportunity for new attorneys and attorneys who cannot commit to long term cases.
- Training and resources are available.
- Virtual and in-person volunteer opportunity.
- Attorneys sign up for clinics or to receive referrals.
NAPOLS Project

- Pro bono attorneys assist Native clients around the state.
- Diverse range of matters, including consumer law and fair debt collection issues, landlord/tenant, public benefits, and estate planning for clients with assets involving federal or tribal jurisdiction.
- Good opportunity for attorneys interested in Tribal/Indian Law.
- Support provided by NAPOLS.
- Remote opportunities available.
- Please contact Fabio Apolito at Fabio.Apolito@lasoregon.org

Benefits of Volunteering with Legal Aid

- Mentorship and support
- PLF Insurance Coverage - Certified Pro Bono Program
- Access to Trainings
- MCLE rules allow you to claim 1 hour of MCLE credit for every 2 hours of pro bono – up to a maximum of 6 per reporting period.
Volunteer Resources

Trainings and Materials:
www.probonooregon.org
www.oregonlawhelp.org
www.oregonrentersrights.org

Interpreter Services

LASO office space

Certified Pro Bono:
More can volunteer,
no PLF required.
Save time on CLEs with pro bono:
1 MCLE credit for 2 hours pro bono.

No time?
Give instead.

Also give if you have time.
Bank where it matters:
Oregon Law Foundation Leadership Banks.

100

1
Leadership Banks & Credit Unions

Visionaries
Bank of Eastern Oregon
Beneficial State Bank
First Republic Bank
Heritage Bank
Northwest Bank
OnPoint Credit Union
OR Community Credit Union
Pacific West Bank
Washington Trust Bank
Wells Fargo Bank
Willamette Valley Bank

Advocates
Chase Bank
Columbia Bank
Oregon Pacific Bank
Summit Bank

Oregon State Bar Referral & Information Services (RIS)
Learning the Ropes
2022
RIS Programs

- Lawyer Referral Service
- Modest Means Program
- Military Assistance Panel
- Problem Solvers
- FEMA Response
- COVID-19 Pro Bono
- Free Legal Answers

Lawyer Referral Service (LRS)

- Approximately 350 attorney panelists
- Statewide, all areas of law
- Bilingual lines for Spanish speakers
- $35 initial 30-minute consultation
- Over 50,000 referrals per year
- Over 90,000 Calls, 10,000 online referral requests (OLR)
- Resource guide
Modest Means Program

- Reduced hourly rates of $60, $80 or $100 per hour based on client income and assets as measured against the Federal Poverty Guidelines.
- $35 initial 30-minute consultation
- Family Law, Criminal Defense, Landlord/Tenant.
- 30,000 calls per year with approximately 4,000 referrals made.
- Launching housing subsidy this year to encourage participation

Pro Bono Programs

- Military Assistance Panel
  - 2 hours of pro bono work for active duty military and families
- Problem Solvers
  - Free 30-minute consultations for children aged 13-17
- FEMA
  - Wildfire related services
- COVID-19
  - Pandemic related services
Free Legal Answers

- Administered by OSB and ABA
- Virtual legal clinic
- Volunteer attorneys answer specific housing questions and respond via email
- Allows some follow up questions based on the attorney response
- Will eventually expand into other areas of law
- Launches 10/1/2022!
- oregon.freelegalanswers.org

Lawyer to Lawyer

- Free resource for attorneys
- Statewide, with over 200 different areas of law
- Includes a Legal Ethics panel
- Phone call or even lunch!
- (503)431-6408
Public Information

- [https://www.osbar.org/public/](https://www.osbar.org/public/)

- Dozens of legal topics written by attorneys

- Will remain available until the legal web services portal is online

Contact Information

- My email for program questions: emccleon@osbar.org

- Or call (503)431-6408

- Any Questions?
Educate
Speak Up
Fund Legal Aid

We need
YOU!

CALL TO ACTION


- Give to the Campaign for Equal Justice. The best way to increase access to legal aid is to support more legal aid staff attorneys.
- Review your OUS A account for abandoned tuition funds. The funds are paid to the Oregon State Bar for appropriation to legal aid through the Oregon State Bar's Legal Services Program.
- Shop: Support legal aid when you shop at Amex by linking your card to Give Early (www.giveearly.org) and when you shop at Amazon through LinkAmazon.com, donate to legal aid.
- Educate: Talk about the importance of access to justice to your family, friends and neighbors. Tell them your story and share the story of how legal aid helped your loved one.
- Endow: Take simple steps to endow your annual gift to the Campaign's endowment fund.
- Volunteer: Become a member of your local legal aid's board of directors or help the Campaign for Equal Justice raise money for legal aid.
- Speak Up: Call your state, federal and private funders and let them know that access to justice is important.
- Learn how legal aid services are delivered in your community so that you can make appropriate referrals for low-income clients.
- Introduce your UO A account to a financial institution that is an Oregon Law Foundation sponsor, and you'll get a UO A account that matches the donation made by the Oregon Law Foundation.

FOR MORE INFORMATION ON HOW YOU CAN BE INVOLVED CONTACT THE CAMPAIGN FOR EQUAL JUSTICE.

www.cej-oregon.org

503-295-8442

Contact the CEJ at 503-295-8442 to sign on today.
Thank You!

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LAWYER WELL-BEING

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About the OAAP

We help lawyers, judges, and law students develop the skills they need to meet the demands of their professional and personal lives in a healthy way. Our services are confidential and free. Call or email us - we offer hope and help.

Well-being and stress
Anxiety or depression
Problem substance use
Compulsive & challenging behaviors
Career transitions
Lifestyle goals
Relationships
Challenging times

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Confidential Assistance

All communications with the OAAP are completely confidential and will not affect your standing with the Professional Liability Fund (PLF) or the Oregon State Bar. The OAAP is a confidential service of the PLF for all members of the Oregon legal community. Call us at (503) 226-1057 or visit us at www.oaap.org.
levels of satisfaction and well-being.” Well-being is thus more than “the absence of illness; it includes a positive state of wellness.” To be a good lawyer, the Report noted, one has to be a healthy lawyer, and the research suggests that “the current state of lawyers’ health cannot support a profession dedicated to client service and dependent on the public trust.” The Task Force thus undertook to address not only mental health and problematic substance use concerns, but also the overarching issue of lawyer well-being within the profession.

How can lawyers experience well-being and actually thrive in their personal and professional lives?

The Task Force defined lawyer well-being as a continuous process whereby one seeks to thrive in six primary areas of one’s life:

- **Emotional health** – identifying and managing emotions in personal and professional environments;
- **Occupational pursuits** – cultivating personal satisfaction, growth, enrichment, and financial stability;
- **Creative or intellectual endeavors** – engaging in continuous learning and the pursuit of creative or intellectually challenging activities;
- **Spirituality** – experiencing a sense of meaningfulness and purpose in all aspects of life;
- **Social connections** – developing a sense of belonging and support with others important in one’s life; and

In 2017, the National Task Force on Lawyer Well-Being (Task Force), consisting of the American Bar Association (ABA) Commission on Lawyer Assistance Programs and a broad coalition of other organizations, published the most comprehensive report (Report) to date on the well-being of American lawyers. The Report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, relied on numerous empirical studies, two of the most notable being the recent ABA-Hazelden Betty Ford Foundation survey of nearly 13,000 currently practicing U.S. lawyers and the 2016 Survey of Law Student Well-Being, surveying over 3,300 law students from 15 law schools throughout the country. These studies revealed that many lawyers and law students struggle with anxiety, depression, and/or substance use issues.

**Well-Being in the Legal Profession**

The findings of these studies and the national media attention their publication generated, sparked the creation of the Task Force and its Report. The central question for the Task Force was how the profession can best address these health concerns in a collaborative, comprehensive, and sustainable way to meet the needs of all concerned.

The Report made clear that, although a disturbing portion of our legal profession has substance use and behavioral health challenges, the majority of lawyers and law students do not. It noted, however, “. . . that does not mean that they’re thriving. Many lawyers experience a ‘profound ambivalence’ about their work, and different sectors of the profession vary in their levels of satisfaction and well-being.”

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- **Spirituality** – experiencing a sense of meaningfulness and purpose in all aspects of life;
- **Social connections** – developing a sense of belonging and support with others important in one’s life; and
**Physical health** – striving for regular physical activity, proper diet, nutrition, sufficient sleep, and recovery from the use of unhealthy substances.

**Stakeholders**

The Task Force’s Report makes over 40 recommendations, some general to all stakeholders within the legal community and some very specific to each individual stakeholder group. The Report is nothing less than a call to action. It seeks to encourage through collective action significant change in the culture of the legal profession. The stakeholder groups addressed include judges, regulators, legal employers, law schools, bar associations, professional liability carriers, and lawyer assistance programs.

**Task Force Recommendations**

To their credit, many of the stakeholders in Oregon are committed to lawyer well-being and have already begun implementing some of the Task Force’s recommendations. However, there is always room for additional improvement when it comes to one of the most important issues for this and future generations of our legal community.

Some of the general recommendations to all stakeholder groups include:

- Take action to minimize the stigma that is often attached to mental health and substance use disorders; encourage those with such conditions to seek help.
- Foster collegiality and respectful engagement throughout the profession; reduce chronic incivility that can foment a toxic culture that is counter to well-being.
- Promote diversity and inclusivity initiatives that encourage both individual and institutional well-being.
- Create meaningful mentoring and sponsorship programs, which research shows can aid well-being and career progress, particularly for women and diverse professionals.
- Guide and support the transition of older lawyers to, among other things, capitalize on the wealth of experience they can offer and, at the same time, reduce risks sometimes faced by senior lawyers challenged by the demands of technically evolving professional environments.

- De-emphasize alcohol at social events, and provide a variety of alternative non-alcoholic beverages at such events.
- Utilize monitoring to support recovery from substance use disorders in environments where it can be supportive.

