

CHAPTER 11

AT THE CROSSROADS OF ETHICS AND PRACTICE MANAGEMENT

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Professional Liability Fund

Practice Management Advisors

Chapter 11

AT THE CROSSROADS OF ETHICS AND PRACTICE MANAGEMENT

TABLE OF CONTENTS

	<u>Page #</u>
PowerPoint Slides	11-1

To view these chapter materials and the additional resources below on or before October 30, 2019, go to www.osbplf.org, select Upcoming CLE, select Learning The Ropes, and click on program materials, under Quick Links. After October 30, 2019, select Past CLE, Learning The Ropes, and click on program materials, under Quick Links.

Additional Resources

- a. PLF Practice Aids available at www.osbplf.org > Practice Management > Forms > View Forms by Category:
 - i. Trust accounting
 1. Accepting Credit Cards
 2. Client ledger card and trust journal
 3. Embezzlement Happens: Protect Your Firm
 4. Frequently Asked Trust Account Questions
 5. How to Set Up Your Trust Account in QuickBooks
 6. Notice to Financial Institutions- Opening an IOLTA Account in Oregon
 7. To Catch a Thief: How a Partner or Employee Can Steal from Your Firm
 8. Trust Account Reconciliation
 - ii. Docketing & Calendaring
 1. Calendaring Note
 2. Docket Control Follow-Up
 3. Docket Sheet
 4. Docketing and Calendaring Checklist
 5. Reminder and Tickler Systems
 6. State Court Rules
 - iii. Client Relations
 1. Using Email in the Office
 - iv. Conflicts of Interest
 1. Checklist for Avoiding Phantom Clients
 2. Conflict Disclosure and Consent Letters
 3. Conflict Informed Consent Checklists
 4. Conflict of Interest Self Audit
 5. Conflict of Interest Systems and Procedures

6. Declined Prospective Client Information Sheet
7. Lawyer Engages in Business Transaction with Client- Disclosure Letter
8. Request for Conflict Search and System Entry
- v. Cybersecurity and Data Breach
 1. Information Security Checklist for Small Businesses
 2. Notice to Clients re Theft of Computer Equipment
 3. Protect Client Information from Identity Theft
 4. Protecting Yourself and Your Law Firm from Data Breach Checklist
 5. Removing Metadata
- vi. File management
 1. File Closing Checklist
 2. File Retention and Destruction Guidelines
 3. New Client Information Sheet with Disclaimer
 4. Production of Client File
 5. Setting Up an Effective Filing System
 6. The Ethics of Electronic Client Files: Floating in the Cloud
- vii. Hardware and Software
 1. ABA Technology Resources
 2. Digital Signatures
 3. Disclaimers
 4. How to Backup Your Computer
 5. Technology Resources for Mac Users
- viii. Mail Handling
 1. Mail Handling- Paper Filing System
 2. Mail Handling- Paperless Filing System
- ix. Paperless Office and Cloud Computing
 1. Checklist for Scanning Client Files
 2. Documenting Email as Part of the Client File
 3. Floating in the Cloud
 4. Is It Time to Go Paperless?
 5. Online Data Storage Providers
 6. Our Paperless World 2013
 7. Paperless in One Hour
 8. Retention of Electronic Records
 9. Saving Text Messages as Part of the Client File
- b. *InBrief* articles available at www.osbplf.org > Practice Management > Publications > In Brief:
 - i. January 2019- File Retention and Destruction Procedures: Additional Safeguards to Protect Your Firm from Lost or Exposed Client Data
 - ii. January 2019- Malpractice Risk Factors and How to Avoid Them Part II
 - iii. October 2018- Malpractice Risk Factors and How to Avoid Them
 - iv. April 2017- Unwanted Data: How to Properly Destroy Data in Hardware
 - v. December 2016- What's Backing Up Your Data?
 - vi. April 2016- Accepting Credit Cards
- c. Additional articles available in our bi-monthly blog, *InPractice*, at www.osbplf.org > Blog

At the Crossroads of Ethics and Practice Management

Practice Management Attorneys:
Sheila Blackford
Hong Dao
Rachel Edwards

OSB Professional Liability Fund


Topics

1. Trust Accounting
2. Attorney Fees
3. Calendaring
4. Conflicts
5. File Management
6. Safe Use of Technology

Trust Accounting

Types of trust accounts | Key responsibilities


OSB Professional Liability Fund



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:

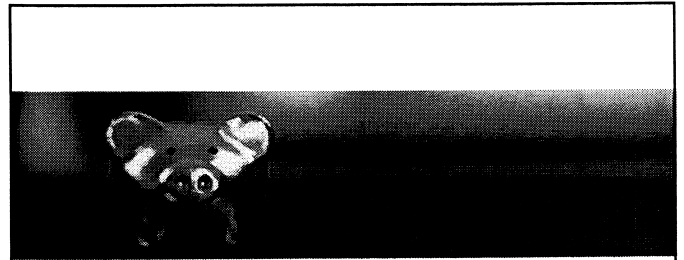
Principal x Interest Rate/12 x Number of Months = Interest

Example: Principal = \$10,000 Cost = \$25
Interest rate = 5% Monthly fee = \$7.50
Number of months = 1

$$\$10,000 \times .05/12 \times 1 = \$41.67$$

Net positive interest return:

$$\$41.67 - \$25 \text{ cost} - \$7.50 \text{ fee} = \$9.17$$



Key Responsibilities

1.

Keep funds separate



- Do not commingle your money and clients' money in the same account
- Do not use IOLTA to hide money from IRS, creditors, or divorcing spouse

2.

Know each client's balance



Keep and review individual client ledgers

3.

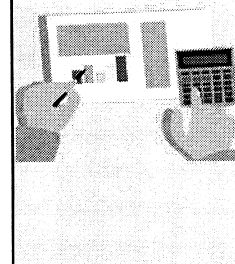
Maintain records



- 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

**Law Office LLC
Three-Way Reconciliation
RECONCILED**

Bank Name:
Bank Account Name:
Bank Account #:
Statement Period: 7/1/2018 - 7/31/2018

1. Book Balance	
Beginning balance on 7/31/2018	\$5,210.00
Plus cleared deposits	\$7,724.00
Less cleared payments	(\$2,903.00)
Ending balance on 7/31/2018	\$10,031.00
2. Bank Balance	
Ending balance on 7/31/2018	\$10,206.00
Plus deposits in transit	0.00
Less outstanding payments	(\$175.00)
Reconciled bank balance	\$10,031.00
3. Client Ledger Balance	
Client Name:	Balance as of 7/31/2018
Alicia Smith	\$5,470.00
Bob Lee	\$3,600.00
Care Black	\$961.00
Total Client Ledger Balances	\$10,031.00

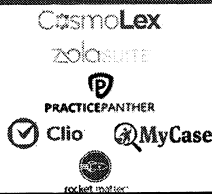
6. Account to clients



- Explain billing procedures
- Send billing statements
- Use written fee agreements

7. Use accounting software

Trust accounting program
in practice management
software:



General accounting
software:



Beware of unclaimed property



- Take steps to find person
- Return to whomever is "entitled" to it
- Abandoned after 2 years
- Report to DSL
- Remit funds to OSB

Attorney Fees

Ethical obligations | Third party payments | Accepting credit cards



Make sure fees are not 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

CAUTION

1. Contingent
 - Cannot be used in domestic relations or criminal matters
 - Comply with ORS 20.340
2. Earned upon receipt
 - Written
 - Will not be deposited into lawyer trust account
 - Entitled to refund

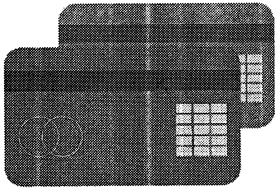


Third party payments

- ORPC 1.8(f)
 - Client must provide informed consent
 - No interference with lawyer's independence of professional judgment or client-lawyer relationship
 - Maintain confidentiality (also see OSB formal ethics opinion 2005-157)
- Specify in writing who receives refund



Accepting credit cards



- OSB Formal Ethics Opinion 2005-172
 - If single merchant account, it must be a trust account
 - Truth in Lending Act
 - Set-up fees, monthly fees, or annual fees are the lawyer's responsibility

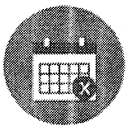
Calendaring

Common issues | Tips to avoid missing deadlines

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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