Some of the recommendations to specific stakeholder groups include:

- Conduct judicial well-being surveys.
- Provide well-being programming for judges and staff.
- Encourage judicial participation in the activities of lawyer assistance programs, such as volunteering as speakers, particularly when the judge is in recovery him/herself.
- Educate and inform the judiciary regarding signs and symptoms associated with substance use and behavior health conditions so they are better able to identify when a lawyer may be in need of assistance.
- Adopt regulatory objectives that prioritize lawyer well-being, such as expanding continuing education requirements to include well-being topics; require law schools to create well-being education as a criterion for ABA accreditation; more closely focus on conduct and behavior rather than diagnosis and treatment as character and fitness bar admission criteria so as to avoid stigmatizing mental and behavioral health conditions and treatment; educate and accurately inform law students about bar admission criteria to reduce their fear that getting needed professional treatment will hinder their chances of bar admission.
- Adopt diversion programs and other alternatives to discipline for minor lawyer misconduct to encourage treatment for underlying substance use and mental health disorders.
- Add well-being-related questions to the multistate professional responsibility exam.
- In legal work environments, form active lawyer well-being committees; monitor for signs of work addiction and poor self-care in legal work; and actively combat social isolation and encourage interconnectivity.
- In law schools, create best practices for assisting law students experiencing psychological distress; provide training to law school faculty regarding student mental
What the Research Tells Us

For years, many have voiced varying degrees of concern about the physical and behavioral health of the legal profession. The findings of the two research studies referred to above clearly signaled “an elevated risk in the legal community for mental health and substance use disorders tightly intertwined with an alcohol-based social culture.” Below are some highlights of that research:

Among law students surveyed:
- 17% experienced some level of depression;
- 14% experienced severe anxiety;
- 23% had mild or moderate anxiety;
- 6% reported serious suicidal thoughts in the past year;
- 43% reported binge drinking at least once in the prior two weeks;
- Nearly one-quarter reported binge drinking two or more times in the prior two weeks;
- 25% qualified as being at risk for alcoholism for which further screening was recommended; and
- 50% reported that chances of bar admission are better if a mental health or substance use problem is hidden.

Among lawyers surveyed:
- Between 21% and 36% qualified as problem drinkers (i.e., hazardous use, possible dependence);
- 28% struggled with depression;
- 19% struggled with anxiety; and
- 23% struggled with unhealthy stress.

Lawyers with less than 10 years of practice and those working in private law firms experienced the highest rates of problem drinking and depression and elevated levels of other difficulties, including social isolation, work addiction, suicide, sleep deprivation, job dissatisfaction, and work-life conflicts.

health and substance use disorders; and develop mental health and substance use disorder resources, including taking active steps to encourage help-seeking practices by students.

- Empower law students to help fellow students in need; facilitate a confidential recovery network for students; provide educational opportunities on well-being-related topics in law schools; and discourage alcohol-centered law-school-related events.

- Encourage local and state bar associations to sponsor quality CLE programming on well-being topics, and utilize the resources of state lawyer assistance programs when appropriate.

- Emphasize well-being in loss prevention programs, including being aware of the role of lawyer impairment in claims activity.

- Among lawyer assistance programs, encourage emphasis on confidentiality; high-quality well-being programming; and appropriate and stable funding for outreach, screening, counseling, professional staffing, and preventative education.

The Task Force Report “makes a compelling case that the legal profession is at a crossroads” and the time for action is now. It is premised on the belief that, through collective action by all of us, we have the capacity to create a better future for our nation’s lawyers. Improving lawyer well-being is a win-win for everyone: it is good for clients, good for business, good for the profession – and it is the right thing to do!

Douglas S. Querin, JD, LPC, CADC I
OAAP Attorney Counselor

References appear on page 4
References:

  https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf

  https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4736291

  https://jle.aals.org/home/vol66/iss1/13
Appendix

Common Signs and Symptoms of Depression and Anxiety

- **Depression:**
  - Prolonged and debilitating feelings of sadness, hopelessness, worthlessness, despair;
  - Feelings of hopelessness, pessimism;
  - Loss of interest in activities once enjoyable;
  - Difficulty focusing, concentrating, tracking, decision-making;
  - Changes in:
    - Energy levels (agitation or lethargy);
    - Sleep Habits (insomnia or sleeping too much);
    - Eating (eating too much or too little; losing or gaining weight);
  - Paralyzed from taking action in their self-interest; procrastination;
  - Can include recurrent thoughts of death or suicide.

Symptoms are usually severe enough to cause noticeable problems in relationships with others or in day-to-day activities, such as work, school or social activities.

Clinical depression can affect people of any age, including children. However, clinical depression symptoms, even if severe, usually improve with psychological counseling, antidepressant medications or a combination of the two.

https://www.mayoclinic.org/diseases-conditions/depression/expert-answers/clinical-depression/faq-20057770

- **Anxiety:**
  - Fight, flight, or freeze response is locked in the on-position;
  - Prolonged debilitating anxiety or worry;
  - Procrastination;
  - Irritability;
  - Prolonged disruption of sleep (inability to fall asleep/ stay asleep);
  - Avoidance of situations;
  - Distress in social situations;
  - Obsessive or compulsive behavior;
  - Difficulty focusing, concentrating, tracking;
• **Acute Stress or Trauma:**
  o Hyperarousal: Startling easily and in a manner that doesn’t fit the situation.
  o Re-experiencing intrusive thoughts, images or memories (flashbacks or nightmares).
  o Avoidance or Numbing: Flat affect, little emotion in face or voice, deep blank stare, fixed look.
  o Disassociation from present state (e.g. presence of unaccounted-for time, incoherent storyline, impaired memory -- especially during emotional content.
  o Change in perspective, cynical or negative view of the world, self-doubt, dampened spiritual beliefs, shame or self-blame, obsessed with trauma. Feelings of hopelessness.
  o Sleep disturbance: Difficulty falling asleep, staying asleep, or getting up in the morning.
  o Somatic disturbance: e.g. headaches, body aches, digestive problems, lack of energy.
  o An inability to stop crying.
  o Feeling sad most of the time, or having thoughts of suicide.
Coping With Anxiety & Depression

Connect – Don’t Isolate. Connecting with other people especially during moments of anxiety or depression can make a huge difference in our outlook and mood. It can change our thoughts, and feelings as well as encourage us to take new positive actions. Remain open to asking for help. Reach out to friends, family, colleagues, peers, or mentors and expand your support system. Contact professionals such as clinicians or counselors, including the OAAP, for added support.

Identify & Reframe Negative Thoughts. Our thoughts can empower us or constrain us. Negative thoughts may be the result of being stuck with a particular way of thinking (“cognitive distortions”). These limiting thoughts can reinforce feelings of depression and anxiety. Some of the common cognitive distortions:

- All or Nothing Thinking: Viewing situations in dichotomies – black or white; right or wrong; good or bad without any middle ground. As an example,
  - “If I don’t do well on this exam then I am a failure.”
- Overgeneralization: Taking a solitary negative experience and generalizing it as permanently true. As an example,
  - “I can’t get anything right as a law student” (after misunderstanding the holding of one case);
- The Mental Filter: Focusing on the negative only and not giving weight to any positive aspects of an event.
- Diminishing the Positive: Discounting the positive experiences or events.
  Examples:
  - “My professor said that my legal memo was exceptionally written but that was a fluke.”
  - “My friend liked my presentation, but anybody could have done it.”

What is the evidence that support the above negative thoughts? Is there another way we might look at the situation? Recognizing that we can view our situations differently and aiming for a balanced thinking can help us move away from limited thinking.

Practice Self-Compassion. When we practice self-compassion, we take on an attitude of kindness and understanding toward ourselves much like a trusted and loving friend who listens to us with empathy, and is encouraging and validating. Self-compassion has been associated with lowered anxiety while allowing us to see shortcomings with greater calm and as a learning opportunity (Seppala, 2011).

Exercising Gratitude. Gratitude elicits positive feelings and leads to emotional well-being. A study of a three-month trial of gratitude journaling showed a significant favorable impact on well-being, affect, and depression (O’Connell, O’Shea, & Gallagher, 2017). Setting up a diary of positive experiences provide the opportunity to experience these emotions again and again when re-reading the diary entries (Seligman et al. 2005). Keeping a journal, a file, or record of events with favorable outcomes can help us cultivate gratitude.
Problem Substance Use

Unhealthy ways of coping with daily stress from work, school or personal life can lead to experiences of emotional dysregulation, anxiety and depression as well as substance use. Regular use of substances such as street drugs, medications or alcohol may lead to dependence, serious consequences, and for some, addiction as well as other mental health or medical concerns.

When Is Alcohol or Other Substance Use “Problematic”?

- A strong relationship with a substance that no longer serves you well, and that you cannot change without help. Continuing to use despite adverse consequences.

- Red Flags.
  - Taking the substance in larger amounts or for a longer period of time than you meant to.
  - Persistent desire or unsuccessful efforts to cut down or stop using the substance.
  - Not managing to do what you should at work, home or school, because of substance use.
  - Continuing to use, even when it causes problems in relationships.
  - Giving up important social, occupational or recreational activities because of substance use.
  - Using substances again and again, even when it puts you in danger.
  - Continuing to use, even when you know you have a physical or psychological problem that could have been caused or made worse by the substance.
  - Spending a lot of time getting, using, or recovering from use of the substance.
  - Cravings and urges to use the substance.
  - Needing more of the substance to get the desired effect (tolerance).
  - Development of withdrawal symptoms, which can be relieved by taking more of the substance.

- Watch for: sudden changes in mood, appearance or behavior; isolation; decreased performance or motivation; inattentiveness or procrastination; excuses that don’t meet the circumstances.

- CAGE Screen for Substance Use Disorders: Yes answers to two or more of the following indicates a need for further screening and assessment.

  - Cutting Down: Have you tried to cut down or quit drinking/drug use?
  - Annoyance: Has anyone annoyed you by suggesting that you quit or cut down?
  - Guilt: Have you ever felt guilty about your drinking/drug use?
  - Eye-Opener: Have you ever needed a drink or a drug to “get started” in the morning?

Helpful approaches to addressing substance misuse:

- Develop adaptive coping skills to manage stress, anxiety, depression or other mental health concerns.
- Recognize the signs and symptoms of substance abuse.
- Get help sooner rather than later.
- Talk to people you trust. That could be family, friends, or supportive school staff. Your campus counseling center, or dean of students can be very helpful resources.
Helping a Friend or Colleague Who Is Suffering

✓ Offering Assistance Helps

You do not have to be a mental health expert to be of assistance to someone who appears to be struggling with mental health or substance use concerns.

- In most cases, if you have concerns about a potentially impaired person, there are likely others who have similar concerns.
- Trust your instincts.
- In most cases, professionals who emotionally implode or get into serious personal and/or professional trouble were previously known by others to be struggling; many of the signs of a problem have existed for some time and have been observed by others.

- Doing something is generally better than doing nothing.
- Personal contact (phone or in-person) is generally better than emails & texts
- Emails & texts are generally better than no contact.
- Law firm professionals who are personally/professionally struggling are often unwilling to seek assistance; they are embarrassed, do not want to impose on others, or are in denial. But they may respond to offers to talk.

✓ Having a Compassionate, Non-Judgmental Conversation Helps.

Compassion, Curiosity, Lack of Judgement and Genuine Concern Are Key.