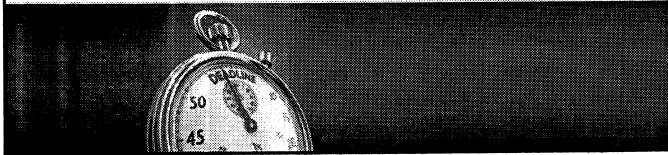
Tips to Avoid Missing Deadlines



ORPC 1.1 Competence
ORPC 1.3 Diligence
ORPC 1.4 Communication

1. Use calendar to:

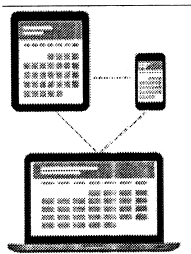
- Docket all deadlines and reminders
- Set recurring reminders to retrieve and review files



What to Calendar?

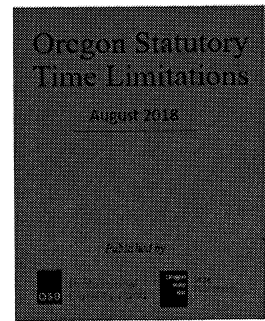
- SOLS and case-related deadlines
- Client-imposed deadlines
- Self-imposed deadlines
- Court appearances
- Appointments

Good calendaring habits

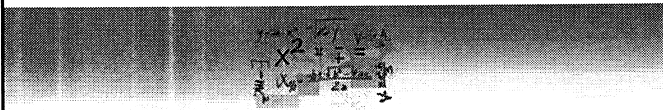


- Enter dates immediately
- Have one entry point
- Capture dates from email, intake sheets, incoming documents
- Synchronize calendars

2. Know statutes of limitations




3. Know how to calculate deadlines



- Manually calculate
- Use rules-based calendaring software

Rules-based calendaring software


Stand-alone rules-based calendaring software	Practice management software integrates w/ stand-alone tools	Practice management software w/ built-in rules-based calendaring



4. Don't Wait to File

- Create a 'cushion'
- Consider eFiling issues

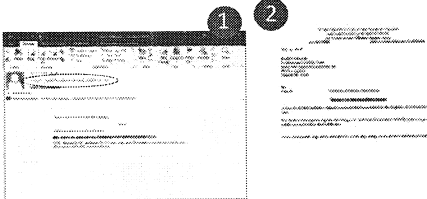
5. Double check entries



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 | Imputation | System: What, How, When | Documentation



Types of Conflicts

ORPC 1.7: Current Clients
Watch self-interest conflicts, conflicts with personal interests, and conflicts with family interests.

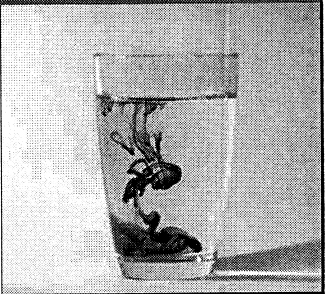
ORPC 1.8: Current Clients Specific Rules
Need helpful examples of the Conflicts 'Shall Nots'? Look here!

ORPC 1.9: Duties to Former Clients
There are still duties owed! Recognize "interests that are materially adverse" and matters that are "substantially related."

Imputation of Conflicts

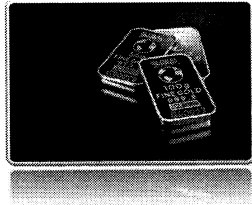
ORPC 1.10: Imputation of Conflicts of Interest; Screening

Find out how to handle conflicts in your firm when any one of you would be prohibited from doing so by ORPC 1.7 or 1.9.



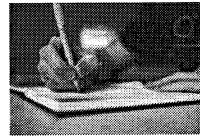
The Golden Rules

1. Establish a reliable system
2. Know what to capture
3. Know how to use the system
4. Know when to run a conflict check
5. Document search and result



Rule 1: Establish a Reliable System

Manual System



Software System



Premise-based software

PC/Windows

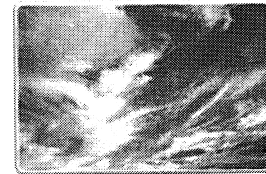
- Amicus Attorney
- HoudiniESQ
- PracticeMaster
- ProLaw
- Abacus Law

MacOS

- Daylite (business management)
- TimeNet Law
- Legal Suite

<https://www.americanbar.org> > Legal Technology Resource Center > LTRC Resource Charts

Cloud-Based Software



And more...

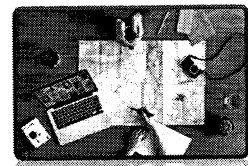
Rule 2: Know What to Capture

- 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

Search	Item	Result	Conflict
10/1/2014	10/1/2014	10/1/2014	10/1/2014
10/1/2014	10/1/2014	10/1/2014	10/1/2014
10/1/2014	10/1/2014	10/1/2014	10/1/2014
10/1/2014	10/1/2014	10/1/2014	10/1/2014
10/1/2014	10/1/2014	10/1/2014	10/1/2014
10/1/2014	10/1/2014	10/1/2014	10/1/2014
10/1/2014	10/1/2014	10/1/2014	10/1/2014
10/1/2014	10/1/2014	10/1/2014	10/1/2014
10/1/2014	10/1/2014	10/1/2014	10/1/2014

Screen & Prepare



Screen incoming lawyers

Prepare outgoing lawyers

Keep your own conflict list

Practice *Tip!*

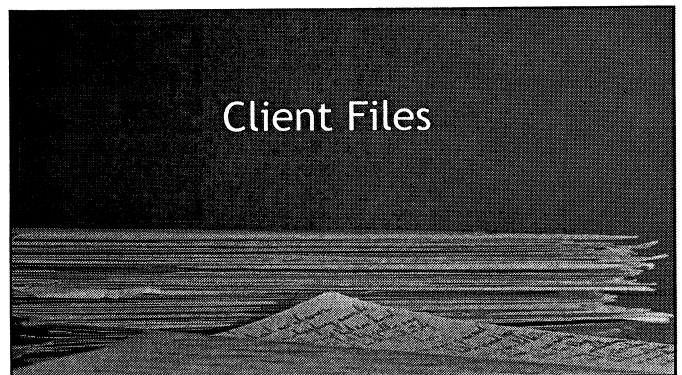
- Circulate 'New Matter' List weekly
- Update your system at closing
- Be aware of consent requirements
- Avoid business deals with clients

File Management

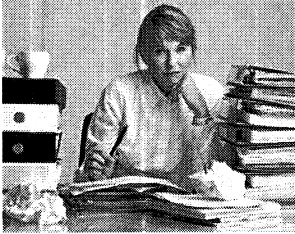
Client Files | Retention

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Client Files



What is the client file?



Oregon Formal Opinion No. 2017-192

Client Property: Duplication Charges for Client Files, Production or Withholding of Client Files

Typical Documents to Keep in Client File

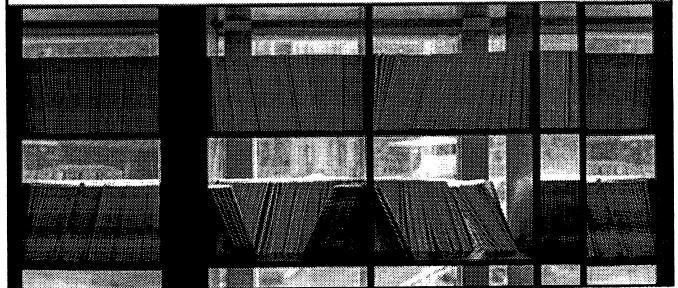
- | | |
|--|--|
| <input type="checkbox"/> Client Intake Form | <input type="checkbox"/> Fee Agreement |
| <input type="checkbox"/> Conflicts of Interest | <input type="checkbox"/> Timekeeping Records |
| <input type="checkbox"/> Engagement Letter | <input type="checkbox"/> Billing Statements |
| <input type="checkbox"/> Nonengagement Letter | <input type="checkbox"/> Documents |
| <input type="checkbox"/> Disengagement Letter | <input type="checkbox"/> Records |
| <input type="checkbox"/> Correspondence | <input type="checkbox"/> Attorney Notes |



How will you organize your client files?

1. Consider setting up a system to organize and retrieve documents whether paper or digital
2. Consider having a standard sub-file structure for each practice area
3. Consider establishing file opening and closing procedures

Retention



File Retention Guidelines

1. See our *File Retention and Destruction Guidelines*. Retain most files for at least 10 years but retain others over 10 years.
2. Research and evaluate any additional factors particular to your practice area, cases, and clients.
3. Treat digital and paper files the same!