- When the potentially impaired person is someone you do not feel comfortable dealing with directly, look for alternatives (e.g., OAAP).
- Avoid “ganging-up.” Especially for an initial conversation, having a private conversation with one or two people present who can express concern, and can discuss behaviors they have observed, is usually more helpful.
- Compassion & candor can go together; be direct (“I’m very concerned about you. You seem to be really struggling with ___________. Can I help you?”).
- Focus on behaviors that you have observed. Avoid second-hand reports if possible. Avoid labeling.
- Be prepared to encounter denial, rationalization, justification and blame.
  - Listening to a person deny what to you is an obvious problem can be very frustrating. Continuing to focus the conversation on specific observed problems (e.g. missed appointments, unanswered phone calls) rather than arguing can be helpful.
  - If the person’s problem is substance use, they may want to make a change, but are also likely getting some benefit from the behavior (“checking-out”, anxiety relief, etc.). They may rationalize or justify their behavior while at the same time acknowledging a problem on some level. Try to talk to the part of them that wants to change or recognizes the problem, rather than arguing with part of them that doesn’t.
- Have a plan in case the person is ready to get help – a phone number to call or a person to talk to. E.g. “Here is a number for someone who can help…can we make the call right now?”

  OAAP - 503.226.1057
  National Suicide Prevention Lifeline - 1.800.273.TALK (8255) (available 24/7)

✔ For A Person Seeking Help, Just Listening Helps.
- Be available to just talk, listen, and be present. Often, this is the most valuable support that can be offered.
- Be supportive and encouraging.
- Be curious and interested.
- Share your experience if relevant.
- Be sensitive to feelings of shame, guilt and embarrassment.
- Be discrete.
- More being than doing (really hard for lawyers!).
PROFESSIONAL QUALITY OF LIFE SCALE (PROQOL)

COMPASSION SATISFACTION AND COMPASSION FATIGUE

(PROQOL) VERSION 5 (2009)

When you [help] people you have direct contact with their lives. As you may have found, your compassion for those you [help] can affect you in positive and negative ways. Below are some questions about your experiences, both positive and negative, as a [helper]. Consider each of the following questions about you and your current work situation. Select the number that honestly reflects how frequently you experienced these things in the last 30 days.

1=Never   2=Rarely   3=Sometimes   4=Often   5=Very Often

1. I am happy.
2. I am preoccupied with more than one person I help.
3. I get satisfaction from being able to help people.
4. I feel connected to others.
5. I jump or am startled by unexpected sounds.
6. I feel invigorated after working with those I help.
7. I find it difficult to separate my personal life from my life as a lawyer.
8. I am not as productive at work because I am losing sleep over traumatic experiences of a person I help.
9. I think that I might have been affected by the traumatic stress of those I help.
10. I feel trapped by my job as a lawyer.
11. Because of my work, I have felt "on edge" about various things.
12. I like my work as a lawyer.
13. I feel depressed because of the traumatic experiences of the people I help.
14. I feel as though I am experiencing the trauma of someone I have helped.
15. I have beliefs that sustain me.
16. I am pleased with how I am able to keep up with lawyering skills and protocols.
17. I am the person I always wanted to be.
18. My work makes me feel satisfied.
19. I feel worn out because of my work as a lawyer.
20. I have happy thoughts and feelings about those I help and how I could help them.
21. I feel overwhelmed because my work load seems endless.
22. I believe I can make a difference through my work.
23. I avoid certain activities or situations because they remind me of frightening experiences of the people I help.
24. I am proud of what I can do to help my clients.
25. As a result of my work, I have intrusive, frightening thoughts.
26. I feel "bogged down" by the system.
27. I have thoughts that I am a "success" as a lawyer.
28. I can't recall important parts of my work with trauma victims.
29. I am a very caring person.
30. I am happy that I chose to do this work.

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YOUR SCORES ON THE PROQOL: PROFESSIONAL QUALITY OF LIFE SCREENING

Based on your responses, place your personal scores below. If you have any concerns, you should discuss them with a physical or mental health care professional.

Compassion Satisfaction

Compassion satisfaction is about the pleasure you derive from being able to do your work well. For example, you may feel like it is a pleasure to help others through your work. You may feel positively about your colleagues or your ability to contribute to the work setting or even the greater good of society. Higher scores on this scale represent a greater satisfaction related to your ability to be an effective caregiver in your job.

If you are in the higher range, you probably derive a good deal of professional satisfaction from your position. If your scores are below 23, you may either find problems with your job, or there may be some other reason—for example, you might derive your satisfaction from activities other than your job. (Alpha scale reliability 0.88)

Burnout

Most people have an intuitive idea of what burnout is. From the research perspective, burnout is one of the elements of Compassion Fatigue (CF). It is associated with feelings of hopelessness and difficulties in dealing with work or in doing your job effectively. These negative feelings usually have a gradual onset. They can reflect the feeling that your efforts make no difference, or they can be associated with a very high workload or a non-supportive work environment. Higher scores on this scale mean that you are at higher risk for burnout.

If your score is below 23, this probably reflects positive feelings about your ability to be effective in your work. If you score above 41, you may wish to think about what at work makes you feel like you are not effective in your position. Your score may reflect your mood; perhaps you were having a “bad day” or are in need of some time off. If the high score persists or if it is reflective of other worries, it may be a cause for concern. (Alpha scale reliability 0.75)

Secondary Traumatic Stress

The second component of Compassion Fatigue (CF) is secondary traumatic stress (STS). It is about your work related, secondary exposure to extremely or traumatically stressful events. Developing problems due to exposure to other’s trauma is somewhat rare but does happen to many people who care for those who have experienced extremely or traumatically stressful events. For example, you may repeatedly hear stories about the traumatic things that happen to other people, commonly called Vicarious Traumatization. If your work puts you directly in the path of danger, for example, field work in a war or area of civil violence, this is not secondary exposure; your exposure is primary. However, if you are exposed to others’ traumatic events as a result of your work, for example, as a therapist or an emergency worker, this is secondary exposure. The symptoms of STS are usually rapid in onset and associated with a particular event. They may include being afraid, having difficulty sleeping, having images of the upsetting event pop into your mind, or avoiding things that remind you of the event.

If your score is above 41, you may want to take some time to think about what at work may be frightening to you or if there is some other reason for the elevated score. While higher scores do not mean that you do have a problem, they are an indication that you may want to examine how you feel about your work and your work environment. You may wish to discuss this with your supervisor, a colleague, or a health care professional. (Alpha scale reliability 0.81)
WHAT IS MY SCORE AND WHAT DOES IT MEAN?

In this section, you will score your test so you understand the interpretation for you. To find your score on each section, total the questions listed on the left and then find your score in the table on the right of the section.

**Compassion Satisfaction Scale**

Copy your rating on each of these questions on to this table and add them up. When you have added them up you can find your score on the table to the right.

<table>
<thead>
<tr>
<th></th>
<th>The sum of my Compassion Satisfaction questions is</th>
<th>And my Compassion Satisfaction level is</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Low</td>
</tr>
<tr>
<td>3.</td>
<td></td>
<td>Moderate</td>
</tr>
<tr>
<td>6.</td>
<td></td>
<td>High</td>
</tr>
</tbody>
</table>

**Burnout Scale**

On the burnout scale you will need to take an extra step. Starred items are “reverse scored.” If you scored the item 1, write a 5 beside it. The reason we ask you to reverse the scores is because scientifically the measure works better when these questions are asked in a positive way though they can tell us more about their negative form. For example, question 1. “I am happy” tells us more about the effects of helping when you are not happy so you reverse the score.

<table>
<thead>
<tr>
<th></th>
<th>The sum of my Burnout Questions is</th>
<th>And my Burnout level is</th>
</tr>
</thead>
<tbody>
<tr>
<td>*1.</td>
<td></td>
<td>Low</td>
</tr>
<tr>
<td>*4.</td>
<td></td>
<td>Moderate</td>
</tr>
<tr>
<td>8.</td>
<td></td>
<td>High</td>
</tr>
</tbody>
</table>

**Secondary Traumatic Stress Scale**

Just like you did on Compassion Satisfaction, copy your rating on each of these questions on to this table and add them up. When you have added them up you can find your score on the table to the right.

<table>
<thead>
<tr>
<th></th>
<th>The sum of my Secondary Trauma questions is</th>
<th>And my Secondary Traumatic Stress level is</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.</td>
<td></td>
<td>Low</td>
</tr>
<tr>
<td>5.</td>
<td></td>
<td>Moderate</td>
</tr>
<tr>
<td>7.</td>
<td></td>
<td>High</td>
</tr>
</tbody>
</table>
CARING FOR YOURSELF IN THE FACE OF DIFFICULT WORK

Our work can be overwhelming. Our challenge is to maintain our resilience so that we can keep doing the work with care, energy, and compassion.

10 things to do for each day

1. Get enough sleep. 6. Focus on what you did well.
2. Get enough to eat. 7. Learn from your mistakes.
4. Vary the work that you do. 9. Pray, meditate or relax.
5. Do something pleasurable. 10. Support a colleague.

For more Information see your supervisor and visit www.psychosocial.org or www.proqol.org

Beth Hudnall Stamm, Ph.D., ProQOL.org and Idaho State University
Craig Higson-Smith, M.A., South African Institute of Traumatic Stress
Amy C. Hudnall, M.A., ProQOL.org and Appalachian State University
Henry E. Stamm, Ph.D., ProQOL.org

SWITCHING ON AND OFF

It is your empathy for others helps you do this work. It is vital to take good care of your thoughts and feelings by monitoring how you use them. Resilient workers know how to turn their feelings off when they go on duty, but on again when they go off duty. This is not denial; it is a coping strategy. It is a way they get maximum protection while working (switched off) and maximum support while resting (switched on).

How to become better at switching on and off

1. Switching is a conscious process. Talk to yourself as you switch.
2. Use images that make you feel safe and protected (switch off) or connected and cared for (switch on) to help you switch.
3. Find rituals that help you switch as you start and stop work.
4. Breathe slowly and deeply to calm yourself when starting a tough job.

We encourage you to copy and share this card. This is a template for making the pocket cards. You may make as many copies as you like. We have heard from some organizations that they have made thousands of copies. Some people find that it is helpful to laminate the cards for long-term use. The ProQOL helper card may be freely copied as long as (a) author is credited, (b) no changes are made other than those authorized below, and (c) it is not sold.

www.proqol.org

18-16
Imposter Experience: 
Self-Doubt and Belonging in Our Legal Culture

I. “Imposter Experience” & “Not Good Enough” Narrative:

a. The core belief of inadequacy, unworthiness, or not belonging often start in childhood, and the internalized messages we receive from our family, social and work environment.

b. Childhood experience, culture, social or work environment and self-expectations can all contribute to our sense of not being good enough and feed into our imposter experience.

c. Cognitive and emotional experiences of love, trust/safety and acceptance, are needed to challenge and change this core belief.