Storage



Physical files

- Physical location
- Think 10 years ahead



Electronic files

- Hard drive or cloud
- Think 10 years ahead

***It is never a good time to lose your data.
Back it up.***

Devices	Software	Devices w/software
<ul style="list-style-type: none"> External hard drive External solid state drive Network attached storage Backup server 	<ul style="list-style-type: none"> Windows Backup MAC TimeMachine Acronis True Image AOMEI Backupper EaseUS Todo Backup Cloud backup service (Backblaze, Carbonite, iDrive, SpiderOak) 	<ul style="list-style-type: none"> Seagate Backup Plus drive Western Digital My Passport portable drive Samsung T5 SSD

Safe Use of Technology

Metadata | Cloud computing | Hardware and data destruction | Social media

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Metadata

"A document may look like a two-dimensional piece of paper on a computer screen, but in reality it is germane to a three-dimensional file folder. The version on the screen is the top document, but behind the screen is the remainder of the folder. In emailing this document, the entire folder is sent which includes all prior versions, dates of alterations, edits, time spent on edits, identity of editors and authors, and any notes attached."

David L. Brandon, The Hidden Perils of Metadata, LPL ADVISORY (ABA Standing Comm. on Lawyers' Prof'l Liab.), Fall 2006, at 2.

Metadata lurking in your document

Properties:

- Title: 371 5028
- Author: [redacted]
- Subject: [redacted]
- Total Editing Time: 524 Minutes
- Size: 9304 x 1100
- Tags: [redacted]
- Timestamps: 2022-10-04-09:00

Related Dates:

- App Modified: 4/2/2022 10:08 PM
- Created: 4/1/2022 10:04 AM
- Last Printed: 4/1/2022 11:06 AM

Related People:

- Author: [redacted]
- Created By: [redacted]
- Last Modified By: [redacted]

Related Documents:

- [redacted]
- [redacted]

- Comments, track changes, versions and ink annotations
- Document properties and personal information
- Header, footer and watermarks
- Hidden text
- Document server properties

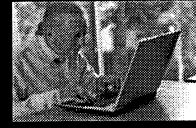
Competency: Disclosure of Metadata

"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 2015)

Worried about having metadata? Don't be!

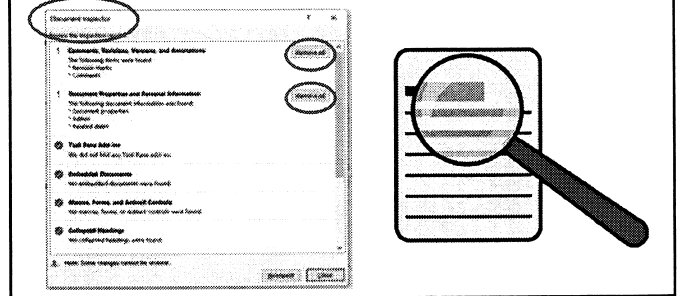
There are ways to get rid of the metadata from Office files, PDFs, and images.



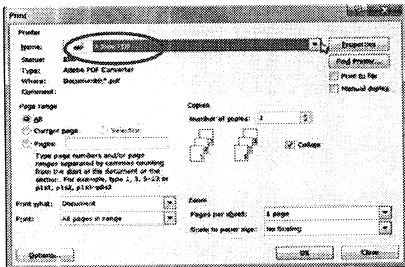
How to remove metadata from Office files

- Step 1 • From within document, select **FILE**
- Step 2 • Select **INFO**
- Step 3 • Select **CHECK FOR ISSUES**
• Then select **INSPECT DOCUMENT**

Meet the Inspector



Print to PDF

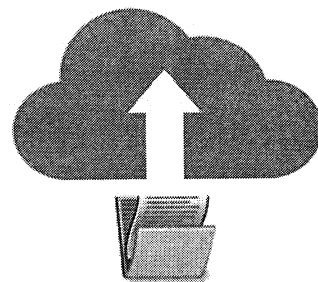


ORPC 4.4(b): A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

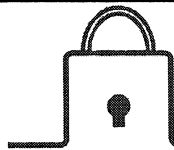
OSB Formal Ethics Opinion No. 2005-150 (Revised 2015)
(Competence and Diligence: Inadvertent Disclosure of Privileged Information)



Cloud Computing



Store | Backup | Share



Security Concerns

Is data encrypted?