II. Helpful Strategies to Create a New ‘Good Enough’ Narrative

a. Link between Brain Reward System & Prefrontal Cortex: The brain reward system and our sense of self needs to be strongly linked in order for us to feel like who we are is good enough.

b. Changing the self-talk of shame, perfectionism and not belonging:

   i. Shift focus towards the meaning, instead of immediate outcome.

   ii. Practice “Satisficient” or “Not Yet”.

   iii. Allow yourself to make deliberate mistakes.

   iv. Focus on making a connection and not an impression.

   v. Avoid comparison by comparing yourself to where you were and where you are now. A little progress in the right direction means you are doing well.

   vi. Recognize where the legal culture or organizational environment is contributing to experiences of self-doubt, lack of belonging, or imposterism.

c. Self-Compassion: Self-compassion is an aspect of resilience and is crucial to positive mental health. Researcher and professor, Kristen Neff, explained that there are three elements of self-compassion: self-kindness, common humanity and mindfulness. Self-compassion research supports higher levels of positive mental health and reduction of negative affect or psychopathology. When it comes to negative thoughts, emotions or experiences, remember to notice (mindfulness) and soften your attitude towards it (kindness & common humanity), then seek a way to reframe it more positively. In reframing, name the inner voice; thank it for its opinion and remember that a thought can be changed.
III. Resources


Cox, E. (2018). *What is imposter syndrome and how can you combat it?* Retrieve from https://www.youtube.com/watch?v=ZQUxL4Jm1Lo


CHAPTER 19

COURTROOM DO’S AND DON’TS

The Honorable Adrian L. Brown

*Multnomah County Circuit Court*

The Honorable Rebecca D. Guptill

*Washington County Circuit Court*
Chapter 19

COURTROOM DO’S AND DON’TS

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Decorum isn’t Dead:
Courtroom Etiquette 101 – Top 10 Tips from The Bench

Presented by:

The Honorable Adrian Lee Brown, Multnomah County Circuit Court
and
The Honorable Rebecca Guptill, Washington County Circuit Court

1. Be on Time (and communicate if you are running behind). If you aren’t early, you will probably be late. Be early (there is always something you can do to improve your case – e.g. practicing your argument, witness prep, introduce yourself and/or confer with opposing counsel, etc. -- while waiting. Remember, depending on the courthouse, you may need extra time to find parking; time to walk several blocks to court; wait in line to get through security; and maybe even search for your client (or agent and/or witness(s)). Oh, and that restroom stop!

   a. If you are running late (life happens), you can still be professional about it by communicating to the court as soon as you know. The key is to communicate – whether with court staff (ideally directly through a call or email); or through your co-counsel, a fellow attorney or assistant from your office. If you are in the same courthouse and just in another courtroom, let that court staff or judge know so that they can alert the other courtroom.

   b. If you aren’t on time, be humble and apologetic. Do not make excuses or blame others, although a matter-of-fact explanation is fine (e.g. my infant twins both had diaper blowouts as I was getting them in the car for daycare (actual statement from counsel to court staff)).

   c. Being late to a court hearing should be an extremely rare circumstance. You don’t want to develop a reputation for lateness – you want judges and staff to find that running late is unusual and out
of character for you, preferably to the point where they are concerned for the worst; happy to hear that you are okay; and relieved to see you when you walk in the courtroom.

d. If you do find yourself having trouble getting to court on time regularly, there is likely a professional practice or personal mental health issue you need to address. You are not alone, and there is help for lawyers struggling to keep up with the pace of the legal profession. The practice of law can be overwhelming. Please reach out to the Oregon Attorney Assistance Program (OAAP), for confidential, career-saving assistance on a range of issues. There is no shame in asking for help, and the court wants you to succeed in being the best professional you can be, for the bar, for your clients, and for the public. Take a look at what OAAP can offer at their website, https://oaap.org/. You can reach a counselor anytime by calling 503-226-1057, including after-hours for urgent matters.

2. **Dress to Impress (sorry soft pants).** When appearing in court, appropriate and professional attire is required. See UTCR 3.010. While some judicial districts may be more relaxed than others, always error on the side of formality. Yes, this means wear a suit or equivalent (blazer and tie, appropriate dress or pant suit, and professional accessories). Attorneys who dress professionally are noticed – in a positive way. How you dress is the beginning of your reputation – with the court, with opposing counsel, and with the jury. You will never be chastised for dressing professionally.

   a. Remind your clients and witnesses to dress appropriately for court -- no jeans, no sleeveless tops or sleeveless dresses; no shorts or mini-skirts; no chewing gum; and no hats (in courtroom).

   b. If your client is in custody, you need to make sure they have appropriate court clothes to wear for a jury trial. Some counties have clothing banks to borrow from; and some clients may have family who are able to provide clothes. Plan ahead and make sure your
client has appropriate clothing for court and know the process with the jail and the court to ensure you have the appropriate permission for delivering the clothes.

3. **All Rise! (Toto, we’re not in Zoom court anymore).** Stand up when the judge enters the courtroom. See UTCR 3.050. Prepare your clients to do the same. Out of respect for those serving as a juror, stand during entry and exit of the jury from the courtroom, and during the reading of the jury verdict. Even if “All Rise,” is not called when the judge leaves the bench, it is still best practice to stand.

   a. Always stand when addressing the judge (or jury) and have your clients do so as well.

   b. It is generally acceptable to sit while asking questions of a witness, but it is always safest to ask the judge if you may remain seated for questioning.

   c. Judges generally will allow attorneys some freedom of movement around the courtroom. Always ask if you may approach a witness, the bench, or to otherwise have that freedom. Play it safe and ask, “may I...?” before approaching witness or bench.

   d. Remember that these are courts of public record – the mics around the courtroom are there to record the proceedings. You need to be close enough to a mic when talking for the record to be clear. Be mindful of mic locations when you are up and about so that you speak in proximity to one of them. You do NOT need to “eat the mic”. If you are near a mic, remember it will pick up your conversation with your client. Press (and hold) the button on the base of your mic to mute your mic.

4. **Check in with court staff when you arrive to court,** especially if you have not appeared in a particular courtroom before. Identify yourself, who you are representing, and what matter you are appearing on and its status. This
is helpful so that the staff and judge know when matters are ready to be heard and what order they should be heard in.

a. Make sure you file your notice of representation on cases so that everyone knows you are on the case and to make sure you receive court notices properly.

b. Unless a judge or another attorney has announced your name on the record when calling the case, state your name and bar number for the record when you go to speak. Always best to make sure the record is clear and that all of the people involved – including the judge – know who you are and there is no confusion.

5. **Pronouns Matter!** Every judge and court likely has a different procedure to address pronoun usage. The judge and court staff will always appreciate being informed of preferred pronouns, names, titles, and honorifics. None of us want to be rude or confused. Every person deserves to be called by their preferred name and pronouns. Help us get it right! This is particularly important if there could be any confusion by the judge. Learn more at the following website: [https://pronouns.org/what-and-why](https://pronouns.org/what-and-why).

6. **Be ready (Bring your “A” game!).** Be prepared when you get to court – each time; every time.

a. Have your calendar ready in case additional hearing dates are scheduled. And even if they aren’t set by the judge at the time of your hearing, post-hearing you should seize any opportunity to confer with opposing counsel on future dates.

b. If you think you have a conflict with a date being proposed – double check, other client meetings and personal appointments can generally be rescheduled -- trials and other court appearances take precedent. A trial or hearing in another courtroom, pre-planned vacation, medical procedure, etc, are actual conflicts. Another trial the same week, a consult, an office conference, etc. are not. Also,
being ready means having paid your trial fees, if applicable, before your trial starts and remember to leave enough time to do so!

7. **Stay Hydrated and Nourished**—Bring a filled water bottle and snacks (for short breaks) to court and advise your clients do so as well. While most courtrooms will have pitchers of water and paper cup, don’t count on it. Come prepared.

   a. Don’t plan to drink your coffee in a courtroom unless you are certain it is allowed in that courtroom. When in doubt, just ask the courtroom clerk.

   b. Do not eat in a courtroom or chew gum, but have those snacks ready in case you have to work through lunch, or don’t have enough time to leave courthouse.

   c. Phones and electronic devices should be turned off — you don’t want that unexpected alert or notification that comes through even if your phone is on silent.

   d. If a phone needs to be turned on in order to check calendars, it is always safest to let the judge know and ask permission. If you have a laptop that you are using at counsel table, make sure it is in silent (not just on vibrate).

   e. Make sure to inform clients and witnesses of these rules – they apply to them as well.

8. **Requests for Accommodations.** Ask for accommodations in advance.

   a. Make sure that the court staff knows well in advance if any interpreter is needed for your client or a witness so that it can be arranged. Never plan to bring your own interpreter -- court certified or qualified interpreters are the only interpreters allowed for court matters.
b. Let the court clerk know if you, your client or a witness needs an assistive listening device, or needs other accommodations (breaks for pumping breast milk, or to take medication). The court and judges want to provide accommodations, and we need to know that you need them.

c. In general, let the court know if you are in need of a comfort break. Do so at an appropriate time and in an appropriately deferential manner. The judge could probably use a break too. (Extra professionalism points if you let us know that a self-represented litigant on the other side of your matter needs an interpreter or accommodation.)

d. Please alert court staff if there are any security concerns in a case, particularly if you are in a county that doesn’t have security for the building.

9. **Communicate, communicate, communicate** (politely and professionally). Every judge’s staff may have a preferred communication method. Most prefer email as they are often in court and unable to communicate via phone.

   a. Email is generally the safest and most preferable method for communicating to court staff. It is the safest way to avoid any *ex parte* communications. Always make sure to cc opposing counsel.

   b. Do not have ex parte contact on a matter with a judge. Never email a judge directly on a matter (unless in a rare instance they have emailed you; and even then be sure to cc judicial staff and opposing counsel in your response).

   c. Don’t email staff a request that is actually a motion. When in doubt, check the UTCRs and SLRs, and confer with opposing counsel, before you reach out to judicial staff.
d. Avoid asking for special favors of court staff – it puts them in an awkward position.

e. Be polite to court staff at all times. They are underpaid, overworked, and doing their best. This goes for staff at filing counters, accounting, and other departments. Word gets around the courthouse if you are a rude or unpleasant person to work with. Kindness costs nothing.

10. **Know your Audience and Stay Curious.** It doesn’t take much these days to learn about your judges—both background and their judicial practices.

   a. Before appearing before a judge see if the court’s website provides any information about judges – Multnomah County judges have a public webpage for each judge on the court’s website.

   b. Read the Uniform Trial Court Rules; the Supplemental Local Rules; and Consensus Statements; and any other practice guides available on the court’s website.

   c. For court filings, know the general standard practices of that court, and any individualized practices the judge you are appearing before may have (e.g. a paper copy of filings over 10 pages must be delivered to chambers; or do not submit any paper copies to judges). Remember, judges are people too (and each independently elected public officials) and we each have our own style. Instead of being frustrated by these differences, embrace them and go with the flow of the judge you are appearing before.
I. Pre-Trial Preparation

A. Trial Schedule. Be realistic on how much time you will need for trial. It is better to overestimate than underestimate. Contact opposing counsel before requesting a trial date; attempt to agree on dates, or at least inform the other side that you will be requesting a trial date. Be sure your witnesses and experts are available before committing to a “Date Certain” trial date.

B. Motions to Suppress & Other Dispositive Motions. File your motions ahead of time; discuss them with opposing counsel. Consider whether truly dispositive motions can be decided in advance of trial. Consider a stipulated facts trial.