Who has access?

Where are servers located?

Take reasonable steps:

- Ensure storage company will reliably secure client data
- Keep information confidential

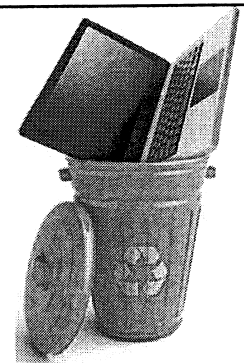


1. Vet the vendors; and
2. Review terms of service and user agreements

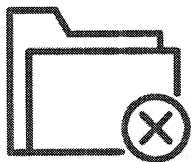
*OSB Formal Ethics Opinion 2011-188
(Third-Party Electronic Storage of Client Materials)*

Hardware and Data Destruction

ORPC 1.6 Confidentiality



Options to completely destroy data:



1. Use specialized software to overwrite data
2. Physically destroy the hard drive

Software

Data Destruction


- DBAN (Darik's Boot & Nuke)
- CBL Data Shredder
- HDDEraser
- KillDisk

Use if you want to recycle, refurbish or donate computer

File Shredder

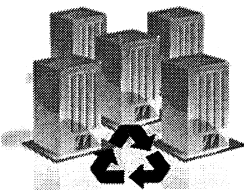
- zDelete
- Eraser
- Freeraser
- File Shredder
- Secure Eraser

Use if you want to keep computer but permanently delete unwanted files



Do it yourself

Physically Destroy Hard Disk

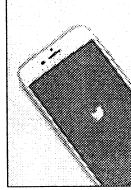


Bring it to a professional

Electronic Recycling Facility

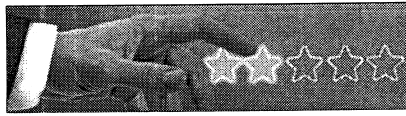
Social Media

<p><u>Temptation</u></p> <ul style="list-style-type: none"> • Clients want to talk about their case • Clients want to talk to parties 	<p><u>Issue</u></p> <ul style="list-style-type: none"> • Clients may damage their case • Contact may be prohibited by court order • ORPC 1.1: Competence • ORPC 1.4: Communication
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Social Media

<p><u>Temptation</u></p> <ul style="list-style-type: none"> • You want to boast about a big win • You want to defend against a bad review 	<p><u>Issue</u></p> <ul style="list-style-type: none"> • ORPC 1.6: Confidentiality • Professionalism
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Resources


 Professional Liability Fund
www.osbplf.org
 Forms ■ Books ■ *inPractice* blog ■ *inBrief* articles
 ■ CLEs ■ Discounts ■ Confidential Advice


 Oregon State Bar
www.osbar.org
 Ethics Helpline (503-431-6475) ■ Bar Counsel Articles ■ Ethics Opinions ■ BarBooks – *The Ethical Oregon Lawyer; Fee Agreement Compendium* ■ Oregon Rules of Professional Conduct (www.osbar.org/docs/rulesregs/orpc.pdf)


Professional Liability Fund
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 ■ CLEs ■ Discounts ■ Confidential Advice

Oregon State Bar
www.osbar.org
 Ethics Helpline (503-431-6475) ■ Bar Counsel Articles ■ Ethics Opinions ■ BarBooks – *The Ethical Oregon Lawyer; Fee Agreement Compendium* ■ Oregon Rules of Professional Conduct (www.osbar.org/docs/rulesregs/orpc.pdf)

eCourt Resources

 **Oregon Judicial Department File & Serve**
<https://oregon.tylerhost.net/ofswb>

 Oregon Judicial Department
<https://www.courts.oregon.gov/services/online/pages/efile.aspx>

 Professional Liability Fund
www.osbplf.org

OJD eFile

- FAQs
- Web training sessions
- Training videos
- User guides

OJD official website

- FAQs
- UTCRs – Chapter 21
- Policies and Standards for eFiling

• Practice Management > Forms > Category > eCourt > Oregon eFiling Checklist for First Time eFiler

Contact Us

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free and confidential