C. Motions in Limine. Use motions in limine to get pretrial rulings excluding (or admitting) evidence that is in dispute. Do not submit “boilerplate” motions. Emphasize quality, not quantity.

D. Jury Instructions. Use the Uniform Criminal Jury Instructions whenever possible. Don’t forget to fill in the blanks, or choose from suggested alternatives. Special instructions should be stated in neutral terms, with appropriate citations (including jump cites). When necessary, summarize complex statutory or regulatory schemes to make them understandable. Consider whether a “lesser included” instruction should be given.

E. Verdict Form. Your verdict form should logically follow from your jury instructions. Use the same terminology. Make sure you have a good understanding of the questions the jury will be expected to answer before you start the trial.

F. Best Practices

- Use an elements checklist
- Prepare your jury instructions and verdict form before trial
• Practice your opening statement in front of a colleague or mirror

• Consider demonstrative exhibits to assist jurors’ understanding of the evidence

• Confer with opposing counsel regarding exhibits, other issues that may or may not be in dispute

• Stipulate in advance of trial to the admissibility of exhibits

• Test technology in the courtroom beforehand; edit video testimony to minimize juror boredom

G. Common Mistakes

• Failing to organize/edit trial exhibits

• Failing to edit videotaped evidence in advance

• Failing to talk to opposing counsel before trial about trial exhibits and other issues

II. Jury Selection

Ask potential jurors about relevant life experiences, opinions and attitudes. Use short, open-ended questions. Don’t make a speech or talk too much. Do not use “conditioning” questions that attempt to “plant the seed” for a favorable verdict. Don’t be afraid to challenge a juror for cause.

A. Best Practices

• Ask open-ended questions; learn about their life experiences and get them to tell you their stories.

• Remember that you are trying to figure out which jurors you will excuse, either for cause or with a peremptory challenge; you will not win your case in voir dire.

• Use favorable jurors to educate others and establish themes, even though the other side will likely bump them.
• Screen questions with your trial judge in advance if you think the other side might object.

• Orient jurors by explaining their task is to speak honestly and to share their experiences and attitudes – one way is to say the parties are looking for the “best fit.”

• Listen to jurors’ answers to your questions; follow up where appropriate, but don’t argue or correct them.

• Ask jurors about their attitudes and experiences with the critical issues in your case, but don’t attempt to condition them.

• Manage juror personalities; don’t let an outgoing juror dominate or ignore shy jurors.

B. Common Mistakes

• Attempting to argue your case or “condition” the jurors to rule in your favor.

• Talking too much; not listening.

• Arguing with prospective jurors who express views that are contrary to yours or harmful to your case.

• Failing to ask questions that matter – about prior experiences and attitudes.

• Asking questions designed to use a juror as an “expert” witness for your case.

• Attempting to condition or manipulate jurors; jurors understand and resent you for trying this.

• Taking too long; there may not be a time limit, but jurors resent it when they think you’re wasting their time.
III. Opening Statement

Tell the story from a key player’s perspective. Make it interesting; don’t just summarize the testimony you expect to elicit from each witness. Set the scene; paint a picture with your words. Establish (and use) a theme for the trial. Define complex or technical words/phrases. Identify the cast of characters. Use visuals. Use a timeline where appropriate.

A. Best Practices

- Tell a story; pick your client’s or a key witness’s perspective and let the jury re-live the experience
- Use active and descriptive words; make the jury “see” and “feel” what happened
- Use demonstrative exhibits
- Define key terms; introduce the cast of characters; use a timeline
- Make it interesting; jurors are used to seeing the whole story unfold in an hour, as on “Law and Order”
- Pick a theme and stick to it
- Keep it short; you can fill in some of the details later
- Introduce your client; tell your client’s story

B. Common Mistakes

- Reciting what each witness will say in order of appearance
- Telling the jury that the opening statement is not evidence
- Relying too much on technology
- Arguing and drawing conclusions for the jury; let them draw the conclusions
• Waiving or deferring opening statement

IV. Presenting the Evidence

A. Direct Examination

Focus the jury’s attention on the witness. Get the testimony out in bite-sized pieces instead of a lengthy narrative. Stop the witness and ask a “why” question when appropriate. Use part of the answer in the next question to emphasize important points (“looping”). Use short, open-ended questions, but use leading questions to get through non-essential information more quickly or to avoid a misstep in a problem area. Use your experts to “teach” the jury about complex, technical issues. Use graphics, demonstrative exhibits, and other visuals to reinforce and explain the testimony. Avoid using lengthy videotaped evidence.

B. Cross Examination

Don’t try to do too much. Don’t go over the witness’s testimony on direct in excruciating detail in the hopes that he will get tripped up on the details. Figure out what points you expect to make with the witness, make those points, and then stop. Typical points: perception; memory; interest in the litigation or other bias; qualifications to offer expert opinions. Control the witness. Use leading statements to make your points and ask the witness to confirm them. Use the other side’s expert to get testimony that helps your case, when possible.

C. Redirect Examination

Use redirect to give your witness a chance to explain any troublesome or confusing answers. Do not “save” key testimony for redirect; that will typically open the door for re-cross.

D. Effective Use of Exhibits and Technology

If you use documents or other exhibits, make sure the jury can or will be able to see the exhibit. Publish the exhibit to the jury after it is accepted into evidence. Make a clear record by referring to documents by exhibit number. Power point presentations can be effective, but don’t rely too heavily on them and be sure to clear it with the judge first.
E. Objections

Make short, one-word objections (relevance, hearsay) in front of the jury. Ask to be heard outside the presence of the jury if you want to argue the point. Don’t be afraid to object (jurors expect lawyers to object on occasion), but don’t overdo it. Use your judgment; don’t object on minor points that don’t make a difference.

F. Best Practices

- Make sure an exhibit has been received before showing it to the jury
- Let your witnesses tell the story on direct examination; don’t lead your own witnesses
- Make your points on cross-examination and stop; don’t try to do too much
- Object when necessary; jurors expect lawyers to object occasionally. Remember, you’re making a record for possible appeal
- Don’t object just because you can; jurors don’t like lawyers who object too much and make it appear that they have something to hide (or want to make life difficult for opposing counsel)
- Make specific objections based on the rules of evidence
- Use Rule 104 hearings appropriately (to challenge an expert’s qualifications or the basis for an expert’s opinion)
- Use your experts to teach the jurors

G. Common Mistakes

- Offering exhibits that include objectionable material; better to redact objectionable material and have the exhibit received than to have it excluded
• Showing illustrative or other exhibits to the jury without the judge’s approval; can be embarrassing in front of the jury if objection is sustained

• Failing to object when necessary, or failing to make specific objections based on the rules of evidence

• Making “speaking” objections in front of the jury

• Trying to do too much on cross; don’t lose control, and don’t let the other side’s witness repeat (and reinforce) testimony on direct

V. Closing Argument

Trust the jury; by the end of the trial, they understand. Do not summarize evidence the jury has already heard several times. Argue the circumstances, the credibility of the witnesses, or other critical issues. Use analogies and examples. Explain why your version of the facts makes more sense. Use the jury instructions and verdict form; tell the jury how you want them to answer the questions and why. Ask questions; answer some of them. Focus on the key issues, and give the jury some direction. Tell them the exhibit numbers of the exhibits you want them to look at during deliberations. Don’t bluster or overstate the facts of the case. Pay attention to the time; don’t be afraid to stop.

A. Best Practices

• Use the jury instructions and verdict form

• Argue and persuade; don’t just summarize the evidence

• Use demonstratives and visuals

• Trust the jury; by the end of the trial, they understand and want to decide the case

• Focus on the key points in dispute; don’t try to argue everything

• Juries want to do the right thing; explain why ruling in your favor is the right thing to do
• Address any weakness or “elephants in the room”

• Ask jurors to look at specific exhibits (by number), but don’t overdo it

• Keep it short, and end on a strong point

B. Common Mistakes

• Torturing the jury by making them sit through lengthy, unnecessary recitation of all the evidence

• Referring to facts that are not in evidence

• Attacking opposing counsel; do not make it personal

• Ignoring the jurors’ body language

VI. Verdict

If you lose, ask the judge to poll the jury on the record. Confirm the results on the record.

VII. PERSONAL CONDUCT

A. The Judge’s Perspective

• Be professional and respectful at all times. Lawyers must behave with courtesy towards everyone in/outside the courtroom. You are never offstage if you are within sight or hearing distance of any juror or member of the court staff.

• If you know a matter for the court is going to take more than a few minutes, let the judge know in advance so it can be arranged to coincide with a jury break.
• Speaking objections are never appropriate during a jury trial. If you need to make a record, ask to be heard outside the presence of the jury.

• Judges do not like surprises – keep your judge apprised of the order of witnesses, which exhibits you intend to offer and legal issues that are critical to your case.

• Be realistic in your estimates about how long the matter will take. Don’t tell the judge that you can try the case in 2 days and then take 4. Make a schedule and stick to it.

B. The Jury’s Perspective

• Jurors do not appreciate lawyers who are disorganized and seemingly unprepared. If you are using a video, PowerPoint, or other “high tech” device, make sure the equipment works and you know how to operate it. Cue the equipment to begin at the correct place. Be prepared with your exhibits.

• Jurors do not like it when lawyers seem to be wasting their time with cumulative evidence, repetitive arguments, or numerous “matters for the court” during trial.

• Jurors do not like lawyers being rude to each other, to their support staff, to court staff, or anyone else. They’re always watching.

• Jurors do not like to be manipulated. Persuade jurors to come to a just decision; manipulation rarely works.
TIPS FOR BETTER BRIEF WRITING AND ORAL ARGUMENT

BRIEF WRITING

1. **Concede Nothing:** Judges are impressed by tough lawyers. Make your opponent fight for every inch of ground, no matter how indefensible your position. If your opponent says today is Monday, move to strike for lack of personal knowledge. If you are persistent, you’ll eventually wear the other side down.

2. **Use the Shotgun Approach:** Make as many arguments as possible, no matter how weak. When in doubt, most judges just tote up the points, e.g., “plaintiff has ten arguments in her favor, defendant only one, so plaintiff must have the stronger case.”

3. **Phrase Every Argument in the Alternative:** If the complaint accuses your client of violating NEPA by not preparing an environmental impact statement, you should simultaneously argue that your client: (a) fully complied with all NEPA requirements for this project; (b) fully complied with NEPA for a prior project, and this is just a continuation of that project; (c) was not required to comply with NEPA; (d) complied with NEPA in spirit; (e) plaintiff lacks standing to contest your failure to comply with NEPA; or (f) . . .

4. **Don’t Give Away the Surprise Ending:** Briefs are like mystery novels -- you don’t want to ruin the suspense by revealing the surprise ending too early. Use the first 34 pages of your brief to lay out the most complicated legal puzzle imaginable. Only after you have completely befuddled the other side (and the judge as well) should you play your ace in the hole. “In any event, this is all academic because [fill in the blank].” The judge will be awed by your legal *tour de force.*

5. **Use All 35 Pages:** One of the most embarrassing things you can do as a lawyer is to file a 15-page brief when the local rules allow up to 35 pages. Your little brief looks wimpy sitting on the table next to your opponent’s power-brief with its 49 attached exhibits all housed in deluxe imitation wood-grain binders. You might as well attach a note saying: “Sorry, but my client has a very weak case and I can’t think of any other arguments to make on her behalf.” If you run out of things to say, just repeat the same arguments over again. No one will notice.

6. **Always Attach Exhibits:** Exhibits lend an air of authority to a brief. It is no longer just a lawyer making an argument; now you have documentary proof of your client’s position. If you don’t have any exhibits, invent some. It really doesn’t matter what you use because, if they are fat enough and contain lots of technical-sounding fine print and rows of numbers, no one will read them anyhow.

7. **Ignore Controlling Authority:** A lot of lawyers assume they have an ethical duty to cite controlling authority contrary to the position advocated by their client; that is nonsense. By definition, if the judge doesn’t follow a case, then it is not controlling. If it is not controlling, then you have no ethical obligation to cite the case. Seems simple enough to me.

April 17, 1997

Donald C. Ashmanskas
TIPS FOR BETTER BRIEF WRITING AND ORAL ARGUMENT

8. **Use String Citations:** Anyone can cite the latest Ninth Circuit authority. What really impresses the judge is citing a long list of pre-World War II cases from district courts in Louisiana and Mississippi that your law clerk cribbed from an old ALR article.

9. **Cite Corpus Juris Secundum:** Can’t find a case on point? Just cite CIS. It is comprehensive, authoritative and those Latin titles get the judge every time. It always worked for Perry Mason. In a pinch, the Harvard Law Review will suffice.

10. **Don’t Shephardize:** Shephardizing is expensive. If you cite a few dozen cases in a brief (or for you string-criers, perhaps a few hundred cases), that adds up to a lot of pocket change, not to mention the time involved. Don’t waste your money -- the odds are that the key cases you cited are still good law. If they aren’t, you’re cooked and there is nothing you can do about it anyhow so, why throw good money after bad?

11. **Cite Out-of-Circuit Authority:** I don’t know why people think the Ninth Circuit is so special -- it’s just one of thirteen circuits. If Ninth Circuit case law doesn’t favor your client, then cite a circuit that is more hospitable. Timid attorneys may want to put a little “but cf. XYZ (9th Cir. 1993)” at the end of the string-citation to avoid possible ethical problems. Alternatively, point out that the Ninth Circuit’s position has not been followed by other circuits and urge the trial judge to overrule the Ninth Circuit. **Example:** “The circuits (with the sole exception of the Ninth Circuit) are unanimous in holding that the Civil Rights Act of 1991 is not retroactive. The Ninth Circuit’s position is clearly an aberration and should not be followed.”

12. **Attack Your Opponent:** Your opponent is a sleazebag who should not be believed and that is reason enough to rule against him. So be sure you attack your opponent in the brief, call him names and impugn his motives.

13. **Whine:** Few federal judges are young enough to still have small children at home, but all it takes is a pair of whining lawyers to bring back those nostalgic memories of two six-year-olds squabbling. “Judge, his brief is one page too long.” “Judge, he pretended to be negotiating with me while he was secretly preparing a complaint.” It will make the judge feel twenty years younger.

14. **Omit No Defense:** Defenses were put on this earth for only one purpose -- to be used by defense attorneys. There’s no sense letting them go to waste. **Example:** A prisoner filed a civil rights action alleging that female clerical employees at a local jail had been viewing strip searches of male inmates through a peep window. The defendants promptly moved to dismiss the inmate’s claim on grounds of qualified immunity, i.e., they didn’t know that such conduct was wrong. Some attorneys might have trouble asserting that defense with a straight face -- but that’s what junior associates are for.

15. **Don’t Read the Cases You Cite:** You’re thumbing through the Federal Digest and you find the perfect headnote -- you couldn’t have written a better holding if you’d tried. Should you read
TIPS FOR BETTER BRIEF WRITING AND ORAL ARGUMENT

the case just to be sure it really stands for that proposition? Of course not! Why spoil perfection? A lot of bad things can happen when you go beyond the headnote and read the actual case. You might discover that the court was applying Washington law instead of Oregon law, or that there were some distinguishing circumstances. Ignorance is bliss.

16. Employ See Creatively: This is one of the most useful signals in brief writing. For instance, you can cite a terribly complicated case to support an obscure procedural point (which the case does not stand for). No one who reads the case can "see" in it what you could -- but are they going to admit that? Of course not, because they don't want to admit they are not smart enough to see the brilliant point you are making. This strategy works particularly well with law clerks who graduated from big name law schools but are haunted by subconscious feelings of inadequacy.

17. Argue Issues Not Before the Court: This strategy works for both briefs and oral arguments. If the issue before the court is not your strongest, don't fight a losing battle. Change the subject and argue some other issue where you have a chance of prevailing. For instance, if the issue is change of venue, argue the merits of the case, e.g., there is no point transferring this case because defendant can't win in any court.

18. A Little Latin Goes a Long Way:

A. Because plaintiff has not shown he suffered measurable injury, his claim must be denied.

B. De minimis non curat lex. Damnus absque injuria. Cedit quaestio.

Which paragraph sounds more authoritative? The second one, of course. Vel caeco apparat. (It would be apparent even to a blind man.) Would you rather tell the jury that your client was "caught between a rock and a hard place," or "a fronte praecipitium a tergo lupi" ("a precipice in front, wolves behind")? If the defendant calls your client a "lying cur", just smile and say: "Proprium humili ingenii est odisse quem laeseris." (It is human nature to hate a person whom you have injured.) Everyone will assume that if you're smart enough to use all these Latin phrases, the rest of your arguments must be of similar caliber. Expertus credite.

19. Don't Search for Recent Decisions: The job of a law clerk can be tedious. One of the few pleasures they get is to uncover a recent decision that neither party cited. Why deprive them of that pleasure by reading slip opinions or doing a Westlaw search?

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If you don’t know any Latin, ask your local bookstore to order copies of Eugene Fehrlich's Amo, Amas, Amat and More: How to Use Latin to Your Own Advantage and to the Astonishment of Others (Harper & Row 1985); Richard A. Branyon's Latin Phrases & Quotations (Hippocrene Books 1994); and Henry Beard's Latin For All Occasions (Random House 1990) and Latin For Even More Occasions (Random House 1991).

April 17, 1997 - 3 - Donald C. Ashmanskas
20. **Let Your Opponent Do Your Research:** Don’t have time to research the theories of your case? No problem. Include the whole kitchen sink in your complaint and let the other side sort them out in its motion to dismiss. Or maybe the judge’s law clerk can figure out which theories are viable.

21. **Always Get the Last Word:** If your opponent files a reply brief, then you *must* file a supplemental response. If she files a sur-reply brief, then you immediately file another supplemental response. Following oral argument, send the judge a letter responding to your opponent’s points. A letter is more effective than a brief because the judge won’t realize it is a brief in disguise until after he has begun to read it. The better letters start by discussing some innocuous procedural matter and then digressing to merits almost as an afterthought, or so the reader should believe.

22. **Assume the Judge Knows Everything About Your Case:** You’ve been working on this case for months. You know the facts and the relevant law, and so should the judge. After all, if she wasn’t so smart she wouldn’t be a judge. So, when writing a brief, just dive right into your arguments without any introduction or background. Don’t bother including a capsule summary of your argument at the beginning -- the judge will figure it out eventually.

Conversely, you should assume the judge knows nothing about basic legal principles. A classic example is a major law firm that devoted ten pages of a brief to explaining the concept of *stare decisis* to a veteran trial judge. Unfortunately, the “controlling” case was construing California law and the judge was applying Oregon law. Oh well, *non omnia possumus omnes.* (No one can be an expert in all things.)

23. **File Your Brief Late:** The best time to file a brief is Friday afternoon at 4:30 for an oral argument on Monday. That’s particularly effective when the judge’s law clerk has already finished her memo and now has to stay all weekend to revise it. You are assured of getting the last word. You should also mail a copy to your opponent on Friday afternoon. With some luck, he won’t receive it until oral argument is over.

24. **Cite Unavailable Materials:** When citing unpublished district court opinions or similar materials, never attach a copy to your brief. If the judge can’t read the case you’ve cited, he’ll have to take your word on its contents. That also applies to obscure 19th Century treatises, or $600/year industry newsletters.

25. **Move to Strike:** Federal judges love motions to strike. Don’t like something in your opponent’s complaint? Move to strike the offending words. If your opponent files affidavits opposing your summary judgment motion, move to strike the entire affidavits or particular sentences in them. If you prevail on the motion to strike, you win the case since your summary judgment motion is now unopposed.
Uniform Trial Court Rules

The most current UTCRs, along with other court rules, can be found at the following link:

https://www.courts.oregon.gov/rules/Pages/default.aspx
CHAPTER 20

ALTERNATIVE DISPUTE RESOLUTION – MANDATED AND VOLUNTARY

Lisa Brown
Lisa Brown Attorney, LLC
Chapter 20

ALTERNATIVE DISPUTE RESOLUTION - MANDATED AND VOLUNTARY

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The Benefits of ADR

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time.”

Abraham Lincoln, 1850
Forms of Alternative Dispute Resolution

- Ombuds
- Facilitation
- Fact finding
- Mediation
- Mediation/Arbitration
- Mandatory Arbitration
- Contractual Arbitration

Ombuds

- An Ombuds is a designated neutral, impartial person who provides independent, impartial, confidential and informal assistance.

- Ombuds do not advocate for either party to a dispute; their job is to research and identify potential options for resolving the issues presented and to help identify a fair resolution that is acceptable to everyone involved.
Facilitation

Facilitation is an informal process involving a neutral third party to facilitate communications and assist the parties in accomplishing a defined task.

Fact Finding

- Neutral third party
  - Investigates complaint
  - Interviews witnesses
  - Gathers facts
  - Prepares non-binding report indicating what facts substantiate or do not substantiate complaint
Consensus Building

- Neutral third-party facilitator
- Assists group of individuals to find consensus through facilitated discussions and negotiations

Mediation

- Neutral third party
- Assists parties in reaching settlement of disputed issue
- Does not impose settlement terms
- Allows parties to find commonality after sharing their respective positions either directly or through the impartial mediator
### Value of Mediation to the Parties in Dispute

- Mediator is neutral and can view facts objectively
- Mediator can assist parties in identifying solutions and options they may not have considered
- Mediation allows for an early settlement, avoiding prolonged and expensive litigation
- Mediation allows for creative solutions
- Parties may select mediator with substantive expertise in the disputed issues
- Confidential (with some limitations)

### Mediation/Arbitration Option

A contract clause or policy can provide that the parties have the option of starting with a mediation and moving to arbitration if the mediation is unsuccessful.
Sample Mediation Clause

If a dispute arises out of or relates to this policy/contract or the breach of this policy/contract and if the dispute cannot be settled directly through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by (ADR provider), prior to resorting to arbitration or litigation.

Arbitration

Arbitration is the adjudication of a dispute by an impartial arbitrator (or a panel of three arbitrators) selected by the parties who hears evidence presented by both parties and renders an Award which is generally a binding decision.
Types of Arbitrations

- Contractual: Arbitration is usually a creature of contract; a well drafted arbitration clause is essential for both parties to a contract as it will define the arbitration process.

- Mandatory Court Annexed Arbitration: (ORS 36.400 to 36.425) Applies to civil cases where the relief claimed is for money or damages in an amount less than $50,000, exclusive of attorney fees, costs and disbursements as well as for some domestic relations cases not involving children or support

Benefits of Arbitration

- Fair and efficient process

- Timely decision, prompt resolution

- Privacy, minimal court intervention

- Finality: Narrow grounds for appeal
Benefits of Arbitration

- Substantive expertise of Neutrals
- Flexible and focused on party needs
- Cost reduction
- Confidentiality

Factors to Consider in Drafting and Arbitration Clause

Identify an arbitration administrator (e.g. Arbitration Service of Portland, American Arbitration Association, JAMS).

Why? this will provide the parties with the applicable set of rules and eliminate ambiguity in how the proceedings will be conducted
Administered Arbitration Providers

- Independent and Impartial
- Independent Administration of the ADR process
- Established Standards for Neutrals
- Clear Selection Process involving all parties
- Identifying Neutrals by areas of substantive expertise
- Choice of Provider

Benefits of Administered Arbitration

- Experienced and qualified arbitrators
- Established rules and procedures
- Administrative support
- Set fees
Sample Arbitration Clauses

We, the undersigned parties, agree to submit the following controversy to arbitration administered by (ADR provider) under its applicable rules: (describe controversy). We agree that this controversy be submitted to (one)(three) arbitrators. We further agree that we will observe this Agreement and the rules of the Arbitration Service and abide by the Award rendered by the Arbitrators, and that a judgment may be entered in the court having jurisdiction over this controversy.

The Benefits of ADR

“I had learnt the true practice of law. I had learnt to find the better side of human nature and to enter men’s hearts. I realized the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.”

Mahatma Gandhi - 1927
Lisa Brown

Lisa Brown mediates and arbitrates cases through the American Arbitration Association, balanced billing arbitration panels in Washington and Virginia, court mandated arbitration programs, the Oregon State Bar Fee Dispute Resolution program, and a variety of other arbitration panels.

Having been a litigator for many years, Lisa enjoys the opportunity to assist parties in resolving disputes through facilitation, arbitration and mediation as cost effective alternatives to litigation. Lisa is a frequent speaker on alternative dispute resolution, recognizing the importance of educating litigators, in-house lawyers, business owners and transactional attorneys on the value of using arbitration and mediation as risk management tools.

Lisa’s contact information is: lisa@lisabrownattorney.com, 503-887-2436.

THANK YOU

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503-887-2436
Preparing for Arbitration

By Lisa Brown

Preliminary Considerations

- Is this arbitration proceeding court mandated or required by contract?
- What rules apply: the local court rules for court mandated arbitration or the rules of the arbitration service designated in the contract (American Arbitration Association, Arbitration Service of Portland, JAMS, FINRA)? Read the rules carefully before you start the arbitration process.
- Is the arbitration binding or is there an opportunity for de novo review?

Demand and Response

- Clearly state each claim and defense.
- Clearly identify damages, including interest and attorney fees if they are allowed by statute or contract.
- Be sure you have identified the correct parties, as it may not be possible to amend.
- If you are using an arbitration service, the arbitration service may charge more money to add a party or increase your damages at a later time.

Preparing Your Case

- Prepare for arbitration like you would for trial.
- This is your client’s one chance to be heard, so be sure you are well prepared.

Preliminary Hearing with Arbitrator

- Be prepared in advance of the preliminary hearing with the arbitrator: know what discovery you need, how many depositions you want to take (if any), how much time you anticipate needing to complete discovery, when you and your client could reasonably be prepared for an arbitration, where the arbitration should take place (check the arbitration agreement and the service provider’s rules).
- Confer with opposing counsel to reach an agreement on as many of these issues as possible; agree, if possible, on a discovery deadline and time frame for the arbitration hearing.
- Be prepared to state how long you will need to present your case and how many days will be necessary for the arbitration.
- Ask if the exhibits should be electronically submitted or if the arbitrator prefers binders and when those exhibits should be provided.
- Talk with your clients and key witnesses before the preliminary hearing to be sure you know when they are available to attend an arbitration.
- How does the arbitrator prefer to resolve discovery disputes?

**Discovery Issues**

- Be mindful that arbitration proceedings are intended to be efficient and cost effective.
- Be aware of any limitations on depositions set by the arbitration agreement, the court rules or the service provider’s rules.
- Avoid lengthy motions to compel; best practice is to send a short letter to the arbitrator, copying all parties, identifying the issues in dispute and the positions of each party.
- Stipulated Protective Orders: does the arbitration service/court have sample forms?

**Subpoenas**

- Use the forms provided by the arbitration service.
- Consider what authority the arbitrator has over the party receiving the subpoena to compel their attendance (especially if the witness is out of state).

**Prehearing Statement**

- This is your chance to explain your case and provide an overview for the arbitrator.
- The prehearing statement should be a roadmap for the arbitrator to review in advance of the hearing.
- Take the opportunity to introduce the key witnesses and exhibits to educate the arbitrator.
- Identify the elements of the claims and defenses.
- Explain industry terms and educate the arbitrator on technical issues or matters that are unique to your client’s business.
- If you have a complex or unusual issue that your arbitrator may not be familiar with, address that issue in the prehearing statement.
• Remember to address damages.
• Consider incorporating a chronology into your prehearing statement or presenting the facts in chronological order, as that chronology will serve as a valuable guide for the arbitrator throughout the arbitration process.
• Alert the arbitrator and opposing counsel if you anticipate the need to have a witness testify by phone; obtain advanced consent and approval.
• Alert the arbitrator of the need for any technical support you may need at the hearing.
• Provide your pre-hearing statements of proof (witness & exhibit lists) and digital copies of exhibits to the arbitrator(s) and opposing counsel on a timely basis.

**Arbitration Hearing**

**Preliminary Matters**

• In advance of the hearing, review the opponent’s exhibits and decide if you can stipulate to the exhibits. If the parties can agree on exhibits, consider preparing a joint set of exhibits for the arbitration.
• Consider in advance if you plan to exclude witnesses so that issue can be addressed before the arbitration commences and a location can be identified for the witnesses to sit while waiting to testify.
• If you stipulate to some of the facts that are not in dispute, be sure to include those facts in your chronology, pre-hearing statement, and opening statement so there are no “gaps” in the factual information presented to the arbitrator.
• Will you need to ask for permission to take witnesses out of order?

**Opening Statements**

• Your opening statement should be a concise summary of the legal and factual issues, explaining what you believe the evidence will show. Let the arbitrator know what damages or other relief you are seeking.
• What are the five key issues you want the Arbitrator to remember and consider as the evidence unfolds?
• Explain how you will tell the story of your case through witnesses and documents
• Be brief, but provide a clear roadmap of your case, following the roadmap you provided in your preliminary statement.
Examination of Witnesses

- Include all potential witnesses in your witness list, but only call the witnesses that are truly necessary to prove your case.
- Avoid unnecessary objections, remembering that this is an arbitration proceeding, not a trial, so you are usually not creating a record for appeal.
- Encourage your witnesses to look at the arbitrator when testifying.
- While arbitrations are less formal than a trial, the direct and cross examination should be conducted as it would be at trial: do not question the witness as if this is a deposition.
- Focus your questions on the key points you raised in your opening statement so the arbitrator can understand how the facts relate to the legal claims, defenses, or damages.
- Be sure every question has a clear purpose; if you or your witness starts to wander away from the key issues, you will confuse the arbitrator.
- Remember there is usually not a court reporter, so go slowly, allowing the arbitrator time to write down the important testimony.
- Listen carefully to questions from the arbitrator, as that will alert you to issues the arbitrator may not fully understand.
- Remind parties and witnesses that they cannot comment on or supplement the testimony of the witness who is testifying: they must remain silent as they would in a courtroom while someone else is testifying.
- Remind your client that they cannot openly comment on your opening, closing, witness testimony, exchanges with opposing counsel or the arbitrator. Again, they must remain silent as they would in a courtroom.
- Encourage parties and witnesses not to use terms unique to their business without first explaining to the arbitrator what those terms mean.

Closing Statements

- Discuss how the evidence proved or failed to prove the elements of the claims/defenses.
- Discuss the opponent’s evidence as it relates to your case.
- Follow through on your theme and reinforce the five key points that you shared in your prehearing statement and opening.
- Clearly underscore the issues you want the arbitrator to remember and consider when the arbitrator is later writing the opinion.
Post Hearing Briefs

- Take the opportunity to prepare a post hearing brief, if one is allowed, but keep it short, focused, and on point: again, what are the key issues you want to be sure the arbitrator understands about your case (facts, legal issues, damages) before they prepare findings of fact, conclusions of law and a final award?
PREPARING FOR MEDIATION

By Lisa Brown

Explain what mediation is to your client and how it differs from going to trial:

- The parties are in charge of the settlement terms
- The mediator has no stake in the outcome and no authority to impose a settlement
- The process is voluntary, confidential, and solution oriented
- Consider and discuss what happens if the case does not settle in mediation

Selecting a Mediator: know what you are trying to accomplish and what your client needs

- Consider different mediation styles, personalities, and experience in deciding what would work best for your case:
  - A third party neutral?
  - A judge?
  - An evaluative approach?
  - A collaborative mediator
  - A mediator who focuses on passing the numbers back and forth?
  - A mediator who is empathetic, a good listener, creative and solution oriented?
  - A mediator who genuinely cares about getting the case resolved (or considers this “just another mediation”)
- Consider the mediator’s subject matter expertise
- Consider whether the mediator’s personality will be a good fit with your client
- Consider how the mediator will interact with opposing counsel and their client as well as anyone else who may be an active participant in the mediation process

Mediation Statement

- What information has the mediator requested?
- Would it be helpful to meet or talk with the mediator in advance?
- Provide the mediator with enough factual and legal information for them to work with in the mediation process, allowing them to understand and analyze the strengths and weaknesses of the case from the standpoints of both parties
- Are there nonmonetary issues that are important to either party?
- What are the emotional issues driving the case?
- What information would it be helpful for the mediator to know about opposing counsel or the other party?
- Be clear what it is you and your client want to accomplish at the mediation
- Is there a reason a joint session may not be advisable in your case?
• Is there anything it would be helpful for the mediator to know about your client in advance of the mediation?

Preparing Your Client

• Explain that the process is voluntary
• Discuss the possibilities of joint sessions and caucus sessions
• Become comfortable discussing both the strengths and the weaknesses of your case
• Prepare your client to respond to the mediator's direct questions
• Explain the confidentiality requirements

Consider taking along a draft of a settlement agreement (hard copy and digital):

• Be mindful of the terms you want to include in the settlement agreement and bring a list with you (confidentiality, tax indemnity, damages for breach, arbitration, etc.)
• Tell the mediator what terms are essential to settlement at the start of the mediation process
• Consider sending a draft agreement to the mediator (without numbers included) with your mediation statement
CHAPTER 21

ACCESS TO JUSTICE: BUILDING A SUSTAINABLE AND INCLUSIVE PRACTICE

Steven L. Hill
Hill Law Office
Kim T. Le
Waxler & Le Immigration Law, LLC
Emery Wang
Vames & Wang
Hong Dao, Moderator
Professional Liability Fund Director of Practice
Management Assistance
Suggested readings from various sources for working with diverse clients and making your practice accessible:

- Representing Transgender and Gender-Diverse Clients, [https://www.okbar.org/barjournal/may2020/obj9105taylor/](https://www.okbar.org/barjournal/may2020/obj9105taylor/)
- How Working Remotely Builds the Case for Accessibility, [https://www.lawpracticetoday.org/article/working-remotely-builds-case-accessibility/](https://www.lawpracticetoday.org/article/working-remotely-builds-case-accessibility/)
- Law Firm Website Accessibility and ADA Compliance, [https://www.lawlytics.com/blog/ada-compliance/](https://www.lawlytics.com/blog/ada-compliance/)
COMMUNITY RESOURCES

Culturally Specific Service Providers

Asian Health & Service Center
9035 SE Foster Rd. 3800 SW Cedar Hills Blvd. #196
Portland, OR 97266 Beaverton, OR 97005
Phone: 503-872-8822 Phone: 503-772-5880
http://www.ahscpdx.org/

Provides culturally and linguistically sensitive care to Asians, including outpatient mental health services, disease education and management, cancer prevention and screening, immunization and education, and senior programming.

El Programa Hispano (Catholic Charities)
333 SE 223rd Ave #100 2740 SE Powell Blvd.
Gresham, OR 97030 Portland, Oregon 97202
Phone: 503-669-8350 Phone: 503-231-4866
https://www.elprograma.org/
http://www.catholiccharitiesoregon.org/services_latino_services.asp

Provides emergency economic assistance, self-sufficiency activities, mental health counseling, domestic violence case management, and youth service to low-income Latino residents in metro Portland.

Immigrant & Refugee Community Organization (IRCO)
10301 NE Glisan St.
Portland, OR 97220
Phone: 503-234-1541
http://www.irco.org/

Promotes the integration of refugees, immigrants, and the community at large into a self-sufficient, healthy, and inclusive multiethnic society by providing multicultural, community-based services such as early childhood development services, parent education and support, youth services, anti-poverty assistance and health education programs.

Additional locations:

- **IRCO Africa House** – supports Portland’s growing African Refugee and Immigrant populations.
  709 NE 102nd Ave
  Portland, OR 97220
  Phone: 503-802-0082

- **IRCO Pacific Islander & Asian Family Center** – provides culturally specific programming for Portland’s Asian and Pacific Islander communities.
  8040 NE Sandy Blvd
• IRCO Eastern Oregon – supports refugee families residing in or near Malheur County, OR.
  723 S Oregon St
  Ontario, OR 97914
  971-335-7107

• IRCO Senior Center – provides services to a diverse group of elder community members.
  10615 SE Cherry Blossom Dr.
  Portland, OR 97216
  Phone: 503-484-6371

Intercultural Psychiatric Program (IPP)
2214 Lloyd Center
Portland, OR 97232
Phone: 503-494-4222
http://www.ohsu.edu/xd/education/schools/school-of-medicine/departments/clinical-departments/psychiatry/divisions-and-clinics/ipp.cfm

Provides culturally sensitive mental health services for immigrant, refugee and ethnic communities with an emphasis on individuals and families whose first language is not English.

Native American Youth & Family Center (NAYA)
5135 NE Columbia Blvd.
Portland, OR 97218
Phone: 503-288-8177
www.nayapdx.org

Seeks to enrich the lives of Native youth and families through education, community involvement, and culturally specific programming.

Slavic Oregon Social Services (Ecumenical Ministries of Oregon (EMO))
7931 NE Halsey St #304
Portland, OR 97213
Phone: 503-777-3437
https://emoregon.org/ross/

Seeks to successfully integrate Slavic-speaking immigrants and refugees into Oregon and southwest Washington communities by providing services that increase independence, enable economic self-sufficiency, and improve mental and physical well-being. In addition, provides multi-layered support services for survivors of domestic violence and sexual assault.
Interpretation and Translation Services

**IRCO International Language Bank**
10301 NE Glisan St.
Portland, OR 97220
Phone: 503-234-0068 | 503-505-5186
https://irco.org/ilb/

Provides telephone and onsite interpretation as well as translation services.

**Passport to Languages**
6443 SW Beaverton-Hillsdale Hwy, Suite 390
Portland, OR 97221
Phone: 800-297-2707 | 503-297-2707
https://www.passporttolanguages.com

Provides onsite, telephonic and video interpretation as well as translation transcription services.

**TeleLanguage**
610 SW Broadway, Suite 200
Portland, OR 97205
Phone: 888-983-5352
https://telelanguage.com

Provides onsite and telephonic interpretation and professional translation.

**Linguava**
2106 NE Marx St.
Portland, OR 97220
Phone: 800-716-1777 | 503-265-8515
https://linguava.com

Provides onsite, telephonic and video interpretation as well as translation services.

**Collective of Indigenous Interpreters of Oregon (Pueblo Unido)**
(Mailing Address)
3439 SE Hawthorne Blvd #327
Portland, OR 97214
Phone: 503-360-0314
Provides interpretation services for indigenous languages from Mexico, Central America, and South America.

**Free / Low-cost Immigration Services**

**Catholic Charities of Portland – Immigration Legal Services**
2740 S.E. Powell Blvd, Suite 2
Portland, OR 97202
Phone: 503-542-2855
https://www.catholiccharitiesoregon.org/services/immigration-legal-services/

Provides legal assistance with family visas, naturalization, asylum, Deferred Action for Childhood Arrivals (DACA), removal/deportation defense through immigration and federal courts, Temporary Protected Status (TPS), visas for crime victims, assistance to survivors of human trafficking, as well as assistance for refugees.

**Immigration Counseling Service (ICS)**
519 S.W. Park Ave, Suite # 610
Portland, OR 97205
Phone: 503-221-1689
http://www.ics-law.org

Provides legal assistance with family unification, representation for detained unaccompanied migrant children (UAC), protection from persecution for asylees and refugees, U and T visas for victims of domestic violence and other serious crimes including human trafficking, Deferred Action for Childhood Arrivals (DACA), removal/deportation defense, and other services.

**Lutheran Community Services Northwest Immigration Counseling and Advocacy Program**
605 S.E. Cesar E. Chavez Blvd., Portland, OR 97214
Phone: 503-231-7480 (Portland), 503-472-4020 (Yamhill/Salem), 503-924-2448 (Beaverton), 360-694-5624 (Vancouver)
http://www.lcsnw.org

Provides legal assistance with lawful permanent residency (green cards), family-based visas, asylum and deportation, employment authorization, Deferred Action for Childhood Arrivals (DACA), naturalization (citizenship), temporary protected status, visas for crime victims (U Visas) and survivors of human trafficking (T Visa), assistance to survivors of domestic violence (VAWA), travel documents (refugee travel documents, re-entry permits), visitor visa, diversity lottery, and removal/deportation defense, as well as assistance for refugees.

Also provides non-legal services including translation of certificates services, notary services, passport photos, fingerprinting, and other types of assistance.
Immigrant Defense Oregon (Metropolitan Public Defenders)
101 S.W. Main St, Suite 1100
Portland, Oregon 97204
Phone: 888-673-5290 | 503-225-9100
https://mpdlaw.com/immigrant-defense-oregon/

Provides removal/deportation defense, counseling regarding potential immigration consequences of criminal charges, representation of detained unaccompanied migrant children (UAC), asylum, certain affirmative applications, and appeals.

IRCO Immigration Legal Services
605 S.E. Cesar E. Chavez Blvd., Portland, OR 97214
Phone: 971-271-6537
https://irco.org/what-we-do/legal-services/

Provides legal assistance with removal/deportation defense, affirmative applications for relief including for survivors of crime, human trafficking and domestic violence, consular processing, as well as assistance for refugees.

SOAR Immigration Legal Services (Ecumenical Ministries of Oregon (EMO))
7931 NE Halsey St., Ste. 302
Portland, OR 97213
Phone: 503-384-2482 | (refugees) 503-221-1054
https://emoregon.org/soar-legal/

Provides legal assistance with applications for U.S. citizenship, asylum, removal/deportation defense, DACA renewals, employment authorization, family-based visas, lawful permanent residency (Green Cards), temporary protected status (TPS), U-visa, Cuban Adjustment Act, and Violence Against Women Act (VAWA), as well as assistance for refugees.

Pueblo Unido (Not a law firm)
Phone: 503-360-0324
https://www.pueblounidopdx.org/get-help-detention.html.en

Provides legal services navigation into Equity Corps of Oregon (ECO), Oregon’s universal representation program for impoverished Oregonians in removal/deportation proceedings. Once navigated into ECO, will be matched with a legal professional/law office.
Free Legal Services

Legal Aid Services of Oregon
520 SW 6th Avenue, Suite 700
Portland, OR 97204
Phone: 503-224-4086
Toll Free: 1-888-610-8764
http://lasoregon.org/

Provides free civil legal services for low-income clients throughout Oregon. Has field offices located in Albany, Bend, Klamath Falls, Newport, Pendleton, Portland, Salem, and Roseburg. Services for farm workers are available through offices in Woodburn, Hillsboro and Pendleton. A statewide tax clinic helps resolve disputes with the IRS and Department of Revenue. In addition, the Native American Program provides statewide services and representation on Native American issues. The Central Administrative office for the program is located in Portland.

Oregon Law Center
522 SW Fifth Ave., Suite 812
Portland, OR 97204
Phone: 800-672-4919 (Toll-Free)
http://oregonlawcenter.org/
https://oregonlawcenter.org/how-to-get-help/find-your-local-office/

Provides free civil legal services to low-income individuals to assure fairness on matters related to critical needs like food, shelter, medical care, income and physical safety. Had field offices in Coos Bay, Grants Pass, Gresham, Hillsboro, Eugene, McMinnville, Portland, Ontario, Salem, St. Helens, and Woodburn.

Oregon Law Help
http://oregonlawhelp.org/

Free legal information for low-income Oregonians